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PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

COMMISSION ADVISORY AND COMPLIANCE DIVISION
TELECOMMUNICATIONS BRANCH

RESOLUTION T-15007
September 2, 1992

RESOLUTION

RESOLUTION T-15007. MCCAW AFFILIATED CELLULAR FACILITIES-BASED CARRIER COMPANIES:
REDDING CELLULAR PARTNERSHIP (U-3020-C),
SACRAMENTO CELLULAR TELEPHONE COMPANY (U-3013-C),
STOCKTON CELLULAR TELEPHONE COMPANY (U-3012-C).

ORDER REGARDING FREEDOM I AND FREEDOM II OPTIONAL RATE PLANS OFFERING FLAT RATE CELLULAR SERVICE AND LONG DISTANCE CALLING.

BY TEMPORARY TARIFF ADVICE LETTER NOS. 27 (U-3020-C), 81 (U-3013-C), AND 53 (U-3012-C) FILED ON MARCH 6, 1992, AND SUPPLEMENTAL ADVICE LETTERS NOS. 27-A, 81-A, AND 53-A FILED ON MARCH 17, 1992, AND TEMPORARY TARIFF ADVICE LETTER NOS. 29, 88, AND 57, FILED ON MAY 22, 1992.

SUMMARY

This Resolution rejects the above noted temporary tariff advice letters for the Freedom I and Freedom II Plans. It also requires the utilities to refund, both to current and former Freedom I and Freedom II Plan customers, the difference between the actual long distance toll charges and the amount provided for long distance charges under the plans retroactive to March 6, 1992. This Resolution also grants the Commission Advisory and Compliance Division (CACD) the authority to reject any future advice letters by any cellular utilities which offer bundled regulated services with services not provided through the cellular carrier's Certificate of Public Convenience and Necessity (CPCN).

The temporary tariff advice letters that were filed violated sections of General Order (G.O.) 96-A due to the fact that they included provisional tariffs and were supplemented with more restrictive conditions without Commission approval. The tariffs violated sections 532 and 702 of the Public Utilities (PU) Code by bundling long distance service with cellular service and reselling long distance service without an appropriate CPCN. The tariffs also violated Commission decisions because the utilities held out as intraLATA toll providers.

The Freedom I and Freedom II optional plans provide flat rates for bundled cellular and long distance calls. The optional plans were filed by three facilities-based cellular utility affiliates of McCaw Cellular Telecommunications Inc. (McCaw): Redding Cellular Partnership, Sacramento Cellular Telephone Company, and Stockton Cellular Telephone Company.

Protests of the Freedom I and Freedom II optional plans were filed by the Cellular Resellers Association, Inc. (CRA), Comtech Mobile Telephone Company (Comtech), and the Division of Ratepayer Advocates (DRA).

BACKGROUND

Redding Cellular Partnership, Sacramento Cellular Telephone Company, and Stockton Cellular Telephone Company, three of the facilities-based cellular utility affiliates of McCaw Cellular Telecommunications Inc., filed advice letters on March 6, 1992, under temporary tariff authority offering optional flat-rate cellular plans known as the Freedom I and Freedom II Plans. The plans were to expire on September 6, 1992.

The Freedom I and Freedom II Plans, as filed on March 6, offer customers the ability to subscribe, on a month-to-month basis, to basic cellular and long distance services for a flat-rate monthly charge. The Freedom I and Freedom II flat-rate plans not only include basic cellular service, but also include up to 60 minutes and 80 minutes, respectively, of off-peak direct dialed toll calls originating within the utility's service area. Wholesale versions of the Freedom plans require resellers to purchase a minimum of 25 initial access numbers with subsequent orders in blocks of 5 numbers. All plans prohibit the customers from accruing unused peak, off-peak, or long distance minutes, and were to be withdrawn on September 6, 1992, unless otherwise extended by the utility. The plans are summarized in Table 1 on the following page.

