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MAIL DATE
12/18/97

Decision 97-12-115 December 16, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into all facilities-based cellular carriers and their practices, operations and conduct in connection in connection with their siting of towers, and compliance with the Commission's General Order No. 159	ORIGINAL I. 92-01-002 (Filed January 10, 1992)

ORDER MODIFYING DECISION (D.) 94-11-018 AND DENYING REHEARING

I. INTRODUCTION

GTE Mobilnet of California (GTEM) has filed an application for rehearing of D.94-11-018 (Decision). The Decision fined GTEM $343,000 for failing to comply with General Order (G.O.) 159. D. 94-11-018 based its fine on the number of days that GTEM unlawfully constructed and operated its Santa Rosa East facility before filing an Advice Letter as required by G.O. 159. At the time, Public Utilities (P.U.) Code § 2107 provided for fines between $500 and $2,000 per offense. Accordingly, the Commission fined GTEM $500 per day for the 100 days of construction, and $1,000 per day for the 293 days of operating before filing the required Advice Letter. The Decision considered each day of premature construction and operation to be a separate offense under P.U. Code § 2108.

GTEM seeks to reduce the fine to $2,000, claiming that the fine amount constitutes legal error for the following five reasons. GTEM first argues that the Commission lacks the power to fine under P.U. Code § 2107. GTEM also alleges that the Decision lacks specific findings to support the $343,000 fine

levied. GTEM then argues that the fine is excessive compared to other comparable situations. Next, GTEM argues that its violation was a one-time violation, not a continuing one. Finally, GTEM argues that such an excessive fine violates both its federal and state constitutional rights.

We have carefully reviewed each and every allegation of error raised by GTEM. We conclude that the application does not demonstrate legal error and thus grounds for rehearing have not been shown. However, we note that some aspects of the Decision require clarification. Thus, we will modify D.94-11-018 in this order. We will then deny rehearing of the Decision as modified.

II. DISCUSSION

GTEM first argues that we lack the power to directly impose such a fine. GTEM contends that we can only impose this penalty through the superior court pursuant to P.U. Code § 2104, which provides that "[a]ctions to recover penalties under this part shall be brought in the name of the people of the State of California, in the superior court" in the county or city where the cause arose. "The action shall be commenced and prosecuted to final judgment by the attorney of the Commission."

Contrary to GTEM's claim, our recent decisions have held that imposing a fine is well within our authority. PU Code Section 2104 does not limit our authority to assess and impose penalties. Rather, that section requires action in superior court if the penalties are not paid voluntarily. (See, e.g., *In re Application of Southern California Water Company* (1991) 39 Cal.P.U.C.2d 507; *TURN v. Pacific Bell* (1994) 54 Cal.P.U.C.2d 122, 124; *Re Facilities-based Cellular Carriers* (1994) 57 Cal.P.U.C.2d 176, 205, 215.)

GTEM's next claim that the Decision lacks sufficient findings of fact to argument to support the fine amount has no merit. GTEM argues that D.94-11-018 does not explicitly correlate the fine amount to the revenue attributable to the

unlawful Santa Rosa site to demonstrate the fine's reasonableness. GTEM, however, failed in its Application, to provide any facts concerning the actual revenue level attributable to the unlawful Santa Rosa site.

Moreover, although we have considered the revenue attributable to the unlawful operation of a particular site in some of our recent decisions as a factor in determining the appropriate fine, we are not limited to such a comparison to set a fine. Instead, we may consider a number of factors. Thus, we may include the size and sophistication of GTEM, and its experience in the regulatory arena; whether the penalty is proportionate to GTEM's wealth and its ability to pay; the economic benefit to GTEM attributable to its unlawful operations; and the continuing nature of the offense. Finally, we may consider GTEM's failure to call attention to its unlawful activity. We weighed all of these factors against the purpose sought to be achieved by the penalty in assessing the $343,000 fine.

We considered GTEM's wealth and size of its operations as reflected by its overall revenues. While the Decision did not state what those revenues were, the record indicates that GTEM reported net operating revenues of $205.7 million in 1992. We also considered the continuing nature of the noncompliance with G.O. 159. GTEM violated G.O. 159 for a period of 393 days after construction began. (Decision, p. 83) In addition, we considered GTEM's failure to call attention to its non-compliance until 2 days before we issued the OII. (Decision, p. 84) Although we properly weighed and included these factors to determine the fine amount, we will add additional findings for clarification. The record fully supports our holding, as the modifications make clear.

GTEM's next argument, that the fine is excessive compared to other similarly imposed fines, is meritless. GTEM has cited a number of Commission decisions, and some decisions of other agencies, which resulted in lower fines. Our review of those cases indicates that the facts in those cases differed considerably

from those involved here. We have indicated before that we assess penalties on a case-by-case basis according to the totality of the circumstances.

GTEM alleges that its conduct does not constitute a continuing violation under P.U. Code § 2108. However, GTEM has failed to recognize our recent cases concerning this matter. (See, for example, D.94-01-045, 53 Cal.P.U.C.2d 145.) In addition, the cases GTEM cites do not support its claim.

Finally, GTEM claims that our penalty provision violates the state and federal constitution. GTEM predicates its constitutional claims on our penalty being excessive and arbitrary. However, as explained above and in the Decision itself, the penalty is neither excessive nor arbitrary.

III. CONCLUSION

Although we will modify the Decision for clarification, we conclude that the application for rehearing does not demonstrate that the Decision is in error. We will order that the application for rehearing be denied.

THEREFORE, good cause appearing,

IT IS ORDERED that:

1. D.94-11-018 is modified as follows:

   (a) The first sentence of the second paragraph of page 83 is replaced by the following sentence "Secondly, the penalty imposed on GTEM is small compared with the $205.7 million in net operating revenues for 1992 reported by GTEM, a factor which can be considered when assessing a penalty under § 2107."

   (b) A new finding of fact 49a is added stating "GTEM's reported net operating revenues of $205.7 million in 1992 is a factor we considered in determining the level of fine to be imposed."

   (c) A new finding of fact 49b is added stating "Other factors affecting the penalty amount include GTEM's untimely

disclosure of its General Order 159 violation 2 days before we issued I. 92-01-022, and after 393 days of non-compliance with General Order 159."

IT IS FURTHER ORDERED that:

2. Rehearing of D.94-11-018, as modified, is denied. This docket is open.

This order is effective today.

Dated December16, 1997, at San Francisco, California.

P. GREGORY CONLON
President
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners

I dissent.
/s/ JESSIE J. KNIGHT, JR.
Commissioner