

L/mbh

Decision 91-11-026 November 6, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application)
of Pacific Bell (U 1001 C), a)
corporation, to amend General)
Order 96-A.)

Application 90-03-008
(Filed March 7, 1990)

ORIGINAL

ORDER GRANTING REHEARING

MCI Telecommunications Corporation (MCI) has filed a petition for rehearing of Decision No. 91-07-010 which grants Pacific Bell's Application 90-03-008 to modify the current provisions of General Order (GO) 96-A to eliminate the preapproval requirement for governmental agency contracts. In so doing, this order revises Section X.B. and adds a new penalty mechanism (Section X.D.) to GO 96-A which provides fines and penalties as alternative safeguards against below-cost contracting by telecommunications utilities operating under the new regulatory framework (NRF).

This decision establishes safeguards applicable to other local exchange telephone companies (LECs) and interexchange carriers (IECs or IXC) governmental agency contracts, for instances of below-cost pricing determinations.

The decision also imposes late-filing penalties which apply to any telecommunications utility that does not file its governmental agency contracts within 15 days after the date of execution.

Lastly, the decision adds Section X.E. to GO 96-A which categorically exempts from the preapproved requirement all governmental agency contracts involving cellular radiotelephone, mobile radiotelephone, and personal signalling services, provided by duly authorized carriers. The addition of this categorical exemption to GO 96-A also resolves two longstanding petitions for modification of Decision (D.) 88-08-059 and D.88-09-059.

MCI contends that the decision: (1) adopts a penalty mechanism in violation of Public Utilities Code, Section 728; (2)

denies equal protection of law by adopting a "moratorium" penalty procedure for IECs, referring to the potential denial of the right of IECs to negotiate new government contracts for a specific period of time; and (3) violates Public Utilities Code, Section 1705, by failing to make findings to support: (a) the imposition of cost-of-service review and costing standards for Non-Dominant Interexchange Carriers (NDIECs) and (b) the removal of the preapproval requirements.

Section 728 determinations of reasonableness are not at issue in this proceeding. Given that elimination of the preapproval requirement is not legally defective (and MCI makes no argument to this effect), then the sanction adopted is within the Commission's discretion and no error is shown.

IECs and LECs are "classifications" of utilities, which MCI does not dispute. MCI makes no showing that adoption of different sanctions for below-cost pricing applied to different classifications is unreasonable or prejudices MCI in any way. No unequal protection is shown.

Finding 28 of D.91-07-010 provides that NDIECs need not include cost-support data with their GO 96-A contracts. Finding 29 provides that cost-support data be provided when such a contract is challenged in a formal proceeding. Pursuant to Public Utilities Code, Sections 584, 729 and 1702, inter alia, the Commission has authority to hear a complaint against MCI and to receive evidence, including cost-support data. MCI cites no prior Commission order constituting a waiver of any cost review by the Commission for NDIECs. MCI asserts an absence of findings to support elimination of the preapproval requirement. MCI agrees that the issue of preapproval is central to this proceeding. In disposing of this issue, the Commission included Findings 1,2,3,9,10 and 11 which support disposition of this issue. Numbers 10 and 11 find:

"10. The preapproval requirement can and often would introduce a delay beyond the due date of a typical government RFP.

11. It is reasonable and necessary to remove the Commission's preapproval requirement on all governmental telecommunications contracts and authorize a substitute penalty mechanism in lieu thereof, to preclude below-cost pricing which could yield anticompetitive results."

The decision includes adequate findings of fact.

The Commission has considered each and every allegation of the petition and is of the opinion that no legal grounds for rehearing are set forth.

However, the Commission is concerned that the decision establishes policies that are not uniform for all affected utilities. Specifically, the Commission would like to see a more uniform policy in the following areas:

1. The type of cost information filed by the utility with the Commission.

2. The type of review of cost information which is conducted by the staff. A uniform policy should either allow the staff to act on its own to request or review cost information and then to impose penalties. If staff is expected to enforce compliance, then utilities should all be held to the same standard in filing cost information. Alternatively, the complaint process would be used to assure compliance, in which case staff does not have the authority to act independently, and therefore utilities do not need to file information with the staff. The discovery process in the complaint case will gather the necessary information.

The decision appears to mix both of the foregoing alternatives, precluding some staff action, but requiring some utilities to file cost information. This is confusing and appears to be at cross purposes with giving the staff clear directions to implement the decision.

3. The type of penalty imposed by the Commission when the utility is found to have bid below cost for the contract. The Commission would prefer a uniform penalty on any utility which violates the Commission's order not to bid below cost on a government contract. The Commission would prefer to either subject all offending utilities to a ban on future bidding, or subject all found guilty to a monetary fine, but avoid establishing one penalty for one type of phone company and another penalty for another type of phone company when the proscribed practice is the same.

Therefore,

IT IS ORDERED that:

Rehearing of Decision No. 91-07-010 is granted consistent with the foregoing language.

IT IS FURTHER ORDERED that rehearing shall be held before such Commissioner and/or Administrative Law Judge and at such time and place and in such manner as may hereafter be ordered.

This order is effective today.

Dated November 6, 1991, at San Francisco, California.

PATRICIA M. ECKERT
President
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