TABLE 1

Current Prices Of Freedom I and Freedom II Plans

	Price	Air Time Peak (Minutes)	Air Time Off-Peak (Minutes)	Maximum Long-Distance [1] (Minutes)
Redding				
Freedom I				
Retail	$ 79.99	90	60	60
Wholesale	$ 63.99	90	60	60
Freedom II [2]				
Retail	$174.99	320	80	80
Wholesale	$139.99	320	80	80
Sacramento				
Freedom I				
Retail	$ 64.99	90	60	60
Wholesale	$ 51.99	90	60	60
Freedom II [2]				
Retail	$159.99	375	80	80
Wholesale	$127.99	375	80	80
Stockton				
Freedom I				
Retail	$ 64.99	90	60	60
Wholesale	$ 51.99	90	60	60
Freedom II [2]				
Retail	$159.99	375	80	80
Wholesale	$127.99	375	80	80

[1] - All Off-Peak minutes can be used for long distance calling.

[2] - Freedom II Plans include all hours on Saturday as off-peak calling; from 7:00 a.m. to 8:00 p.m. on Saturday is normally charged the peak rate.

On March 17, 1992, the utilities filed supplemental temporary tariff advice letter Nos. 27-A, 81-A, and 53-A to their Freedom I and Freedom II Plans to place more restrictive conditions on toll calls. These supplemental advice letters required that toll calls under the plans be limited to the continental United States.

On May 22, 1992, the utilities filed new temporary tariff advice letter Nos. 29, 88, and 57 to satisfy some of the concerns of CACD and the Division of Ratepayer Advocates (DRA). In those filings the utilities removed the termination dates of the plans and reduced the minimum purchase block for resellers from 25 to 10 access numbers.

PROTESTS

Public notice that the McCaw companies filed advice letters Nos. 27, 81, and 53 to introduce the Freedom Plans appeared in the California Public Utilities Commission's March 10, 1992, Daily Calendar. Supplemental advice letters Nos. 27-A, 81-A, and 53-A appeared in the Daily Calendar on March 19, 1992. Advice letters Nos. 29, 88, and 57 appeared in the Daily Calendar on May 28, 1992.

On March 24, 1992, protests were filed with CACD by CRA and Comtech. Both protests contended that the McCaw-affiliates did not have Commission authority, via a CPCN, to provide interexchange long distance service. CRA also protested that the filings constituted a retail rate increase and a reduction in wholesale margins under the Freedom I Plan.

On March 25, 1992, a protest was filed by DRA. DRA contended that the McCaw-affiliates could not resell long distance service because they did not possess CPCNs which authorized them to provide interexchange long distance telephone service. DRA also indicated that the McCaw-affiliates had not demonstrated that the Freedom Plans would not impact an average customer bill by more than the 10 percent limitation for advice letters filed under temporary tariff authority, as required in Decision (D.)90-06-025. Finally, DRA indicated that the minimum initial order of 25 access numbers and subsequent order of 5 block increments could be construed as anticompetitive and discriminatory against resellers.

McCaw, on April 2, 1992, filed different responses to the resellers (CRA and Comtech) and to CACD and DRA. In the response to the resellers, McCaw stated that its response to CACD contained confidential business information and that it was exercising the non-disclosure provisions of G.O. 66-C and Section 583 of the PUC Code. McCaw stated that the protestants were unable to rebut McCaw's arguments and that the disclosure of the confidential information would prove to be seriously damaging to the McCaw affiliates. CRA and Comtech did not receive information pertinent to their protests in the McCaw response that they received.

CRA and Comtech's legal representative petitioned the Commission's Executive Director for immediate release of McCaw's full response on the basis that McCaw was not responsive to the protests and did not make a fair showing that the release of information would warrant the non-disclosure provision. On April 14, McCaw responded to CRA and Comtech by releasing the full response.

In its full response to DRA and CACD, McCaw refuted the protests that its affiliates needed a CPCN by stating that the Freedom Plans were designed so that any long distance charges were simple pass-throughs and that by passing through these charges, the utilities were not involved in the resale of services. As a basis for its argument, McCaw used D.87-01-063 (incorrectly identified as D.87-01-062 in McCaw's response) as the authority to "pass-through" toll charges without a CPCN by claiming that the affiliates are shared tenant service (STS) providers, and as STS providers they are exempt from obtaining CPCNs authorizing them to provide interexchange long distance telephone services.

