

ALJ/RAB/jt

Decision 90 06 031 JUN 06 1990

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Weitbrecht Communications, Inc., )

Complainant, )

vs. )

Pacific Bell, )

Defendant. )

**ORIGINAL**

Case 88-01-023  
(Filed January 4, 1988)

Peggy S. Foraker, Attorney at Law, for  
Weitbrecht Communications, Inc., complainant.  
Bonnie Packer, Attorney at Law, for Pacific Bell,  
defendant.  
J. Kendrick Kresse, Attorney at Law, for the  
California Association of the Deaf; and  
Peter A. Casciato, Attorney at Law, and  
Ralph Krongold, for Krown Research, Inc.;  
interested parties.  
James S. Rood, Attorney at Law, Jack Leutza,  
and Mary Cooper, for the Division of Ratepayer  
Advocates.

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O P I N I O N

Deaf and severely hearing impaired persons use the telephone system to talk to hearing persons and other deaf and severely hearing impaired persons by means of telecommunications devices for the deaf (TDDs) and third-party relay intervention (Relay Service). This complaint concerns the manufacture, sale, and distribution of TDDs. The TDD in question looks something like a portable typewriter with a receptacle (called acoustical cups) for the telephone handset. To make a telephone call the deaf person places the handset of a conventional telephone in the TDD and dials the called party's number. Assuming the call is to a person with a similar TDD, when that person answers, the caller then types his message. The receiving TDD has a screen on which the typed message appears and a printer which prints out a hard copy of the message. The recipient can then type a response and the sender's TDD shows the response on its screen and also prints out a hard copy. Thus, the conversation goes back and forth. If the caller or the recipient is a hearing person, the call goes through a Relay Service equipped with a TDD. The person at the Relay Service types the oral message to the deaf person and orally delivers the typed message to the hearing person. As of December 31, 1988 there were over 18,000 TDDs in service in California.

Weitbrecht Communications, Inc. (Weitbrecht) is a distributor of TDDs and other devices for the deaf. In its complaint Weitbrecht alleges that defendant Pacific Bell (Pacific) has violated various decisions of the Commission by failing to provide the deaf and hearing-impaired communications with advanced technology TDDs purchased at competitive prices. Weitbrecht seeks a Commission order that (1) Pacific purchase TDDs through competitive bidding where only the low bidder is awarded the contract, and (2) Pacific be audited to determine if its

expenditures on TDD purchases, repairs, distribution, etc. have been prudent, with refunds to be imposed if imprudence is found. The Commission's Division of Ratepayer Advocates (DRA) and the California Association of the Deaf (CAD) join Weitbrecht in seeking an audit and refund. Pacific denies all allegations and asserts that its TDD program fully complies with the law and no audit is necessary.

The Legislature has provided that the Commission shall implement a program whereby each telecommunications corporation shall provide a TDD at no charge additional to the basic exchange rate to any subscriber who is deaf or severely hearing impaired. (Public Utilities Code § 2881.) Pursuant to that mandate the Commission created the Deaf Equipment Acquisition Fund Trust (DEAF Trust) to facilitate the providing of TDDs and the Relay Service, paid for by a surcharge on all telephone bills. In 1989 the Trust collected about \$28 million. Each telephone utility collects the surcharge each month and deposits the money with the Trust. Telephone companies with expenses then submit their bills to the Trust for reimbursement, and a statement of accountability for inventory control. The Trust reviews the submissions and, if no exceptions are noted, authorizes reimbursement.

Ultratec is a corporation which designs, manufactures, and distributes TDDs, signallers, and various other types of assistive devices and equipment which are used by the hearing impaired. Ultratec sells its products both on the retail and wholesale markets throughout the United States and internationally. Ultratec products are currently distributed by 14 state-run TDD programs. The sole shareholder of Ultratec is Robert Engelke.

Weitbrecht is a corporation that is actively involved in the marketing and distribution of TDDs and other assistive equipment for the hearing impaired. The president and sole shareholder of Weitbrecht is Susan Engelke, the wife of Robert

Engelke. Robert Engelke is the chairman of the Board of Directors of Weitbrecht.

Weitbrecht is a separate corporate entity which acts as a distributor for and has dealership agreements with Ultratec. Weitbrecht distributes Ultratec TDD products throughout the United States and Canada provided such sales do not interfere with the exclusive territory of other Ultratec distributors. Weitbrecht does business directly with various government-sponsored equipment programs, telephone companies, and dealers. It presently sells Ultratec TDDs and signallers to General Telephone Company of California (GTE), which GTE supplies to its customers. Weitbrecht also sells TDDs and signallers to other state distribution programs including Washington, Nevada, Rhode Island, and Connecticut.

Ultratec, through Weitbrecht and by its own activities, has offered to Pacific a TDD known as the Superprint. The Superprint is a printing TDD which meets all the basic requirements of Pacific's program, is fully modular, has an enhanced acoustic reception system, a voice announcer, 300 baud ASCII, a four-row keyboard, and memory. Features may be modified by changing a single integrated circuit chip which, in some models, can be done by the user. In the event of failure, the internal printing mechanism and battery pack may be replaced by the user or program personnel without opening the case. The battery pack can be purchased at a local camera or electronic store.

A TDD voice announcer is an electronic reproduction of a human voice which alerts hearing recipients of a call that a TDD is being used. (The hearing impaired are alerted by flashing lights.) Ultratec developed the voice announcer in 1986. Its primary purpose is to alert 911 and other emergency service providers, such as hospitals, doctors, ambulance services, and fire and police departments that a TDD call is coming in. It also aids the TDD user in completing calls to businesses, government agencies, and other parties whose telephones may be answered in voice or by TDD.

Krown Research, Inc. (Krown) is a manufacturer of TDDs since 1975 when it developed the first portable printing TDD, the Porta Printer. In 1977, it developed the first microprocessor-based portable printing TDD, the Porta Printer 2; and in 1980, the first combined display and printing TDD, the Porta Printer Plus (PPP). Currently, Krown's primary model is a memory printer (the MP-20) which includes such features as off-line message preparation and storage, tone and memory dialing, and upper and lower case character printing to separate incoming and outgoing messages. Krown has supplied over 20,000 printing and combined printing and display TDDs to the California TDD distribution programs since 1979.

In the 1980-1981 period there were at least six manufacturers of TDDs in the field. By about 1986 the field had narrowed to four manufacturers, and today there are essentially only two manufacturers in the United States, Krown and Ultratec, with Ultratec being by far the largest.

Weitbrecht Testimony

Weitbrecht presented the testimony of its vice president, who is also the marketing director of Ultratec, who testified and gave a brief history of the TDD program since 1981. She said that Pacific originally purchased the Krown PPP TDDs because at the time it was the only printing TDD available which met PUC's specifications. Pacific through 1983 purchased in excess of 12,000 Krown TDDs and, because demand was not as great as anticipated, did not need to make new purchases until 1986. By 1986 Ultratec had manufactured its Superprint which offered features not present in the old PPP; that is, four-row keyboard, memory, and modular replacement of the battery and printer. In August 1985 Weitbrecht demonstrated a prototype Superprint to Pacific, and in September Weitbrecht sent four prototype Superprint TDDs to Pacific at Pacific's request. However, unbeknownst to Weitbrecht Pacific was negotiating a new contract with Krown for the retrofitted old PPP.

