

Decision 89 08 029 AUG 3 1989

**ORIGINAL**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation to )  
determine whether competition should )  
be allowed in the provision of )  
telecommunications transmission )  
services within the state. )

OII 83-06-01  
Petition for Modification  
(Filed May 15, 1989)

OPINION ON PETITION FOR MODIFICATION OF  
DECISION 84-01-037 BY PACIFIC BELL

Background

By Decision (D.) 84-01-037 the Commission permitted Non-Dominant Inter-Exchange Carriers (NDIECs) to file revisions to their filed tariffs to become effective five days after the date of filing rather than the then regular provisions for the effectiveness of tariff revisions for utility services involving new services or reduced rates, namely 30 days after filing, as specified in General Order (GO) 96-A<sup>1</sup> and Public Utilities (PU) Code § 455.

Under the provisions of Resolution M-4744 and subsequent issues of GO 96-A, utility tariffs could be protested not later than 20 days after filing and if the protest was other than frivolous, the tariff would not be allowed to become effective until the protest was resolved, withdrawn, or set aside by the Commission or its staff.

Since D.84-01-037 had theretofore exempted the NDIEC's from the 30-day tariff effectiveness provisions of GO 96-A and imposed a 5-day tariff effectiveness provision instead, the changes to GO 96-A occasioned by Resolution M-4744 on December 17, 1986, had no impact on these non-dominant carriers.

1 By Resolution M-4744 dated December 17, 1986, the Commission changed the effective date of utility tariff revisions for new services or reduced rates to be 40 days after filing.

Pacific Bell's Petition

On May 15, 1989 Pacific Bell (Pacific) filed a Petition for Modification of D.84-01-037 (petition) seeking to require a minimum of a 40-day period for NDIEC tariff revisions filed by advice letters to become effective, in order to allow sufficient time for filing protests within the first 20 days and for the Commission staff to analyze those protests as is regularly permitted under the present version of GO 96-A.

Pacific argues that it has been denied effective participation in the Commission's process in connection with a recent advice letter of US Sprint (Sprint)<sup>2</sup> which Pacific protested on January 12, 1989, 20 days after Sprint filed it.<sup>3</sup> Pacific's protest was obviously filed after the effective date of Sprint's Advice Letter 28 and associated tariff revisions. Accordingly, the Chief of the Telecommunications Branch of the Commission Advisory and Compliance Division (CACD) forwarded a letter to Pacific on January 20, 1989 denying its protest, since it had arrived after the effective date of the advice letter and tariff.

Pacific, in its petition, argues that: "The right to protest advice letters is contained in Section III of GO 96-A and, therefore applies to NDIECs such as US Sprint."

Pacific then alluded to the workshop record in R.85-08-042, pending before the Commission, wherein respondent parties discussed practical problems associated with protests of the 5-day effective tariff filing of NDIEC's. Pacific also

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2 Sprint's Advice Letter 28 was filed December 23, 1988 and became effective January 5, 1989.

3 Pacific's petition includes a lengthy discussion of the distribution of its protest of Sprint Advice Letter 28, and the dates of such distribution; however, Pacific's protest was filed well after the effective date of the tariff filed under Advice Letter 28.

referred to a statement, in the January 22, 1986 draft workshop report, from the then Chief of the Telecommunications Branch of the Evaluation and Compliance Division,<sup>4</sup> that "currently NDIECs' advice letter filings are subject to III, H., of GO 96-A... ." Contemporaneously CACD had noted that protests to be valid were to be submitted 20 days prior to the effective date of the given tariff filing. Since NDIEC tariff revisions can be effective 5 days after filing, Pacific alleges that CACD presumed that "the Commission did not want NDIEC filings subject to protest prior to their effective date."

Pacific argues that Resolution M-4744 later changed the protest provision of GO 96-A from not less than 20 days prior to the regular effective date, to not later than 20 days after the date of the tariff filing. Thereby, Pacific contends "that because an advice letter is effective, [the view that] a protest and subsequent Commission action are not allowed is incorrect." Pacific opines that the Commission has authority to suspend the tariff.

#### Responses to Pacific's Petition

Five timely responses to Pacific's petition were filed. GTE California Incorporated (GTEC) supported Pacific's petition based on its similar interpretation of the revision of GO 96-A occasioned by the Commission's issuance of Resolution M-4744 on December 17, 1986.

The remaining four responses from MCI Telecommunications Corporation (MCI), Sprint, Bay Area Teleport (BAT), and California Association of Long Distance Companies (CALTEL) opposed Pacific's petition on the basis that the changes requested by Pacific are contrary to previously established regulatory principles of this Commission.

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<sup>4</sup> Predecessor of the Commission Advisory and Compliance Division (hereafter referred to as CACD).

For example, CALTEL asserted that Pacific's requested relief should be denied, arguing that:

"Reduced to its essence, Pacific's petition expresses the fear that unless Pacific is permitted to file timely protests to IEC advice letters, Pacific will be unable, as either a legal or practical matter, to enjoin IEC's from unlawfully holding out intralATA services provided pursuant to the tariff filings at issue (Petition, pp. 9 and 10). Were Pacific correct in this assumption, CALTEL could hardly fault Pacific for seeking the requested relief. CALTEL does not, however, agree with Pacific's fundamental assertion that its ability to protect its franchise is predicated on the ability to protest NDIEC advice letter filings.

