

Decision 87-12-027 December 9, 1987

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of)
The Pacific Telephone and Telegraph)
Company, a corporation, for)
authority to carry out the terms)
and conditions of agreements with)
certain customers covering the)
offering of 770A Dial Private Branch)
Exchange Service.)

Application 54881

Amended application of the Pacific)
Telephone and Telegraph Company, a)
corporation, for a revised regular)
tariff for 770A Private Branch)
Exchange Package I and II Service)

Application 55276

O P I N I O N

On September 18, 1987, Pacific Bell (Pacific) filed an application to modify Decision (D.) 88465 to permit it to obtain the Commission staff's review of Pacific's customer-specific contracts under General Order (GO) 96-A, paragraph X and the subsequent forwarding of those contracts to the Commission for approval.

Pacific states that the Evaluation and Compliance Division (recently renamed Commission Advisory and Compliance Division (CACD)) has declined to review or recommend for approval any of the contracts submitted by Pacific when such contracts contain, in any portion, a service that is currently offered under tariff. These contracts, according to Pacific, involve large customer networks that combine switched and private line services, portions of which can be currently tariffed services. They also involve special terms conditions and services which are not tariffed. Pacific believes that these customer-specific composite services cannot practically be dealt with by tariffs and therefore

seeks to serve these customers through the vehicle of contracts under GO 96-A.

American Telephone and Telegraph Co (AT&T-C), Bay Area Teleport (BAT) and Public Staff Division (recently renamed Division of Ratepayer Advocates (DRA)) all filed responses opposing the petition to modify and requesting that the issue of contracting flexibility be addressed in the broader context of the Regulatory Alternatives investigation expected to follow the Commission's recent en banc on telecommunication regulation. That investigation was commenced by the Commission on November 25, 1987 as I.87-11-033.

BAT raises the most specific questions in its response. It asks: Under what circumstances will Pacific be free to depart from tariffed rates? Will Pacific be allowed to charge prices above or below tariff whenever it feels the need to do so? What differences between a customer-specific service and a tariffed service would justify a departure from the tariffed rate? How far above or below currently tariffed rates could Pacific offer service? What steps will be taken by CACD to insure that prices are above cost? Will parties other than CACD be allowed to review the cost support information? Which customers will be eligible for customer-specific contract rates, and which customers will not be eligible? Will customer-specific contracts be offered only for some services, and not for others?

BAT asks that if the petition is not consolidated with I.87-11-033 that the Commission schedule a prehearing conference to permit interested parties such as BAT the opportunity to be heard on the questions noted above and to consider scheduling any necessary discovery.

DRA agrees that the issue of contract flexibility should be addressed in I.87-11-033 but suggests that if the Commission chooses to consider the petition for modification, it should consolidate the petition with the investigation and name the

independent telephone companies as respondents in the consolidated proceeding.

DRA also takes issue with Pacific's assertion that no modification to General Order 96-A is necessary for the Commission to grant its petition for modification. DRA notes that this appears to conflict directly with the assertion of the staff in the 1978 proceeding that resulted in D.88465 that GO 96-A needed to be modified to establish new principles for the introduction of competitive devices. That recommendation was rejected. DRA goes on to recommend that difference in treatment in GO 96-A between contracts with individual parties and contracts with governmental parties be examined and any impermissible inconsistencies which could result in an anti-competitive preference to the utility be resolved.

Pacific filed a reply to these responses. Pacific states:

"Through this Petition, Pacific merely seeks the ability to operate under the Commission's existing rules and procedures which govern the offering of contract services. Pacific is not herein asking for a change to General Order No. 96-A or what we believe to be the existing Commission policy or regulation inherent in and authorized by General Order No. 96 A." (Petition to Modify, p. 3. Emphasis in original.)

Pacific goes on to state in its reply:

"We are simply asking the Commission to require its Staff to process our contracts under the current provisions of the Commission's General Order No. 96-A. . . . The respondents, particularly AT&T, have misread our Petition. We are not asking for additional or greater contract flexibility than exists today." (Emphasis supplied. Reply, p. 2.)

Discussion

It might be useful, at the outset, to review the facts giving rise to D.88465. In 1972 Pacific first sought to introduce Package II 770A PBX service. In July, 1974 Pacific was authorized

by D.83158 in A.54881 to provide this service to 36 customers, under contract, on an interim basis. In November 1974, by D.83761 in Application (A.) 55276, an initial tariff was approved for the service, subject to refund and further hearings.