In addition, she testified, Pacific was also negotiating with Krown to purchase the new MP-20 and in that negotiation Pacific requested that the MP-20 be defeatured so that it would look like the retrofitted model. Pacific informed the DEAF Trust of these new purchases and justified them on the ground that they would preserve the embedded base of older TDDs and there would be no migration to the new units. At this time, she said, Pacific was paying \$367 for the MP-20 while Weitbrecht had quoted the Superprint at \$329 less a \$50 trade-in on old TDDs.

She testified that prior to January 1988 Weitbrecht had never received a Request for Quote (RFQ) or other information request from Pacific regarding TDDs, nor had Ultratec. In her opinion, during the period 1985 through 1988 Ultratec and Krown were the only manufacturers who made TDDs which met the minimum specifications required in the California distribution program.

She pointed out that in Decision 92603 when this Commission established guidelines for distribution of TDDs part of that decision stated that the purpose of the Trust was to "allow telephone utilities to furnish fully adequate devices for deaf communications at the lowest cost to the general public..." She said that Pacific's activities violated that decision and Pacific's own plans and commitments to the deaf community. The violations occurred because Pacific purchased TDDs without requiring competitive bids, because they did not purchase state-of-the-art equipment, and because they paid too much for the TDDs they did purchase.

She described the discussions she had with Pacific's employees involved in the purchase of TDDs and the features that the Superprint had which were not included in the Krown products. These discussions began in late 1985. At that time she indicated to Pacific that the Superprint, among other things, had a four-row keyboard which more closely approximates the standard typewriter compared to the PPP three-row keyboard. The Superprint offered

memory; the PPP did not. She said that Pacific's personnel informed her that if Pacific were to offer a machine with more features than the current offering there would be a migration of old users to the new machines and Pacific might be stuck with the surplus of unwanted units. To alleviate that problem Weitbrecht offered a \$50 trade-in allowance for each Superprint purchased. She testified that Pacific was paying approximately \$195 each time a failed Krown unit went through the repair process and that the rate at which Krown TDDs failed was five to seven times greater than the Superprint failures.

In 1986 Weitbrecht began supplying the Superprint to GTE. She introduced Exhibit 44, a letter dated April 10, 1987 from GTE to the president of Krown. Among other things, the letter said "Krown's repair, maintenance and service history with respect to General's TDD equipment has been less than exemplary. In fact, it is my understanding that General's purchasing and handicapped services personnel (PHS) have met with, and corresponded with, you and/or members of your staff on several occasions over the period of time you have been supplying General with TDDs, regarding General's dissatisfaction and General's requests for improved delivery and repair service by Krown." The letter went on to discuss GTE's purchase of the Superprint and continued "it is my further understanding that the decision to purchase this Superprint 200 has turned out to be a wise decision, based on the performance to date of the Superprint 200 units."

She said that Pacific paid Krown \$367 per unit for the defeatured Krown TDD while Weitbrecht offered to sell the fully featured state-of-the-art Superprint to Pacific for \$329, less a \$50 trade-in, making the effective price \$279 per unit. If Pacific had requested the Superprint to be defeatured without memory and with a three-row keyboard similar to the Krown TDD, Ultratec could have done that and charged an even lower price.



In regard to Krown's retrofit she said that Krown originally offered to do the retrofit for \$56 in September 1985, which was increased to \$75 in July 1986. By 1988 the average cost of a retrofit plus repair was \$176. This retrofitted unit did not have any memory or a voice announcer. During this time and until September 1988 Pacific had supported the retrofit program.

She said that Pacific was not interested in obtaining current technology. She explained that in 1986 Ultratec began marketing the "voice announcer" in its TDD. Until Ultratec developed the voice announcer the standard method of informing a hearing person that he or she was receiving a TDD call, was to hit the space bar on the TDD which would transmit annoying electronic tones. The tones would, in theory, alert the recipient to turn on his or her TDD. With the voice announcer, the recipient hears instead a voice which states "hearing impaired caller, use TDD". This increases the likelihood of a response. Every state program since 1986 has made this feature mandatory in their TDDs. Pacific knew about this feature at least as early as January 1987 when she told them and when GTE announced it was now offering the voice announcer. She said that until early 1989 Pacific had not provided TDDs with a voice announcer. Ultratec added the feature to its Superprint at a cost of \$10 a unit.

She testified that she frequently makes presentations to various state TDD distribution programs about the Ultratec product line and the various features offered. She is involved in the bid process in those state programs and once the bids are awarded the prices become public information. As part of her regular duties for Ultratec she is required to review and keep records of the various bids to determine how Ultratec bid as compared to the competition. She testified that Pacific was not only paying the most money for the least amount of features but that Krown was offering a much more sophisticated product to other state programs for a much lower price in much smaller quantities. She testified

that since spring 1986 the highest price Krown has bid outside of California for a unit is \$322 and the lowest price is \$243. For example, in 1986 the MP-20 was defeatured at Pacific's request so that the memory capability was disabled, the standard four-row keyboard was replaced with a three-row keyboard, and the 300 baud rate was replaced with 110 ASCII capability. By contrast, the MP-20D bid by Krown in Arizona in spring 1986 had a four-row keyboard, 2K memory capability with four send message buffers, ten phone number memory dial, direct connect, auto answer, and remote message retrieval. The price bid was \$322. Pacific paid \$367 for its defeatured model. The witness testified to nine other bids made by Krown in the 1986-1988 time frame in which Krown bid state-of-the-art TDDs to programs in other states, all at prices substantially below the \$367 that Pacific was paying.

In early 1988 Weitbrecht finally received an RFQ from Pacific. Weitbrecht responded by offering their Superprint for \$219, without the voice announcer. In September 1988 it was notified that it received a joint award with Krown. It also received a proposed master contract. Krown's bid to Pacific was \$275 for quantities of 1,000 or more, going up to \$299 for quantities of 1 to 99.

On cross-examination she testified that Weitbrecht currently sells TDDs to GTE at a price of \$339 for the Superprint 200 VA (VA stands for voice announcer) plus \$89 for a five-year warranty. Weitbrecht does not have a master contract with GTE but sells to GTE based upon purchase orders. GTE issues a purchase order to Weitbrecht for TDDs when needed and Weitbrecht supplies them at the \$339 price. In this manner GTE has purchased some 1,400 TDDs. She further testified that Weitbrecht or Ultratec sells TDDs which are equivalent to or have more features than the Superprint VA at prices substantially less than the price Weitbrecht offered to Pacific. For instance, Weitbrecht sells a comparable unit in Tennessee for \$255, in Florida for \$239, in

Oklahoma for \$265, and in Washington for \$265.<sup>1</sup> She said that it was not until early 1989 that Pacific offered the Voice Announcer with the Krown TDD. She concluded her cross-examination by referring to the Krown-Pacific master contract which has in it the clause "that Seller would not charge Buyer any prices that are higher than those charged to any other customer," and commenting that, in her opinion, Krown has not abided by that agreement.

