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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,
Mr. William Behrman, and
Mr. Gerald LeTendre,
Complainants,

ORIGINAL

Communication Services,
Stanford University, and
Pacific Bell, (U1001C)
Defendants.

And Related Matter.

Case 90-05-023

(Filed May 11, 1990)

Case 90-12-014

(Filed December 6, 1990)

OPINION

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

to its own PBX switch.<sup>1</sup> 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.

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.<sup>2</sup> Pacific Bell

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 sold to Stanford was surplus property and was properly conveyed to Stanford under its Tariff Rule 16.<sup>3</sup> 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.<sup>4</sup> 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 arguments.

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.

<sup>3</sup> Tariff Rule 16 provides for the sale of telephone (cable and) or wiring made surplus by the installation of a customer-owned PBX.

<sup>4</sup> 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..."



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 more clearly 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 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, D.90-11-030 shall be given effect as originally issued on November 9, 1990.

Findings of Fact

1. D.90-11-030 ordered Pacific Bell to file an application for authority to transfer telephone cable, wire, and conduit 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 a public utility is unnecessary.

4. The invitations in D.90-11-030 to present legal argument on whether Stanford should be required to provide lifeline 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.

Conclusions of Law

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.





c. How should PU Code § 741.2 be construed with PU Code § 234?

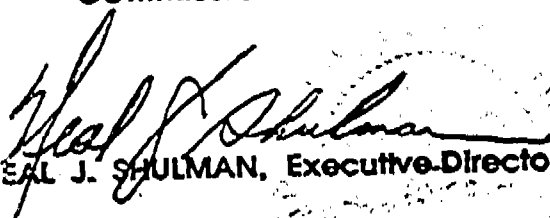
4. Except as modified herein, D.90-11-030 shall remain in effect and together with this decision shall guide the parties in the conduct of the rehearing of D.90-06-065.

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

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

  
NEAL J. SHULMAN, Executive Director