

NOV 10 1988

Decision 88 11 030 NOV 9 1988

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of)
Pacific Bell, a corporation, for)
authority to increase certain intra-)
state rates and charges applicable)
to telephone services furnished)
within the State of California.)

Application 85-01-034
(Filed January 22, 1985;
amended June 17, 1985 and
May 19, 1986)

I.85-03-078
(Filed March 20, 1985)

And Related Matters.)

OII 84
(Filed December 2, 1980)

Case 86-11-028
(Filed November 17, 1986)

OPINION MODIFYING DECISION 87-12-067
IN CONNECTION WITH RATEPAYER EDUCATION TRUST FUND

In Decision (D.) 88-09-065, issued September 28, 1988, we proposed certain modifications to D.87-12-067 in connection with the Ratepayer Education Trust Fund (RETF). As explained more fully in D.88-09-065, the proposed modifications were designed to clarify: (1) our role in approving or disapproving trust disbursements; (2) the authority of the Disbursements Committee (DC) to meet at least annually; (3) the authority of the DC to incur administrative expenses subject to Commission approval and certain limitations; (4) the role of the Commission's General Counsel in resolving questions about the tax exempt status of the trust, given the subsequent decision to retain outside counsel for that purpose; and (5) our practice not to engage in contacts of any sort with potential grantees and/or their agents on the subject of specific grant proposals. Pursuant to our request, written comments on the proposed modifications were filed by Pacific Bell, Public Advocates, and the Division of Ratepayer Advocates (DRA).

These parties generally supported the intent of the modifications proposed in D.88-09-065; however, Public Advocates and DRA made specific suggestions in certain areas, as detailed below.

The Commission's Role

In D.88-09-065 we proposed to modify D.87-12-067 (the "Decision") and the Trust to clarify that we will approve or disapprove all grants to be issued by the RETF, after receiving recommendations from the DC. We also proposed a somewhat related modification designed to clarify the Public Advisor's status as a voting DC member.

Public Advocates' Concerns

Public Advocates strongly endorses our proposal that the Public Advisor be a voting member of the DC. However, it opposes our proposal to approve or disapprove the DC's recommendations because it believes this will politicize the process, cause substantial delay, and impair the DC's effectiveness.

Despite its belief that the present Commission will not use these grants for political purposes, Public Advocates argues for the future that Commission approval presents the potential for use of the grants for political purposes, or at least the appearance of impropriety. It opposes the suggested modification on that basis.

Assuming that the Commission disagrees with Public Advocates and decides to maintain final approval, Public Advocates suggests that it avoid substantial delay in the disbursement of grant funds by providing that grants be automatically approved within sixty days of the time they are submitted to the Commission unless the Commission has taken action in the interim. Finally, Public Advocates believes that the Commission should only disapprove grants for "very substantial reasons," and where it believes that such a grant is "substantially inconsistent with the purposes of the Trust Fund." Public Advocates asserts that, in the absence of such stringent standards, the Commission will "be

overwhelmed with minutiae and will minimize the effectiveness and interest of the Trust Fund members, since they will be reduced to a very modest role, something that was not foreseen by any of the parties." (Public Advocates' Comments, pp. 2-3.)

We believe that significant safeguards exist, as reflected in D.87-12-067, to meet Public Advocates' concerns that the Commission's oversight role will politicize this process. We have provided that disbursements shall not directly benefit any of the voting members of the DC and that disbursements shall not duplicate programs already covered by Pacific Bell's authorized commercial expenses. We have also carefully defined the goal of the RETF as promotion of ratepayer education efforts, thereby further minimizing the possibility of misuse of these funds (D.87-12-067, Ordering Paragraph 6). Finally, we have proposed a modification, which Public Advocates fully endorses, banning contacts between potential grantees and/or their agents and Commissioners on the subject of specific grant proposals. While we are sensitive to Public Advocates' concerns, we believe the overriding issue is the need to modify the Decision as proposed in order to resolve the delegation questions raised in D.88-09-065. On balance, we believe the present safeguards address Public Advocates' concerns that the process will be politicized.

We do not expect the Commission's review process to significantly delay the disbursement of RETF funds, and we are not persuaded that it is necessary to impose a fixed decisionmaking timetable. Nor are we convinced that we should adopt predetermined standards for disapproving the DC's grant recommendations, as Public Advocates suggests. There is no demonstrable need for such action at this point, and in the absence of a compelling showing that such standards are needed, we believe the better approach is one that affords the Commission, as the ultimate decisionmaker, the freedom to exercise its discretion, as necessary to carry out the purposes of the RETF.

