Decision **DRAFT DECISION OF ALJ VIETH** (Mailed 9/3/2002)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, practices, and conduct of Pacific Bell Wireless LLC dba Cingular Wireless, U-3060, U-4135 and U-4314, and related entities (collectively "Cingular") to determine whether Cingular has violated the laws, rules and regulations of this State in its sale of cellular telephone equipment and service and its collection of an Early Termination Fee and other penalties from consumers.	Investigation 02-06-003 (Filed June 6, 2002)

INTERIM OPINION GRANTING PETITION FOR MODIFICATION AND DENYING MOTION TO DISMISS BUT MODIFYING OII FOR GREATER CLARITY

Summary

We grant the petition for modification filed by Cingular Wireless (Cingular) and, pursuant to statutory and other legal precedent, modify this Order Instituting Investigation (OII) to exclude three categories of confidential information from public disclosure. Cingular provided the information in response to discovery requests from Consumer Protection and Safety Division (CPSD) but has not waived its confidentiality claims and has established that disclosure of the information may cause it unfair economic disadvantage. We direct CPSD to prepare public versions of its Staff Report and of Attachment E to the Staff Report, from which the confidential information has been redacted.

We deny Cingular's motion to dismiss. The OII is neither preempted by federal law nor barred by state law. However, we modify certain Ordering

Paragraphs in the OII to clarify the charges and make one minor modification to the text to correct an inadvertent clerical omission.

Factual Background and Procedural History

This OII issued on June 6, 2002 but did not appear in the Commission daily calendar until June 21, the date it was served on Cingular. On June 25, Cingular filed a petition for modification of Ordering Paragraph 10 of the OII. Ordering Paragraph 10 authorizes the public release of information that Cingular provided to Commission staff in the course of informal discovery and identified as confidential and/or proprietary at the time of production. To date, Cingular has not waived its confidentiality claims. CPSD filed a response to the petition on June 28 and Cingular filed a reply on July 8. As directed by the assigned administrative law judge (ALJ) at the prehearing conference (PHC), Cingular made a supplemental filing on July 31.

Cingular filed the motion to dismiss for lack of subject matter jurisdiction on July 19, immediately prior to the PHC. Consistent with the schedule set at the PHC, CPSD and intervenor Utility Consumers Action Network (UCAN) filed responses on August 19 and Cingular filed a reply on August 30.

Petition for Modification

Overview of the Issues Presented

Ordering Paragraph 10 of the OII states:

> Staff's investigative Report contains Cingular's responses to Staff data requests, which Cingular has identified as confidential and/or proprietary pursuant to Public Utility Code section 583. The Commission finds that none of the information contained in the report is so trade sensitive as to outweigh the public interest in disclosure, and such disclosure is herby authorized. (I.02-06-003, mimeo at p. 19.)

Cingular's petition challenges the conclusion in Ordering Paragraph 10 and asserts that, in fact, the information (Attachment E to the Staff Report and references in the Staff Report to specific data contained in Attachment E) is highly proprietary and commercially sensitive and that no public interest is served by its disclosure.[1] The petition asks the Commission to modify the OII to require that the information (including all of Attachment E) remain under seal. The petition describes this information, generally, as consisting of (1) identification of Cingular's total California subscriber base; (2) data on the growth of Cingular's California subscriber base for specific periods; and (3) Cingular's entire indirect distribution program. The supplement identifies, by page, exactly which data Cingular deems confidential and states that redaction of this data from the public versions of the Staff Report and Attachment E will resolve Cingular's concerns.

Discussion

Rule 47 of the Commission's Rules of Practice and Procedure[2] governs petitions for modification of Commission decisions. As relevant here, Rule 47 provides: "A petition for modification must concisely state the justification for the requested relief and must propose specific wording to carry out all requested

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[1] Cingular communicated its concerns about Ordering Paragraph 10 to CPSD after the Commission adopted the OII but before the OII was mailed or posted on the Commission's website. CPSD placed the Staff Report, including Attachment E, under seal at the time copies were delivered to the Commission's Central Files and represents that no copies have been provided to members of the public, pending the Commission's resolution of this petition.