The president of Ultratec, who is also the Chairman of the Board of Weitbrecht, testified extensively regarding the repair rate of the Krown equipment as compared to the repair rate of the Ultratec equipment. He said that data generated by Pacific, which he reviewed, showed that as late as 1988 the new MP-20 units were failing at a rate of about 24% and the older PPP units were failing at a rate of about 29%; this compares to the failure rates for the Superprint which run between 2-1/2% to 3-1/2% a year. He said that Pacific's records show that the repair rate for the PPP in 1985 was 24.5% with an average bill from Krown of \$105. This compared to Ultratec's repair rate on the Superprint of 2% at an average cost of about \$55. He testified that in conversations with Pacific employees he was told that Pacific's average repair cycle cost of repairing a PPP was approximately \$190. He testified that he reviewed the DRA material which found the average cost to repair/retrofit the PPP was \$176 per unit but found that this cost does not include shipping, warehousing, overhead, or handling by program personnel. In his opinion those costs could easily double the retrofit figure. He said that he examined documents produced by Pacific which showed the repair rate for the PPP in 1985 to be

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1 At this point the administrative law judge requested that DRA send a copy of Mrs. Dreyfus' testimony to GTE and the Deaf Trust. DRA agreed to do that and did so.

24.5% but that comparable information presented by Krown shows that the repair rate was actually 34.2%.

The balance of his testimony was substantially in corroboration of the testimony of Weitbrecht's vice president.

Public Witness Testimony

A number of deaf persons and persons who work with the deaf testified, called either by Weitbrecht or CAD. Bill White, for over 40 years an officer of the California Association of the Deaf and other organizations devoted to serving the deaf, testified that he is a long-term consumer and a close follower of TDD distribution and relay development. He is very familiar with the California TDD distribution program. He is deaf. He said that in 1979 California was the first state to create a TDD distribution program. At that time the program was innovative and inspired other states to follow. It brought to deaf Californians access to the telephone system by providing a TDD at no cost, particularly important to a group who earn less than the hearing community. He said that Pacific has managed its portion of the program very badly. He testified that the breakdowns of the TDDs provided by Pacific and the high repair rates Pacific has reported demonstrate a disregard for both the ratepayers and the deaf users. He has experienced repeated breakdowns of the Krown TDD. Most recently, the retrofitted Krown TDD which was distributed to him by Pacific broke within three months of its delivery. From his own personal experience, in his opinion, Pacific gives low priority to cost-effectiveness and to service to the deaf. He has seen no effort by Pacific to improve the service. He testified that Pacific has given him, and other deaf users, a TDD which is not reliable and is manufactured by a company, Krown, which has never been a pacesetter in making TDDs with state-of-the-art technological advances. As an example, TDDs with voice announcers have been available for about three years, but Pacific did not purchase nor distribute TDDs with that feature.

Richard Babb, the director of the Inland Service Center, a not-for-profit agency funded by the State of California, which provides a variety of services to the deaf community in the Riverside-San Bernardino area, testified that he has had considerable experience in using TDDs over the last several years. He is deaf. He participated in drafting the original bill which set up the TDD distribution program in California. He said that in early 1985 his agency was authorized to receive TDDs and he applied to Pacific and the PUC for a number of TDDs and got no response. After a nine months' wait he called Pacific who told him to call PUC, which he did. About a month later he began receiving the requested TDDs.

He testified that when the original Krown TDDs were distributed in 1981, they worked just fine. However, the TDDs began breaking down regularly. By 1986, his clients were having a problem not just with TDDs which failed but also in going through the process Pacific set up to provide replacements. He said that it is very difficult to replace a TDD. When a TDD breaks down it must be shipped in a special box, which the user does not have. The user has to call and arrange for a UPS delivery of a shipping box in which to return the broken TDD. Someone has to be home to take delivery of the box. Then, someone has to pack the TDD, call for a UPS pickup, and then be home to hand the box to the driver. A third stay-at-home is required when UPS delivers the replacement TDD. In order to ease that problem his organization requested Pacific to give it six TDDs to stock so that a deaf person with a broken TDD could come into his agency and receive a good TDD to use while the broken TDD was being replaced. He talked to Pacific's manager in charge of the program and requested the additional TDDs. Pacific never responded to his request. No one at Pacific has ever asked him for any information regarding his experience and his organization's experience with the TDDs. All of the TDDs he has described were Krown TDDs. He said that his organization has had

no trouble at all with the Superprints supplied by GTE, and has been using them since 1986.

Kathy Stacey is employed at NorCal Center on Deafness in Sacramento for the past 8-1/2 years. NorCal is a private, not-for-profit, human service agency which provides interpreters, counseling, advocacy, legal services, and employment counseling for deaf and hard-of-hearing clients. Currently, she is the administrative assistant to the deputy and executive directors. She is not deaf. In early 1985 when her agency was eligible for TDDs, she requested information from the PUC regarding obtaining TDDs. In July 1985 she obtained five Krown TDDs. She testified that there were numerous problems regarding the performance of the TDDs. There is a serious problem with a number of machines that just do not work. Printers jammed and Pacific did not have any in stock. It was a gross inconvenience to have to take the time needed to return the TDDs to Pacific. Pacific did not have replacement units. She testified that she had as many as 11 broken TDDs in her office with Pacific repeatedly telling her that they had none in stock. She said that the first batch of Krown TDDs received in 1986 were wonderful, but more recent replacements just do not maintain at all. They do not receive. The TDDs usually break due to the malfunction of the machine itself. Since 1975 her organization has received 42 Krown TDDs from the program and 30 of them have been returned to Pacific for repair. An associate of hers has had to return four Krown TDDs in use at his home in the last eight months.

Pauline Annarino is the director of Life Signs, a medical interpreter referral service, and the program development specialist for the Greater Los Angeles Counsel on Deafness (GLAD). GLAD provides various social and communications services to deaf and hard-of-hearing people. She is a professional interpreter and teacher of the deaf. She is not deaf. In this proceeding she testified as a representative of CAD. She testified that it is

CAD's position to advance and protect the interests of the deaf and hard-of-hearing beneficiaries of the TDD distribution program. CAD is interested in insuring that the TDDs distributed are of high quality, reliable, and have the features needed by the deaf. CAD seeks to insure the fullest participation in the TDD program and that distribution and repair organizations deliver TDDs in a timely manner with the least possible inconvenience to program beneficiaries. CAD requests that if it is determined that Pacific, as an agent of the Trust, has not purchased and distributed the lowest cost TDDs that meet the needs of the deaf beneficiaries, either intentionally, through neglect, or from mismanagement, then Pacific should be ordered to pay back to the Trust the amount that can be fairly determined to have been wasted.

She said that GLAD first began receiving Krown TDDs in July 1986. GLAD eventually received a total of 83 TDDs. Through March of 1989 Pacific's records indicate that GLAD has returned 38 TDDs for repair or replacement. At any one time, GLAD has had on the average between two and three TDDs in need of repair and not working. She testified that, in her opinion, Pacific does not appear to have consistently acted in the best interests of either the ratepayers or the program beneficiaries. Instead, Pacific appears to have placed a higher priority on business convenience and private business loyalties.

Gerri Healy is deaf and is employed by the Deaf Counseling, Advocacy and Referral Agency in San Leandro. She testified that she first received a Krown TDD from Pacific in 1982 and since then has had five of those TDDs break down. She has had trouble with letters on the display screen appearing garbled, and machines that have stopped receiving. The reliability of the TDDs provided her has not been good. When her TDD breaks down, she takes it to a nearby Pacific distribution center where, she testified, the service has been fine. In 1985 when TDDs were available to organizations such as hers, her organization requested

43 TDDs in February. In June the Commission approved the distribution of 25 TDDs which were received starting in August and over the next two months. She said that most of the TDDs her organization has obtained from Pacific have broken down and have had to be returned. For example, over the first two years, through August 5, 1987, her records indicate that 31 TDDs were returned. She testified that other agencies for the deaf throughout the State have told her that they have experienced long delays before their requests for TDDs were filled.

