D&C/NAD/jlc

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

FILED
PUBLIC UTILITIES COMMISSION

JUL 10 1985

SAN FRANCISCO OFFICE

NO. (I&S) Case 85 07 024

In the matter of the Investigation and Suspension on the Commission's own motion of tariffs to offer cellular mobile radiotelephone service at reduced rates, filed under Advice Letters No. 2 and No. 4 of GTE Mobilnet of California, Inc. (U-4026-C), under Advice Letter No. 2 of Comtech Mobile Telephone Company (U-4024-C), under Advice Letter No. 6 of Bay Area Cellular Telephone Company (U-4022-C), and under Advice Letter No. 4 of American All-Carr Communications Company (U-4021-C).	)

ORDER OF INVESTIGATION AND SUSPENSION

GTE Mobilnet of California, Inc. (Mobilnet) filed on June 7, 1985, by Advice Letter No. 2, tariff revisions described as follows:

> "....(A) promotional program proposed by Mobilnet for the purpose of stimulating demand for its cellular telecommunications service in the San Francisco/Oakland and San Jose areas. The program will apply to all new customers who sign up for Mobilnet's network service from June 24, 1985 through July 31, 1985. Those customers will receive cellular telecommunications service at a reduced rate level during the August, September and October billing periods."

The filed rates of $28.75 for access, $0.36 per peak period minute of usage, and $0.20 per off-peak minute, are at or slightly above the underlying wholesale rates of $28.25, $0.36, and $0.16 respectively; the wholesale rate of $28.25 applies to a total quantity of access numbers of 110 or more, and the $0.36 rate to a total usage of more than 30,000 minutes per month.

As competitive responses to Mobilnet's filing, Comtech Mobile Telephone Company (Comtech) on June 14, 1985, filed its Advice Letter No. 2; Bay Area Cellular Telephone Company (BACTC) on June 17, 1985, filed its Advice Letter No. 6; and American All-Carr Communications Company (All-Carr) on

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June 20, 1985, filed its Advice Letter No. 4. Each of these filings presented the same rates as Mobilnet's Advice Letter No. 2, and All-Carr further extended the rate reductions for the stated period to all its existing customers.

On June 24, 1985, Mobilnet filed its Advice Letter No. 4 extending the rate reductions for the stated period to all its existing customers.

PacTel Mobile Services, (PacTel) on June 17, 1985, filed its Advice Letter No. 3 introducing the same reductions and also extending them to existing customers; however, PacTel withdrew that filing prior to its effective date, stating (in a related communication) that they wish to "...avoid the appearance of ...(a) tariff war and confusion...".

A protest to Mobilnet's Advice Letter No. 2 was filed on June 21, 1985, by Peter A. Casciato, Esq., attorney for Cellular Resellers Association, Inc. (Association), for Comtech Mobile Telephone Company (Comtech), and for Advanced Cellular Mobile Telephone Company (Advanced), the latter being an applicant for cellular resale certification; on June 26, 1985, the attorney for BACTC also filed a protest to Mobilnet Advice Letter No. 2. On June 28, 1985, the protest of Association (et al) was amended to address Mobilnet's Advice Letter No. 4 as well. Further, Association (et al) protested Advice Letter No. 3, of PacTel; that protest is moot as the filing has been withdrawn by PacTel.

Basically, the protests allege that the promotional rates of Mobilnet are unreasonably low, and therefore are anticompetitive in effect and will destroy the viable resale program which this Commission has fostered. Protestants note that they had no realistic alternative, in their view, to filing identical promotional rates for the same period, since not to do so would presumably result in a substantial loss of customers to Mobilnet.

Association (et al) further alleges that Mobilnet's action is taken in collusion with the wholesale provider in this area, GTE Mobilnet, Inc., to drive other resellers from the market in circumvention of the expressed intent of this Commission, as stated in Decision 84-11-029, to assure a viable resale program and to foster competition.

Protestants note that this Commission has in every instance granted cellular resellers authority to make tariff filings with effective dates 15 days after the filed date. Protestants contend that a paradox has been created in that Section III.H. of our General Order (GO) No. 96-A directs, with respect to advice letters, that "(a) protest must be made by letter or telegram and received not less that 20 days prior to the regular effective date of the tariff filing." Association alleges that any resulting denial of the timeliness of its protests here would violate the Administrative Procedure Act, would deprive protestants of the right to be heard under Sections 454 and 455 of the Public Utilities (PU) Code, would be arbitrary and capricious and constitute lack of procedural due process. Association contends that this Commission has the authority to act pursuant to PU Code Sec. 701 to devise and implement fair procedures in resolving this matter.

