

'JUN 26 1997

Decision 97-06-096 June 25, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of the Safety and Enforcement Division for an Emergency Order to Declare Void the Authority "granted" through the Advice Letter Process to MIDCOM Communications, Inc. (U-5261-C) and Cherry Communications, Inc. (U-5306-C) for MIDCOM Communications to Purchase a Portion of the California Customer Base of Cherry Communications, Inc.

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

O P I N I O N**Background**

On January 13, 1997, the Commission issued an interim opinion in this proceeding in which it approved the specific customer base transfer¹ at issue and set for later hearings consideration of its proposal to subject all future customer base transfers to the application, rather than advice letter process.

On February 6, 1997, the assigned Commissioner and assigned ALJ held hearings on the Commission's proposal. The Commission's Consumer Services Division (CSD), formerly the Safety and Enforcement Division, presented one witness, Fred Patterson, Investigator. Witness Patterson testified on CSD's position that Public Utilities (PU) Code § 2889.5 applies to customer base transfers. He also offered testimony on his experience with customers who had been transferred without their authorization from one NDIEC to another. Patterson offered no testimony on any specific customer

¹ As defined in Decision (D.) 97-01-021, a customer base transfer is the sale from one Nondominant Interexchange Carrier (NDIEC) to another of the contractual rights it has to serve its existing customers. The contractual rights are best described as a requirements contract, subject to termination at any time. That is, until the customer cancels the contract, the NDIEC is obligated to provide service and the customer is obligated to pay the tariffed prices for any calls the customer may make. *MIDCOM and Cherry Communications*, D. 97-01-021, mimeo at 9.

complaints that arose as a result of a customer base transfer, nor did he offer any testimony supporting the Commission's proposal to require an application, rather than an advice letter to transfer customer base.

The California Association of Competitive Telecommunications Companies (CALTEL), formerly the California Association of Long Distance Telephone Companies, also presented one witness, Jim Smith. Witness Smith testified that he has personally participated in several customer base transfers and, as president of CALTEL, was well-informed on several (other) customer base transfers. He stated that the Commission's application process is extremely time-consuming and expensive and that these burdens are particularly misplaced on customer base transfers. He explained that terms of these transactions typically call for the buyer to pay the seller some multiple of monthly billings, with sizable "hold-back" provisions to penalize the seller for customers that leave the seller's service. Thus the seller has a significant financial incentive to ensure all customers' continuing satisfaction with the service provided. The buyer has an equally powerful incentive to maintain customer satisfaction as the buyer's revenue will be decreased if the customer leaves the system. He further stated that buyers do a thorough review of a potential sellers' customer base to determine the likelihood that any of the customer were transferred without authorization to the sellers' service. He indicated that customers so transferred often do not pay their bills and usually quickly leave the service. For these reasons, buyers are disinterested in customer bases which include unauthorized customers.

In addition to CSD and CALTEL, the Commission's Telecommunications Division and Sprint conducted cross-examination of the witnesses.

CSD, CALTEL, the Telecommunications Resellers Association, the Telecommunications Division and Sprint filed opening briefs on March 10, 1997, and in addition to Cherry Communications,² filed reply briefs on March 19, 1997.

² Cherry's request for leave to file out-of-time is granted.

Discussion

In D.97-01-021, the Commission determined that PU Code § 2889.5 "was not specifically written nor intended to impose its rigorous requirements on customer base transfers." *MIDCOM/Cherry Communications*, D.97-01-021, mimeo., at Finding of Fact 1. The Commission further determined that it may exercise its discretion in determining the procedural and substantive requirements for authorizing customer base transfers. *Id.* at 12. The Commission then proposed to replace the current advice letter process with the application process. *Id.* The wisdom of this proposal was the central issue in this final phase of this proceeding.

The evidentiary record on this issue is quite lopsided - it consists almost entirely of credible testimony by a well-qualified expert on the burdens the application process would impose on the industry. CSD's testimony and brief single-mindedly focus on applying PU Code § 2889.5 to customer base transactions. CSD previously submitted these arguments, and the Commission rejected them.

