

Decision 00-04-027 April 6, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

FORMAL FILE COPY

Investigation on the Commission's own motion into the operations, practices, and conduct of Communications TeleSystems International and Edward S. Soren, President of Communications TeleSystems International, to determine whether they have complied with the laws, rules, regulations and applicable tariff provisions governing the manner in which California consumers are switched from one long-distance carrier to another, and other requirements for long-distance carriers.

Investigation 96-02-043
(Filed February 23, 1996)

OPINION

Summary

This order approves a modification to the settlement agreement approved by the Commission in Decision (D.) 99-06-005 between the Commission's Consumer Services Division (CSD), Communications TeleSystems International (CTS), The Greenlining Institute, the Latino Issues Forum, and Pacific Bell.¹ Pursuant to the modified settlement agreement, CTS will contribute \$966,612 to a consumer education trust being established as ordered by D.98-12-084.

Procedural Background

In D.97-05-089, the Commission established a reparations fund of \$1.9 million to be disbursed to customers who had submitted presubscribed

¹ Although CSD and Pacific Bell are signatories to the modification, neither joined the motion seeking its adoption nor did they oppose the motion.

interexchange carrier disputes ("PIC disputes") against CTS with their local exchange carrier. A PIC dispute is an allegation that a subscriber's long distance service has been transferred without authorization. That decision also ordered CSD and the local exchange carriers to determine the exact number of customers who had filed such complaints and to divide the \$1.9 million evenly among the customers. At this time, the best available estimate was that 56,000 customers had filed such complaints.

In D.99-06-005, the Commission found that the local exchange carriers were only able to provide current addresses for approximately half of the 56,000 customers to whom CTS had been ordered to make reparations. In the later decision, the Commission approved a settlement agreement among the parties which provided that CTS would immediately issue checks for \$40 to the customers (approximately 24,000) for whom addresses were available. The settlement agreement contemplated that disposition of the remaining portion of the reparations fund would be by subsequent agreement.

On August 13, 1999, CTS, The Greenlining Institute, and the Latino Issues Forum filed their Joint Motion for Adoption of Modification to Partial Settlement. The modification states that the remainder of the reparations fund cannot be delivered to the estimated 32,000 customers because the local exchange carriers no longer have current telephone numbers or addresses. Thus, the parties agreed that the best course for the amount remaining in the reparations fund (\$966,612) was to contribute the amount to the customer education fund being established pursuant to D.98-12-084.² The proposed modification to the settlement agreement is affixed to this decision as Attachment A.

² In D.98-12-084, the Commission ordered GTE California Inc. (GTEC) to establish the Telecommunications Consumer Protection Fund for consumer protection and education

Footnote continued on next page

On October 29, 1999, CTS filed a report on its compliance with D.99-04-023 and D.99-06-005. The report stated that CTS had delivered 24,320 checks, in the amount of \$40 each, to CSD, totaling \$972,800, made out to customers identified by Pacific Bell and GTEC as having registered PIC disputes against CTS. At the conclusion of the 90-day period of honoring the checks, 16,793 had been cashed, leaving \$301,080. In compliance with D.99-04-023, CTS then issued a check for \$270,285.50 to The Greenlining Institute and the Latino Issues Forum in compensation for their work in this proceeding. CTS then issued a check for the remaining amount from the uncashed checks, \$30,794.50, to the Office of the Controller of the State of California.

Thus, the only remaining issue in this proceeding is the disposition of the share of the reparations fund original intended for the approximately 32,000 customers for whom the local exchange carriers have no current addresses.

Discussion

As this proceeding nears its fourth anniversary, we are dismayed to find that roughly half of the amount intended for reparations to California consumers has not been and, apparently, cannot be distributed to customers that registered PIC disputes. The parties assure us that this regrettable situation should not be repeated. As Pacific Bell explained at the March 8, 1999 prehearing conference, it intends to obtain addresses as part of a PIC dispute, which will provide some information. Nevertheless, Pacific Bell notes that California residents move frequently and that addresses quickly become outdated.

of limited English speaking and non-English speaking communities. GTEC will fund the trust in the amount of \$4.85 million. GTEC agreed to take these actions as part of a settlement agreement with CSD regarding alleged marketing abuses by GTEC.

