

Decision 00-04-012 April 6, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's Own Motion into the Operations, Practices, and Conduct of ACI Communications, Inc., and Larry Cornwell, in his Capacity as Receiver for ACI, to Determine Whether ACI has Violated the Laws, Rules, and Regulations Governing the Manner in Which California Consumers are Switched from One Long Distance Carrier to Another.

Investigation 99-06-035
(Filed June 22, 1999)

OPINION**Summary**

This order revokes the Certificate of Public Convenience and Necessity (CPCN) of ACI Communications, Inc. (ACI) and orders ACI to pay restitution.

Background

On June 24, 1999, we issued an order instituting investigation (OII) into the operations of ACI based on allegations made by the Utility Enforcement Unit (staff) of the Consumer Services Division (CSD) that ACI had violated Pub. Util. Code Section 2889.5 by switching subscribers' long distance provider without the subscribers' authorization. (Unless otherwise stated, all statutory references are to Pub. Util. Code.) The OII sought to determine whether:

1. ACI had violated Section 2889.5;
2. ACI should pay restitution;
3. ACI should be fined pursuant to Sections 2107 and 2108; and
4. ACI's CPCN should be revoked.

The OII issued also served as a scoping memo.

On July 27, 1999, a prehearing conference (PHC) was held in this matter. At the PHC, counsel appeared for Larry Cornwell (Cornwell), receiver for ACI. Counsel explained that ACI was in receivership and that in late February 1999, the Superior Court for the County of San Diego (Court) appointed Cornwell receiver¹ of ACI and that the Court also directed Cornwell to take possession and control of the operation of ACI's business which Cornwell has done. Counsel explained that Cornwell's role is to make a determination of the best disposition of the property and the business for the benefit of ACI's creditors. Counsel stated that since taking possession, Cornwell has terminated all marketing efforts by ACI, including shutting down operations that were focused in San Diego. Additionally, the function of Cornwell has been to service the existing customer accounts that were in place at the time he took over. The receiver also estimated that as of June 1999, 34,000 customers remained with ACI, of which approximately 10,000 customers are located in California. Further, counsel stated that it was Cornwell's intent to attempt to make a sale of the customer base.

At the PHC, counsel for CSD explained that fact finding was still going on, but that CSD had good hopes that it could reach a compromise with ACI. Further, CSD believed that an evidentiary hearing would not be necessary. Based on CSD's need for further investigation, CSD requested that a second PHC be held on October 1, 1999.

A second PHC was held on October 1, 1999. At the second PHC, counsel for ACI explained that an offer to purchase the ACI customer base had been received and that the receiver was waiting to get approval from one of the major

¹ Court Case No. 72814.

secured creditors. Counsel for CSD reported that it was trying to arrange for restitution for "the as yet undetermined number of ACI customers who are in California." Further, that settlement talks were ongoing and that settlement was close. The PHC was concluded with the understanding that the parties would inform the ALJ about the status of their settlement discussions.

On October 8, 1999, a telephone conference call was held and counsel for ACI reported that the offer to purchase ACI's customer base had been withdrawn.

In a letter dated November 17, 1999, counsel for ACI represented that revocation of ACI's CPCN effective March 31, 2000 would not be opposed. Further, ACI would comply with State statutes regarding notice to customers due to termination of ACI operations or the transfer of the ACI customer base.

On December 16, 1999, another PHC was held in San Francisco. At the PHC, ACI and CSD represented that an agreement had been reached on contested issues. At the PHC, ACI and CSD stipulated to the following:

- ACI has switched subscribers' long distance service provider without the subscribers' authorization;
- ACI should be ordered to pay restitution in the amount of \$20.00 per customer to reach consumers whose long distance service provider was switched without their authorization;
- ACI is unfit to conduct utility service in California;
- ACI's certificate of public convenience and necessity should be revoked as of March 31, 2000; and
- CSD withdrew its request for the imposition of fines.