[2] Unless otherwise indicated, all subsequent citations to a Rule or Rules refer to the Commission's Rules of Practice and Procedure, which are codified at Chapter 1, Division 1 of Title 20 of the California Code of Regulations, and all citations to sections refer to the Public Utilities Code.

modifications to the decision …" (Rule 47(b).) Taken together, Cingular's petition and supplement comply with the procedural requirements of Rule 47(b). We turn, next, to the merits of this matter.

Whether by statute, rule, or order, all regulated entities are obliged to provide the Commission with certain kinds of information that is open to public inspection.[3] However, the Commission historically has recognized the need to protect verifiably confidential information from public disclosure, at least for a period of time. The Commission's General Order 66-C identifies the kinds of confidential information that may be protected in this way, citing both § 583 (which prohibits public disclosure of confidential information obtained from a regulated entity except by Commission order, etc.) and Evid. Code § 1040 (which defines the "official information" privilege and describes the balancing test applicable to nondisclosure of information obtained from businesses the Commission does not regulate).[4]

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[3] For statutory requirements, see for example, §§ 581 et seq. of the Public Utilities Code.

[4] GO 66-C (2)(b) excludes from public disclosure:

> Reports, records, and information requested or required by the Commission, which, if revealed, would place the regulated company at an unfair business disadvantage.

Though GO 66-C (2)(e) governs information obtained in confidence from entities the Commission does not regulate, Evid. Code § 1040, which GO 66-C (2)(e) references, lends guidance regarding utility information, as well.

Evid. Code § 1040(a) defines "official information" as "information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made".

Evid. Code § 1040(b)(2), which codifies the balancing test, provides in relevant part, that:

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Cingular asserts that public disclosure of the information will place Cingular at an unfair business disadvantage. It articulates three primary reasons for protecting data on its California subscriber base and the growth of that subscriber base:

> (i) state or locality specific data is highly useful to determine the business plans of competitors upon which financing depends. A competitor gaining access to another provider's subscriber growth data could then target that provider's chosen markets, undercutting the initial provider's business efforts and its financing; (ii) if other carriers obtain California customer base numbers, such carriers inappropriately obtain a better sense of overall market penetration and then determine whether their business plan should focus on new activations or customers who would "switch" providers; and (iii) by having access to Cingular's customer growth information, and cross-checking this against Cingular's promotion and advertisements during the same period, competitors can also unfairly determine which of Cingular's initiatives were more or less successful and act accordingly. For these and other reasons, subscriber base and subscriber growth data are highly sought after in the wireless industry yet never released on an individual company basis other than aggregated at the national level. (Petition at p. 7.)

With respect to the indirect distribution program, Cingular states that the chart it has provided to CPSD, if disclosed, "essentially provides a 'road map' to a competitor to 'cherry pick' Cingular's distribution system". (Petition at p. 8.) All of these concerns underscore a competitive aspect of wireless service, where

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> Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice. … In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

the development and maintenance of market share are issues of large economic interest to carriers.

CPSD's response focuses on the public interest in releasing subscriber base data and suggests, with respect to the other information, that the harm of public disclosure is negligible. With respect to the former, CPSD argues that consumers need to know what the subscriber base is in order to interpret reports on the complaint rates of major carriers. With respect to growth rates and distribution network data, CPSD states that part of the information is publicly available or can be inferred from information that is publicly available. CPSD points out that the public Local Exchange Routing Guide (LERG) publishes telephone numbers assigned to individual carriers and that by reviewing the LERG, a wireless carrier may determine in which rate centers a competitor is focusing its efforts. Likewise, information can be gleaned about Cingular's indirect distribution network by walking into a distributor's office (such as the "Good Guys" or "Parrot Cellular") and ascertaining if it carries Cingular's products. CPSD concedes that this information is unavailable publicly in the chart's aggregate format.