We note that prior to today, no regular meeting of the Commission has been held following the receipt of the various protests as described, and that in the meantime all the filings as enumerated have become effective, save the withdrawn filing of PacTel. We shall therefore act today to suspend the continued operation of the various advice letters and related tariff's pending hearing and final disposition of the matter, as it appears possible that irreparable harm to the cellular resale program in the San Francisco-San Jose area may otherwise result, an outcome which would defeat the stated objectives both of this Commission and of the Federal Communications Commission. (See our Decision 84-11-029 at page 9).

We agree with protestants' contentions that rejection of their protests on the basis of timeliness would be unreasonable and could constitute denial of due process, particularly in such an instance as this wherein the resulting delays could cause the destruction of the resale program. We shall therefore waive the requirement of Sec.III.H. of GO No. 96-A in this instance, pursuant to our general authority under PU Code Sec. 701.

This matter did not appear on the public agenda as required by the Government Code; however, since the customer registration period for the promotional offerings in question will have nearly run its course by the next regular meeting of the Commission, a sufficient emergency exists to justify our action today under PU Code Sec. 306(b).

Findings of Fact

1. The protests set forth adequate grounds for suspension of the further operation of the respective tariffs, pending an investigation, hearing and decision.

2. The provisions of Sec. III.H. of G.O. 96-A regarding timely filing of protests to advice letter filings are unreasonable in this instance and should be waived.

Conclusions of Law

1. The advice letters as enumerated should be suspended as described in the Order, pending investigation and hearing before the Commission.

2. The Commission has authority under PU Code Sec. 701 to waive the provisions of Sec. III.H. of G.O. 96-A in this matter.

O R D E R

IT IS ORDERED that:

1. An investigation is instituted into the propriety and reasonableness of the tariff revisions filed by Mobilnet under Advice Letters No. 2 and No. 4, by Comtech under Advice Letter No. 2, by BACTC under Advice Letter No. 6, and by

All-Carr under Advice Letter No. 4. Hearing in this matter shall be held before Commissioner Calvo and/or such Administrative Law Judge as may be designated, at a time and place to be determined.

2. Customers having executed agreements with the respective carriers under the advice letters and related tariffs as enumerated shall receive the service stated in their individual agreements at the rates and conditions specified. As of the effective date of this order no additional agreements shall be executed under these tariff rates and conditions pending further order of the Commission, this suspension to extend to the 120th day after the earliest effective date of such tariffs, namely, October 20, 1985, unless otherwise ordered.

3. The Executive Director of the Commission is directed to cause copies of this order to be served on GTE Mobilnet of California, 21150 Cabot Boulevard, Hayward, CA 94545, and to mail copies to Philip L. Forbes, GTE Mobilnet Inc., 616 FM 1960 West, Suite 400, Houston, TX 77090; Peter A. Casciato, Esq., Media Building, 943 Howard Street, San Francisco, CA 94103; James D. Squeri, Esq., Graham & James, One Maritime Plaza, Third Floor, San Francisco, CA 94111; Roger P. Downes, Esq., PacTel Mobile Services, 3001 Redhill Avenue, Building 1, Suite 103, Costa Mesa, CA 92626; William R. Haerle, Esq., Pelavin, Norberg, Harlick & Beck, Two Embarcadero Center, 23rd Floor, San Francisco, CA 94111; and to Steven J. Muir, General Manager, Comtech Mobile Telephone Company, 28301 Industrial Boulevard, Suite I, Hayward, CA 94545.

This order is effective today.

Dated JUL 10 1985, at San Francisco, California.

DONALD VIAL
President
VICTOR CALVO
PRISCILLA C. GREW
WILLIAM T BAGLEY
FREDERICK R. DUDA
Commissioners

Certified as a True Copy
of the Original
K. A. Sarasola
ASST. EXECUTIVE DIRECTOR, PUBLIC UTILITIES COMMISSION
STATE OF CALIFORNIA

ATTACHMENT 6

CPUC Decision, 90-12-038

COM/GMW/PME/rys/cip **

Mailed

DEC 12 1990

Decision 90-12-038 December 6, 1990

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, rates and practices of U.S. West Cellular of California, Inc.	I.90-01-013 (Filed January 9, 1990)

Jackson, Tufts, Cole & Black, by William H. Booth and Evelyn K. Elsesser, Attorneys at Law, for U.S. West Cellular of California, Inc., respondent.

