

Decision 99-05-008 May 13, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Leo Ferrick, on behalf of the Laguna Shores
Vacation Plan Owners Association,

Complainants,

vs.

GTE California Incorporated,

Defendant.

ORIGINAL

Case 98-03-049
(Filed March 20, 1998)

Leo Ferrick, for Laguna Shores Vacation
Plan Owners Association, complainant.
Sottile & Taketa by Donn Taketa, Attorney
at Law, for GTE California Inc.,
defendant.

OPINION

On March 20, 1998, Leo Ferrick, on behalf of Laguna Shores Vacation Plan Owners Association (Laguna Shores), complainant, filed a complaint against GTE California Incorporated (GTE), defendant. Laguna Shores is an owners association, formed as a nonprofit corporation, to manage the deeded timeshare property located at 419 N. Coast Highway, Laguna Beach, California.

Laguna Shores' complaint alleges facts that raise the issue of whether Tariff Rule 22 has been incorrectly applied in determining that Laguna Shores should take business service. On August 26, 1998, Commissioner Knight issued a scoping memo that ruled the complaint is adjudicatory, identified the scope of the proceeding, set a schedule and identified Administrative Law Judge (ALJ)

DeUlloa as the presiding officer. The complaint was heard in Anaheim on October 21, 1998 before ALJ DeUlloa.

I. Position of Laguna Shores

In its complaint, Laguna Shores contends that from 1979 up until June 1997, GTE billed at residential rates the phone lines that serve the owners' unit when they are in residence at Laguna Shores. Laguna Shores alleges that on or about June 1997, GTE switched Laguna Shores' phone service from residence to business.

Prior to the service change from residence to business, GTE sent the phone bills to Mary Garcia (Garcia), "Agt Lag Shores Owner Assn." In 1991, Dick DeCamp (DeCamp) replaced Garcia as property manager. In 1997, Laguna Shores contacted GTE and requested that it change the contact person from Garcia to DeCamp. Laguna Shores also alleges that GTE consequently changed Laguna Shores' phone service from residence to business, thus resulting in increased charges. Once Laguna Shores noticed the change, it claims that it contacted GTE and contested the change in service.

Laguna Shores also states in its complaint that the phone lines in question are not the lines that serve Laguna Shores' office, but the lines that serve the owners' units when they are in residence at Laguna Shores. Laguna Shores contends in its complaint that the owners consider their timeshares at Laguna Shores to be their vacation homes which they have purchased for that specific reason and the phones they use while in residence at their vacation homes are used in the same manner and for the same purposes as their permanent resident phones.

¹ Exhibit 9.

Leo Ferrick, a non-attorney, states that the Board of Directors for the Association has directed and authorized him to file a formal complaint against GTE. In its complaint Laguna Shores requests as relief that GTE resume providing residential service to Laguna Shores and return all monies paid by Laguna Shores as a result of the change in service from residence to business.¹

II. Position of GTE

In its answer, GTE admits that on or about June 7, 1997, it changed Complainant's telephone service from residence to business service. Further, GTE states that it provides telephone exchange service to complainant pursuant to GTE's tariffs. Thus, GTE denies that Complainant is entitled to any remedy or reparation in this proceeding. GTE avers that it has acted properly and in full accordance with its tariffs on file with the Commission and/or the Federal Communications Commission (FCC). GTE also contends that it has acted properly and in full accordance with the Public Utilities Code of the State of California.

GTE also asserts two affirmative defenses. First, that the complaint fails to state facts sufficient to state a cause of action under the Public Utilities Code. Second, to the extent that the Complaint seeks damages or remedies beyond the jurisdiction of the Commission, such requests for damages and or/remedies must be stricken and dismissed.

Additionally, at hearing, GTE's counsel argued that GTE is subject to the Commission's tariffs and regulations and thus, has no discretion to reinstate residential service for Laguna Shores. Further, since tariffs have the force of law,

¹ In its complaint, Laguna Shores refers to the current service it receives from GTE as "commercial." The correct tariff term is "business" and such term is used throughout the text of this decision.

to do otherwise subjects GTE to potential liability for not treating customers equally and not following its own requirements. GTE believes that it has acted in accordance with Tariff Rule 22 as well as the tariff definitions filed with the PUC for business service, residence service and customer.