CPSD's arguments fail to consider the competitive impacts or potential consequences of making previously undisclosed, specific or aggregated information about one wireless carrier available to its competitors. This is what public release of the information would do. Cingular has made a reasonable case that unilateral disclosure of this information would cause it unfair business disadvantage. We do not find that the public need for this particular data is so great as to outweigh the public interest in preventing that harm. On this record we cannot determine whether we would reach a different conclusion if the issue before us were the concurrent release of the same information, or some subset of it, about all other wireless carriers. While such a situation might or might not

raise other competitive concerns, it would not raise the specter of economic harm for one and economic advantage for others through different regulatory treatment of industry competitors.

Competitive concerns are not unique to this proceeding and the Commission has considered similar issues before. In other areas of the telecommunications industry the Commission has confirmed the need to preserve the confidentiality of proprietary and competitively sensitive information, such as the financial and customer base information of individual competitive local exchange carriers and the number of lines those carriers were serving.[5]

Because we find that the three categories of information Cingular seeks to protect should not be publicly disclosed, we therefore modify Ordering Paragraph 10 to require that select portions of the Staff Report and Attachment E to the Staff Report remain under seal.[6] The Commission's Central Files shall continue to hold under seal the Staff Report and Attachment E to the Staff Report

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[5] See the following decisions in the *OII/OIR into Competition for Local Exchange Service*: D.99-07-048, 1999 Cal/ PUC LEXIS 452 *25; D.00-9-037, 2000 Cal. PUC LEXIS 697 *20; D.01-09-063, 2001 Cal. PUC LEXIS 854 *14-15.

[6] Cingular's supplement identifies this information as appearing in four locations:

1. Staff Report: page 5, prior to footnote 23 (the number of Cingular customers in California).

2. Attachment E to the Staff Report:

   (a) Page bearing Bates Stamp 00138 (specifically, data on the number of Cingular customers in California in the Response to Data Request No. 10, page 2, which is part of the October 11, 2001 letter from Jimenez to Alderson).

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previously provided to it. CSPD shall provide the service list for this proceeding and the Commission's Central Files with public versions of the Staff Report and Attachment E to the Staff Report in which the confidential information has been redacted, consistent with Ordering Paragraph 2 of today's decision.

Avoiding This Problem in Future

The petition and related pleadings are the "fall out" of discovery conducted prior to the issuance of the OII. Post-OII discovery has led to a number of contentious disputes over very similar confidentiality concerns.[7] The litigation preferences of parties on both sides of this proceeding clearly have escalated this problem, and the solution (or at least a partial solution) is equally clear.

First, Cingular should carefully review its confidentiality concerns before claiming § 583 protection for any documents responsive to discovery requests. Cingular should exercise care to avoid nominating for protection, however inadvertently, information that does not reasonably warrant nondisclosure. Second, if CPSD disputes Cingular's assertion that § 583 protection must be afforded specific information, CPSD and Cingular should meet and confer in

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(b) Page bearing Bates Stamp 00151 (specifically, data Cingular's California subscriber base and growth in the Response to Data Request No. 10, page 7, which is part of the October 26, 2001 letter from Jimenez to Alderson).

(c) Page bearing Bates Stamp 00154 (specifically, a chart detailing Cingular's indirect distribution network in California attached to the October 26, 2001 letter from Jimenez to Alderson).

[7] See August 8, 2002 *Administrative Law Judge's Ruling Granting Request of Telephia, Inc. to Intervene and Resolving July 29, 2002 Motion to Compel Discovery*; August 19, 2002 *Joint Ruling of Assigned Commissioner and Administrative Law Judge Resolving Motions to Compel Discovery (CPSD, August 13, 2002; UCAN, August 15, 2002).*

good faith regarding the matter, as Commission Resolution ALJ-164 requires, before either brings it to the Commission's law and motion calendar. Selectively redacting confidential information from a document obtained in discovery should allow public use of the document while preserving realistic expectations of confidentiality, in most cases. Third, the same practice should be followed with respect to disputes between Cingular and a private party who has executed a nondisclosure agreement with Cingular.