McCaw also refuted the protests that the Freedom Plans involved rate increases and reduced the margin between retail and wholesale rates by a lengthy mathematical evaluation which indicated that the rates did not increase and the margins were not reduced. McCaw did concede, in Footnote #14 of its response, that if a customer chose a Freedom Plan and then did not utilize all features to the fullest extent of the plan offering, the customer could indeed see a rate increase. McCaw stated that it was relying on the customer to make a correct decision in choosing a rate plan.

McCaw stated that it was not improperly requiring resellers to order an initial minimum of 25 access numbers and subsequent block of 5 numbers for each plan, as protested by DRA. McCaw argued that the requirement was justified in order to maintain a wholesale rate and that the 25 initial access numbers was a very modest block purchase requirement.

DISCUSSION

Contrary to McCaw's argument that the utilities are exempt from obtaining a CPCN for providing the long distance calling feature of the Freedom Plans, the utilities do not fit the definition of an STS provider. McCaw's argument, which was based upon the Adopted Guideline #4 of D.87-01-063, is invalid. The definition of an STS provider, as found in Appendix A of that decision, is:

> A multi-tenant or shared-tenant service provider (provider) is a person or firm that owns or manages a PBX-type switch and provides telephone service to tenants in a single building or complex of buildings on continuous property. (Appendix A, Page 1)

We are disturbed that McCaw argues that the affiliates are STS providers. The Commission's decision is very clear in the description of tenants being "in a single building or complex of buildings on continuous property." Obviously cellular consumers do not fit this description and the utilities that serve them are not STS providers.

A CPCN is required when a utility resells services, either by marking up or discounting the services. An examination of McCaw's response shows that the affiliates are reselling long distance services. McCaw, in its response to CACD, indicated that the pricing of each of the three utilities' plans utilized a nine company-wide average of $0.13 per minute for long distance charges. This average included both interstate and intrastate (interLATA and intraLATA) toll charges. Under normal cellular service circumstances, a cellular carrier would simply pass-through the actual toll charges to the customer. The charges would vary with distance and, according to one local exchange carrier's intraLATA tariff, could possibly be as high as $0.28 per minute or as low at $0.07 per minute. The $0.28 per minute charge is significantly higher than the $0.13 per minute average utilized in McCaw's workpapers. The utilities, by charging an average rate, rather than passing through the actual long distance charges, are operating as long distance resellers without possessing a CPCN.

After CACD staff expressed concerns about the McCaw affiliates needing a CPCN, California InterCall, Inc. (CII), an authorized intrastate long distance carrier, on April 16, 1992, filed its Promotional Plans A.L. No. 5 which offered flat-rate interLATA calling. This advice letter was filed as a result of McCaw's desire to eliminate the requirement of a CPCN, as CII's actual toll charges would be passed on to the customer. CII's A.L. No. 5 was effective on May 16, 1992, and will expire on October 6, 1992.

CII's tariff consists of two plans which allow customers to obtain either 60 or 80 minutes of interLATA calling for a flat-rate equivalent of $0.13 per minute. Both plans allow the flat-rate regardless of the mileage associated with each call. Both plans contain day and hour restrictions on the usage. The two plans are summarized in Table 2 on the following page.

TABLE 2

California InterCall Inc.
A.L. No. 5
Promotional Plan Rates

Plan	Price	Maximum Minutes	Day And Hour Use Restricted To
A	$ 7.80	60	Monday to Saturday from 8:00 p.m. to 7:00 a.m. All day Sunday and Holidays.
B	$10.40	80	Monday to Friday from 8:00 p.m. to 7:00 a.m. All day Saturday, Sunday, and Holidays.

CII's flat-rate Promotional Plan tariff is identical, both in cost structure and day and hour restrictions, to the long distance calling portion of the Freedom Plans. McCaw uses this similarity as a basis for toll charge price support in the Freedom Plans. The CII flat rate toll plan is offered in lieu of the previously referenced nine company-wide average which appeared in McCaw's supporting workpapers and which included both interstate and intrastate charges (interLATA, intraLATA).