Pacific did not put on any witnesses to refute the testimony of those persons representing deaf people and organizations for the deaf. Pacific did put on one service-witness, the area manager of Pacific's deaf and disabled services program. His testimony was to the effect that Pacific has provided the best possible service to its deaf, hearing-impaired, and disabled customers consistent with the intent of the legislation, Commission regulations, and customer opinion. He said that Pacific's commitment has gone beyond the mandated provisioning of specialized terminal equipment, to assure that all of Pacific's customers are treated fairly. Pacific recognizes and takes seriously its obligation to operate in a prudent and cost-effective manner and is constantly looking for ways to increase efficiencies while reducing program costs.

Pacific's Involvement with TDDs

Pacific's area manager testified regarding the history of Pacific's TDD purchase decisions. He said that in 1981, after competitive bids, Pacific purchased two TDDs: the PPP, manufactured by Krown, and the VuPhone manufactured by a company called Plantronics. The PPP had a built-in hard copy capability while the VuPhone required an additional piece of equipment to render a hard copy of the message.

After a number of years of use it was found that the PPP was requested by deaf users in at least a 2 to 1 ratio over the



VuPhone. Therefore, Pacific ceased purchasing the VuPhone and had some 7,500 in stock, of which over 3,000 were defective. Pacific sold its functioning VuPhones to individual customers for \$25 each and sold the 3,000 defective VuPhones at \$5 each. He testified that this VuPhone surplus episode had a strong and lasting impact on the product management philosophy of Pacific. As a consequence Pacific decided to offer only one model TDD and, when newer models were available, to condition its purchases so as not be left with thousands of models in storage or with a situation where customers would be trading in their old models for new; what he called a "migration." Pacific wanted to eliminate the possibility of getting into another, expensive, surplus TDD situation.

The witness testified that when he became involved with the TDD program at Pacific in 1984 new or refurbished TDDs went from the equipment vendor to Pacific's warehouse Zamudio Distribution, Inc. (ZDI). ZDI had been hired by Pacific in early 1983 after Pacific concluded that its prior warehouse, Western Electric, was too costly. ZDI charged \$20 per unit received and \$25 per unit shipped. All warehouse charges were paid by Pacific who then billed the DEAF Trust. ZDI would ship TDDs either directly to customers or to Pacific's TDD centers, where customers could pick up the equipment. All defective or disconnected TDDs would ultimately be channeled through ZDI for return to the equipment manufacturer for repair or refurbishment. In 1984, ZDI was charging Pacific a flat monthly fee for handling new, disconnect, and repair TDD transactions. The witness said that he believed ZDI was charging more than the service was worth and had ZDI's contract renegotiated at a savings of approximately \$41,000 a year. In early 1986 Pacific requested a lower price from ZDI for bulk shipments of TDDs. ZDI refused the lower price with one exception, for the defective VuPhones. That one-time agreement for the VuPhone shipment saved the DEAF Trust \$68,800.

In October 1986 Pacific instructed Krown to send new and repaired TDDs directly to Pacific's TDD centers, to bypass the ZDI warehouse. This saved the \$20 receiving and \$25 shipping charges

per TDD that ZDI was billing Pacific. This arrangement was expanded in November 1986 to include direct shipments of defective and disconnected TDDs to Krown from the TDD centers. With an average monthly TDD turnaround of 100 units, the yearly saving of bypassing ZDI was estimated to be \$50,400. Anticipating ZDI's contract expiration, Pacific issued an RFQ, for warehouse service, won by North Supply Company in September 1988. He estimated that by this award within three years there will be a savings of approximately \$635,000 in connection with the TDD program alone.

He said that while using ZDI the cost to ship TDDs was about a minimum of \$100 for each TDD which included a \$45 handling charge by ZDI, a \$55 refurbishing charge by Krown, plus shipping charges. In mid-1984 it became obvious to Pacific that many of the TDDs returned by the customers as defective had become inoperable as a result of improperly keying a function or because of such things as a paper roll being installed improperly or the need for a new battery. Pacific determined that many of the TDDs could be repaired by ZDI or in the Pacific's TDD centers. Accordingly, in November 1984 the ZDI agreement was modified to have ZDI perform certain repairs rather than sending all units to Krown. Pacific estimates that since 1986 \$61,000 was saved by having ZDI do some repair work. He said that renegotiations with Pacific's warehousemen have resulted in a cumulative savings of over one million dollars in TDD warehousing costs alone.

In 1984, after four years into the program, Pacific realized that if the battery in the TDD could be replaced in-house there could be great cost savings. Unfortunately, the PPP was not designed for in-house battery replacement as it required special tools to open the housing. In September 1985 Krown agreed to retrofit the PPP TDDs to allow for in-house replacement of batteries, printers, and keyboards. The retrofit was a major change which allowed for the modularity of the battery housing, keyboard, and printer. By these modifications approximately 40% of

all repairs and maintenance could be done in-house, that is, not having to send the unit back to Krown. Retrofitting was begun in approximately October 1986.

Pacific did not purchase any TDDs during 1984-1985, but early in 1986 it realized that by mid-1986 it would require new TDDs. Because of its costly experience with the surplus VuPhone situation, it decided to proceed cautiously in determining whether to purchase an entirely different TDD model or modify the new Krown TDD, the MP-20, so it would more closely resemble existing TDDs. Pacific's goal at that time was to prevent the possibility of a migration and a repeat of the expensive VuPhone surplus situation.

Pacific engineers evaluated the Krown MP-20 TDD and the Ultratec TDD for at least three months during which time they were concerned with an existing embedded base of approximately 10,000 Krown TDDs. Any surplus resulting from a migration caused by a new unit could result in a significant costs of the DEAF Trust. Pacific requested Krown to modify its MP-20 which had a four-row keyboard and a memory function to change it to a three-row keyboard and disable the memory function, so that the modified MP-20 would be more comparable to the retrofitted PPP. Krown agreed.

Pacific did not request a modified Superprint because such a unit would look totally different from the Krown PPPs that were currently in service and might cause a migration. In May 1986 Pacific decided to purchase the modified MP-20 because it would not cause a migration of the current PPPs and because the Superprint was brand new with no reliable repair track record. Pacific began purchasing the modified MP-20 in mid-1986. It did not conduct a formal competitive bid at this time because it believed it had sufficient information from the two major reliable TDD suppliers upon which to make a cost comparison; their TDD procurement needs were minimal; and there was no Commission order or rule that required a formal RFQ for every TDD purchase.

During 1987 and 1988 the TDD program underwent changes. It appeared likely that the Legislature would approve additional funding for programs, which would mean Pacific would reach more customers. Krown's agreement was due to expire September 1988 and new products were available. Customers were beginning to request new features. In May 1988 Pacific issued an RFQ to seven vendors, of which four responded. Those were Krown, Ultratec, Weitbrecht, and Keiko Corporation. Keiko Corporation's bid was much too expensive. After reviewing the bids of the other three and evaluating the products Pacific decided to split the award between Krown and Weitbrecht. Pacific felt a split award would serve at least three important purposes: (1) it would offer the customer a choice of equipment which seemed to be a desire that was being voiced more and more often, (2) it would give Pacific the opportunity to compare the reliability of the two TDDs by consistently tracking return and repair rates using the same criteria, and (3) it would provide Pacific with an alternate supplier in the event Pacific became dissatisfied with the performance of either TDD model.