We intend to monitor carefully further claims and challenges to confidentiality over the course of this proceeding. Neither this Commission nor any hearing officer assigned to this proceeding will order the public release of allegedly confidential information except upon careful consideration, after notice and opportunity to be heard on the matter. Having reached this determination for this proceeding, we have no need to reach Cingular's argument that § 583 prohibits public disclosure except upon such notice and we decline to do so.

Motion to Dismiss

Cingular's motion to dismiss argues that the Commission must dismiss the OII for lack of subject matter jurisdiction. In essence, Cingular contends that federal law preempts this Commission from investigating the marketing and customer service practices Cingular employs in selling wireless service in California, and that even if such an examination is not federally preempted, the Commission may not investigate those practices under the state law theories charged in the OII. We review these arguments below.

Federal Law Does Not Preempt the Field of Wireless Regulation

The controlling legal authority is the Omnibus Budget Reconciliation Act of 1993 (1993 Budget Act), which amended § 332(c)(3)(A) of the Communications Act of 1934 regarding regulation of Commercial Mobile Service (also known as

Commercial Mobile Radio Service or CMRS), which includes the "wireless" or "cellular" service that Cingular provides in California. The OII quotes the 1993 law, in relevant part, and we repeat the quotation here:

> . . . no state or local government shall have any authority to regulate the entries of or the rates charged by any Commercial Mobile Service or any Private Mobile Service, except this paragraph *shall not prohibit a state from regulating the other terms and conditions of Commercial Mobile Service.* (OII at 11, citing 47 USC § 332(c)(3)(A) (Emphasis added)).

As discussed in the OII, the Commission has exercised its jurisdiction to regulate various "other terms and conditions" of wireless service on a number of occasions since enactment of the 1993 Budget Act.[8] Though no appellate court has held so, Cingular appears to suggest that the Commission's prior efforts have overreached, and it argues that the Commission overreaches now.

Cingular's motion largely ignores the 1993 Budget Act's explicit recognition of the continued, permissible sphere of state regulation or the supporting legislative history,[9] which explains that "other terms and conditions" includes the several consumer protections enumerated therein as well as other "consumer protection matters". Likewise, Cingular gives mere passing acknowledgment to several important cases which recognize the state interests in consumer protection inherent in 47 USC § 332(c)(3)(A).

The Federal Communications Commission (FCC), in its recent order in *Wireless Consumers Alliance,* held "that Section 332 does not generally preempt the award of monetary damages by state courts based on state consumer

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[8] See OII at 11-12.

[9] See OII, footnote 18, quoting from House Report No. 103-111.

protection, tort, or contract claims".[10] Previously, in *SBMS Ruling,* the FCC determined that though states may not prescribe the charges for CMRS services or the rate structures for those services, 47 USC § 332(c)(3)(A) does not exempt the CMRS industry from the neutral application of state contractual or consumer fraud laws.[11]

Wireless Consumers Alliance contains an instructive discussion of both the comments of parties to the FCC proceeding and of extant case law, in which courts had both upheld and rejected similar preemption arguments. Notably, the FCC stated:

> In short, we reject arguments by CMRS carriers that non-disclosure and consumer fraud claims are in fact disguised attacks on the reasonableness of the rate charged for the service. [Citation omitted] *A carrier may charge whatever price it wishes and provide the level of service it wishes, as long as it does not misrepresent either the price or the quality of service.* Conversely, *a carrier that is charging a "reasonable rate" for its services may still be subject to damages for a non-disclosure or false advertising claim under applicable state law if it misrepresents what those rates are or how they will apply, or if it fails to inform consumers of other material terms, conditions or limitations of the service it is providing.* We thus do not agree with those commenters who allege that, for consumer protection claims, any damage award or damage calculation, including any refund or rebate, is necessarily a ruling on the reasonableness of the price or the functional equivalent of a retroactive rate

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[10] *Wireless Consumers Alliance, Inc.* (*Wireless Consumers Alliance)* (2000) 15 FCC Rcd 17022 ¶ 2. The FCC added "whether a specific damage calculation is prohibited by Section 322 will depend on the specific details of the award and the facts and circumstances of a particular case". (*Ibid.*)

[11] See (1999) 14 FCC Rcd 19898 ¶ 24, which resolved the petition of Southwestern Bell Mobile Systems, Inc.