Peter A. Casciato, Attorney at Law, for Cellular Resellers Association, Inc.; Armour, Goodin, Schlotz and MacBride, by James D. Squeri, Attorney at Law, for Mobilnet; Kingston Cole, Attorney at Law, for Kingston Cole and Associates; Michael V. Rosenthal, for PacTel Cellular; and Spike Schultheis, for Mission Bell Telecommunications; interested parties.

Peter Arth, Jr., Attorney at Law, for the Commission Advisory and Compliance Division, and Ravi Kumra, for the Commission Division of Ratepayer Advocates.

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O P I N I O N

Comments on the Proposed Decision of the Administrative Law Judge (ALJ)

As provided by Public Utilities (PU) Code § 311, the Proposed Decision of ALJ John B. Weiss was served on the parties to this proceeding. Both U.S. West Cellular of California, Inc. (U.S. West) and Cellular Resellers Association, Inc. (CRA) submitted comments and reply comments.

U.S. West's Comments

U.S. West's comments dealt with the procedural schedule under which its existing multiple unit tariff must be revised, the treatment of existing multiple unit discount customers, and concerns that the Rule 1 violations are being ascribed to U.S. West's then counsel

While the text of Decision (D.) 90-06-025, the generic investigation decision of the cellular industry, changes Commission policy to some degree on volume use, describing the changes to be required, the decision did not specify a time frame for the filing of conforming tariff revisions. U.S. West expressed concern that requiring it to conform within 60 days would serve to place it at a serious competitive disadvantage. Although any "regulatory interference" with U.S. West's existing tariffs is substantially the result of U.S. West's own actions, we find merit in that concern. Our intent in D.90-06-025 was to enhance effective competition to the end of lower prices to end-users and expanded, innovative services, and effective competition requires there be a level playing field for all participants. Accordingly, we have revised the time schedule for U.S. West to require it to submit a conforming tariff advice letter to require submission by March 1, 1991. We will also shortly issue a supplementary order to D.90-06-025 to add a requirement that all carriers file conforming tariff advice letters by that same March 1, 1991 date.

Our determination on a date certain for submission of a conforming tariff advice letter from U.S. West, which date will be subsequently made applicable to all carriers, will place all existing multiple unit customers on the same basis insofar as regulatory requirements affect rates. We remind U.S. West that carriers are free under our regulatory policies to initiate price decreases to retain customers whenever they wish. Our objective is to further competition to decrease rates to the customer end-users, not to unduly protect some groups by grandfathering.

We do not agree that the ALJ's proposed decision ascribes the Rule 1 violations to U.S. West's outside counsel at the time. The ALJ correctly concluded that the counsel was merely the agent and voice of U.S. West in articulating the utility's interpretations of Advice Letter 8-A and its stance, and the decision on close inspection states no more. It is significant that the order subjects U.S. West alone, and not its counsel, to the penalties set forth. The outside counsel was not a party to this proceeding, and there, therefore, was no opportunity or necessity to ascertain his advice to U.S. West or to determine his role in the misleading by U.S. West.

CRA's Comments

CRA would quibble with the ALJ's interpretation of what constituted eligibility to meet the U.S. West tariff requirement that eligible persons be engaged in the entity's "main line of business." It is this Commission's responsibility to interpret and determine what is required under a tariff. U.S. West's internal interpretations are not binding on the Commission. The Building Industry Association of San Diego's (BIA) main activity is the promotion of construction and land development. It involves no strain to conclude, as do we and our ALJ, that the association's members, builders, also involved in construction and land development are in the same "main line of business."

The captioned investigation, with the agreement of all parties, was submitted on April 5, 1990. CRA's inclusion in its opening brief after submission of a later April 18, 1990 U.S. West internal memorandum (the Schena memo which CRA's attorney somehow obtained) revealed entity names which U.S. West had been required to furnish in coded form under seal after considerable argument and compromise during the April 5, 1990 prehearing conference.

We adopt the decision of the ALJ except to change the time within which U.S. West must submit a conforming advice letter modifying its tariff.