By the time D.88465 was issued in February, 1978, Pacific had more than 400 contracts for 770A Package II PBX service on file with the Commission. D.88465 noted that Pacific had based each of the contract prices on a common formula, thereby avoiding unlawful discrimination between customers. However, the decision also observed that the common formula became, for all practical purposes, Pacific's rate for the 770A service, a rate which under Section 489 of the Public Utilities Code, should have been published in Pacific's tariffs.

A.55276 sought permanent rates for these services but protestants were alleging, among other things, that use of contracts instead of tariffs to offer 770A service was a device to evade regulatory scrutiny. A complaint, Case (C.) 9794 and an investigation, C.9838 were consolidated with the two applications to explore all aspects of Package II 770A PBX service.

D.88465 states:

"Purportedly these contracts were issued under the authority of paragraph X of General Order No. 96-A. That paragraph is an exercise of the Commission's power to grant deviations (Sections 489 and 532 of the Public Utilities Code). Deviation contracts are intended for use in situations unique or exceptional enough that they cannot practically be dealt with by tariffs. A paragraph X deviation contract should not be used to establish interim rates for a generally offered new service....

"Staff and protestants urge the Commission to prohibit the future use of untariffed contracts in similar situations. As noted above, that prohibition is implicit in General Order No. 96-A." (Emphasis supplied. 83 CPUC 428, 437.)

This is the language that gives rise to the problem Pacific complains of, which its inability to get special contracts

containing tariffed services processed through the advice letter procedure.

Pacific alleges that the contracts for which it seeks approval today are distinctly different from the contracts discussed in D.88465. Pacific states that it is not seeking some interim vehicle for providing a generally offered new service that later can be offered via tariff. Pacific seeks approval for contracts, each unique, containing varying tariffed and nontariffed services, terms and conditions. While common elements may be found in some of the contracts, they are not, Pacific states, identical copies of each other.

We think this is the critical distinguishing factor between current conditions and the situation existing in the early 1970s which gave rise to D.88465 and to our longstanding refusal to consider contracts which contained elements of tariffed services via advice letter.

We also recognize that the competitive world in which Pacific does business is vastly different than the days when only unregulated PBXs offered any real competition to Pacific's services. We have, for several years, allowed energy utility companies to use customer specific contracts for the provision of tariffed energy services at less than tariffed rates. We have permitted this to prevent bypass of the utility system in an increasingly competitive energy market.

Our recently issued investigation into alternative regulatory frameworks for local exchange carriers (I.87-11-033) recognizes this by taking up as the first phase issues of pricing flexibility for services subject to competition. A subset of the broad issue of pricing flexibility is special contracts, for which we hope to hold workshops early in 1988 to discuss development of the policy issues surrounding special contracts. I.87-11-033 is the forum in which we will explore the concerns set forth in the comments of AT&T, BAT and DRA on Pacific's petition in this

proceeding. To that end we have asked parties to file proposed guidelines for special contracts by January 11, 1988.

Based on Pacific's representation that its petition does not seek additional or greater contract flexibility than exists today, we will grant the petition and modify D.88465 to permit the filing of special contracts using the advice letter process. We take this procedural step so that we will have some practical experience to work with when we consider the broader policy issues in the workshops in I.87-11-033 early in 1988.

We will not consolidate this petition for modification with I.87-11-033 as DRA and BAT have requested. This proceeding is old and the factual conditions which gave rise to D.88465 have changed. Since we are specifically considering special contracts in I.87-11-033, a fact which was unknown to either DRA or BAT when they filed their responses to the petition, we see no need to keep this proceeding open.

There are a number of caveats to our approval, however. The first is that the Commission needs to assure itself that any contracts submitted under GO 96-A will not result in anticompetitive pricing or practices. It must, therefore, have sufficient information tendered with the advice letter to enable CACD to make the analysis required under Northern California Power Agency v Public Utilities Commission (1971) 5 Cal 3d 370.

In filing these advice letters, Pacific should not use either the Macy's special contract or the May Co. special contract advice letter as a pattern to follow. Rather, Pacific and other interested telephone companies should follow GO 96-A exactly and should work closely with CACD prior to filing any advice letters to develop interim standardized filing requirements for special contracts so that they may be reviewed and processed without the delay inherent in having to request additional information.