III. Discussion

A. Procedural Matters

Laguna Shores' complaint proposes that this matter be categorized as ratesetting and refers to the change in service as a discriminatory rate change.³ In its answer, GTE appropriately notes that the complaint lacks the requisite 25 signatures for challenging the reasonableness of a rate and thus moves to dismiss the complaint. Additionally, GTE moves to dismiss the complaint on the basis that the complaint fails to allege the violation of any Commission rule, order, tariff, Pub. Util. Code section or any provision of state or federal law. In support of its position, GTE cites Pub. Util. Code § 1702. Pursuant to Pub. Util. Code § 1702 a complaint may be made:

"... setting forth any act or thing done or omitted to be done by any public utility, including any rule or charge heretofore established or fixed by or for any public utility, in violation of any provision of law or of any order or rule of the commission."

GTE asks the Commission to apply Pub. Util. Code § 1702 in an overly restrictive manner. In *Westcom Long Distance, Inc. v. Pacific Bell*, 57 CPUC2d 120, Decision (D.) 94-10-061 (1992), the Commission addressed a similar argument made in an application for rehearing. In D.94-10-061, applicants for rehearing argued that the Commission's order was erroneous as a matter of law because the decision:

³ Pursuant to SB 960, this matter was categorized as adjudicatory.

"...(2) fails to determine whether the ... complaint states a cause of action under section 1702 of the Public Utilities Code..."

In D.94-10-061, applicants insisted that Pub. Util. Code § 1702 requires complainant to allege, with specificity, defendants' violation of the particular Commission rule or order which defendants are bound to obey.

In D.94-10-061, the Commission rejected applicants' restrictive interpretation of § 1702 since it ignores the Commission's practice of liberal construction in determining the sufficiency of a complaint. (*Westcom*, 57 CPUC2d at 122.) When issues raised by a complaint pertain to the subject of the regulation and control of a public utility, "[t]he complaint is not required to set forth a theory of relief; it is only necessary to allege facts upon which the Commission may act" (*Westcom*, 57 CPUC2d at 122 citing *Sunland Refining Corp. v. Southern Tank Lines, Inc.* (1976) 80 CPUC 806, 809). The liberal construction of complaints serves the interest of justice. (*Westcom*, 57 CPUC2d at 122.) Complaint allegations which merely suggest or infer the violation of a Commission order can be sufficient. (*Id.*).

In this proceeding, Laguna Shores' complaint alleges facts upon which the Commission can act. In its allegation of "rate change," Laguna Shores alleges facts which, if true, may mean that GTE incorrectly applied Tariff Rule 22. Notwithstanding GTE's argument to the contrary, Laguna Shores' complaint provided adequate notice to GTE that it may have misapplied Tariff Rule 22 and incorrectly changed Laguna Shores' service from residence to business. An indication that GTE had adequate notice that Tariff Rule 22 may have been incorrectly applied is evident from GTE's motion to dismiss. In GTE's motion to

dismiss, GTE explicitly addresses complainant's claimed "residential" customer status, including a review of Tariff Rule 22.

The record supports a finding that Laguna Shores' complaint alleges facts, that GTE incorrectly switched Laguna Shores from residential service to business service, which the Commission may act upon in a complaint proceeding. Further, Laguna Shores articulates a remedy that the Commission may grant (service switched back to residence and reimbursement of monies paid as a consequence of being switched from residence to business service). Accordingly, GTE's motion to dismiss should be denied.

B. Tariff Rule 22

The main issue in this proceeding is whether Laguna Shores should take residence or business local exchange service from GTE. Laguna Shores argues that the principal use of the telephone service is domestic, and thus GTE should provide residence service. GTE's defense is multifaceted. Although GTE contests Laguna Shores' claim that the obvious or actual use is domestic, GTE's main defense is that it believes the customer of record is a business and thus Laguna Shores should take business service.

Tariff Rule 22 governs the provision of residence and business service.⁴

Tariff Rule 22 states :

"Business and Residence Service

"The applicability of business and residence rates is governed by the actual or obvious use made of the service. The use to be made of the service will be ascertained from the applicant

⁴ The pre-filed testimony of Reynolds, GTE's witness, concurs that Tariff Rule 22 sets forth the applicability of business versus residential rates. (See Exhibit 7 at p. 2.) However, GTE's interpretation conflicts with this decision.

at the time of application for service or from evidence of usage once service is established.”⁵

Tariff Rule 22 also states “locations” at which business rates apply. Laguna Shores is a vacation timeshare property. Vacation timeshare properties are not listed as a specific location in Tariff Rule No. 22.⁶

In its complaint, Laguna Shores alleges that the principal use of telephone service for lines serving timeshare units is domestic. At hearing, Laguna Shores presented five witnesses. Four of the witnesses similarly testified that they purchased a timeshare at Laguna Shores as a vacation or second home. A fifth witness testified that he purchased a timeshare to exchange it to go to other

⁵ Commissioner Knight’s August 26, 1998, Scoping Memo followed the language in Tariff 22 and provided notice to parties that “[t]he applicability of business and residence rates is governed by the actual or obvious use made of the service. The use to be made of the service will be ascertained from evidence of usage when the service is already established.” (Knight’s Scoping Memo at p. 1.)