Contracts were sent to Krown and Weitbrecht. Krown signed its contract without change, but Weitbrecht and Pacific have been negotiating continually since then to arrive at a satisfactory agreement. Because there is no contract with Weitbrecht, only Krown TDDs were being offered as of the date of the hearing. Pacific would, however, prefer to offer both models.

DEAF Trust

Pacific's representative on the DEAF Trust testified that each month Pacific and the other participating telephone companies prepare and submit to a committee of the DEAF Trust a statement summarizing expenses incurred in providing equipment and services under the programs for the deaf and disabled funded by the Trust. The statements are reviewed by the committee staff for accuracy. The committee only approves summary bills submitted by the

participating telephone companies. The telephone company manager responsible for authorizing the expenditure is required to maintain records to substantiate the nature of the charge as being applicable to the Trust. The validity of the charges submitted are verified annually by independent auditors hired by the Trust. After the committee approves the statements they are sent to the bank which pays them to the telephone companies. He said that the committee's review of the monthly expense reports is primarily concerned with the accuracy of the reports and the trend and total program costs as it affects the Trust's cash flow. The committee does not exercise prudence review of specific expenses incurred by the utilities. There is an annual audit of the Trust's operation by independent certified public accountants. The audit procedures include verification of expenses submitted by the telephone companies, but not a prudence review.

He testified that he was representing Pacific at the hearing and not the Trust. He said that the committee is primarily concerned with cash flow and looks at trends and expenses. It wants to make sure that there is sufficient money coming in to pay bills as they are incurred. He said that if the committee were to get an extraordinarily high repair bill in any month the function of the committee is not to question the bill itself but to question where the money is going to come from to pay the bill. He said it was for the PUC to determine whether or not the expenses incurred were prudent.

Krown Testimony

The founder and president of Krown testified concerning Krown's products, their maintenance history and evolution, and Krown's relationship with Pacific and GTE. He testified that his company has provided a full range of products and services to the hearing impaired since 1975; that the first combined display and printing TDD, the Porta Printer Plus (PPP), was introduced in 1980. Currently he produces the MP-20, the memory printer, in a variety

of configurations. In his opinion the MP-20 is state of the art providing multiple memory buffers for off-line message preparation and storage, tone and memory dialing, and upper and lower case character printing to separate incoming and outgoing messages. His company has supplied over 20,000 printing and combined printing and display TDDs to the California TDD distribution programs since 1979. His PPP model which combined a display and an internal printer was the first of its kind and has been imitated by all other manufacturers.

He testified extensively regarding Krown's TDD repair costs and challenged just about every estimate that was put in by either Weitbrecht or DRA. He said that he tabulated every repair cost for every month from October 1982 to June 1988, based on every single invoice submitted to Pacific for repair of a Krown TDD. His statistics show a six-year average maintenance cost of \$19.35 per unit, per year, or less than 20% of the cost claimed by Weitbrecht. He said that his tabulations shows that the average repair cost to Pacific in 1989 for a Krown TDD was \$108. And for the period 1982 through 1986 Pacific's annual average cost to repair Krown TDDs was only \$88.27. This compares to the \$194 costs submitted by Weitbrecht. The difference between Krown's charges of \$18 and Pacific's cost of \$108 was the shipping and handling costs of the unit.

He said that the single most disturbing factor of Weitbrecht's presentation was its assertion that the average repair rate for Krown TDDs was 51%. He again calculated an average repair rate based upon every single TDD returned to Krown by Pacific and GTE and determined that the total return rate was about 21% but that the actual returns in which repairs were made was on an average about 15%; and half of those returns were returned for battery replacement only. The part that fails most often in Krown's TDDs is the battery. He said that the new Krown modular units permit field repair for such things as changing the battery

and the printer, thus reducing the failure return rate to the factory to about 3.3%.

He testified that although Weitbrecht claimed that the repair rate for the Superprint was only 2-1/2% in actuality the repair rate, according to his statistics, was at least 14% and perhaps as high as 19%.

In regard to prices charged other state programs he said that Ultratec and Weitbrecht submitted bids to other state programs for the Superprint which were much lower than those submitted to Pacific. For instance, in Florida a bid for a Superprint was submitted for \$239 and in the state of Washington Ultratec bid \$249 for the Superprint, whereas the price quoted to Pacific was \$329. As to his product, he testified that the range of prices to other states was caused by different features on the particular TDD which was being offered. Pacific paid a higher price because it got a better model.

On cross-examination he responded that the original PPP TDD was designed so that the case had to be opened to change the battery, but should the case be opened by a nonauthorized person the warranty would be voided. The consequence was, he admitted, that persons not trained in repairing the TDD could not change the battery. In his new models the battery is located so that the user can change it. The batteries in question can be bought by the user and replaced just as you would a flashlight battery. On the retrofitted PPP models the modularity was not installed until 1986. By retrofitting the PPP, he testified, it gave the deaf community the advantage of having a machine that was easily maintained.

As to the retrofit he said that his original price of \$56 per unit was proposed in December 1985 and raised to \$75 in July 1986. He also made the same offer to GTE who retrofitted a small number of PPPs but then terminated the retrofit program. Eventually the average cost of the retrofit and repair program was \$176 by mid-1988. At that time a new MP-20 would have been sold

for \$219. He said that all of the statistics regarding failure rates and cost of repair were suspect because the parties using the statistics used different definitions of "failure rate." For instance, some parties asserted any return to the manufacturer for any reason was a failure. Another party would say that only a return caused by the failure of the equipment was a failure. Failures caused by misuse of the equipment or when nothing wrong was found would not be considered failures under this definition.

The DRA Audit

DRA presented one witness, a regulatory analyst in the Telecommunications Rate Design Branch, who testified regarding DRA's recommendations. After reviewing the exhibits and the material received by DRA pursuant to data requests, she said that it is DRA's recommendation that the Commission order Pacific to return \$827,740 to the Trust Fund. This figure includes 60% of the estimated costs of the TDD retrofit and the difference between the cost of the Krown MP-20 and the Weitbrecht units. The witness stated that DRA's recommendation was based on certain assumptions that were made because there was insufficient time to do a full audit. The witness recommended that the Commission order an audit of Pacific's records for the period January 1985 to the present to determine whether the costs incurred in providing TDDs were prudent.

The witness testified that in 1985 Pacific had enough data on hand to make an informed and cost-effective product decision regarding whether to purchase the Ultratec Superprint or the Krown MP-20. Pacific chose the Krown MP-20.