Statement of Facts

U.S. West, the non-wireline-facilities based cellular carrier in the San Diego Statistical Metropolitan Service Area (SMSA),[1] has offered multiple unit cellular phone tariff discount service since beginning its operations. Its multiple phone tariffs establishing reduced access and usage fees for subscribers to 25 or more units were first approved by its Advice Letter 2 without objection from resellers. Later, also without reseller protest, by its Advice Letter 4, further reductions were provided and extended

1 By D.85-12-023 (Application (A.) 85-07-018) Gencom, Inc. was authorized to provide non-wireline cellular radiotelephone service in the San Diego SMSA. By D.86-05-077 (A.85-12-037) Gencom, Inc. was authorized to transfer its assets, customer base, and operating authority to New Vector Communications. On April 21, 1987 New Vector Communications advised the Commission of its name change to U.S. West.

to users of as few as two units. These rates were fashioned so that multiple unit users were charged less than full retail rates, but more than the "wholesale" rates that were available to resellers and bulk users.

CRA, an association composed of independent certificated resellers that are not licensed by the Federal Communications Commission or affiliated with either the wireline or non-wireline certificated wholesale/retail provider in San Diego, on September 12, 1988 filed Complaint (C.) 88-09-027 alleging that U.S. West was offering "illegal, anticompetitive, and misleading" sales promotions to the public. In addition, and as relevant to this proceeding, CRA also alleged that U.S. West was offering its corporate rates to "groups of unrelated individuals" in violation of its tariff. CRA asked for an immediate Cease and Desist Order with regard to the alleged practice in offering corporate rates.

On November 3, 1988, stating its desire to clarify the circumstances under which its multiple unit rates are made available to corporations and other legal entities, U.S. West filed Advice Letter 8. On November 15, 1988, Mission Bell Telecommunications Corporation (Mission Bell), a reseller customer of U.S. West, formally protested the Advice Letter as "vague and ill-defined." On November 16, 1988, CRA similarly protested the Advice Letter. In response to the request of Commission staff, U.S. West on November 18, 1988 filed a supplementary version (Advice Letter 8-A) of Advice Letter 8. By their responses, the protestants complained of open-ended offerings to individuals with minimal affiliations, and evidenced their concern for the ability of resellers to compete with broadly available offerings made under loose tariff interpretations from U.S. West, especially where no comparable discount is provided to resellers.

On December 19, 1988, counsel for U.S. West responded, contending that the protests were merely attempts to artificially maintain rates at a high level and block the beneficial effects of

free competition. But counsel also represented that U.S. West did not intend to make bulk rates available to members of just any affinity groups; that the associations must be one organized for "profit-making purposes."[2]

On February 9, 1989, U.S. West's counsel again wrote to reiterate the utility's position, asserting that non-profit associations or loose affinity groups would not qualify as a "corporation or other legal entity" under Advice Letter 8-A.

On March 8, 1989, the Commission adopted Resolution T-13052, agreeing with what it perceived to be U.S. West's position as articulated by U.S. West's counsel. The Commission found the terms, rates, and conditions proposed in Advice Letter 8-A appropriate and reasonable, and dismissed the protests of Mission Bell and CRA without prejudice. In its review and discussion of the relative arguments presented, the Commission noted U.S. West's willingness to give discounts through corporations and associations where the ultimate liability for payment rests with individual employees, officers, and members, and there is no back-up guarantee of payment from the corporation or association. The Commission, as is particularly relevant in this present proceeding, observed that the entity through which the discounted rates flow must be one legally organized for <u>profit-making</u> purposes, and that the individuals receiving the discounted rates must be directly involved in the business of the entity. The

2 On January 11, 1989, CRA moved to consolidate C.88-09-027 with U.S. West's Advice Letters 8 and 8-A, a move opposed by U.S. West as unduly delaying the tariff changes requested by the Advice Letters. The ALJ in C.88-09-027, ALJ Malcolm, ruling that the issues in the complaint could be considered separately from the Advice Letters, denied the motion to consolidate in a March 1, 1989 ruling. Subsequently, pursuant to a settlement agreement between CRA and U.S. West, CRA asked for and on July 7, 1989 received dismissal of C.88-09-027.

Commission observed that U.S. West has found that lower market costs, roughly similar billing and collection costs, and less "churn" from these entities fully justified discounts to employees, officers, or eligible members even though the entity itself did not guarantee payment. The Commission also determined that resellers should not be entitled to an additional discount to serve this class; that where costs of service to an identified group of users are less, the savings ought to be passed through to the consumers and not to the reseller middleman.