⁶ In its motion to dismiss and at hearing, GTE compares vacation timeshares to hospitals and hotels and thus concludes that Laguna Shores should take business service. (Tariff Rule 22 lists hotels and hospitals as locations at which business rates apply.)

This is a complaint case, thus we are reluctant to expand the listed locations in Tariff Rule 22 by adding timeshares without providing due process notice to entities that may be affected by such a wholesale change to the tariff. However, this decision does not preclude GTE from filing, in the future, a request to modify Tariff Rule 22 to include vacation timeshares.

This decision makes no final determination as to the appropriateness of modifying Tariff Rule 22 to explicitly apply business rates to timeshares locations. However, it should be noted that one distinction between vacation timeshares and hospitals or hotels is that patients at hospitals or guests at hotels have no ownership interest in the hotel or hospital while occupants at a timeshare may have an ownership interest in the timeshare.

resorts. All five witnesses similarly testified that the nature of their telephone calls was principally personal. However, two of the five witnesses testified that they might use the telephone for business purposes. Tito Romero (Romero) indicated less than 10% of his calls were business related and Paul McNamara (McNamara) testified that he would use the phone the same way he did at home, which included some business calls.

Laguna Shores states in its complaint that the phone lines in question are not the lines that serve Laguna Shore's office, but the lines that service the owners' units when they are in residence at Laguna Shores. At hearing, DeCamp testified that 494-8521 is the telephone number for the front office of Laguna Shores. The record supports a finding that the principal use of 494-8521 is business. Thus, under Tariff Rule 22, GTE should provide business service to 494-8521. In its response to GTE's appeal, Laguna Shores clarified that three other lines also serve Laguna Shores' office, (949) 494-8522, 494-8523 and 497-2166. The lines should also receive business service.

GTE's current records reflect that it provides local exchange service to 39 separate nonpublished telephone accounts, all currently held under the designation "Laguna Shores." At hearing, none of GTE's witnesses testified in depth to the actual or obvious use of the telephone service. As indicated above, in response to cross-examination, counsel for GTE elicited testimony that a small percentage of calls may be for business use.

The testimony and record in this proceeding support a finding that, except for the four lines serving Laguna Shores' business office, the actual and obvious use of the local exchange service provided by GTE to Laguna Shores is principally for domestic purposes. The lines serving the timeshare units are listed in Exhibit A. Thus, GTE should resume providing residence service to Laguna Shores. Additionally, GTE should refund all monies collected as a result

of switching Laguna Shores phone service to business service from residence service.

C. Customer of Record

In its pre-filed testimony and at hearing, GTE presented testimony that the current customer of record is Laguna Shores. GTE's witness Winona Johnson (Johnson) testified that she identifies business customers by determining the responsible party. In this instance, she believed that Laguna Shores was the responsible party. Further, she testified that De Camp told her that Laguna Shores was the responsible party and that De Camp also provided a corporate tax identification.

Ronda Reynolds (Reynolds), GTE's Regional Administrator for Regulatory Compliance, testified regarding the definition of "customer." Reynolds testified that the definition of "customer" is the person who is identified or pays the bills, regardless of the identity of the actual end user. Reynolds emphasized that should Laguna Shores not pay its bill, GTE would consider Laguna Shores the responsible party. GTE states that previously, Maria Garcia was the responsible party and that had the bill not been paid, GTE would have engaged in collection against Garcia. GTE's Exhibit 9 shows that prior to June 1997, GTE addressed bills to "Maria Garcia, Agt Lag Shores Owner Assn." Exhibit 9 indicates that prior to June 1997, GTE's practice was to bill "Lag Shores Owner Assn," through its agent, for residence service.

GTE has established and the record in this proceeding supports a finding that Laguna Shores, subsequent to May 1997, is the customer of record. However, it does not follow that because the customer of record is a nonprofit corporation formed to manage the interests of the timeshare owners that the customer must take business service.