CII's tariff, however, does not provide for all the long distance services which are included in the Freedom Plans. CII's preliminary statement of applicability states:

> California InterCall, Inc. has been granted authority by the California Public Utilities Commission to provide specialized intrastate long distance commercial telecommunications services within the State of California. California InterCall also provides interstate long distance commercial telecommunication services; however such services are not subject of this tariff.
>
> California InterCall, Inc. does not hold itself out as offering intraLATA service. IntraLATA communications should be placed over the facilities of the local exchange company.

CACD staff asked CII to verify that its tariff did not allow for interstate calling under the terms of the promotional tariff offered by CII's AL No. 5. CACD also requested CII to supply a copy of its interstate rates. CII supplied CACD with a copy of an AT&T tariff and indicated that its rates mirrored AT&T's rates. CACD's investigation also revealed that McCaw is the parent company of CII.

CII's tariff is temporary (effective until October 6, 1992) and allows for intrastate, interLATA calling only. The Freedom Plans, however, are permanent tariffs and offer long distance calling to anywhere in the continental United States, which would include both interstate and intrastate (interLATA and intraLATA) calling. CII's tariff, which McCaw is now using as its sole basis for long distance price support, does not allow for the same long distance calling as that offered in the Freedom Plans. Therefore, McCaw cannot use CII's tariff as its sole basis for long distance price support. With this in mind, the McCaw affiliates have been resellers of interstate and intrastate, intraLATA services without the provisions of a CPCN since March 6, 1992. In addition, if CII's tariff is not extended, or if the existing rates are changed, the McCaw affiliates will again become resellers of intrastate, interLATA services after October 6, 1992, or at any time the rates are changed, without the provisions of a CPCN.

In response to CRA's protest, CACD staff reviewed McCaw's quantitative evaluation refuting the change in margins between retail and wholesale and found that McCaw's calculations were incorrect. Staff recalculated the margins and found that, in spite of McCaw's errors in calculations, there were no reductions in margins as alleged by CRA.

Staff also reviewed McCaw's response to CRA's and DRA's concerns about rate increases. McCaw's workpapers indicate that the utilities have assumed that the customers would utilize the maximum number of minutes allocated in each plan for long distance calling. This assumption equates to 100 percent of the off-peak minutes allocated in each plan being used for long distance calling. CACD has evaluated this assumption and believes that it overestimates customer usage of the off-peak long distance feature. CACD staff has found that off-peak long distance calling experienced by other cellular carriers has been less than 10 percent of the total off-peak usage. Given the fact that customers are not allowed to bank unused minutes offered under the Freedom Plans, we conclude that many customers are likely to see bill increases because they do not utilize 100 percent of the off-peak allocation for long distance calling. Even McCaw conceded to the possibility of the customers seeing a bill increase if the plans' long distance minutes were not used to the fullest.

We are also concerned about the bundling of the long distance services with the tariffed cellular services as a requirement for service under the Freedom Plans. D.89-07-019 clearly states that bundling of one product conditional on the purchase of a tariffed product is unlawful. Specifically, D.89-07-019 states:

> We have found that a special rate offered on one product, conditional on the purchase of a tariffed product, constitutes an indirect and unlawful discount on the tariffed product.... (page 18)
>
> In sum, the practice of bundling unregulated products with regulated services and discounting the package is unlawful whether it is practiced by the utility or its agent. (page 20)

The long distance service features provided for in the Freedom Plans are not tariffed but must be taken if one wishes to obtain the lower priced cellular services under the Freedom Plans. This is a violation of both the word and spirit of our bundling decision. As directed by D.89-07-019, McCaw must not make the long distance services a condition for obtaining service under the plans. These plans, because of the clear violations of our cellular industry structure decisions, must be rejected.

All customers must be noticed that the Freedom Plans will no longer be offered. CACD has worked with the Public Advisor's Office to draft up the notice that should be sent to the customers. The notice can be found in Appendix A.