Before we turn to consideration of the proposed settlement modification as a whole, we focus on the alternatives for funding. The agreement states that CSD shall deposit the remainder of the reparations fund (\$966,572) into either the Telecommunications Consumer Protection Fund or "an existing fund compatible with public education purposes" and goes on to define such a fund and set up a process for the parties to select such a fund. This level of specificity is insufficient. Thus, we will reform the settlement agreement to exclude the option for final disposition of the remainder of the reparations fund in any account other than the Telecommunications Consumer Protection Fund as established in D.98-12-084. Should that fund fail for any reason, the parties may file a petition for modification of this decision.

We therefore now turn to consideration of the proposed settlement modification, reformed as set out above, which directs that the remainder of the reparations fund be contributed to the Telecommunications Consumer Protection Fund.

Rule 51(e) of the Commission's Rules of Practice and Procedure requires that settlement agreements be (1) reasonable in light of the whole record, (2) consistent with the law, and (3) in the public interest if they are to be approved by the Commission.

a. Reasonable in Light of the Whole Record

The record in this case reveals that CTS engaged in widespread violations of Pub. Util. Code § 2889.5, the "anti-slamming" statute. The Commission designated a fund to be returned to customers who had disputed their transfer to CTS. Unfortunately, due to the passage of time, over half of the intended recipients are no longer reachable.

As the Commission noted in D.97-05-089, CTS targeted customers whose language preference was Spanish. CTS' PIC dispute rate for Spanish-

speaking customers was substantially higher than the industry average. See D.97-05-089, FOF 1, 6-8. The trust fund to which the settlement agreement proposes to donate the remainder of the reparations fund is directed at providing customer protection and education for limited English speaking and non-English speaking telecommunications customers.

In light of CTS' history of targeting the non-English speaking community, the inability to reach the actual customers that filed PIC disputes, and the trust fund's purpose to provide protection and education to the same customer group, it is reasonable to direct transfer of the remainder of the reparations fund to the Telecommunications Consumer Protection Fund.

b. Consistent with the Law

We have on several occasions in this proceeding considered distributing a portion of the reparations fund for consumer education purposes. In D.97-05-089, we originally directed:

[a]ny undeliverable or returned checks and checks not cashed within 90 days of mailing [be] . . . reissued . . . payable to the order of a public purpose trust, fund, or organization to be designated by the Consumer Services Division (CSD) to use to advance consumer education and awareness about how to avoid being "slammed." (72 Cal. PUC 2d 621, 639.)

However, in D.97-10-063, we granted a limited rehearing of D.97-05-089 on the issue of whether the Commission may divert undeliverable checks to a public purpose trust, fund, or organization. In D.97-10-063 we said:

Code of Civil Procedure § 1519.5, part of the California Unclaimed Property Law, states:

. . . any sums held by a business association [which includes a public utility] that have been ordered to be refunded by a court or an administrative agency including, but not limited to, the Public Utilities Commission, which have

remained unclaimed by the owner for more than one year after becoming payable in accordance with the final determination or order providing for the refund, whether or not the final determination or order requires any person entitled to a refund to make a claim for it, escheats to this state.

Further, it is the intent of the Legislature that nothing in this section shall be construed to change the authority of a court or administrative agency to order equitable remedies.

Were it not for the last clause in this section, we would be compelled to change our Decision to eliminate the public purpose trust and require these monies to escheat to the State. Because we are uncertain as to whether or not we can consider the public purpose trust in this case to be an equitable remedy within the meaning of this statute, we will grant rehearing in order to receive briefs from the parties on the issue of whether, in light of Code of Civil Procedure section 1519.5, Assembly v. Public Utilities Com., [(1995) 12 Cal.4th 87], or any other authority or authorities, we have the power to create such a trust in the circumstances presented by this case. (Slip op. at 14-15.)