The significance of the customer of record in determining the type of service the customer should take is not an issue of first impression. In D.90-03-013, Robert David Heller v. Pacific Bell, the Commission addressed the issue of whether two telephones located inside the passenger and service elevators of an apartment building that are used solely for emergencies should have service changed from business to residence.

In Heller, one of the defenses the defendant raised is similar to GTE's. The defendant in Heller argued that the two telephones at issue were billed to business entities⁷ and thus, a business rate should therefore be charged for each of these phones. In Heller, the Commission rejected the customer of record argument. The Commission stated:

"The fact that the service is billed to a corporation which would at least imply that the service is a business is not compelling in this instance. Therefore, the case turns on whether the predominant use of the service is business or residential in nature." (Heller, mimeo., at p. 5.)

This decision follows Heller. In this proceeding, the customer of record defense implies that Laguna Shores is a business, but it is not compelling evidence in view of Laguna Shores' showing that the predominant use of telephone service is domestic. In instances where Tariff Rule 22 is silent on the applicability of residence or business service, the actual or obvious use of telephone service, not the name of the customer of record, generally determines whether a customer should take residence or business service. However, in the absence of compelling evidence regarding use, a utility should be able to rely on a business type name to imply that the obvious use of the service is business.

⁷ In Heller, the telephone service was billed to "1960 Vallejo Inc.," a corporation and "Hanford-Fruend & Co.," a real estate management company, respectively.

D. Discrimination

GTE's witness Reynolds raises valid and thoughtful concern about liability for treating similarly situated customers differently. However, GTE's concern is overstated.

Tariff Rule 22 provides for a customer-by-customer determination at the time of application for service or from evidence of usage once service is established. For instance, the fact that a customer resides in a residence is not absolutely determinative of the service that customer should take. More importantly, GTE does not subject itself to liability for treating customers in residences differently.

Tariff Rule 22 states that residence service applies to private residences. However, pursuant to Tariff Rule 22, a customer receiving residence service at a private residence may be required to take business service if it is found that a residence customer's service is being used principally for business purposes.

Similarly, telephone use at timeshares may vary. Thus, service at Laguna Shores should not necessarily dictate service at other timeshare properties. GTE should determine, as necessary, on a case-by-case basis, the actual or obvious use made of the service by other timeshares.⁸ The determination of whether a timeshare should receive residential or business service pursuant to Rule 22 is a factual question.

⁸ During cross-examination, counsel for GTE elicited a response from DeCamp that it was possible for persons to use units for business meetings. However, DeCamp did not know whether any such meetings in fact took place. Speculative answers that an act is possible hold little weight in showing the actual or obvious use of service.

IV. Appeal

The decision of the presiding officer, ALJ DeUlloa, was mailed on February 11, 1999. Pursuant to Rule 8.2 of the Commission's Rules of Practice and Procedure (Rules), GTE filed an appeal of the Presiding Officer's Decision (POD) on March 8, 1999. On April 1, 1999, Laguna Shores filed a response to GTE.⁹

GTE's appeal contends that: (1) the POD fails to "properly consider the record evidence on utilization of these accounts in this customer's business" (GTE's Appeal at p. 1), (2) that the "record shows that Laguna is using these services in its resort business" (GTE's Appeal at p. 2), and (3) "Rule 22 requires that business rates apply to Laguna."

In analyzing GTE's appeal, it appears that GTE does not contest key findings of the POD. Instead, GTE's appeal agrees with the POD that Laguna Shores is the customer of record (GTE's Appeal at p. 1), and that determination of whether a timeshare should receive residential or business service pursuant to Rule 22 is a factual question (GTE's Appeal at p. 2).

GTE's appeal does not raise legal error. Instead, the central thesis of GTE's appeal is that the POD has not properly weighed or ignored substantial evidence. GTE's appeal, as discussed below, lacks merit.

On the other hand, Laguna Shores contends that:

"The PD properly points out that the main issue in the proceeding is whether the thirty-five (35) telephone lines at Laguna Shores should take residence or business local exchange service from GTE. This issue is governed by GTE Tariff Rule 22, which states that the applicability of business and residence rates is governed by the

⁹ On March 22, 1999, pursuant to Rule 48, ALJ DeUlloa granted Laguna Shores' request for an extension of time to file its response.

actual or obvious use made of the service. The use to be made of the service will be ascertained from the applicant at the time of application for service or from evidence of usage once service is established. (See PD pp. 6-7; Commissioner Knight's August 26, 1998 Scoping Memo, p. 1.)