Finally, in adopting Resolution T-13052, it was the Commission's stated perception that under Advice Letter 8-A: "Unaffiliated individuals, non-profit associations, or loose 'affinity groups' would not qualify as a 'corporation or other legal entity.'" The Commission also stated that if "any of the conditions, stipulations, rates, terms, or provisions imposed by U.S. West's Advice Letter 8-A are violated and offered to individuals, groups, or any other such entities that do not qualify for, and therefore should not receive the multiple unit discount," the violation would be brought to the attention of the Commission for investigation, and fines and other appropriate remedies may result.

On October 11, 1989, CRA requested an immediate investigation and enforcement proceedings against U.S. West, alleging that the utility was offering multiple unit tariff rates to members of non-profit affinity group, the BIA, in violation of Resolution T-13052 and its own tariff. In an unsuccessful effort to resolve the matter, a November 16, 1989 Commission Advisory and Compliance Division (CACD) workshop held with U.S. West, CRA, and PacTel Cellular produced no consensus. Thereupon, in that Resolution T-13052 provided for investigations in such event, the Commission on January 9, 1990 made its Order Instituting Investigation (I.90-01-013), directing public hearing to ascertain whether U.S. West had violated its tariff and Resolution T-13052

with respect to multiple unit discount rates, whether operating authority action and/or a fine should follow, whether a cease and desist order should issue, and whether any other action should be taken.

A duly noticed prehearing conference (PHC) was held on April 5, 1990 before ALJ John B. Weiss in San Francisco. The captioned parties participated.

U.S. West readily stipulated during the PHC that it was providing multiple unit discounts to members of some non-profit organizations in San Diego, including members of the BIA. It was U.S. West's view that its practice was in compliance with the strict language of its tariff; that its tariff does not distinguish as to the profit or non-profit nature of the legal entity - the requirement of the tariff being that the member or Eligible Person be engaged "on a for-profit basis," but there is no tariff requirement that the association or organization be a for-profit entity. U.S. West stated it had earlier acknowledged[3] to the Commission staff that there was an ambiguity between the language of Special Condition G.2. of U.S. West's California tariff (Schedule CPUC No. 3-T, Original Sheet 10) and language within the

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3 U.S. West pointed to the November 1, 1989 letter of its then counsel addressed to Kevin P. Coughlan in CACD, specifically to Footnote 1 of that letter on page 4 which states:

> "1/ This mistake in the body of the resolution concerning the plain meaning of the tariff's language may stem from correspondence from counsel for U S WEST responding to CRA's protest to its Advice Letter No. 8. In a December 19, 1988 letter to you, counsel for U S WEST mistakenly stated that the association must be organized for profit-making purposes. The characterization of the tariff was in error as there is no such requirement in the tariff. U S WEST apologizes for any confusion this characterization may have caused. The plain meaning of the tariff remains clear, however."

body of Resolution T-13052 which approved that tariff, with regard to the permissible scope for offers of multiple unit discounts. U.S. West further pointed out that on January 9, 1990 - the same day that I.90-01-013 was issued by the Commission - the utility had filed its Advice Letter 24, seeking thereby to make explicit its view on the perceived ambiguity.

For its part CRA sought consolidation of U.S. West's Advice Letter 24 into the present complaint proceeding, and asked time to conduct discovery to determine whether the data previously presented to CACD to support Advice Letters 8 and 8-A was the appropriate data; whether it really evidenced that the same marketing costs (billing and collection costs and churn rates) had been experienced by U.S. West in non-profit as well as for-profit group users. U.S. West opposed reopening and reevaluation of material provided over a year previously and since resolved by the Commission. Noting that the Commission was at a decision point in its major cellular radiotelephone utilities regulation investigation (I.88-11-040), U.S. West suggested it withdraw Advice Letter 24 to await guidance anticipated in that investigation decision; that it would be premature to proceed with Advice Letter 24 before the anticipated new ground rules were enunciated so that they could be incorporated into a revised Advice Letter.