> adjustment. [Citation omitted] (*Wireless Consumers Alliance* at ¶ *29 (Emphasis added).)*

Cingular's motion, which characterizes the OII as a thinly veiled attempt by this Commission, in clear violation of the 1993 Budget Act, to regulate both wireless rates and the conditions of entry, clearly misconstrues the nature of the OII. Cingular relies on three cases, one from the 7th Circuit and two others from federal district courts in Texas and Michigan, the latter apparently unreported. None of these cases persuades us that we must dismiss this OII.

Two of the cases, the 7th Circuit's *Bastien*[12] and the district court's *Bryceland*[13] (from the Northern District of Texas), concern the propriety of federal removal jurisdiction. In the course of determining whether the respective complaint raises a federal question that supports removal of the action from state to federal court, each court examines whether the allegations in the complaint (e.g. consumer fraud in the provision of wireless services) actually constitute an impermissible state law attack on defendant's rates or terms of market entry. While the *Bastien* and *Bryceland* courts each find that the respective complaint, as pleaded, challenges rates and terms of entry rather than consumer protection matters, these decisions reach different conclusions on removal jurisdiction—the *Bastien* court upholding removal and dismissing the action, and the *Bryceland* court, after recognizing *Bastien* but applying a three-part removal test not discussed by the 7th Circuit, remanding the action to the state court.

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[12] *Bastien v. AT&T Wireless Services, Inc* (*Bastien)* (7th Cir. 2000) 205 F.3d 983, 2000 U.S. App. LEXIS 3385.

[13] *Bryceland v. AT&T Corp* (*Bryceland)* (N.D. Tex. 2000) 122 F. Supp. 2d 703, 2000 U.S. Dist. LEXIS 17198.

In the third case Cingular relies upon, *Aubrey* (from the Eastern District of Michigan), the district court resolved a judgment on the pleadings in favor of defendant, a wireless carrier.[14] The *Aubrey* court's decision follows *Bastien* on the basis that the pleadings at issue, which (unlike this OII) sought the construction of additional cellular towers and other infrastructure to improve service, did not in fact raise consumer protection concerns.

Finally we observe that Cingular's motion does not discuss *Spielholz*, the recent California Court of Appeals decision on the case that gave rise to *Wireless Consumers Alliance*, and Cingular's reply argues that *Spielholz* was wrongly decided.[15] After carefully considering *Wireless Consumers Alliance*, *Bastien*, and other authority, the *Spielholz* court reversed the trial court, which had granted defendant's motion to strike allegations for monetary relief for consumer fraud in the provision of wireless services.

The *Spielholz* court distinguished preempted claims, those that directly challenge a rate and seek prospective or retrospective remedies to control the rate, from those that are not preempted, such as "a claim that directly challenges some other activity, such as false advertising, and requires a determination of the value of service provided in order to award monetary relief…"[16]

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[14] *Aubrey v. Ameritech Mobil Communications* (*Aubrey*) (E.D. Mich. June 14, 2002) No. 00-cv-75080.

[15] *Spielholz v. Los Angeles Cellular (Spielholz)* (2001) 96 Cal. App.4th 1366; 2001 Cal. App. LEXIS 96 (review den. May 23, 2001). The petitioners in *Wireless Consumers Alliance* explicitly sought the FCC's guidance on a threshold issue in *Spielholz*—whether a state court might award monetary damages under the 47 USC § 332(c)(3)(A)—and the court of appeals stayed *Spielholz* until the FCC's order issued.