"Based on the clear wording of GTE Tariff Rule 22, the actual use of the lines must be the basis for the decision as to whether a particular line is domestic or business. That was the holding of this commission in Robert David Heller v. Pacific Bell, Decision 90-03-013. In that case, the Commission held that the corporate status of the customer being billed for telephone service was not dispositive of the rates to be charged for that service because the rate charge was based on the *type of usage* of the service. Thus a corporate entity may be the customer of record but the service may be billed at residential rates if actual usages is by residential type patrons in a residential setting. Heller is on fours with this case." (Laguna Shores response at p. 2.) (Emphasis in original.)

A. Tariff Rule 22

Tariff Rule No. 22 in its entirety states:

"BUSINESS AND RESIDENCE SERVICE

"The applicability of business and residence rates is governed by the actual or obvious use made of the service. The use to be made of the service will be ascertained from the applicant at the time of application for service or from evidence of usage once service is established.

"A. Business Service

"Business rates apply at the following locations:

- "1. In offices, stores, factories and all other places of a strictly business nature.
- "2. In boarding houses and rooming houses with more than five rooms available for rent (except as noted under Paragraph B below), colleges, clubs, lodges, schools, libraries, churches, lobbies and halls of hotels,

apartment buildings, airport hangars, hospitals, and private and public institutions.

- "3. At any location when the listing of 'office' is provided, or when any title indicating a trade, occupation or profession is listed, except as modified under Schedule Cal. P.U.C. No. D-1.
- "4. In private residences or places of dwelling when the customer has no regular business telephone service and the use of the service by the customer, members of the customer's household, or the customer's guests is more of a business than residence nature as might be indicated by advertising through newspapers, handbills, billboards, circulars, business cards or other means.
- "5. In general, in any place where the principal use of the service is of a business, professional or occupational nature.

"B. Residence Service

"Residence rates apply at the following locations:

- "1. In private residence's or residential apartments of hotels, apartments houses and in any other location where the actual or obvious use of the service is domestic.
- "2. Repetitive commercial solicitation from a residence service is considered a business activity.

"If it is found that a residence customer's service is being used principally for business purposes, the Utility will thereafter require the customer to take business service, except in cases where the customer thereafter uses the service principally for domestic purposes."

B. Allegation that the POD fails to Consider Record Evidence

At page one and two of its appeal, GTE contends that the POD fails to "consider the record evidence." However, nowhere under the heading that the POD fails to "consider the record evidence" does GTE cite evidence from the record that the POD failed to consider. Instead, GTE's appeal agrees with the POD that Laguna Shores is the customer of service. Further, GTE's appeal accepts the actual use test of Tariff Rule 22. GTE states:

"The parties accept that the actual usage of the pertinent telephone services provided to Laguna is by the myriad timeshare participants that continually occupy and depart the units, or by their guests, or by visitors of the resort rental program." (GTE's Appeal at p. 2.) (Emphasis added.)

Rather than establish that the POD failed to properly consider the record evidence, GTE's appeal agrees with two key findings of the POD. First, that Laguna Shores is the customer of record and second, that the actual usage was made by the timeshare participants. As discussed in the POD, the overwhelming record evidence showed that the timeshare owners' principal use of telephone service was domestic.

Although GTE elicited some acknowledgement that guests or visitors also used the phones in addition to timeshare owners, GTE did not present any significant evidence, through its direct testimony, regarding actual usage to contradict the testimony of complainants.

In response to GTE's appeal, Laguna Shores admits that it is indeed a licensed corporation which receives bills for the thirty-five (35) domestic lines used by its timeshare owners and receives bills for the four (4) business lines used by its Managing Agent on behalf of its timeshare owners. This, however, Laguna Shores argues, does not change the conclusion that the actual and obvious use of the thirty-five (35) lines (other than the four (4) Laguna Shores HOA business lines) is domestic.

Laguna Shores states that the POD properly states that the business known as Laguna Shores is the customer of record for lines (949) 494-8521, 8522, 8523 and 497-2166 and that Laguna Shores should pay a business rate for those lines.

Laguna Shores argues that at the hearing, GTE presented no testimony as to the actual or obvious use of the telephone lines. Laguna Shores, on the other hand, provided documents and testimony at the hearing to support a finding that

the actual and obvious use of the local exchange service for the thirty-five (35) separate unpublished telephone accounts provided by GTE to Laguna Shores was principally domestic. Laguna Shores thus concludes that the actual and obvious use of those lines was, according to the evidence, domestic and not business.