Counsel for ACI represented that ACI waived the opportunity to present evidence or contest the CSD's staff report. Counsel for ACI also made clear that ACI was not contesting any of the four allegations contained in the OII to the

extent such activity occurred prior to February 25, 1999, when the receiver took over the operations of ACI.

The parties also stipulated to receiving into evidence CSD's staff report. ACI also requested that decisions regarding payment of restitution be left to the Court. In response, the ALJ directed the parties to address any jurisdictional conflicts between this Commission and the Court.

On January 3, 2000, ACI and CSD filed a joint brief addressing the jurisdictional issues. This matter was submitted on January 3, 2000.

Position of the Parties

The stipulation of the parties is set forth in the background section. In their joint brief, ACI and CSD state that the Commission has jurisdiction over enforcement of the Public Utilities Code and ACI's utility service. However, ACI and CSD contend that the Court has jurisdiction to guide and direct the receiver in making expenditures from ACI's remaining funds. In short, the parties believe that the Commission may order ACI to pay restitution, but that it is up to the Court to determine whether any amounts ordered by the Commission as restitution will be paid.

ACI and CSD request that notice be given to existing customers that ACI will no longer be providing telecommunications services.

Discussion

Based on the stipulations made by ACI and CSD we find that prior to February 25, 1999, ACI has switched subscribers' long distance service provider without the subscribers' authorization. We conclude that ACI is unfit to conduct utility service in California based upon the unopposed request of respondent that ACI's certificate of public convenience and necessity should be revoked as of March 31, 2000.

We accept ACI's representation that ACI has approximately 10,000 subscribers in California. Staff contends that all of the consumers subscribing to ACI's service were switched without authorization. Based on the stipulations made by the parties, we find that ACI should be ordered to pay restitution to 10,000 subscribers in the amount of \$20.00 per subscriber. Further, ACI should mail a notice to its current subscribers that ACI will cease doing business in California as a telecommunications provider as of March 31, 2000. The Commission's Public Advisor's office shall approve ACI's notice prior to being the time it is mailed to ACI customers.

Need for Hearing

This matter was categorized as an adjudicatory proceeding and the OII indicated that an evidentiary hearing was needed. In this proceeding, the parties reached consensus stipulations that resolved all the contested facts. Thus, no factual dispute existed that required an evidentiary hearing. Based on the parties' stipulations, we change the prior determination that an evidentiary hearing is required.

Section 311(g)(1) Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g) and Rule 77.1 of the Rules of Practice and Procedure. No comments were filed.

Findings of Fact

1. This matter was submitted on January 3, 2000.
2. Prior to February 25, 1999, ACI switched subscribers' long distance service provider without the subscribers' authorization.
3. ACI is unfit to conduct utility service.

Conclusions of Law

1. No evidentiary hearing is required in this matter.
2. ACI's certificate of public convenience and necessity should be revoked effective today.
3. ACI should mail a notice to its subscribers that ACI has ceased doing business in California as a telecommunications provider. Such notice should be approved by the Commission's Public Advisor's Office prior to mailing.
4. Based on the stipulations made by the parties, we conclude that ACI should be ordered to pay restitution to 10,000 subscribers in the amount of \$20.00 per subscriber.

O R D E R

IT IS ORDERED that:

1. ACI Communications, Inc.'s (ACI) Certificate of Public Convenience and Necessity is revoked effective today.
2. ACI shall mail a notice to its subscribers indicating that ACI has ceased doing business in California as a telecommunications provider. The notice must be approved by the Public Advisors Office prior to mailing and mailed no later than 15 days after the effective date of this order.
3. ACI shall pay \$200,000 in restitution.

4. The Commission's General Counsel shall deliver this order to the Superior Court for the County of San Diego and present a claim for restitution in the amount of \$200,000.

5. This investigation is closed.

This order is effective today.

Dated April 6, 2000, at San Francisco, California.

LORETTA M. LYNCH

President

HENRY M. DUQUE

JOSIAH L. NEEPER

RICHARD A. BILAS

CARL W. WOOD

Commissioners