Assuming an immediate withdrawal of Advice Letter 24 as suggested by U.S. West, and facing the uncertainties of impinging or duplicating I.88-11-040 with its impending decision, ALJ Weiss questioned the need to go to hearing on the present investigation. Rather, he proposed to determine in this proceeding how extensive were U.S. West's past offerings of these discounts to non-profit entities; and since the clear thrust of the language in the body of Resolution T-13052 was to prohibit such offerings, and U.S. West was willing to stipulate that it had done so, the Commission would order an immediate cease and desist as to additional offerings, thereby preserving the status quo pending a decision in the

I.88-11-040 generic proceeding, while grandfathering the then existent and innocent end-users who were receiving the discount. The ALJ would take briefings on the applicability and amount of possible fines.

In response to the ALJ's question whether it would be necessary to try the case if the investigation proceeded in that manner:

The CACD attorney, in the absence of Division of Ratepayer Advocates, and noting that the Commission directive in the present proceeding was to investigate potential tariff violations, stated that inasmuch as there had been a stipulation from U.S. West to the fact of the complained of discounts in the San Diego area, it did not appear necessary to proceed with an evidentiary hearing.

CRA's attorney stated that if U.S. West was willing to stipulate and identify all the groups in a verifiable manner the Bench could go forward and decide which sanction to issue in addition to a cease and desist order.

U.S. West, carefully emphasizing it had not stipulated to violation of its tariff, agreed that there was no need to try the case, stipulated that it had provided the discount plan to entities other than the BIA which could be characterized as non-profit associations, and agreed to provide the Commission with a list of these entities, but wanted such a list to be under protective order.

CRA objected to any protective order, pointing out that the extent of such discounts with their asserted harm to his clients went to the very issue of applicability of and extent of

fines that should be levied upon U.S. West.[4] CRA argued that the attorneys to the proceeding at least had to have access to the U.S. West list, so that they would be aware of the full extent and impact of such discounts.

The ALJ then ruled that within one week U.S. West would submit to the Commission and CRA's attorney, under the protective restrictions of PU Code § 583, a list of those non-profit associations through which U.S. West had provided multiple unit discounts to end-users, appending to each association name a corresponding identity number, together with a number reflecting the aggregate number of units furnished through that association. The list was to be restricted to staff and CRA's attorney and CRA's office personnel with a need to know. The information was to be used only in the captioned proceeding, and solely with regard to the briefings on possible sanctions. The information was not to be reproduced, and CRA's copy was to be returned to U.S. West after submission of CRA's briefs in the instant proceeding without any disclosure to others.

Subject to withdrawal of U.S. West's Advice Letter 24, submission by U.S. West under protective order of its list of associations and aggregate number of affected end-users, issuance by the Commission of a Cease and Desist Order, and the filing of briefs, the investigation was submitted for decision.

On April 5, 1990, U.S. West formally filed a withdrawal of its Advice Letter 24.

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4 Both Resolution T-13052 and I.90-01-013 included possible fines within their scope if violations of the Resolution or U.S. West's tariff had occurred.

On April 12, 1990, U.S. West under the confidentiality restraints of PU Code § 583 furnished the Commission and CRA's attorney confidential multiple unit discount data.[5]

On April 11, 1990, by D.90-04-030 the Commission issued its order to U.S. West to cease and desist from offering or providing multiple unit rate discounts thereafter where the aggregating entity is a non-profit entity. Those individuals receiving the discounts as of April 11, 1990 were "grandfathered" pending a decision in I.88-11-043.

Opening briefs from the Commission staff, CRA, and U.S. West were received on May 7, 1990.

Staff's Brief asserts that while the limitations are not expressly stated in U.S. West's tariff, Resolution T-13052 which authorized the Advice Letter filing to take effect makes it clear that these multiple unit discount rates were not to be made available to non-profit affinity groups, and that through the Resolution the limitations were incorporated into the tariff. And, assuming the Commission finds a violation of Resolution T-13052, staff recommends either a fine of $2,000 per each of the nine types of associations permitted the discount,[6] with the Commission's attorney to take action pursuant to PU Code § 2104 against U.S. West to levy the total $18,000 fine,[7] or alternatively, that a temporary $18,000 discount be prorated among U.S. West resellers in

5 U.S. West's list showed nine non-profit affinity groupings as having provided multiple unit discounts to 2,611 end-users.

6 PU Code § 2107 provides, inter alia, that any public utility which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the Commission is subject to a penalty of not less than $500 nor more than $2,000 for each offense.

7 PU Code § 2104 provides that Chapter 11 penalties be levied through actions brought in Superior Court by the Commission in the name of the people of the State of California.

amounts proportional to the number of U.S. West access numbers resold.

