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MAIL DATE
12/18/97

Decision 97-12-119

December 16, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the matter of the Application of the Safety and Enforcement Division for an Emergency Order to Declare Void the authority "granted" through the Advice Letter Process to MIDCOM Communications, Inc. (U-5261-C) and Cherry Communications, Inc. (U-5306-C) for MIDCOM Communications to purchase a portion of the California customer base of Cherry Communications, Inc.

ORIGINAL

Application 96-02-004
(Filed February 2, 1996)

ORDER DENYING REHEARING OF DECISION 97-01-021

I. SUMMARY

In D.97-01-021, the Commission approved customer base transfers, pursuant to agreements entered into by Cherry Communications, Inc. (Cherry) and MIDCOM Communications, Inc. (Midcom) for the purchase by Midcom of a portion of Cherry's California retail customers, upon filing of the Commission's Public Advisor's written approval of a customer notification plan. The Utility Reform Network (TURN) filed an application for rehearing of D.97-01-021, alleging that the Commission failed to apply Public Utilities Code section 2889.5 to the customer base transfers.

We have reviewed all of the allegations of error raised by TURN and are of the opinion that good cause for rehearing, as discussed below, has not been shown. Therefore, we are denying TURN's application for rehearing.

II. DISCUSSION

A. Section 2889.5's Procedures Were Not Intended to Apply to Customer Base Transfers

We find TURN's argument that the steps mandated in section 2889.5 apply to the transfer of customers from Cherry to Midcom without merit. TURN asserts the Commission erred in authorizing the transfer of Cherry's customers to Midcom without requiring the steps found in section 2889.5. TURN alleges section 2889.5's procedures apply to customer base transfers and that the Commission has both failed to apply and/or misapplied principles of statutory construction. D.97-01-021 finds that section 2889.5 was not specifically written nor intended to impose its rigorous requirements on customer base transfers. That finding is a proper interpretation of section 2889.5.

The first step in statutory interpretation is to examine the actual language of the statute, giving the words their ordinary, everyday meaning. If the meaning is without ambiguity, doubt, or uncertainty, the language controls. (See D.97-11-020, mimeo, p. 5; D.97-03-067, mimeo, p. 11, citing IT Corp. v. Solano County Bd. of Supervisors, (1991) 1 Cal. 4th 81, 98) The specific procedures required by section 2889.5 clearly do not apply to the transfer of customers from one carrier to another. Section 2889.5 provides, in part:

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

- (1) The telephone corporation, its representatives or agents shall thoroughly inform the subscriber of the nature and extent of the service being offered.
- (2) The telephone corporation, its representatives or agents shall specifically establish whether the subscriber intends to make any change in his or her telephone service provider, and explain any charges associated with that change.

(3) For sales of residential service, the subscriber's decision to change his or her telephone service provider shall be confirmed by an independent third-party verification company

...

(4) For sales of all nonresidential services, the subscriber's decision to change his or her service provider shall be confirmed through any of the following means . . . (emphasis added)

These procedures were written to apply to the sale of a service. All of the required steps cannot be followed to the letter where one carrier intends to sell its customer base to another carrier.

B. The Commission Did Not Err in its Interpretation of the Limited Applicability of Section 851 and D.94-05-051 to the Transfer of Customers from Cherry to Midcom

We similarly find TURN's argument that we improperly applied section 851 and D.94-05-051 to the transfer of customers from Cherry to Midcom without merit. TURN asserts that the advice letter process authorized for non-dominant interexchange carriers' (NDIEC) asset transfers in D.94-05-051 should not have been used to review the request to transfer Cherry's customer base to Midcom. In D.97-01-021, the Commission did not find that process sufficient for this customer base transfer. Instead, the Commission found that the advice letters did not become effective automatically, even though there was no timely protest. The Commission also determined that two notices, describing the transfer and the customers' options and approved by the Commission's Public Advisor's office, were necessary before the transfers could proceed. The Commission based this notice requirement on an earlier discussion of balancing the competing interests of section 2889.5, the protection of customer choice in the selection of a telephone service provider, and D.94-05-051.

TURN also alleges that section 851 does not apply to transfers of utility customers and could not apply to Cherry's customers who allegedly were slammed. Section 851 requires Commission authorization for transfers of public utility property and

is limited in D.94-05-051 for NDIECs to filing an advice letter. In D.97-01-021, the Commission found that the public interest would be served by allowing Cherry to transfer its customers to Midcom, because Cherry could not continue to provide service to its customers, pursuant to the terms of the settlement agreement entered into by Cherry and S&E and approved by the Commission in D.96-09-041. As part of the settlement, Cherry surrendered its operating authority for a period of two years.

The factual issue of whether Cherry was engaged in slamming and was without authority to transfer its customers is not before the Commission in this proceeding. The May 31, 1996 Joint Stipulation of Facts by Midcom, Cherry and S&E, filed in this proceeding, do not include any such allegations. By its terms, the Joint Stipulation of Facts was submitted "for the purposes of establishing the factual record in this proceeding." (Joint Stipulation, p. 1.)

The Commission only can take notice in this proceeding of D.96-09-041, the decision resulting from the investigation into Cherry's operations, practices and conduct. In that decision, the Commission concluded that Cherry did not admit the allegations brought against it. (D.96-09-041, Conclusion of Law 1.) In addition, the Commission-approved May 9, 1996 settlement agreement placed disposition of the issue of the transfer of the customer base from Cherry to Midcom in this proceeding and not in that investigation. (Id. at Attachment A, ¶ 4.)

If the Commission had been presented in this proceeding with allegations of slamming in conjunction with the issue of the customer base transfers, the Commission would have needed to examine section 2889.5's limitation on the property interest a telephone corporation has in its customer base. Section 2889.5(b), (c), (f) and (g) provide remedies for slamming which serve to limit a telephone corporation's property interest in its customers. However, the Commission did not need to assess these limitations in D.97-01-021, because slamming was not an issue.

C. **The Commission Did Not Need to Circulate the Draft of D.97-01-021 Before Issuing It**

TURN alleges that the Commission improperly modified Administrative Law Judge (ALJ) Bushey's proposed decision without circulating an alternate. However, Chief ALJ Carew clearly noted in her letter of November 15, 1996 that the Commission was not required to circulate the proposed decision under section 311(d), since there were no evidentiary hearings, but was electing to do so because circulating it was in the public interest. Therefore, the Commission was not required to circulate an alternate under section 311(e).

III. CONCLUSION

We properly interpreted the applicability of section 2889.5 and D.94-05-051 to the facts presented in this proceeding concerning the transfer of customers from Cherry to Midcom.

THEREFORE, IT IS ORDERED that rehearing of D.97-01-021 is denied and A.96-02-044 is closed.

This order is effective today.

Dated December 16, 1997, at San Francisco, California.

P. GREGORY CONLON
President

JESSIE J. KNIGHT, JR.

HENRY M. DUQUE

JOSIAH L. NEEPER

RICHARD A. BILAS

Commissioners