"It is well to not overstate the significance of a tariff page being placed into effect. The fact that a service is being offered pursuant to an effective tariff does not mean that the service itself is lawful. Before complying with the provisions of PU Code § 532 (requiring that services be provided pursuant to the terms set forth in a filed tariff) a utility must first meet the requirements of PU Code § 1001 by obtaining Commission authority to provide the service. A public utility does not become certified to provide a particular service simply by filing tariffs. Industrial Communications Systems, Inc. v Pomona Radio Dispatch Corporation (1973) 75 Cal PUC 433. Were the contrary true, SFO Airporter (PSC-37) could obtain the rights to operate in Southern California simply by filing a tariff for service to and from Los Angeles International Airport. The resolution of the SoCal Gas/PG&E Kern County EOR battle would have turned on which company could have first sneaked a tariff past the CACD.

"Tariffs are merely means by which public utilities offer to the public the services for which they have obtained operating authority pursuant to § 1001. The fact that tariffs have been filed does not of itself provide that

authority (Industrial Communications Systems, Inc., supra, 75 CPUC at page 437; Dyke Water Co. (1957) 56 CPUC 109)."

Assuming for the sake of argument that Sprint were in violation of PU Code § 1001 (which prohibits providing services, even pursuant to a tariff, which are inconsistent with the certificate of public convenience and necessity held by that public utility), CALTEL notes that Pacific (or any other entity) may file a complaint and, seek injunctive relief.

CALTEL submits that the Commission need not address the issues posed by Pacific in its pleading since Pacific possesses adequate remedies under existing rules.

Lastly, CALTEL notes that a great portion of Pacific's petition refers to various pleadings, reports, and recommendations in the long dormant R.85-08-042 originally proposed to develop modified tariff rules for NDIECs. CALTEL suggests that the Commission hold a conference in that proceeding to effect possible resolution of concerns similar to those raised by Pacific.

#### Discussion

The issue of 5-day versus 40-day effectiveness of tariff revisions filed by NDIECs is under consideration in R.85-08-042 and Pacific and other interested parties will have an opportunity to present comments on any proposed decision in that proceeding in the near future.

Meanwhile, the 5-day effectiveness period for tariff revisions of NDIECs has been applied as the acceptable standard for more than four years by CACD and its predecessors. It is also apparent that few issues, similar to the one presently before us, have surfaced regarding these tariff filings during that time. The clear difference is that the NDIECs operate in a very competitive market in contrast to the monopoly service utilities which are required to adhere to the 40-day rule and for which the 20-day protest period applies.

While we will seek further comments from all interested parties on the tariff revision effectiveness issue in R.85-08-042, we do not believe it necessary or desirable to address this generic issue in response to Pacific's instant petition which concerns a single advice letter filing by Sprint.

We concur with CALTEL that Pacific's petition should be denied and Pacific may instead file a formal complaint against Sprint seeking specific remedies as necessary, if it believes that Sprint's Advice Letter 28 contains unlawful rates, charges, classifications, conditions, practices, or rules. In that manner we may deal with the issues squarely as we would for any other effective rate which is contested.

We recognize that this proposed procedure essentially will shift the burden of proof of demonstrating unlawful service to Pacific. Meanwhile, the 5-day review period for NDIEC tariffs will continue to be used by our CACD staff and interested parties for possible technical rejections or corrections of readily apparent errors.

Findings of Fact

1. Sprint filed Advice Letter 28 on December 23, 1988 and requested an effective date for the appended tariff revisions of January 5, 1989.
2. CACD routinely accepts NDIEC advice letters for tariff revisions to become effective on 5 days' notice.
3. Sprint's Advice Letter 28 requested an effective date later than was available to it under the 5-day notice customary standard used by CACD.
4. Pacific protested Sprint's Advice Letter 28 on January 12, 1989, after that advice letter and the associated tariff revisions were already effective.
5. By letter dated January 20, 1989, CACD denied Pacific's protest on the basis that the protest was made after the effective date of Sprint's Advice Letter 28.

6. On May 15, 1989, Pacific filed a Petition for Modification of D.84-01-037 in OII 83-06-01 seeking a review of the denial of its protest or alternatively a modification of D.84-01 037 to allow for a 20-day protest period for NDIEC tariff revisions.

7. Since the tariff revisions filed by Sprint under Advice Letter 28 became effective on January 5, 1988, Pacific's protest of that filing on January 12, 1988 did not delay or set aside the effectiveness of the rates, charges, classifications, conditions, or rules contained therein.

8. The issues raised in Pacific's petition regarding the protest period for NDIEC tariff revisions are currently pending before the Commission in R.85-08-042.

9. If Pacific believes that any rate, charge, classification, condition, practice, or rule filed by Sprint under its Advice Letter 28 is unlawful, it may file a formal complaint seeking remedies as may be appropriate.

10. Pacific has not shown reasonable cause for granting its petition for modification of D.84-01-037 in OII 83-06-01.

#### Conclusions of Law

1. Pacific's protest of Sprint's Advice Letter 28 was not timely filed for review to set aside the effectiveness of the tariff revisions appended thereto and should be denied.

2. The remaining issues in Pacific's petition for modification of D.84-01-037 in OII 83-06-01 are currently pending in R.85-08-042 and should not be considered separately here.

3. Any and all other relief sought by Pacific in its petition should be denied without prejudice to its right to file a complaint against Sprint, subject to the provisions of PU Code § 1702.

ORDER

IT IS ORDERED that:

1. Pacific Bell's (Pacific) petition to modify D.84-01-037 in OII 83-06-01 is denied for the reasons set forth in the preceding findings of fact and conclusions of law.

2. Any and all other relief sought by Pacific in its petition is denied without prejudice.

3. This proceeding is closed.

This order becomes effective 30 days from today.

Dated AUG 3 1989, at San Francisco, California.

G. MITCHELL WILK  
President  
FREDERICK R. DUDA  
JOHN B. OHANIAN  
PATRICIA M. ECKERT  
Commissioners

Commissioner Stanley W. Kulett,  
being necessarily absent, did not  
participate.

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

  
Victor Weisser, Executive Director