[16] *Spielholz* 2001 Cal. App. LEXIS 96 *17.

We find Cingular's federal preemption arguments to be unpersuasive. The OII raises the kind of consumer protection matters that federal law permits the states to adjudicate. The OII neither expressly or impliedly seeks to regulate wireless rates or terms of entry. Cingular fails to establish otherwise, and we deny the motion to dismiss.

State Law Theories

Cingular challenges the Commission's authority to commence an investigation of a utility's compliance with §§ 451, 702, and 2896 and to order penalties or reparations under 701, 734, 1702, and 2107 for any violations found. Cingular also challenges the OII's reference to consumer protection statutes found in California's Civil, Commercial, and Business & Professions Codes.

With respect to the Commission's authority under the Public Utilities Code, we will not belabor the matter. Cingular fails to establish the cited statutes are too vague to support an investigation into past utility behavior, on the one hand, or that they merely permit the Commission to fashion prospective relief, on the other. Neither does Cingular establish that the Commission is barred from assessing a penalty against a utility without first applying to a superior court. Numerous Commission decisions on these issues hold otherwise.[17]

Cingular next challenges the OII's Ordering Paragraph 1(d) and 1(e) because they reference consumer protection laws that are codified, not in the Public Utilities Code, but in other California Codes. Specifically, Ordering

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[17] See for example, *National Communications Center Corp. v Pacific Telephone* D.90997, 1979 Cal. PUC LEXIS 1178 [finding a failure to provide customers with available and accurate information, under § 451 and ordering reparations], mod. and suppl'd by D.91784, 1980 Cal PUC LEXIS 512. See also, *UCAN v Pacific Bell* D.01-09-058, 2001 Cal PUC LEXIS 914 [ordering reparations and penalties for violations of § 2896], mod. and ltd rhrg granted on other issues by D.02-02-027, 2002 Cal PUC LEXIS 189.

Paragraph 1(d) refers to the Song-Beverly Consumer Warranty Act (Civ. Code §§ 1792-1792.4), the Consumer Legal Remedies Act (Civ. Code §§ 1770) and Com. Code §§ 2314-2316. Ordering Paragraph 1(e) refers to Bus. & Prof. Code § 17200 et seq. and § 17500 et seq, as well as Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a). The premise for these references is the Commission's 1995 decision in *Re: Regulation of Cellular Radiotelephone Utilities,* which permits wireless carriers operating in California to "bundle" sales of equipment, such as telephones, with sales of service as long as they comply with "all applicable California and federal consumer protection … laws."[18]

Cingular argues that these references are tantamount to an attempt by this Commission to exceed its regulatory jurisdiction by stepping into the shoes of the superior courts or, with respect to the Federal Trade Commission Act, a federal regulatory agency. Cingular plainly misreads these Ordering Paragraphs. We need not reach Cingular's arguments that we lack jurisdiction to enforce these statutes because, at a minimum, we may look to cases decided under them for guidance on the kinds of activities that have constituted violations. Cingular provides no authority to the contrary. The parties' post-hearing briefs are the proper place to argue the correct use of these statutes in assessing evidence and fashioning appropriate relief, if any.

Cingular fails to establish that we must dismiss the OII.

Limited Modification of the OII is Appropriate

Cingular identifies several defects in Ordering Paragraph 1 of the OII, which, though not grounds for dismissal, warrant correction. After review of

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[18] D.95-04-028, 1995 Cal PUC LEXIS 175, Ordering Paragraph 1(5) [modifying Paragraph 16c. of Decision (D.) 90-06-025 as modified by D.90-10-047.]

Cingular's arguments and the text in question, we are persuaded to make the following modifications.

First, Ordering Paragraph 1(c) charges Cingular with violation of § 451, as follows:

> … by failing to comply with certain standards (*described in previous Commission decisions* and in P.U.Code Section 2896 *inter alia*) that require all relevant, available, and accurate information be provided to customers so that they can make an intelligent choice between similar services where such a choice exists; (Emphasis added in first instance.)