Lastly, also under the heading that the POD "failed to properly consider record evidence, GTE raises again its customer of record argument by contending that:

"...it is essential to determine 'where and in what manner is the customer using the services' in order to apply the correct business or residential rate structure." (GTE's Appeal at p. 2.) (Emphasis in original.)

GTE's contention has nothing to do with failure to properly consider record evidence. In response to GTE's contention, Laguna Shores asserts that although GTE established and the record of the proceeding supports a finding that Laguna Shores, subsequent to May 1997, was and is the "customer of record," it did not follow that, simply because the customer of record is a nonprofit corporation formed to manage the interest of the timeshare owners, the customer must take business service for all thirty-nine (39) telephone lines.

Laguna Shores further states that GTE's argument is that the party to whom the billing is sent determines whether the use of the line is residential or domestic. Laguna Shores notes that taken to its logical conclusion, if a residential customer's home telephone bill is sent to that customer's office, then under GTE's reasoning that home line should be billed at the business rate. Laguna Shores concludes that GTE's argument violates the language and the intent of Tariff Rule 22, and ignores this Commission's decision in Heller. Laguna Shores believes that the POD properly rejects this reasoning and should be affirmed.

As clearly stated in the POD, the Commission has in the past stated that the determination of service "turns on whether the predominant use of the service is business or residential." (Heller) GTE's continued reliance on the customer of record is simply misplaced and does not support an argument that the POD failed "to consider the record evidence."

C. Allegation that the Record Shows that Laguna Shores is Using Telephone Service in its Resort Business.

Under its second argument of error, GTE erroneously contends that Laguna Shores is a resort business. However, GTE does agree with the POD that the determination of whether a timeshare should receive residential or business service pursuant to Rule 22 is a factual question.

In its second major argument, GTE correctly cites the record for the proposition that a local business license was issued to Laguna Shores Homeowners Association. Further, GTE correctly states that the business license provides a business location (419 North Coast Highway) which is the same location as the service address for all the telephone services of the customer of record.

Additionally, GTE accurately states that Laguna Shores Homeowners Association has contracted with Tricom Management to manage the resort. Further, GTE correctly states that one of the services Tricom provides to Laguna Shores is the payment of telephone service. Further, GTE correctly notes that Platinum Interexchange, a division of Tricom, rents out units located at Laguna Shores.

Based on the above record, GTE's appeal then concludes that the "record demonstrates that Laguna is operating a resort business on the coast. The PD errs in failing to acknowledge that the record evidence that the customer is a

licensed business, that it has 34 units available for rental..." (GTE's Appeal at p. 3.)

GTE's logic is flawed. Laguna Shores is a nonprofit owners' association, not a "resort business." GTE cites no evidence in the record for the proposition that Laguna Shores is a "resort business" with "34 units available for rental..." Rather, GTE's transcript citation is to questions regarding how many owners and timeshare units are at Laguna Shores. In fact, the record conflicts with GTE's conclusion. In direct response to a question posed by GTE's counsel as to whether Laguna Shores rents out units, the answer was that it could not be done through Laguna Shores. Laguna Shores' witnesses testified that Laguna Shores is a nonprofit organization (Tr. p. 43, L.16-18).

GTE's appeal inappropriately concludes that because a nonprofit owners' association has a contract with a property management firm for operational support, that Laguna Shores becomes a "resort business" engaged in renting out 34 units on the coast. GTE's argument is both not supported by the record and logically flawed.

D. Allegation that Rule 22 Requires that Business Rates Apply to Laguna Shores

GTE's appeal asserts that the POD errs because "the facts show that the customer is operating a resort rental business ..." As addressed earlier, the record does not support a finding that Laguna Shores is a "resort business."

Additionally, GTE's appeal criticizes the POD for lightly addressing the discrimination issues. GTE contends that a public utility may not arbitrarily select which portions of its tariffs it will either enforce or ignore. As stated in the POD, "[t]he use to be made of the services will be ascertained ... from evidence of usage once service is established." (Tariff Rule 22.) The question of usage is a factual one. GTE's appeal agreed with the POD that the predominate use of the

service is a factual question. Thus, customers may be treated differently based on the factors surrounding the customer's usage. This approach is articulated in the last paragraph of Tariff Rule 22.

Lastly, GTE contends that the POD's reliance upon Heller v. Pacific Bell is misplaced. The POD cited Heller for the proposition that in instances where Tariff Rule 22 is silent on applicability of residence or business service, the actual or obvious use of telephone service, not the name of the customer of record, generally determines whether a customer should take residence or business service.

