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Decision 91-06-052 June 19, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Mr. Michael M. Murray, no telen) 38 on mil Mr. William Behrman, and)
Mr. Gerald LeTendre,)

Complainants,

(Filed May 11, 1990) Communication Services, Stanford University, and in the designed polaritors we care-accorded to accompany Pacific Bell, (U1001C)

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Background

This is a petition for modification of our order granting rehearing of Decision (D.) 90-06-065. In D.90-06-065 we resolved a complaint against Pacific Bell filed May 11, 1990 by three Stanford University students (referred to herein as "Students"). The Students objected to the University's plan to provide students living in University-owned campus housing with telephone service. Stanford envisioned the purchase of on-campus telephone cable and wiring owned by Pacific Bell. Stanford intended to connect all telephones in its academic buildings and student housing complexes

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to its own PBX switch. 1 Student access to Pacific Bell's local exchange and to interexchange service would be controlled by Stanford's PBX. We dismissed the Students' complaint in D.90-06-065 on June 20, 1990. The Students applied for rehearing on July 20, 1989, and we granted limited rehearing in D.90-11-030 on November 9, 1990.

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In our decision granting rehearing, we invited legal argument on six of the 15 issues raised by the Students. We also modified D.90-06-065 by deleting portions of the text and Conclusion of Law 4 (relating to our Guidelines for Shared Tenant Services (STS)) and adding an ordering paragraph which directed Pacific Bell to file an application for authority to transfer the subject telephone distribution cable and wiring as provided by Public Utilities (PU) Code § 851.

Pacific Bell's Petition to Modify D.90-11-030

Pacific Bell did not file an application for authority under § 851. Rather, on January 9, 1990, Pacific Bell filed a petition for modification of D.90-11-030 seeking to be relieved of that requirement because it believes the necessity of the § 851 application depends on the outcome of the rehearing. According to Pacific Bell, if the Commission ultimately finds that Stanford is an STS provider, then Pacific Bell will continue to have a duty to serve any Stanford student resident who exercises its option to select utility service under (STS) Guideline 8.2 Pacific Bell

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¹ In addition to student telephone service, Stanford planned to provide computer access and cable television over the same network. The telephone service portion of the program was initiated in September 1990.

² STS Guideline 8 provides that an STS provider "shall place no restrictions on tenants which desire service directly from the telephone utility in addition to or in lieu of service furnished by the [STS] providers." (D.87-01-063.)

believes that in the absence of such a duty, the property it solds to Stanford was surplus property and was properly conveyed to Stanford under its Tariff Rule 16. Pacific Bell maintains that until the Commission concludes its rehearing on the question of whether the STS Guidelines apply, there is no factual or legal support for the order.

Stanford essentially supports the petition for modification. Stanford, however, argues that D.90-11-030 left intact and did not stay the Commission's holding in D.90-06-065 that Stanford is not a public utility. Stanford claims that it is a PBX customer of Pacific Bell and that it purchased telephone cable and wire on its side of the PBX switch in accordance with Tariff Rule 16. As such, the cable was surplus property and not subject to PU Code § 851. Stanford also believes that it purchased the property from Pacific Bell in the good faith belief that it was surplus and is therefore the beneficiary of a conclusive presumption that the cable was surplus. Stanford further requests that any modification to D.90-11-030 include clarification as to the basis for inviting legal argument.

The Students oppose the petition for modification. They believe that the petition strays beyond the scope of Rule 43 in that it would make a major change to D.90-11-030, requiring an application rather than a petition for modification. The Students also argue that Pacific Bell has always known and has admitted that § 851 is applicable to the sale of the distribution cable.

³ Tariff Rule 16 provides for the sale of telephone cable and of wiring made surplus by the installation of a customer-owned PBX. Associated and the sale of the s

⁴ Section 851 provides in pertinent part that "Nothing in this section shall prevent the sale, lease, encumbrance, or other disposition by any public utility of property which is not necessary or useful in the performance of [a utility's] duties to the public..."