CALTEL's witness testified that the application process is burdensome and expensive for the buyer and seller. Further, due to the typical structure of these transactions, the buyer and the seller have powerful financial incentives to ensure continuing customer satisfaction. Given this, it is unclear what benefits the application process would bring to customers. In any event, the evidentiary record reveals no support for the application process over the advice letter process, or that the advice letter process is not protecting the public interest.

Accordingly, the advice letter process adopted by the Commission in D.94-05-051 for general asset transfers shall remain applicable to customer base transfers.³

Notice Requirements

While we retain the advice letter process for NDIECs that seek authorization for customer base transfers, we find that additional notice of such transfers would enhance

³ The notice provisions adopted in D.97-01-021 for the MIDCOM/Cherry transactions shall be applicable to that transaction only.

our ability to regulate and supervise these transactions. First, due to the short time period in which the Commission's consumer protection staff must analyze and respond to an advice letter, and the strong consumer interest in selecting a carrier, we direct that all NDIECs filing an advice letter seeking authorization for a customer base transfer shall serve a copy of such advice letter, and any supporting documentation, upon the Director of the Commission's Consumer Services Division.

Second, although we understand that virtually all carriers do so as a matter of good customer relations, we will formalize the requirement that customers be notified of an impending transfer to another carrier.⁴ We will allow the carriers some leeway in determining the timing and form of the notice(s); however, it must meet these minimum standards:

1. The notice must be in writing;
2. The carrier must provide it to customers no later than 30 days before the proposed transfer;
3. The notice must contain a straightforward description of the upcoming transfer, any fees the customer will be expected to pay, a statement of the customer's right to switch to another carrier, and a toll-free phone number for questions; and,
4. The notice and the carrier's description of service to customers must be included in the advice letter.

These additional notice requirements will ensure that customers are notified prior to their transfer and that the Commission's enforcement staff will have an opportunity to review all such transfers and consider any enforcement action.

Findings of Fact

1. No evidence was presented that customer base transfers have caused any complaints to the Commission.

⁴ The California State Legislature is currently considering legislation which may address notice requirements for customer base transfers. Should such legislation be adopted, any party may submit a petition for modification to make any needed changes to this decision.

2. No customer, or customer group, testified that this type of transfer has caused any customer dissatisfaction.

3. The evidentiary record consists almost entirely of credible testimony by a well-qualified expert on the burdens the application process would impose on the industry.

4. The typical structure of customer base transfers results in the buyer and seller having financial incentives to ensure continuing customer satisfaction.

5. The evidentiary record reveals no support for the application process over the advice letter process, or that the advice letter process is not protecting the public interest.

6. The Consumer Services Division should be served with all advice letters that involve customer base transfer between NDIECs.

7. Customers should receive notice of the impending transfer to another carrier.

Conclusions of Law

1. The Commission has previously determined that PU Code § 2889.5 "was not specifically written nor intended to impose its rigorous requirements on customer base transfers."

2. The Commission has discretion in determining the procedural and substantive requirements for authorizing customer base transfers.

3. In D.97-01-021 the Commission proposed to replace the current advice letter process with the application process.

O R D E R

IT IS ORDERED that:

1. The advice letter process adopted by the Commission in Decision 94-05-051 shall remain applicable to Nondominant Interexchange Carrier (NDIEC) seeking Commission authorization for customer base transfers.

2. All NDIECs that file an advice letter seeking authority to transfer or acquire customer base shall include the Commission's Consumer Services Division in their

service list and send a notice to all customers of the impending transfer which meets the minimum standards set out above.

3. This docket shall be closed.

This order is effective today.

Dated June 25, 1997, at San Francisco, California.

P. GREGORY CONLON

President

JESSIE J. KNIGHT, JR.

HENRY M. DUQUE

JOSIAH L. NEEPER

RICHARD A. BILAS

Commissioners