GTE's appeal erroneously states that Rule 22 is not silent on the applicability of residence or business service. The point the POD made was that timeshares are not listed in Rule 22.

Rule 22 says that:

"A. Business Service

"Business rates apply at the following locations:

"**2. In boarding houses and rooming houses with more than five rooms available for rent (except as noted under Paragraph B below), colleges, clubs, lodges, schools, libraries, churches, lobbies and halls of hotels, apartment buildings, airport hangars, hospitals, and private and public institutions.

"**5. In general, in any place where the principal use of the service is of a business, professional or occupational nature."

A careful reading of Rule 22 shows that the POD is correct in that timeshares are not a location listed in Rule 22.

Further, GTE attempts to analogize timeshares to apartments. GTE states "Laguna units are clearly akin to apartments." (GTE's Appeal at p. 4.) Thus, GTE attempts to bring Laguna Shores within the ambit of locations to which it believes business rates apply.

In response, Laguna Shores states that:

"Timeshares are not apartments. Calif. Bus. & Prof. Code § 11003.5(a) defines a timeshare project as one in which a purchaser receives the right in perpetuity to the recurrent, exclusive use or occupancy of a lot, parcel, unit or segment of real property, annually or on some other periodic basis, for a period of time that has been or will be allotted from the use or occupancy periods into which the project has been divided. Laguna Shores is a timeshare project composed of timeshare estates. A timeshare estate (defined by Bus. & Prof. Code § 11003.5(b)) is a right of occupancy in a timeshare project *which is coupled with an estate in the real property*. As the Sample and actual Deeds admitted into evidence at the hearings as Laguna Shores Exhibits 3 and 4 show, owners of interests at Laguna Shores (unlike apartment dwellers) own a deeded interest in their own property. Timeshare owners are assessed real property taxes, under Calif. Rev. & Taxation Code § 998(a), based on the full value of the real property interest of the timeshare estate. (See, 18 Cal. Adm. Code § 472(a).) Further, unlike short-term apartment dwellers, timeshare owners are not subject to transient occupancy tax. (Calif. Rev. & Taxation Code § 7280(b).) Since Calif. Rev. & Taxation Code § 7280 was enacted almost fifteen (15) years ago, cities cannot impose transient occupancy taxes on timeshare owners.

"In summary, a timeshare is neither a hotel, nor a hospital, nor an apartment. A timeshare is a grouping of private residences with deeded interests. GTE Tariff Rule 22(B) states that residential rates apply in private residences or residential apartments of hotels, apartment houses and in any other location where the actual or obvious use of the service is domestic. Under GTE Tariff Rule 22, the Proposed Decision properly finds that the actual and obvious use of the thirty-five (35) lines is domestic because the thirty-five (35) lines are used by owners of private residences within a timeshare estate. Residential service rates should apply to those lines." (Laguna Shores' Response at p. 5.) (Emphasis in original.)

GTE's analysis is flawed in two major respects. First, GTE disregards footnote 6 of the POD which acknowledged that timeshares could be analogized to a listed location in Paragraph A.2 of Rule 22. However, the POD explicitly

chose not to expand the definitions in Tariff Rule 22 since this proceeding is a complaint case and that affected entities would not receive due process notice. GTE's analysis fails to acknowledge or address this concern.

Moreover, assuming GTE's thesis to be correct that timeshares are akin to apartments, GTE's application of Rule 22 is flawed on factual as well as legal grounds. On a factual basis, GTE asserts that "[i]f the telephone service is rendered to a customer that makes those services available to renters of units in an apartment building, business rates apply." (GTE's Appeal at p. 5.) (Emphasis added.) Little evidence in the record exists to support GTE's assertion that Laguna Shores is occupied by renters. The record evidence, as weighed by the ALJ, shows that the predominant use of telephone service is by owners of timeshare units, not renters.

On a legal basis, GTE misinterprets Tariff Rule 22. GTE apparently believes that Tariff Rule 22 means that renters in apartment buildings must take business service. Paragraph B.1 of Tariff Rule 22 explicitly covers renters in "apartment houses" or residential apartments of hotels. Tariff Rule 22 states:

"B. Residence Service

"Residence rates apply at the following locations:

- "1. In private residences or residential apartments of hotels, apartment houses and in any other location where the actual or obvious use of the service is domestic.

GTE's reliance on Paragraph A.2 of Tariff Rule 22 fails to note the qualification "lobbies and halls" appearing before the phrase apartment buildings. The record does not support a finding that the phone lines at issue are in "lobbies and halls." Thus, following GTE's logic, if timeshares are akin to apartment houses then residential rates must apply.