Current and former Freedom Plan customers should be refunded any unused toll charges (difference between the actual long distance charges incurred and the amount provided for long distance calls in the plans) retroactive to March 6, 1992. Refunds should be made as long as former customers can be reached. This is consistent with discussions between CACD staff and McCaw representatives where the McCaw representatives indicated that the affiliates were to refund unused amounts from March 6, 1992, to the filed date of CII's tariff. Because staff has not been informed of the status of the refunds, we will require the utilities to refund retroactive to March 6, 1992, and to report the status of such refunds to CACD.

The McCaw affiliates should submit a refund plan to CACD for review and approval within 30 days of the effective date of this order. The plan should include the customer notification (as shown in Appendix A), the number of customers that will be affected, the amount of refund, how the refund will be made, and the time frame over which the refund will be made. The utilities will also be required to submit to CACD a final report after the refund showing the actual amounts refunded.

Under G.O. 96-A, Commission approval is required for any tariffs which are provisional. McCaw, however, has justified the filing of the limited term Freedom Plans under temporary tariff by referencing page 53 of D.90-06-025 as its authority to do so. The decision states:

> The ALJ's proposed decision contemplated the use of temporary tariffs for rate increases and decreases. This decision provides that temporary tariffs be used only for rate decreases, and that increases be filed by advice letter for approval by Commission Resolution. Carriers may file temporary tariffs for promotional offerings with a set expiration date; the expiration of such a tariff will not require additional approval.

McCaw is reminded that the term "promotional offerings" refers to temporary discounts to existing plans, such as waivers of activation fees and discounted airtime charges. The Freedom Plans that were filed, however, are clearly not promotional versions of current tariff offerings. On the contrary, they are new optional plans which have been made provisional by the inclusion of a termination date that allows the utility to withdraw the service without first obtaining Commission approval. Under G.O. 96-A, provisional tariffs must have Commission approval before implementation. A utility is not permitted to remove a service plan at its own discretion without first obtaining Commission approval.

We are not pleased with the way McCaw handled its response to the protestants in this case. According to our staff legal counsel, the information McCaw considered to be proprietary should have been made available to the protestants immediately after McCaw and the protestants signed a non-disclosure agreement. The two week delay that protestants experienced in this case is unacceptable. In future cases involving proprietary data, McCaw is directed to include a non-disclosure agreement in its response to protestants. By enclosing the agreement and acting on it promptly, delays such as found in this case can be avoided.

FINDINGS

1. On March 6 and March 17, 1992, the McCaw-affiliated cellular telephone companies filed advice letters under temporary tariff authority offering limited term promotional flat-rate cellular service bundled with long distance service.

2. Limited term service plans may not be filed as temporary tariff advice letters because they require Commission approval under GO 96-A, Section XIV.

3. Three protests were filed against the March 6 filings by the California Resellers Association, Inc. (CRA), Comtech Mobile Telephone Company (Comtech), and the Division of Ratepayer Advocates (DRA). All three protests were found to have some merit.

4. McCaw submitted a full response to the DRA protest to DRA and CACD on April 2, 1992, but did not submit a full response to CRA and Comtech until April 14, 1992.

5. On May 22, 1992, the McCaw-affiliated cellular telephone companies filed advice letters under temporary tariff authority offering the plans on a permanent basis.

6. The Freedom I and Freedom II Plans offer basic cellular service and interstate and intrastate (interLATA and intraLATA) long distance calling.

7. At the time the March 6 tariffs were in effect, the McCaw-affiliated cellular telephone companies were operating as long distance resellers without a CPCN authorizing the provision of interexchange long distance services.

8. California InterCall Inc. (CII), on April 16, 1992, filed its promotional tariff which offered flat-rate interLATA calling. CII's tariff was not effective until May 16, 1992, and will expire on October 6, 1992.

9. California InterCall Inc. is authorized by this Commission to provide intrastate, interLATA calling and is authorized by the FCC to provide interstate calling.

10. McCaw Cellular Communications, Inc. is the parent company of California InterCall, Inc.

11. The McCaw-affiliated cellular telephone companies have been operating as interstate and intrastate, intraLATA resellers without a CPCN since March 6, 1992.

12. The McCaw-affiliated cellular telephone companies were operating as intrastate, interLATA resellers from March 6 to May 16, 1992.

13. The advice letters addressed in this resolution contain bundled long distance and cellular services which violate D.89-07-019, PU Code Sections 532 and 702.