In the witness's opinion, in the light of the high repair/return rates experienced by Pacific with the Krown PPPs, she believes that Pacific should have been very cautious when it evaluated a new product from the same vendor. She said that Pacific's records show that for the first eight months of 1988 the MP-20 repair rate was 1.75% per month or an estimated 21% repair



rate for the entire year. She projected five-year (1986-1990) estimated repair rates for the MP-20:

<u>1986-1990</u>	
1986	-
1987	18%
1988 (est)	21%
1989 (est)	24%
1990 (est)	27%

From Pacific's records and from the testimony of a knowledgeable Pacific employee, DRA derived the following PPP repair/return rates for the period 1985-1989:

<u>1985-1989</u>	
1985	17.9%
1986	22.5%
1987	26.7%
1988	28.8%
1989 (est)	32.4%
Average 25.7%	

To estimate the 1989 repair/return rate, DRA assumed that as the useful life of the equipment decreases the corresponding repair/return rate increases. DRA plotted the increases in repair/return rates from 1985 through 1988, average them, and then calculated a 2.7% monthly or 32.4% yearly rate. DRA contends that Pacific should have projected future repair/return rates when Pacific made its TDD cost comparison studies in 1985.

The witness calculated for the five-year period 1985-1989 an average repair rate for the PPP of 25.7%; an average cost per repair of \$100.68; and an average yearly cost of \$25.98.

Comparison of keeping PPP or replacing with Superprint:

PPP average repair cost	\$100.68
Cost to replace with Superprint	\$368
PPP average repair cost for five years (\$25.98 * 5)	+ <u>129.90</u>
Total	\$230.58

Cost to replace: \$368 - \$230.58 = \$137.42

No. Units in service 1985	8,898	
	\$137.42	Cost to replace
Total	\$1,222,763.16	

	3,115	VuPhone
X	368.00	Cost to replace
	\$1,146.320	Total Cost
+	\$1,222,763	Cost to replace
	\$2,369,083	Total

Pacific's estimated cost to replace:

\$2,636,557

DRA's cost using five-year projections:

\$2,369,083

Difference: \$267,474

Based on the preceding calculations, DRA estimates it would cost approximately \$267,000 less than what Pacific claims it would cost to replace the PPP with the Superprint.

DRA then factored in the \$90 cost of warehousing the product in its cost comparison. When the warehouse cost is included DRA estimates program costs increase by approximately \$605,000 because Pacific purchased the Krown MP-20 instead of the Ultratec Superprint.

In regard to the retrofit program DRA admits that Pacific obtained the permission of the Commission and the DEAF Trust to do

the retrofit. (The retrofit program was begun in March 1986 and continued until March 1988.) Nevertheless, DRA points out that at the time of receiving permission Pacific informed the Commission that the retrofit process would cost approximately \$56 per unit. In fact the retrofit process increased to where the average cost of retrofit and repair was \$176 per unit. This information apparently was not transmitted to either the Commission or the DEAF Trust. In late 1988 DRA issued a position paper in which it advised the DEAF Trust against Pacific continuing the retrofit. The Trust voted not to continue the program.

A summary of her recommended return of \$827,740 to the DEAF Trust is:

Estimated 5-year (1986-1990) purchase price, repair, and warehousing costs.

MP-20	\$5,331,850
Superprint	<u>5,032,400</u>
MP-20 exceeds Superprint	\$ 299,450

Estimated retrofit/repair costs of Krown PPP for period 3/86-3/88

4,800 units @ \$176	\$844,800
1 year repair costs	25,603
1 year warehouse costs	<u>10,080</u>
	\$880,483

To reflect 40% savings in repair costs because of retrofit	<u>.60</u>
	\$528,290

	\$299,450
	<u>528,290</u>
Total to be refunded by Pacific	\$827,740

The witness emphasized that her recommendation was based on estimates because there had not been enough time to get accurate figures on the five years in question from Pacific. The purpose of DRA's recommending an audit is to get those accurate numbers.

The Contract Negotiations

After Pacific chose the bids of Weitbrecht and Krown, it sent out its standard form contract to both. Krown signed the

agreement without modification, but Weitbrecht suggested numerous modifications. From that time until the close of this hearing, Pacific and Weitbrecht had not come to an agreement on the terms of the contract and Pacific had bought no Ultratec TDDs. Weitbrecht's complaint alleged that Pacific failed to negotiate in good faith and presented its chief negotiator as its witness on this issue. Pacific presented its chief negotiator as its witness. At the close of the evidence, Weitbrecht withdrew its allegation of failure to negotiate in good faith and the presiding administrative law judge said in view of that he would make no findings on the issue. He also said that had he made findings his ultimate conclusion would be that Pacific had negotiated in good faith and if anyone had not negotiated in good faith, it was Weitbrecht. We also will make no findings on this issue and just assume that both parties have negotiated in good faith and could not reach a mutually satisfactory contract. However, the fact that negotiations have been ongoing for well over a year and a half has a significant implication for our findings regarding Pacific's obligation to purchase the most advanced technological equipment for the DEAF Trust. Obviously, if the person making the superior product cannot, or will not, come to an agreement as to terms of sale, then we cannot fault the prospective purchaser, who has acted reasonably, for not purchasing.

Discussion

Weitbrecht seeks two forms of relief: (1) an order that Pacific purchase TDDs by competitive bid and award its entire contract to the lowest bidder, and (2) that an audit be conducted of Pacific's DEAF Trust transactions to determine if any were imprudent and order reparations accordingly.

In our opinion a case has not been made for granting Weitbrecht relief regarding an award to the lowest bidder but a case has been made for an audit of Pacific's TDD transactions as it affects the DEAF Trust. The evidence shows that Pacific is the

largest purchaser of TDD equipment in the United States and probably in the world. There are only two manufacturers in business today who have the facilities to supply large quantities of TDDs within a reasonable time. Those two are Ultratec and Krown. Pacific acted reasonably when it granted its 1988 TDD award to both manufacturers. Pacific recognized that its customers would benefit by having a choice of equipment and that Pacific itself would benefit by having two vendors. In the long-run the public is best served by having competition. Although there is no evidence that Krown would be forced out of business had it not received any orders from Pacific, Pacific was reasonable in its assumption that it is good business practice to assure competition in the TDD industry. The reasonableness of Pacific's decision was borne out by the events that occurred after the award, when Weitbrecht could not, or would not, negotiate a contract for the sale of TDDs to Pacific. It has been over two years since the award and no contract has been agreed upon as yet. It would be intolerable for Pacific to be put in the position that it could not provide TDDs because the seller was intransigent in its bargaining position. We note that when Pacific went to bid on the TDDs it attached a copy of its master contract to the RFQ. Ultratec and Weitbrecht knew the terms of that contract when they placed the bid and did not object or qualify their bid.

We are persuaded, however, that Pacific has been imprudent in its TDD program in a number of instances and we will order an audit, to be paid for by Pacific, to determine the magnitude of that imprudence and the amount of refund that should be made to the DEAF Trust to mitigate the cost of the imprudence.