We revisited this issue in D.99-04-023 in this proceeding. There we considered a settlement under which the funds represented by undeliverable and uncashed checks that were not needed to pay intervenor compensation would have been transferred to the Telecommunications Consumer Protection Fund. We declined to approve that portion of the settlement, concluding that

The parties presented no legal authority allowing the Commission to disregard the Unclaimed Property Law, Code of Civil Procedure § 1519.5, and divert unclaimed funds to a consumer education fund . . . (Conclusion of Law No. 4, slip op at 23.)

Now, under the modification to the settlement agreement currently before us, we are faced with a very similar question: whether the portion of the

reparations fund that was never converted into checks, because of a lack of current addresses, can be paid over to the Telecommunications Consumer Protection Fund. While the parties have cited no more legal authority than they did previously, our own research has revealed that this use of this portion of the reparations fund is legally permissible.

The final paragraph of Code of Civil Procedure (CCP) § 1519.5 preserves this Commission's authority to order equitable remedies. In other words, where funds would otherwise escheat to the state under that section, but the Commission has authority to order an equitable remedy putting those funds to another use, the Commission may order the equitable remedy and, in that case, the funds need not escheat to the state.

In D.94-04-057 (54 Cal. PUC 2d 122, 127), in a complaint case against Pacific Bell regarding incorrect handling of late payment charges, we addressed this provision of CCP § 1519.5. There, under our equitable powers, we ordered unclaimed refunds to be used to benefit those most likely to have been injured by the unlawful practices from which the refunds arose, rather than having those sums escheat to the state. Our construction of CCP § 1519.5 followed the court's construction of that same statute in People ex rel. Smith v. Parkmerced Co. (1988) 198 Cal. App.3d 683,692-3. There the court concluded that unclaimed refunds of illegal security deposits collected by the landlords at the Parkmerced apartment complex need not escheat to the state. Instead, the court used its equitable authority to transfer those funds to the Parkmerced Residents' Organization for use in representing the interest of the Parkmerced tenants.³

³ D.94-04-057 mentioned the concept of "fluid recovery" in discussing the equitable remedy we were authorizing. California v. Levi Strauss & Co. (1986) 41 Cal.3d 460, 471-80, discusses the concept of fluid recovery in class action cases

We will not attempt to outline here the full extent of the Commission's equitable powers, but will simply note two cases that help to show that the Commission has such authority to order the deposit of funds in the Telecommunications Consumer Protection Fund. The first of these is, of course, the Commission decision that created the Telecommunications Consumer Protection Fund (Fund). In D.98-12-084 we authorized the creation of the Fund to finance customer education as a remedy for harm suffered by victims of GTEC's alleged marketing practices.⁴ We specifically characterized the creation of the fund for this remedial purpose as an "equitable remedy." (Slip op. at 20.)

The second case is the recent court of appeal decision in Wise v. PG&E (1999) 77 Cal.App.4th 287. In its opinion, the court had occasion to address the Commission's equitable jurisdiction. While that opinion addresses a somewhat different kind of equitable remedy than is involved here, it contains language indicating that the Commission has broad authority to fashion equitable remedies for wrongs committed by public utilities subject to the Commission's jurisdiction. (77 Cal. App. 4th at 299-300.)

As noted above, in the Pacific Bell late payment case, in D.94-04-057, we concluded that we had the equitable authority to order that unclaimed refunds be used to benefit those most likely to have been injured by the incorrect late payment charges, rather than having those sums escheat to the state. However,

and notes that this concept is based on the equitable doctrine of cy près. (41 Cal.3d at 472.) The opinion specifically endorses, as one appropriate method of fluid recovery, the use of consumer trust funds to receive the portion of class recoveries that are not claimed by individual class members.

⁴ The parties to that proceeding had agreed that prior restitution and educational efforts had been an inadequate remedy.

in a later decision in that same proceeding, we declined to use those funds for upfront funding of nonprofit customer representatives in Commission proceedings, and instead directed that the sums involved be paid into the State Treasury. (D.97-06-062, 72 Cal. PUC 2d 799.)