14. McCaw's assumption that customers would utilize 100 percent of off-peak minutes for long distance calling is not reasonable, based on recorded data available from other cellular carriers.

15. Other similar cellular carriers have indicated that less than 10 percent of their off-peak calls involve long distance charges.

16. Freedom Plan customers may experience bill increases if they do not utilize 100 percent of the off-peak minute allocation for long distance calling.

17. The McCaw-affiliated cellular telephone companies should notify all customers that the Freedom Plans will no longer be offered, using the customer notice in Appendix A.

18. The McCaw-affiliated cellular telephone companies should refund all current and former Freedom Plan customers any unused toll charges (difference between the actual long distance charges incurred by each customer and the amounts provided for long

distance calls in the plans) retroactive to March 6, 1992. Refunds should be made as long as former customers can be reached.

19. The McCaw-affiliated cellular telephone companies should, within 30 days of the effective date of this order, submit a refund plan to CACD for review and approval as discussed in this resolution.

20. The McCaw-affiliated cellular telephone companies should submit to CACD a refund report in 12 months, explaining the status of refunds to current and former Freedom Plan customers and showing the actual amounts refunded.

THEREFORE, IT IS ORDERED that:

1. The following advice letters (A.L.) are rejected:

REDDING CELLULAR PARTNERSHIP (U-3020-C)
A.L. No. 29, 27, and 27-A
SACRAMENTO CELLULAR TELEPHONE COMPANY (U-3013-C)
A.L. No. 88, 81, and 81-A
STOCKTON CELLULAR TELEPHONE COMPANY (U-3012-C)
A.L. No. 57, 53, and 53-A

2. The above named cellular utilities shall notify all customers within 30 days of the effective date of this order that the Freedom Plans will no longer be offered. The utilities shall utilize the customer notification found in Appendix A.

3. The above named cellular utilities shall submit a refund plan, as discussed in this resolution, to CACD for review within 30 days of the effective date of this order. Following CACD's approval for such plan, the above named cellular utilities shall refund all current and former Freedom I and Freedom II Plan customers any difference between the actual long distance charges incurred by each customer and the amount provided for long distance calls in the plans, retroactive to March 6, 1992. Refunds shall be made as long as former customers can be reached.

4. The above named cellular utilities shall submit to CACD a refund report no later than 12 months from the date of this order, giving the status of refunds made to current and former Freedom Plan customers. The report shall indicate the total amount due to go back to customers, the amount actually refunded, and the amount unrefunded.

5. CACD is required to immediately reject any future advice letter filings from any cellular utility which bundle regulated services with other services not authorized under a cellular carrier's CPCN.

This Resolution is effective today.

I hereby certify that this Resolution was adopted by the Public Utilities Commission at its regular meeting on September 2, 1992. The following Commissioners approved it:

Neal J. Shulman

NEAL J. SHULMAN
Executive Director

DANIEL Wm. FESSLER
President
JOHN B. OHANIAN
NORMAN D. SHUMWAY
Commissioners

Commissioner Patricia M. Eckert, being necessarily absent, did not participate.

APPENDIX A

CUSTOMER NOTIFICATION OF REFUND

We have been informed by the California Public Utilities Commission (PUC) that the Freedom I and Freedom II Plans that we offer are in violation of the PUC Decision No. 89-07-019 and Public Utilities Code Sections 532 and 702. As cellular utilities, we are not authorized to provide long distance telephone services and cannot bundle long distance services with cellular services (e.g. require customers to subscribe to long distance services in order to receive discounted cellular services). Effective immediately, we will no longer offer the Freedom I and Freedom II Plans.

We have been ordered to refund excess amounts paid for long distance charges retroactive to March 6, 1992. We will be refunding the difference between the actual cost of the long distance calls and what we charged the customers for the calls. We will refund to current and former customers.

If you have any questions, please contact our business office at:

[Local Office Address and Phone Number]

Or, you may contact the PUC at:

California Public Utilities Commission
Telecommunications Branch
505 Van Ness Avenue, Room 3203
San Francisco, CA 94102
(415)703-3073

(End of Appendix A)