Finally, while we appreciate Public Advocates' concerns that the DC's role is somewhat circumscribed by the requirement that its recommendations be approved or disapproved by the Commission, we are adamant that we must retain an oversight role in order to properly discharge our decisionmaking responsibilities. Despite this fact, the DC members should understand that their role as an advisory body to the Commission is absolutely crucial, and that without their contribution, the quality of the decisionmaking process would be greatly diminished. We intend to work closely with the DC and to call upon its considerable talent and resources to the fullest extent possible over the life of the Trust.

DRA's Concerns

DRA suggests a minor change to the Decision to reflect the fact that the proposed modifications to Section 1.4 of the Trust may make it less likely for the Trust to be eligible for an IRC § 501(c)4 designation.¹ DRA is apparently concerned that the retention of ultimate decisionmaking by the Commission, as proposed in D.88-09-065, will have this undesirable impact. DRA recommends that the discussion of IRC § 501(c) contained in the D.87-12-067 be modified to add a reference to "another designation (such as intergovernmental immunity)", to ensure that the tax-exempt status of the Trust is not threatened. DRA believes that if its recommendation is adopted, the Trust may be eligible for a tax designation of governmental immunity. There is no opposition to DRA's recommendation, and we will make the modification it suggests at page 87, Slip Opinion D.87-12-067.

¹ 26 U.S.C.A § 501(c)(4) provides tax exempt status for: "Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes."

The Authority of the DC to
Incur Administrative Expenses

In D.88-09-065 we proposed to modify the Decision to make explicit the fact that the DC and the Trust will incur certain administrative expenses, and that the Commission will authorize such expenditures up to a dollar limit of \$300,000 per year, or 10% of annual disbursements, whichever is lower. DRA proposes that we remove the requirement that administrative expenses be less than 10% of annual disbursements. DRA concurs with the Commission that there should be a \$300,000 cap on annual administrative expenses, but believes the 10% cap should be deleted because it may not provide adequate funding in years when disbursements may be less than \$3 million. DRA notes that the Commission will retain adequate control even if the 10% cap is removed, because it must approve the expenditure of funds in any event.

While the goal of the RETF is to disburse \$3 million per year over its life (D.87-12-067, Ordering Paragraph 6.d.(i)), in years that goal is not met, there may indeed be a problem, especially if the shortfall is substantial. However, in the normal course of events, we expect the \$3 million goal largely to be met.

If there are unusual circumstances resulting in a substantial disbursements shortfall in a particular year, we expect that a request to enlarge the cap, in those limited circumstances, would be made, and that we would have an opportunity to carefully consider this request. We prefer to address such a problem when, and if, it arises, rather than effectively raising the cap at the outset.

This approach is consistent with our commitment to keep administrative expenditures at the lowest reasonable level in order to protect the Trust corpus. Indeed, we have indicated that we view the proposed limitation "as quite generous and will not be inclined to consider requests to enlarge it" (D.88-09-065, mimeo. p. 4, fn 3). We have also indicated that we will review these administrative expenditures for reasonableness and will explore the

feasibility of lowering the limitation after completion of the first disbursement cycle (id.). Considering all these factors, as well as the fact that we have not had an opportunity to conduct the anticipated "end of the first disbursement cycle" expense review, we have no present basis for altering the proposed cap. We conclude that DRA's request to eliminate the 10% cap is premature and should be denied.

Other Proposed Modifications

While offering general support for the proposed modifications, the parties did not specifically address the revisions proposed in D.88-09-065 to clarify the following issues: the authority of the DC to meet at least annually; the role of the Commission's General Counsel in resolving questions about the tax-exempt status of the Trust; and our practice² not to engage in contacts of any sort with potential grantees and/or their agents on the subject of specific grant proposals. Given this general support, we will modify D.87-12-067 in accordance with the proposals contained in D.88-09-065.

ORDER

Therefore, good cause appearing,

IT IS ORDERED that:

1. D.87-12-067 is modified by revising the third full paragraph appearing on page 87, Slip Opinion, to read:

Third, it is our intent that this Trust conform to IRC 501(c) or another designation (such as intergovernmental immunity) which would ensure that the Trust is tax-exempt, and we will require that Pacific Bell take all necessary steps to effect this intention.

² We have noted, supra, that Public Advocates specifically expressed support for this proposal. No other party specifically addressed the proposal.

2. D.87-12-067 is modified by revising the first sentence of the fifth full paragraph appearing on page 87, Slip Opinion, to read:

It is our intention to retain the disbursements committee structure set forth in the ALJ's Proposed Decision, with DRA, Pacific Bell, and two consumer groups serving as committee members. We also intend the Public Advisor to serve as a committee member, while retaining the mediation role envisioned by the ALJ.