The evidence regarding the quality of the Krown TDDs from 1980 to 1988 was vigorously contested, but often came down to a matter of defining terms: Was a repair needed because of a defect in the equipment or because of abuse or failure to operate properly on the part of the user? Whether the repair return rate was from

30% to 51% as Weitbrecht asserts or was 15% to 20% as Krown and Pacific assert need not be decided at this time. We prefer to have the auditors look at that and report back to us. But, what is very clear, and was uncontroverted, is that the public--the deaf community--felt that the Krown TDD was an inferior product when compared to the Ultratec TDD. It would be difficult to find more persuasive evidence than the public witness testimony that the deaf community was dissatisfied with Krown TDD, that it made its dissatisfaction known to Pacific, and that for at least eight years Pacific did nothing about it. Pacific knew what its customers wanted, it knew what GTE's experience had been with the Krown TDD, it had examined the Ultratec TDD; yet it concluded that the Krown TDD, with less features than the Ultratec, was best for its customers. In 1987-88 it would rather spend \$176 to retrofit and repair a 1980 model Krown TDD than buy a new Krown TDD for \$219.<sup>2</sup> It would rather defeature a new model TDD to make it resemble an old model and give its customers obsolete equipment than invest in state of the art. This indifference is imprudence. Pacific had been on notice that the Commission expected telephone companies to provide TDDs incorporating new features. In our TDD Order Instituting Investigation (OII) (D.92603, dated January 21, 1981, in OII 70) Pacific took a leading role. In D.92603 we said:

"Where there is available to telephone companies equipment features or combinations of features beyond the minimum features above, and where those features are available at substantially no greater cost to the utility (within 5%) of the cost for a minimum package, equipment incorporating such features may be furnished as a basic device at no additional charge to the certified deaf." (Appendix B, p. 6.)

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<sup>2</sup> During the 1986-1988 period when the retrofit program was in effect, the price of new state-of-the-art TDDs was as low as \$219 to \$279.

Equally imprudent was its handling of its warehouse contract and the repair of defective TDDs. In 1981 when it first purchased the PPP TDD from Krown with the battery encased in a piece of equipment that could not be opened by the customer, Pacific had no choice and under the circumstances made the right choice in acquiring the Krown product. But Pacific knew where the battery was, knew batteries by their very nature fail over time, and knew that the product would have to be repaired. Pacific adopted a procedure whereby it cost the DEAF Trust anywhere from \$100 to \$176 to replace a rechargeable nickel-cadmium battery pack. When one looks at the array of equipment that Pacific affiliates offer to the public that have batteries which can be changed by the customer at home; when one knows that Pacific maintains the most sophisticated electronic equipment in the world; one is hardpressed to understand how Pacific could have tolerated a procedure for five years where the cost of changing a battery is over \$100.

Pacific certainly cannot plead ignorance.<sup>3</sup> For example, PacTel, one of its affiliates, sells a Feature Phone with Speaker Model 5200 which comes with a user's manual describing installation by the customer. Among other things it instructs the customer to insert four AA type batteries, observing the correct polarity, in the base unit. A Pacific affiliate does that with its own battery-operated equipment yet on an item that is paid for by the public through the DEAF Trust Pacific set up a system whereby to change batteries required weeks of transportation time, thereby depriving the customer of the use of the unit, while running up a

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3 In D.92603 it was assumed that batteries would fail and be replaced by the user. We said "Provision of additional batteries and paper shall be the responsibility of the user." (D.92603, Appendix B, p. 6.)

charge that could be as high as \$176.<sup>4</sup> At the outset of the program Pacific at the very least should have instituted a procedure at its own TDD centers whereby its personnel changed the battery, thereby saving the cost of shipping to the warehouse, shipping to the manufacturer, having the manufacturer replace the battery (at a cost of \$20 to \$50), return the product to the warehouse, and return the product to the customer. Pacific's failure to do so was indifference on a grand scale.

In October 1986 Pacific instructed Krown to bypass ZDI and send new and repaired TDDs directly to Pacific's TDD centers, thus saving the \$20 receiving and \$25 shipping charges. This was expanded in November 1986 to include shipments from Pacific's TDD centers to Krown. The savings are estimated at over \$50,000 a year. There is no excuse for not doing this bypass surgery in 1983.

A third concern of ours is that Pacific was paying more for the MP-20 TDD, with less features, than other states were paying for the same or comparable model. Pacific is certainly buying more TDDs than any other state and from the evidence presented it is likely that it is buying more TDDs than all other state programs combined. Yet it is paying more for its TDD and getting less features on its TDD than other state programs. The price that other states pay is a matter of public record. Pacific did not seek to inquire about the price paid by other states for comparable equipment.

This case was filed in January of 1988 and we believe that in fairness the audit should not include refunds for transactions prior to 1985. The auditors may examine any

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<sup>4</sup> "The utility enterprise must be viewed as a whole without regard to separate corporate entities..." (City of Los Angeles v PUC (1972) 7 Cal. 3d 331, 344.)



procedures and transactions regarding all phases of Pacific's TDD program from its inception, and are limited only in regard to the cutoff date of January 1, 1985 in the recommendation for refunds to the DEAF Trust. Admittedly this will eliminate some of the more flagrant charges imposed by the original warehouseman and the costs that were incurred because Pacific did not have in-house capability to repair the TDDs, but there are sufficient imprudent transactions since 1985 to make the audit worthwhile. Because we are finding Pacific was imprudent we are charging the cost of the audit to Pacific.

Comments

This decision was issued as a proposed decision. Comments were submitted by Pacific, CAD, Krown, and DRA. The DRA "strongly supports" the proposed decision, but recommends that the decision be clarified to insure that the cost of the audit and any reparations for imprudence be borne solely by Pacific shareholders. We will make that modification. The CAD comments support the proposed decision and observe that errors of fact in the proposed decision could be easily corrected and should not affect the result.

Krown disagreed with the decision's characterization of Krown's equipment, but that is merely rearguing its position and will be disregarded. Krown also pointed out some minor errors of fact in the decision which have been corrected.

Pacific takes the strongest exception to the proposed decision. It pointed out some minor errors of fact, which have been corrected. Pacific attacks the decision on the ground that it is legal error to propose findings and conclusions of law that Pacific was imprudent without reference to any legal standard. This contention requires discussion. Pacific argues that "before the Commission can reach a determination regarding the prudence of Pacific's behavior with respect to the TDD program, it must define a standard of care." (Re DEAF Trust I.87-11-031, D.89-05-060 at

p. 29.) The Commission, in D.89-05-060, directed the Commission Advisory and Compliance Branch to schedule a workshop involving all interested parties and prepare a workshop report. The Commission said that parties should give particular attention to a definition of the standard of care to which participating utilities should be held, a periodic and independent means to insure that the standard is being met, and specific definitions of the roles and obligations of utility, subscriber, and Commission staff representatives throughout the administrative structure. (At p. 30.) Pacific asserts that the Commission has not yet found a standard of care. Pacific recommends that the standard of care should be that of a trustee as set forth in Probate Code Section 16040(a) which states that the trustee's actions should be evaluated "under circumstances then prevailing that a prudent person acting in like capacity and familiar with such matters would use in the conduct of an enterprise of like character...." Pacific believes that if the standard of the Probate Code were used, it would not be found to be imprudent.

If Pacific is arguing that we applied no standard here, or that the standard of the Probate Code is lower than the standard that we did apply, Pacific is in error. This Commission has been making findings regarding unreasonableness and imprudence since its inception.

Utilities regulated by this Commission in general, and Pacific, in particular, are no strangers to disallowances for imprudence. And the cases which found imprudence (or its twin, unreasonableness) did not require elaborate definitions, or any definitions, of the terms or their standards. (See City of Los Angeles v. PUC and Pac. Tel. (1972) 7 Cal. 3d 331, 350; City and County of San Francisco v. PUC and Pac. Tel. (1971) 6 Cal. 3d 119, 126, 127); Pac. Tel. v. PUC (1965) 62 Cal. 2d 634, 646, 673-74; Re Pac. Tel. (1968) 69 CPUC 53, 60-61; Re PG&E (1979) 3 CPUC 2d 1, 25 ("It is well established that this Commission has authority to

declare, ex post facto, that a utility contract is imprudent..."); Re SDG&E (1980) 3 CPUC 2d 503, 504; Re PG&E (1980) 3 CPUC 2d 552, 563 ("the basic prudence test is economic....").)