However, Ordering Paragraph 1(c) fails to specify which Commission decisions are meant. The only decision mentioned in connection with § 451 in the text of the OII is D.95-04-028, which concerns the limitations on bundling of cellular products and services. This is the issue at the core of the charge under Ordering Paragraph 1(d), which specifically cites D.95-04-028. The OII does not identify any other Commission decisions

It is well established that administrative pleading is not bound by the strict rules applicable to pleadings in court proceedings; fair notice to the respondent is more important than compliance with technical pleading rules.[19] A pleading is sufficient and comports with due process when it provides the respondent with enough notice of the charges to enable him or her to prepare a defense.[20]

Cingular cannot reasonably be expected to prepare defense against violation of unspecified Commission decisions. We will cure the notice defect by

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[19] *Stearns v. Fair Employment Practice Comm'n* (1971) 6 C3d 205, 213

[20] *Dyment v. Board of Medical Examiners* (1922) 57 CA 260, 265.

modifying Ordering Paragraph 1(c) to delete the reference to "previous Commission decisions".

Second, the citations to D.95-04-028 in Ordering Paragraph 1(d) and (e) contain an inadvertent clerical error. The references to "Ordering Paragraph 5 of D.95-04-028" should be to Ordering Paragraph 1(5), consistent with the text of the OII.

The third problem, also in Ordering Paragraph 1(d), concerns a notice defect similar to the one discussed above. Ordering Paragraph 1(d) charges violations of §§ 451 and 702, as well D.95-04-028, as follows:

> … by marketing and selling bundled packages of services and goods in a way that was illegal, and therefore unjust and unreasonable, under the consumer protection laws of the State of California, *including but not limited to* the Song-Beverly Consumer Warrant Act (CC §§ 1792-1792.4), the Consumer Legal Remedies Act (CC § 1770), and Sections 2314-2316 of the California Commercial Code; (Emphasis added.)

The text of the OII does not discuss any consumer protection laws other than those in the Civil Code. We deem inadvertent the failure to mention the Commercial Code statutes and modify the text of the OII to include that reference in the discussion of the sale of equipment and goods at the bottom of page 14, *mimeo*. We cure the notice defect in Ordering Paragraph 1(d) by deleting the words "but not limited to."

Comments

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure.

Findings of Fact

1. The petition to modify and the supplement comply with the procedural requirements of Rule 47.

2. Cingular has established that public disclosure of following information has the potential to cause it unfair economic disadvantage: the number of Cingular customers in California; data on Cingular's California subscriber base and growth; and the chart detailing Cingular's entire indirect distribution network in California.

3. The OII raises the kind of consumer protection matters that federal law permits the states to adjudicate and does not expressly or impliedly seek to regulate wireless rates or terms of entry.

4. The Commission may look to cases decided under statutes outside the Public Utilities Code for guidance on the kinds of activities that have constituted violations.

Conclusions of Law

1. The petition to modify should be granted to the extent discussed herein.

2. Pursuant to § 583 and GO 66-C, the confidential information described in Ordering Paragraph 2 of today's decision should not be publicly disclosed.

3. Federal law does not preempt this OII.

4. The Commission has jurisdiction to investigate Cingular under the state law theories alleged.

5. The motion to dismiss should be denied.

6. The OII should be modified as described herein to correct notice defects and inadvertent clerical omissions.

7. In order to provide certainty to the parties and promote an efficient use of their resources and the resources of the Commission, this decision should be effective immediately.

INTERIM ORDER

IT IS ORDERED that:

1. The Petition for Modification filed June 25, 2002 by Cingular Wireless (Cingular) is granted to prohibit the public disclosure of the following information: the number of Cingular customers in California; data on Cingular's California subscriber base and growth; and the chart detailing Cingular's entire indirect distribution network in California.