3. D.87-12-067 is modified by revising the first three complete sentences appearing on page 89, Slip Opinion, to read:

The Trustee shall proceed with disbursements only after receiving a formal decision made by the Commission after its review of the recommendations of the five-member disbursements committee (with each member having one vote). In no event shall such disbursements benefit any of the five disbursements committee members. If the Committee is unable to make a decision on a particular disbursement, or its members are otherwise deadlocked, the Commission's Public Advisor shall seek to mediate the dispute.

4. D.87-12-067 is modified by revising Ordering Paragraph 6.d.(ii) to read:

Decisions regarding disbursements shall be made by the Commission after a review of the recommendations of a committee composed of representatives of Pacific Bell, DRA, two consumer groups (chosen by the Commission, in accordance with Ordering Paragraph 6c), and the Commission's Public Advisor, with each committee member having one vote. If the committee is unable to make a decision on a particular disbursement, or its members are otherwise deadlocked, the Commission's Public Advisor shall seek to mediate the dispute.

5. Pursuant to Section VII of the Ratepayer Education Trust Agreement, which provides that the Trust may be amended at any time pursuant to order of this Commission, we hereby direct Pacific Bell

to draft an amendment to Section 1.4 of the Trust and secure the necessary signatures by December 15, 1988. More specifically, the first three sentences of Section 1.4 shall be deleted, to be replaced by the following text:

All decisions regarding payment of amounts or disbursements of funds by the Trust shall be made by the Commission, after a review of the recommendations of the Disbursements Committee (the Committee). Pursuant to the Commission's decisions, the Committee shall be composed of five voting members, including one representative from Pacific Bell, one representative from the Division of Ratepayer Advocates (DRA), the Commission's Public Advisor, and two representatives of consumer groups.

6. D.87-12-067 is modified by revising Ordering Paragraph 6.d(iii) to read:

The disbursements committee shall meet at least once per year to make disbursements recommendations, based on proposals presented by its members. The financial trustee shall thereafter make the disbursements in accordance with the Commission's decisions and/or resolutions regarding the disbursements committee's recommendations.

The disbursements committee may incur expenses, such as expenses for outside tax counsel and other administrative services, in carrying out its duties, so long as such expenditures are approved by the Commission. In addition, the financial trustee is authorized by the Trust Agreement (Section 6.2) to incur reasonable administrative expenses. We wish to set some specific limitations for such expenditures in order to underscore our concerns that, to the fullest extent possible, the trust corpus will be preserved for its intended purpose. To that end, we require that administrative expenses shall not exceed \$300,000 per year, or ten percent of annual disbursements, whichever figure is lower. We view this limitation as quite generous and will not be inclined to consider requests to enlarge it. The financial trustee shall submit quarterly written reports

to the Director of the Commission's Advisory and Compliance Division detailing 'year to date' expenses. The first report, covering the period January 1, 1988 to September 30, 1988 is due December 31, 1988. For 1989 and subsequent years, the due dates are January 30, April 30, July 30, and October 30 of each year. Further, we hereby give notice that after the first disbursement cycle has been completed, we will review these administrative expenditures for reasonableness, and explore the feasibility of lowering the limitation. Finally, we hope that our Public Advisor will assume the responsibility of informing us promptly of problem situations as they arise, so that we may take appropriate action to ensure the reasonableness of such administrative expenses.

7. Pursuant to Section VII of the Ratepayer Education Trust Agreement, which provides that the Trust may be amended at any time pursuant to order of this Commission, we hereby direct Pacific Bell to draft an amendment to § 2.1 of the Trust Agreement and to secure the necessary signatures by December 15, 1988. More specifically, the following sentence shall be deleted from § 2.1:

Any question as to whether a proposed disbursement may jeopardize the tax exempt status of the Trust shall be determined and resolved by the General Counsel of the Public Utilities Commission.

8. D.87-12-067 is modified by adding the following paragraph to the Decision, at page 90, Slip Opinion, immediately preceding Section E:

Given the interest this program is likely to generate, and the potential number of grantees competing for awards, we find it necessary to state at the outset that it will be our practice not to engage in contacts of any sort with potential grantees and/or their agents on the subject of specific grant proposals. To that end, we direct that the RFPs include language admonishing potential grantees that they and/or their agents are not to contact, by any means, Commissioners or their advisors on

the subject of specific grant proposals. We believe that this ban on such contacts is necessary to facilitate this Commission's day-to-day regulatory functions.

This order is effective today.

Dated NOV 9 1988, 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 Weisner, Executive Director