In addition, staff would freeze the rates received by ineligible end-users grandfathered under the April 11, 1990 Cease and Desist Order, and also allow CRA to recover intervenor fees and expenses pursuant to PU Code § 1801 et seq. up to the maximum amount of the fine. Another proposal of staff was made moot by the issuance of D.90-06-025 on June 6, 1990.

CRA's Brief noted U.S. West's stipulated violations of the Commission's intent that lay behind Resolution T-13052, argues that U.S. West engaged in a pattern of open deceit, that U.S. West's attorney by repeated misrepresentations to CACD that its offerings were limited to profit-making entities only, induced the Commission to issue Resolution T-13052 approving Advice Letter 8-A. CRA contends that this deceit pattern will continue unless the Commission imposes the maximum fine permitted under provisions of PU Code § 2107. CRA asserts that by imposing the maximum fine on U.S. West a message will be sent to all cellular providers that Commission resolutions and orders are not trivial pronouncements but rather clear statements of law that are not to be violated with impunity. Thus, CRA would impose the maximum $2,000 fine and apply it for each of the aggregate 2,611 units provided end-users in the nine association groups for a total fine of $5,222,000.

In addition, CRA asks that U.S. West be audited by independent outside auditors at U.S. West's expense to determine compliance with Resolution T-13052 and the April 11, 1990 Cease and Desist Order,[8] and that all end-users acquired in violation of

8 By its brief CRA alleges ongoing flagrant violations of the April 11, 1990 Commission's Cease and Desist Order and Resolution T-13052. In support of its allegations CRA included in its brief new evidence in the form of a copy of an April 18, 1990 internal U.S. West memorandum to its agents from Schena, its Sales

(Footnote continues on next page)

the Resolution and the Cease and Desist Order be informed of the illegality of the offer and be afforded a 60-day transition period to transfer service to any other certificated cellular provider in San Diego. In the event U.S. West does not comply with the Commission's order in the present proceeding CRA asks that its retail cellular service authority be revoked.

U.S. West's Brief reviews the factual background of its Advice Letters 8 and 8-A multiple discount rates leading up to Resolution T-13052, stressing that the purpose of the Advice Letters was not to change its previous practice in extending such rates, but merely to respond to reseller accusations that the terms of its discount rates were not fully delineated in its then existing tariffs. It points out that Tariff Sheet 151-T permitted "any corporation or other legal entity" to qualify - that the offering was not limited to "for-profit" corporations or entities. The only distinction vis-a-vis for profit/non-profit was with regard to eligible persons - only the eligible persons of a legal entity--not the legal entity itself--were required to be engaged on a for-profit basis in the entity's main line of business, thus excluding members of "loose affinity groups." The language in the discussion portion of Resolution T-13052 limited the multiple unit discount to situations in which both the legal entity and eligible persons operate on a for-profit basis. Thus, the language used in

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(Footnote continued from previous page)

Manager, Agent Programs. This memorandum states that because its tariff supersedes the order, the order may be "circumvented" only if a "financial guarantee" letter (to be developed) is obtained. A copy of this memorandum found its way into the hands of CRA's attorney. In this internal memorandum U.S. West reveals the names of the non-profit entities which made up the list furnished by U.S. West at the direction of the ALJ under the confidential provisions of PU Code § 583. Unfortunately, in using the full memorandum CRA did not mask the names of the entities, a use under the circumstances legally unassailable but ethically distasteful.

the discussion portion of the Resolution is clearly at odds with the language of Advice Letter 8-A approved by the Resolution.

U.S. West's brief concedes that it cannot deny some responsibility for creation of the ambiguity. It drafted the language of the tariff sheet, and the Commission staff drafted the Resolution based on a letter sent to CACD by U.S. West's then attorney. But U.S. West also observes that neither CRA nor CACD took any steps to resolve the ambiguity during consideration of the Resolution by the Commission or after issuance of the Resolution. It asserts that when U.S. West was made aware of the ambiguity it filed an Advice Letter to remove it and clarify the tariff. Meanwhile, its employees who U.S. West states systematically rely on tariff schedules rather than Commission resolutions as primary sources of direction, proceeded, believing the discounts could be offered to non-profit associations.

U.S. West, citing a somewhat parallel violation proceeding, C.89-03-016,[9] submits that if the Commission finds a violation of Resolution T-13052, the circumstances surrounding the present matter may warrant the Cease and Desist Order as issued in D.90-04-030, but do not warrant imposition of sanctions.