We had several reasons for rejecting the particular use of the unclaimed refunds proposed by the consumer groups in that case. Perhaps most importantly, we found that the allocation of the unrefunded charges to advocacy activities served no equitable function connected with that proceeding. (Finding of Fact No. 3, 72 Cal. PUC 2d at 801.) In contrast, in this case (as described above in our discussion of why this settlement is reasonable in light of the whole record), the allocation of the remainder of the reparations fund to the Telecommunications Consumer Protection Fund serves an important equitable function in this proceeding, because the Fund is designed to provide consumer education about telecommunications matters to limited English speaking and non-English speaking customers, a group that was a major target of CTS illegal marketing practices. In addition, in the Pacific Bell late payment charge case, we noted that the majority of customers had received their refunds. Here, in contrast, the majority of the customers who filed PIC disputes never received any reparations, making this case more like the situation we faced in D.98-12-084 (the GTEC marketing abuse case) where the restitutive remedies had not been adequate.

In sum, we conclude that we have sufficient equitable authority to order the remainder of the reparations fund to be paid over to the Telecommunications Consumer Protection Fund, and that CCP § 1519.5 does not require us, under the present circumstances, to order these funds to escheat to the state. Accordingly, we find that the proposed modification to the settlement agreement is consistent

with statutory and decisional law, including decisions of both this Commission and the courts.

c. In the Public Interest

The Commission is responsible for ensuring that the public is protected from unscrupulous practices by interexchange carriers. The reformed modification to the settlement agreement is the best available means of fulfilling the Commission's intent in D.97-05-089 to provide reparations to affected customers. It will also protect members of the public by providing information to the public about unauthorized transfer.

For these reasons, the Commission finds that the reformed settlement agreement is reasonable in light of the whole record, is consistent with the law, and is in the public interest. The agreement is approved pursuant to Rules 51 through 51.10 of the Rules of Practice and Procedure. (See also San Diego Gas & Electric (1992) 46 CPUC 2d 538 (rules for all-party settlements).)

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 party filed comments.

Findings of Fact

1. As submitted, the modification to the settlement agreement allows the parties to subsequently designate the recipient of the remainder of the reparation fund.
2. The modification to the settlement agreement is the best available means of fulfilling the Commission's intent in D.97-05-089 to provide reparations to affected customers.
3. The parties agreed to a modification to their previous settlement agreement which is Attachment A to this decision.

4. The modified settlement agreement resolves all remaining issues in this proceeding.

Conclusions of Law

1. Allowing the parties to subsequently designate the recipient fund is insufficiently specific.

2. The modification to settlement agreement should be reformed to limit the recipient fund to the Telecommunications Consumers Education Fund.

3. The modified settlement agreement, as reformed, is reasonable in light of the whole record, is consistent with the law, and is in the public interest.

4. The modified settlement agreement, as reformed, should be approved.

5. In order to assure prompt compliance with the terms of the modified settlement agreement, and to quickly obtain the benefits of the modified settlement agreement for California consumers, this order should be made effective immediately.

O R D E R

Therefore, **IT IS ORDERED** that:

1. The modified settlement agreement is reformed to delete all text following "Telecommunications Consumers Protection Trust Fund" in paragraph 4, and insert a period. Such deletion is indicated by overstrikes in Attachment A.

2. The modified settlement agreement and amendment, as reformed, affixed hereto as Attachment A and made a part hereof is approved, and the parties are directed to comply with the terms set forth in the reformed modified settlement agreement.

3. This proceeding is closed.

This order is effective today.

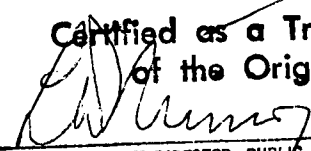
Dated April 6, 2000, at San Francisco, California.