2. Ordering Paragraph 10 of Investigation (I.) 02-06-003 is modified as follows (text to be deleted is indicated in strikeover format and text to be added is indicated in italics):

> *(a)* Staff's investigative Report contains Cingular's responses to Staff data requests, which Cingular has identified as confidential and/or proprietary pursuant to Public Utility Code section 583. The Commission finds that ~~none of the information contained in the report is so trade sensitive as to outweigh the public interest in disclosure, and such disclosure is herby authorized~~ *in order to prevent an unfair business disadvantage to Cingular, the following information should be excluded from public disclosure: (i) the number of Cingular customers in California (found in the Staff Report, at page 5 prior to footnote 23 and in Attachment E to the Staff Report on the page bearing Bates Stamp 00138); (ii) data on Cingular's California subscriber base and growth (found in Attachment E to the Staff Report on the page bearing Bates Stamp 00151; and (iii)the chart detailing Cingular's indirect distribution network in California (found in Attachment E to the Staff Report on the page bearing Bates Stamp 00154).*
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> *(b) The Commission's Central Files shall hold the Staff Report and Attachment E to the Staff Report under seal for the duration of this proceeding or for two years from this order (whichever is later), except as provided in Ordering Paragraph 2(c). CSPD shall provide the service list for this proceeding and the Commission's Central Files with public versions of the Staff Report and Attachment E to the Staff Report in which the confidential information has been redacted consistent with Ordering Paragraph 2(a).*

> *(c) For the duration of this proceeding or for two years from this order (whichever is later), the documents or portions of documents described in Ordering Paragraph 2(a) shall not be made accessible or be disclosed to anyone other than Commission staff except on the further order or ruling of the Commission, the Assigned Commissioner, the assigned Administrative Law Judge (ALJ), or the ALJ then designated as Law and Motion Judge.*
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> *(d) If Cingular believes that further protection of this information is needed beyond the duration of this protective order, it may file a motion stating the justification for further withholding the material from public inspection, or for such other relief as the Commission rules may then provide. Such motion shall be filed no later than 30 days before the expiration of this protective order.*

3. Parties shall comply with the discovery directives, herein, regarding claims for protection of confidential information and resolution of related disputes.

4. For the duration of this proceeding, neither this Commission nor the any hearing officer assigned to this proceeding will order the public release of allegedly confidential information except upon careful consideration, after notice and opportunity to be heard on the matter.

5. Cingular's motion to dismiss (motion), filed on July 19, 2002, is denied.

6. Ordering Paragraph 1(c) of I.02-06-003 is modified as follows (text to be deleted is indicated in strikeover format):

> (c) Respondents violated P.U. Code § 451 by failing to comply with certain standards (described ~~in previous Commission decisions and~~ in P.U. Code Section 2896 *inter alia*) that require all relevant, available, and accurate information be provided to customers so that they can make an intelligent choice between similar services where such a choice exists;

7. The final paragraph on Page 14, *mimeo*, of I.02-06-003 is modified as follows (text to be deleted is indicated in strikeover format and text to be added is indicated in italics):

(b) *Sections 2314-2316 of the California Commercial Code and* ~~The~~ *the* Consumer Legal Remedies Act (Civil Code § 1770), *the latter* which defines as illegal any sale of goods or services accompanied by the following conduct:

8. Ordering Paragraph 1(d) of I.02-06-003 is modified as follows (text to be deleted is indicated in strikeover format and text to be added is indicated in italics):

(d) Respondents violated P.U. Code §§ 451 and 702 and Ordering Paragraph *1(*5*)* of D.95-04-028 by marketing and selling bundled packages of services and goods in a way that was illegal, and therefore unjust and unreasonable, under the consumer protection laws of the State of California, including ~~but not limited to~~ the Song-Beverly Consumer Warrant Act (CC §§ 1792-1792.4), the Consumer Legal Remedies Act (CC § 1770), and Sections 2314-2316 of the California Commercial Code;

This order is effective today.

Dated _____, at San Francisco, California.