In our review of the reasonableness of any utility action, the Commission has applied certain general principles. The starting point being the facts that are known or should have been known by the utility management at the time of the decision in question. This standard is used to avoid the application of hindsight in reviewing the reasonableness of utility conduct. (Re SoCal Edison (1987) 24 CPUC 2d 476, 486.)

In a recent decision considering the reasonableness of a proposed amendment to a contract, we noted our obligation to protect ratepayer interests in determining its reasonableness. Specifically, we concluded:

"Utilities are held to a standard of reasonableness based upon the facts that are known or should be known at the time. While this reasonableness standard can be clarified through the adoption of guidelines, the utilities should be aware that guidelines are only advisory in nature and do not relieve the utility of its burden to show that its actions were reasonable in light of circumstances existent at the time. Whatever guidelines are in place, the utility always will be required to demonstrate that its actions are reasonable through clear and convincing evidence."  
(D.88-03-036, at p. 5.)

In City of Los Angeles v. PUC (1972) 7 Cal. 3d 331, a Pacific rate case was under review. One of the issues was that Pacific objected to the Commission's ordering Pacific to install \$750 million of plant additions for each of the years 1971, 1972, and 1973. Pacific argued that the order was outside the Commission's authority. The court, in holding that Pacific's objection was unfounded said, among other things, "Moreover, Pacific concedes that the Commission has the power to review the specific expenditures made from this gross amount and to disallow

as an expense any which it considered unjustified or wasteful." (7 Cal. 3d at 350.) That is exactly what we are doing in this case, determining what was unjustified or wasteful, based on the facts that were known, or should have been known, at the time the decisions in question were made.

Findings of Fact

1. In 1981 Pacific began purchasing the Krown PPP TDD. February 1, 1983 Pacific hired ZDI as its warehouse. All repairs to the TDD were routed through the warehouse to the vendor then back to the warehouse to the user. The warehouse charged \$20 per unit received and \$25 per unit shipped.

2. The PPP TDD in 1981, and until it was retrofitted in 1986, had an enclosed battery section and printing section. When the battery went dead or the printer jammed the entire unit had to be returned to the vendor. If the user opened the unit's case the manufacturer's warranty would be voided. Both the vendor and Pacific knew, or should have known, the battery would fail during normal use and the printer would jam during normal use. Battery failures caused at least 7% of the returns and perhaps as much as 12%.

3. The cost to replace a battery on the PPP TDD, prior to November 1984, was at least \$110. This cost included two in-out cycles at ZDI and a \$20 Krown repair cost. On occasion Krown charged as high as \$50 for this battery replacement. This cost did not include Pacific's costs, if any, nor the cost to the user. This \$110 cost was imprudent on the part of Pacific. Pacific knew, or should have known, by mid-1983 at the latest that the cost to repair the Krown TDD was excessive and could have been substantially reduced by having the work done at Pacific's TDD centers or by ZDI.

4. Pacific's 1985 contract with Krown provided that Krown would not charge Pacific prices higher than those Krown charged any other customer. In 1986 and thereafter Pacific paid Krown \$367 per

unit for the MP-20, a more advanced, state-of-the-art TDD. There was more than one model of the MP-20, at different price levels. Krown has offered, and has sold, MP-20 TDDs with more modern features than the TDDs sold to Pacific, to other state programs for prices substantially less than Pacific paid Krown. Pacific was imprudent in (1) not informing itself of prices charged by Krown to other state programs and (2) failing to hold Krown to its contract by obtaining a rebate of overcharges.

5. In 1986 Pacific purchased the MP-20 which was modified on Pacific's instructions to disable the memory function and change the four-row keyboard to three rows. Pacific's decision to purchase the modified MP-20 was imprudent because (1) it paid a premium for less features and (2) it did not provide its customers with the best equipment available at a reasonable price.

6. From almost the inception of the Pacific TDD program Pacific knew or should have known that its primary customers for TDDs were dissatisfied with the operation of the program, the delays in obtaining TDDs, the length of time to repair defective TDDs, and the quality of the product. When the Ultratec TDD was introduced the deaf community became dissatisfied with the Krown PPP and made its concerns known to Pacific. Pacific knew that GTE had problems with repairing the Krown TDD and had had favorable results with the Ultratec TDD. Pacific ignored the opinions of its customers and the experience of GTE.

7. In 1986 Pacific began its program to retrofit the PPP to include modular units for the battery, printer, and keyboard at a cost of \$56, later raised to \$75. At the start of the program this was a prudent decision. The price of the retrofit plus repair soon averaged \$176 at which time a new state-of-the-art TDD could be purchased for \$219 to \$279. It was imprudent for Pacific to pay \$176 to retrofit and repair a TDD which was built to 1980 technology when state-of-the-art TDDs could be purchased for \$219 to \$279.

8. Pacific in 1988 requested bids from vendors to provide new TDDs. The request for bids included a form master contract in which Pacific set forth the conditions of its purchase. Both Krown and Ultratec submitted bids, with Ultratec's bid being the lowest. Pacific chose both Krown and Ultratec as its suppliers and offered contracts to both. Krown signed its contract but Ultratec is still negotiating. Pacific was reasonable in awarding contracts to both vendors: the multiple award encouraged competition, provided a means to compare products, and gave Pacific an immediate alternate supplier should one or the other not perform adequately.

9. Because of Pacific's imprudence in managing its TDD program we shall instruct DRA to audit the program to determine which of Pacific's charges to the DEAF Trust were imprudent and in what amount. The auditors may investigate all phases of the program from its inception but shall recommend refunds only for transactions occurring after January 1, 1985. The auditors are not limited by the findings of this decision, but may propose additional instances of imprudence. The cost of the audit shall be paid for by Pacific. DRA may hire an independent contractor to assist.

Conclusions of Law

1. Pacific was imprudent in its management of its TDD program.
2. Pacific was prudent in awarding TDD procurement bids to two vendors.
3. DRA should conduct an audit of Pacific's TDD program and should recommend refunds to the DEAF Trust, as set forth in the following order.

O R D E R

IT IS ORDERED that:

1. The Division of Ratepayer Advocates (DRA) shall conduct an audit of Pacific Bell's entire TDD program, as more specifically described in this decision. The audit shall begin within 60 days after the effective date of this order and shall be completed within one year after the effective date of this order.

2. Upon completion of the audit DRA shall, by motion in this complaint case, recommend to the Commission the amount Pacific Bell imprudently spent in the management of its TDD program since January 1, 1985 which should be refunded to the DEAF Trust.

3. DRA may hire an independent contractor to assist in the audit.

4. Pacific Bell shall pay all costs of the audit and reparations, which costs shall be borne solely by its shareholders.

5. All other relief requested by complainant is denied.  
This order is effective today.

Dated JUN 06 1990, at San Francisco, California.

G. MITCHELL WILK  
President  
FREDERICK R. DUOA  
STANLEY W. HULETT  
JOHN B. OHANIAN  
PATRICIA M. ECKERT  
Commissioners

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