Both CRA and U.S. West submitted reply briefs, and the matter was submitted on May 18, 1990.

CRA's Reply Brief reiterates its opening brief contentions that U.S. West's violations were "willful, recklessly negligent, and callously indifferent to the Commission's processes," and did not end with the Cease and Desist Order, so

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9 Comtech Mobile Telephone Company et al. v Bay Area Cellular Telephone Company & San Jose Real Estate Board (D.89-05-024), where the Commission declined to impose sanctions but ordered Bay Area Cellular Telephone Company (BACTC) to cease and desist from further extension of discounts to San Jose Real Estate Board (SJREB) members until the generic cellular investigation (I.88-11-040) clarified the status of wholesale/retail customers. SJREB members already served were grandfathered.

that a maximum $2.5 million fine is necessary to send a clear message to all. CRA's brief also includes additional evidence in the form of a "Schena" U.S. West's internal memorandum dated May 15, 1990, which appears to have been issued to advise U.S. West's cellular agents that the April 11, 1990 Cease and Desist Order, while prohibiting discounts to members of non-profit entities under Section G.2 of Schedule 3-T, did not, under Section G.1 of the schedule, serve to prohibit discounts to non-profit entities if the entity agreed to guarantee payment of all accounts. CRA argues that given what it terms as U.S. West's attempts to disguise efforts to avoid compliance under both the Resolution and the Cease and Desist Order, it is doubtful if clearer evidence of willful misconduct could be found. CRA also includes new declaratory evidence from its President to the point that three CRA members believe they are losing approximately 50 subscriber units monthly as the result of U.S. West's ongoing violations. The declaration also quantifies claimed losses to date. CRA in this brief suggests as an alternative sanction that U.S. West be ordered to reduce its wholesale rates 30% per rate element for a three-year period.

U.S. West's Reply Brief reiterates its position that sanctions are inappropriate. While it acknowledges extending discounts to members of non-profit entities before the Cease and Desist Order, U.S. West denies that in doing so it violated its tariff language which had been approved by the Commission. It denies acting in bad faith, stating that after the Resolution ambiguity was raised in October of 1989, it candidly explained its practices and offered a new Advice Letter to clarify them.

In rebuttal to CRA's new evidence assertions on brief of violations of the Cease and Desist Order, it states there have been no violations, that "Absolutely no new orders have been accepted since April 11, 1990, either under Section G.1 or Section G.2 of the tariff." U.S. West offers its own new evidence to recite the steps it took upon issuance of the Cease and Desist Order to ensure

compliance; evidence in the form of affidavits from its Senior Counsel (Ford), Customer Support Manager (Kim), and Sales Manager (Schena), and copies of a series of internal memoranda including an April 17, 1990 Kim to San Diego Branch Management, an April 18, 1990 Schena to all agents, an April 26, 1990 Ford correction to Kim, and finally a May 11, 1990 Kim to Branch Management and Agents. The position finally enunciated being that while under discounts under Section G.2 must be limited to members of for-profit entities, discounts under Section G.1 provided payments were guaranteed by the entities, could be given without regard to the profit/non-profit status of the entity.[10]

U.S. West's reply brief also opposes staff's recommendation that CRA be permitted to recover its expenses, pointing out that while some CRA members are wholesale customers of U.S. West, these are not end-user customers and have an interest antithetical to the interest of end-users who want wider application of such discounts; that CRA failed to file the PU Code § 1804 mandatory request for finding of eligibility for compensation; and that is doubtful CRA could make the requisite showing of hardship. U.S. West also would not reward CRA's behavior in unnecessarily including in its brief the complete Schena's memorandum listing the non-profit entities by name, thus broadcasting these names although they were the subject of an ALJ confidentiality order.

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10 Underlying U.S. West's position in this proceeding is its belief that Section G.2 of its tariff is the sole focus of this entire controversy. Section G.2 provides that members of associations are eligible for discounts based on the total units aggregated under the association when the latter provides certain marketing assistance to U.S. West. Section G.1 is different and U.S. West does not regard it as having been at issue in this proceeding. Section G.1 provides that where an individual or entity agrees to be "separately liable for all tariff charges" for multiple units, such units are entitled to a multiple unit discount. U.S. West believes it unlikely that a non-profit entity would agree to guarantee payments for its customers.