We do not know what the "pent up demand" is for special contracts, or how many advice letters we may expect before the procedure becomes routine and the workload predictable. We assume

that utilities other than Pacific will also wish to take advantage of the advice letter process, thereby adding to the workload. It is a truism to say that, with our limited resources, an initial flood of advice letters cannot be processed simultaneously. We do not expect to automatically approve special contracts without assuring ourselves, for example, that the prices included are above cost, that use of a special contract is appropriate and that there are no anticompetitive problems. Nor do we expect to approve special contracts on an emergency basis simply because they may have been pending with customers awaiting the outcome of this petition.

Lastly, we remind telephone utilities that we recently ceased approving special contracts for electric utilities under the advice letter procedure because of the scope of such special contracts and the need to explore in a more public forum, the basis on which the contract was drawn and the benefits to be derived from it. For this purpose we established on a trial basis the Expedited Application Docket. It may well be that given experience with special contracts in the telephone area that the advice letter process will prove equally unsuited to addressing special contracts and a similar expedited formal docket will have to be developed to address them. We will not know this until we gain the experience we are sure will come very shortly.

Because this is a new process, and because we want all the parties to I.87-11-033 to have the practical experience with it to contribute to the development of the policy surrounding special contracts, Pacific should serve its first advice letter filing on all parties to I.87-11-033. Subsequent filings must be made on any party requesting them under GO 96-A.

Findings of Fact

1. Pacific has petitioned to modify D.88465 to permit filing of special contracts under GO 96-A which contain elements of tariffed services.

2. Pacific does not intend to use special contracts to provide generally offered new services that can later be offered via tariff.

3. Pacific is not asking for additional or greater contract flexibility in this petition for modification than exists under current commission practice.

4. The policy surrounding special contracts and potential increased pricing flexibility will be developed in I.87-11-033.

5. Eliminating the procedural barriers to filing special contracts under the advice letter procedure will provide practical experience to enhance development of policy for special contracts in I.87-11-033.

6. The Commission has permitted energy utilities to file special contracts to provide tariffed services at less than tariffed rates to specific customers in the face of imminent bypass of the utility system.

7. The competitive world in which today's telephone utilities operate is similar in many ways to the competitive world in which energy utilities operate, with bypass of the utility system or loss of substantial customers a real possibility.

8. There is no longer any need to enforce D.88465's rigid prohibition against untariffed contracts.

9. The proceeding which gave rise to D.88465 is old and the factual circumstances existing at the time the decision was issued in 1978 have changed materially.

Conclusions of Law

1. D.88465 should be amended to delete language that prohibits filing of special contracts under the advice letter procedure which contain elements of tariffed services.

2. GO 96-A does not by its terms, preclude the filing of customer specific contracts.

3. The Commission has authority under Public Utilities Code Section 532 to permit deviations from filed tariffs if there are unusual or exceptional circumstances justifying the deviation.

4. The request of DRA and BAT to consolidate this petition for modification with I.87-11-033 should be denied.

ORDER

IT IS ORDERED that:

1. Decision 88465 is modified to delete the following language found at page 437 of 83 CPUC 428: "Staff and protestants urge the Commission to prohibit the future use of untariffed contracts in similar situations. As noted above, that prohibition is implicit in General Order No. 96-A. Therefore, no special prohibition is required." and to delete the first sentence of Conclusion of Law 10 which reads: "Under General Order No. 96-A, paragraph X, individual contracts may not be utilized for an offering that is made to the public generally."

2. In all other respects Decision 88465 remains in full force and effect.

3. Pacific, and any other telephone utility proposing to file special contracts using the advice letter process, shall coordinate the filing requirements with CACD in advance of making the filing.

4. The first customer specific special contract filing under the advice letter process shall be served on all parties to I.87-11-033.

5. The request to consolidate this petition for modification with I.87-11-033 is denied and this proceeding is closed.

This order is effective today.

Dated DEC 9 - 1987, at San Francisco, California.

STANLEY W. HULETT
President

DONALD VIAL

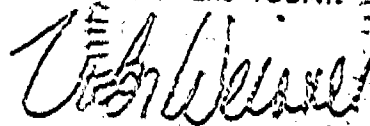
FREDERICK R. DUDA

G. MITCHELL WILK

JOHN B. OHANIAN

Commissioners

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY.



Victor Weisser, Executive Director



Decision 87 12 027 DEC 9 1987**ORIGINAL**

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