LORETTA M. LYNCH
President

HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
CARL W. WOOD

Commissioners

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of the Original


ASST. EXECUTIVE DIRECTOR, PUBLIC UTILITIES COMMISSION
STATE OF CALIFORNIA

ATTACHMENT A

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion)
into the operations, practices, and conduct of) I.96-02-043
Communications TeleSystems International and)
Edward S. Soren, President of Communications)
TeleSystems International, to determine)
whether they have complied with the laws,)
rules, regulations and applicable tariff)
provisions governing the manner in which)
California consumers are switched from one)
long-distance carrier to another, and other)
requirements for long-distance carriers.)
_____)
)
)

MODIFICATION TO PARTIAL SETTLEMENT

(COUNSEL LISTED ON SIGNATURE PAGES)

MODIFICATION TO PARTIAL SETTLEMENT

This settlement agreement, to be presented to the California Public Utilities Commission ("CPUC") for adoption, by and among Communications TeleSystems International ("CTS"), Intervenors The Greenlining Institute and Latino Issues Forum (collectively "Intervenors" or "Greenlining"), the Consumer Services Division of the CPUC ("CSD"), and Pacific Bell ("Pacific"), collectively known as the "parties," resolves certain unresolved issues in the enforcement and execution of D 97 05 089 in this case, which issues have arisen since the September 1998 Partial Settlement herein was lodged with the Commission.

WHEREAS on February 23, 1996, the CPUC opened I.96-02-043, styled as an "Investigation on the Commission's own motion into the operations, practices, and conduct of Communications TeleSystems International and Edward S. Soren, President of Communications TeleSystems International, to determine whether they have complied with the laws, rules, regulations and applicable tariff provisions governing the manner in which California consumers are switched from one long-distance carrier to another, and other requirements for long-distance carriers."

WHEREAS decision 97-05-089 required that CSD contact California Local Exchange Carriers (LECs) to identify those subscribers who had submitted complaints about CTS' unauthorized submission of presubscribed interstate carrier (PIC) changes (sometimes referred to as "slamming");

WHEREAS decision 97-05-089 ordered CTS to pay \$1,939,412 in reparation to those subscribers for such unauthorized changes;

WHEREAS the LECs had reported, the Commission understood, and the Partial Settlement contemplated that there were roughly 56,000 such PIC complaints and, based on the 56,000 figure, estimated reparations of roughly \$34.60 per PIC dispute;

WHEREAS it was subsequently determined that the LECs could identify only 24,321

PIC disputants for whom current addresses remain;

WHEREAS the parties wish to adequately and promptly compensate those 24,321 identified victims, while avoiding a windfall to them;

WHEREAS the parties desire to use that portion of the \$1,939,412 reparations fund which has failed, due to the inability to identify PIC disputants by name and current address, for compatible public education and advocacy purposes;

WHEREAS the parties had previously entered into a Partial Settlement dated September 29-30, 1998, which had resolved certain issues related to the payment of reparations to PIC disputants and payment of attorneys fees to Intervenors;

WHEREAS the Partial Settlement was approved with certain limitations by the Draft Decision of ALJ Bushey mailed to the parties on January 15, 1999;

WHEREAS the parties wish to modify the Partial Settlement consistent with the Draft Decision and with the comments of Assigned Commissioner Neepser and ALJ Bushey at a March 8, 1999 Prehearing Conference in this matter;

WHEREAS ALJ Bushey has directed the parties to apply for Executive Director authority to comply with D 97 05 089 by mailing checks in the amount of \$40 to each of the identified 24,321 PIC disputants as soon as possible, and the parties have applied for such authority;

WHEREAS this case is a quasi-judicial reparations case, see D.97-05-089 at p. 33, which has created a common reparations fund;

WHEREAS restitution has thus failed as to the roughly 34,000 PIC disputants for whom the LECs could not identify names and current addresses;

WHEREAS the Commission retains authority to "order equitable remedies" as to such failed restitution (see ALJ Ruling herein, dated July 20, 1998);

WHEREAS all parties wish to comply with the letter and spirit of D 97 05 089 to the

full extent possible;

WHEREAS all parties recognize that this case arises from unique, unprecedented and unfortunate circumstances which they believe will not be repeated;

THEREFORE, in consideration of the foregoing and based upon the mutual promises made by the parties to each other, as well as their representations to the ALJ and Assigned Commissioner, the parties hereby agree as follows:

1. Within seven days of the approval and action requested in the Joint Motion of all Parties for Executive Director Action Pursuant to D 97 05 089, attached hereto as Exhibit A, CTS shall establish (or will have established) an account ("Fund A") into which it will deposit sufficient funds to pay the checks referenced in paragraphs 1 and 2 of the September, 1998 Partial Settlement referenced above and attached hereto as Exhibit B. The parties anticipate that this amount will be \$972,840 (24,321 checks x \$40).
2. Intervenor compensation shall be paid from the residue of Fund A, out of undeliverable, unclaimed or unpaid checks, as foreseen by paragraph 3 of the Partial Settlement.
3. If, after payment of intervenor compensation, any sums remain in Fund A, those sums shall escheat to the State of California and be paid through the Commission to the State of California pursuant to the Unclaimed Property Law, C.C.P. § 1519.5, in accordance with the ALJ's draft decision of January 15, 1999, which is now before the Commission for approval.
4. Within fourteen days of the Commission's approval of this Modification to Partial Settlement, CTS shall pay the "failed reparations" remainder of the reparations fund to CSD (\$966,572, which represents reparations to unidentified victims, i.e., the total reparations amount of \$1,939,412 minus the \$972,840 in checks sent out to the identified victims as described above). CSD shall deposit these funds into an interest-bearing account within two

(2) days of receipt from CTS, and hold these monies in trust pending the formation of a Telecommunications Consumer Protection Trust Fund ~~or identification of an existing fund compatible with the public education purposes of such a trust fund. As used herein, public education purposes means the education of the public, and particularly vulnerable communities such as those identified by the ALJ in her January 15, 1999 Draft Opinion, as to their telecommunications choices and remedies, and to advocate on their behalf for such remedies. Such a fund shall be acceptable to CSD and Intervenor Greenlining and Latino Issues Forum, and these parties agree that all such monies shall be directed to end users within three years (see, e.g., D 98-12084, and attached Agreement, creating Telecommunications Consumer Trust Fund in recent GTE case, with three-year funding limit). These parties agree to meet no less than once a week following the approval of this Modification of Partial Settlement, and to reach agreement as to the identification of an acceptable fund. Any disputes in the disposition of these funds shall be resolved by ALJ Bushey.~~

5. To the extent that Fund A is not sufficient to fully pay intervenor fees, such fees shall be paid from Fund B prior to the disbursement contemplated above.

6. CPUC approval of this Modification to Partial Settlement shall not constitute precedent regarding any issue, and it shall not be cited by any authority to any proceeding as such.

7. The CPUC shall retain jurisdiction over this matter to the extent necessary to enforce the terms of this Modification to Partial Settlement.

8. This Modification of Partial Settlement is without prejudice to CTS' pending federal actions, case number 98 16400 in the U.S. Court of Appeals for the Ninth Circuit, and case number C 98 2861 MHP in the United States District Court for the Northern District of

California, regarding the Commission's action against CTS in I.96 02 043.

Dated: March __, 1999

Communications TeleSystems International

By: _____
David C. Brownstein
HELLER, EHRMAN, WHITE & McAULIFFE

Dated: March 26, 1999

The Greenlining Institute

By: Chris Witteman
~~Robert Gnaizda~~ CHRIS WITTEMAN

Dated: March 25, 1999

Latino Issues Forum

By: Susan E. Brown
Susan E. Brown

Dated: March _____, 1999

Pacific Bell

By: _____
Robert Mazique

Dated: March _____, 1999

Consumer Services Division, CPUC

By: _____
Robert Cagen or Travis Foss

California, regarding the Commission's action against CTS in L96 02 043.

Dated: March __, 1999

Communications TeleSystems International

By: _____
David C. Brownstein
HELLER, EHRMAN, WHITE & McAULIFFE

Dated: March __, 1999

The Greenlining Institute

By: _____
Robert Gnaizda

Dated: March __, 1999

Latino Issues Forum

By: _____
Susan E. Brown

Dated: March 26, 1999

Pacific Bell

By: Robert Mazique
Robert Mazique

Dated: March __, 1999

Consumer Services Division, CPUC

By: _____
Robert Cagen or Travis Foss