Discussion of the many of a grade a grade of a special order of special order

It now appears to us that our order directing Pacific
Bell to file a § 851 application was in error because the record in
this proceeding is not sufficiently clear to warrant it. Section
851 exempts the sale of utility property which is not useful or
necessary in providing utility service. Stanford and Pacific Bell
(at least initially) have argued that the sale was arranged under
Tariff Rule 16 which governs the transfer of surplus property. The
Students did not allege a violation of § 851 either in the hearing
or in their application for rehearing. Even now, in their
response to the petition for modification, the Students' only argue
that Pacific Bell knew there was § 851 issue; they offer no
argument that the property sold was not surplus.

We conclude that it was premature to order the filing of the 851 application without first establishing whether the property was surplus. D.90-06-065 did not discuss and did not make findings or conclusions of law as to the applicability of § 851. The parties, therefore, should have an opportunity to present evidence and argument on this point before we impose the requirement. We will modify D.90-11-030 to delete Ordering Paragraph 3 and instead require the parties to address the issue on rehearing. Pending our decision on rehearing, the sale is not voided under PU Code § 851.

We turn now to Stanford's request for clarification of the scope of the issues on rehearing. Stanford believes that

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⁵ The statement in D.90-11-030 that the Students alleged that Pacific Bell violated Section 851 is incorrect. The only reference to Section 851 in the record is a statement by Pacific Bell's counsel in closing argument that there was a Section 851 problem. Counsel explained that Pacific Bell inititally believed the property in question was surplus, but changed its mind when one of the Students contacted Pacific Telesis' chairman requesting that Pacific Bell continue to serve the student housing complexes. Mere oral argument of counsel is not evidence on which we could determine whether or not the property was surplus.

D.90-11-030 "leaves intact and unchanged all discussions, findings, and conclusions of law ... ruling that the commission had no jurisdiction over Stanford. See, e.g., Decision 90-06-065, Conclusions of Law 5 and 6, Findings of Fact 1-5, Discussion at 18-21." (Stanford, Response to Petition to Modify Decision 90-11-030, p. 3, see also pp. 5 and 6). This interpretation is at odds with our statement on pages 2 and 3 of D.90-11-030 and Ordering Paragraph 1. We stated that "On rehearing we invite the parties to present legal argument on how Stanford's proposal may be affected, if at all, by Guideline 8 of Decision 87-01-063." We went on to invite additional legal argument on the following questions:

- 1. Whether the Stanford Students living in private campus housing are members of the general public.
- 2. Whether Stanford's proposed telephone network renders it a public utility subject to our jurisdiction.
- 3. Whether Public Utilities Code Section 741.2 affects the interpretation of Section 234.
- 4. Whether Stanford's proposed system should provide a "lifeline" type service.
- 5. Whether Stanford's system should provide its recipients with 900, 950, 976, or 10-XXX access. (D.90-11-030, mimeo. p. 3.)

We also invited the parties to consider a nonexclusive list of appellate court authorities and Commission decisions in briefs. While we did not modify all of our findings, conclusions, and orders and did not stay or suspend our orders in D.90-06-065, we did express our desire to hear additional legal argument on the question of our jurisdiction over Stanford either as a public utility telephone corporation or an STS provider. We do expect Stanford and each of the parties to take full advantage of our offer.

We note in addition that the invitation should be moreclearly stated in several respects. First, our request for legal
argument on STS Guideline 8 was intended to focus upon whether or
not those Guidelines were intended to apply, or should apply, to
Stanford's telephone service. We will not consider arguments as to
whether the Guidelines should apply to universities or residential
developments generally in this complaint. Such a question should
be resolved if at all in a generic proceeding on the Guidelines
themselves. For the present, we are concerned only with Stanford's
service.

Second, our invitation to present legal argument on whether Stanford student residents are members of the public was misstated. We do not doubt that the Students are members of the public for most purposes. We intended only to consider whether the Students are members of the public for the purpose of determining whether Stanford is a public utility within the meaning of Article 12, Section 3 of the California Constitution and Public Utilities Code Section 216. Properly stated, the parties are invited to present legal argument on:

Whether Stanford University is holding itself out as a telephone utility providing service to the public or any portion thereof.