For all the foregoing reasons, GTE's appeal should be denied.

E. Correction

Laguna Shores' response to GTE's appeal provided the specific phone numbers serving Laguna Shores' office. Finding of Facts 6 and 9 are modified to clarify which specific lines serve Laguna Shores' office. Exhibit A is also incorporated to clarify which specific lines serve the timeshare units.

Findings of Fact

1. Laguna Shores is an owners association, formed as a nonprofit corporation, to manage the deeded timeshare property located at 419 N. Coast Highway, Laguna Beach, California.
2. From 1979 up until June 1997, Laguna Shores received residence service from GTE.
3. In May 1997, Laguna Shores contacted GTE and requested that GTE change the contact person from Maria Garcia to Dick DeCamp.
4. In June 1997, GTE converted Laguna Shores service from residence to business.
5. Laguna Shores' complaint provided adequate notice to GTE that it may have misapplied Tariff Rule 22 and incorrectly changed Laguna Shores' service from residence to business.
6. Laguna Shores Homeowners Association is the customer of record for, and the principal user of, lines (949) 494-8521, 494-8522, 494-8523 and 497-2166 Business Lines.
7. GTE provides local exchange service to 39 separate nonpublished telephone accounts, all currently held under the designation "Laguna Shores."
8. Except for service to line (949) 494-8521, 494-8522, 494-8523 and 497-2166, the actual and obvious use of the local exchange service provided by GTE to Laguna Shores is principally for domestic purposes.

9. Laguna Shores Home Owners Association is the customer of record for thirty-five (35) domestic lines described in Exhibit "A."

10. GTE's appeal has not shown that the POD failed to consider record evidence.

11. GTE's appeal has not shown that Laguna Shores operates a resort business.

12. GTE's appeal has not shown that Tariff Rule 22 requires business rates to apply to Laguna Shores.

Conclusions of Law

1. When issues raised by a complaint pertain to the subject of the regulation and control of a public utility, the complaint is not required to set forth a theory of relief; it is only necessary to allege facts upon which the Commission may act.

2. The liberal construction of complaints serves the interest of justice.

3. Complaint allegations which merely suggest or infer the violation of a Commission order can be sufficient.

4. Laguna Shores' complaint alleges facts which the Commission may act upon in a complaint proceeding.

5. GTE's motion to dismiss should be denied.

6. Tariff Rule 22 governs the provision of residence and business service.

7. The applicability of business and residence rates is governed by the actual or obvious use made of the service.

8. Under Tariff Rule 22, GTE should provide business service to (949) 494-8521, 494-8522, 494-8523 and 497-2166 .

9. In instances where Tariff Rule 22 is silent on the applicability of residence or business service, the actual or obvious use of telephone service, not the name of the customer of record, generally determines whether a customer should take residence or business service.

10. Under Tariff Rule 22, GTE should provide residence service to Laguna Shores for all lines listed in Exhibit A.

11. GTE's appeal lacks merit and should be denied.

O R D E R

IT IS ORDERED that:

1. GTE California Incorporated's (GTE) motion to dismiss is denied.
2. GTE shall resume providing residence service to Laguna Shores except for lines that serve Laguna Shores' office.
3. GTE shall refund the revenue differential collected from Laguna Shores as a result of switching Laguna Shores' phone service for lines listed in Exhibit A to business service from residence service.
4. GTE's appeal is denied.
5. Case 98-03-049 is closed.

This order is effective today.

Dated May 13, 1999, at San Francisco, California.

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

EXHIBIT "A"

List of phone numbers that were changed from domestic to business rate at Laguna Shores:

Unit Number	Telephone Number Prefix (949)	Unit Number	Telephone Number Prefix (949)
211	497-2108		
212	497-2119	231	494-1228
214	497-2124	232	494-1249
215	497-2128	233	494-1254
216	497-2129	234	494-1204
217	494-4105	235	494-1208
218	494-4126	236	494-1220
219	494-4174	237	494-1224
220	494-4172	238	494-1238
221	494-4139	239	494-1263
222	494-4135	240	494-6904
223	494-4176	241	494-3252
224	494-4183	242	494-3218
225	494-4104	243	494-7472
226	494-1202	244	494-3272
227	494-1203	245	494-3226
228	494-1209	257	494-7482
229	494-1212		
230	494-1221		

(END OF EXHIBIT A)