The question of whether Stanford's telephone network renders it a public utility subject to our jurisdiction is merely a restatement of the same question and should, therefore, be withdrawn.

Third, the question relating to §§ 234 and 741.2 is intended to call on the parties to present legal argument on how these statutes should be construed.

Finally, the questions concerning whether Stanford should provide lifeline service and 900, 950, 976, or 10-XXX services are withdrawn. These questions will turn on whether or not we ultimately conclude that Stanford is subject to our jurisdiction.

If Stanford is shown to be an STS provider, the Students would have access to these services through Pacific Bell. If Stanford is found to be a public utility, it will, of course, be subject to all applicable statutes, rules, and orders of the Commission as well-as federal law. If Stanford proves to be neither an STS provider nor a public utility, these questions would be little more than a hortatory.

The assigned Administrative Law Judge in this proceeding is directed to prepare a schedule to receive the presentations of legal argument either oral or in briefs in accordance with this decision. In all other respects, D190-11-030 shall be given effect as originally issued on November 9: 1990.

- for authority to transfer telephone cable, wire, and conduit wire without first determining whether the property was surplus.
- 2. The invitation in D.90-06-065 to present legal argument as to whether Stanford student residents are members of the public was incorrectly stated.
- 3. The invitation to present legal argument as to whether Stanford's telephone network renders it as public autility is an unnecessary.
- 4. The invitations in D.90-11-030 to present legal argument on whether Stanford should be required to provide lifeline of the telephone service and access to 900, 950, 976, or 10-XXX services will be resolved by a final resolution of the question of whether Stanford University is subject to the Commission's STS-Guidelines or to regulation as a public utility.
 - 1. Ordering Paragraph 3 of D.90-11-030 should be deleted.
- 2. The parties in this proceeding should present evidence showing whether or not the property conveyed to Stanford was surplus property.

- 3. The invitation to the parties in D.90-11-030 to present legal argument on whether Stanford students are members of the public should be restated as "whether Stanford University's student telephone service is offered to the public or to a portion thereof within the meaning of PU Code § 216 and Article 12, Section 3 of the California Constitution."
- 4. The invitation to the parties to present legal arguments are on whether Stanford's student telephone service renders its a public utility should be withdrawn.
- 5. The invitation to the parties in D.90-11-030 to present legal argument as to whether Stanford University should provide universal lifeline telephone service and interexchange carrier access should be withdrawn.
- 6. This decision should be effective immediately so that the rehearing of D.90-06-065 may proceed in a timely manner.

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IT IS ORDERED that:

- 1. Ordering Paragraph 3:of D.90-11-030 his deleted and the same of the same of
- 2. The parties may present evidence and testimony in the rehearing pursuant to D.90-11-030 on the question of whether Public Utilities (PU) Code § 851 requires Pacific Bell to file and application for Commission approval of the transfer of its telephone facilities to Stanford University.
- 3. The parties are invited to present legal vargument on the Time following questions only: The Time of the Time following questions only:
 - a. Are the Commission's Shared Tenant Service Guidelines applicable to Stanford University's Student Telephone Services?
 - b. Is Stanford University offering telephone services to the public or a component thereof within the scope of Public Utilities (PU) Code § 216 and Article 12, Section 3 of the California Constitution?

- c. How should PU Code § 741.2 be construed with PU Code § 234?
- 4. Except as modified herein, D.90-11-030 shall remain in effect and together with this decision shall guide the parties in the conduct of the rehearing of D.90-06-065.

This order is effective today.

Dated June 19, 1991, at San Francisco, California.

PATRICIA M. ECKERT
President
G. MITCHELL WILK
JOHN B. OHANIAN
DANIEL Wm. FESSLER
NORMAN D. SHUMWAY
Commissioners

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

MAN. Executive-Director