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Decision 92-02-034 February 5, 1992

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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| In the matter of Alternative Regulatory Frameworks for Local Exchange Carriers. | I.87-11-033 (Filed November 25, 1987) |
| In the Matter of the Application of Pacific Bell (U 1001 C), a corporation, for authority to increase intrastate rates and charges applicable to telephone services furnished within the State of California. | Application 85-01-034 (Filed January 22, 1985; amended June 17, 1985 and May 19, 1986) |
| In the Matter of the Application of General Telephone Company of California (U 1002 C), a California corporation, for authority to increase and/or restructure certain intrastate rates and charges for telephone services. | Application 87-01-002 (Filed January 5, 1987) |
| And Related Matters. | I.85-03-078 (Filed March 20, 1985)<br>OII 84 (Filed December 2, 1980)<br>C.86-11-028 (Filed November 17, 1986)<br>I.87-02-025 (Filed February 11, 1987)<br>C.87-07-024 (Filed July 16, 1987) |

**ORDER GRANTING LIMITED REHEARING AND MODIFYING DECISION 91-07-056**

Decision 91-07-056 (D.91-07-056 or the Decision) adopted a monitoring program for the telephone utilities, Pacific

Bell (Pacific) and GTE California (GTEC), under the new regulatory framework (NRF). The Decision also adopted policies for the treatment of traditional ratemaking adjustments for these two local exchange carriers (LECs). TURN filed its application for rehearing (Application) on August 26, 1991.

Responses were filed by Pacific and GTEC in opposition to the Application. A response was filed by MCI Telecommunications (MCI) in support of the Application.

The Application requests rehearing on two matters. First, TURN requests clarification of the procedure for access by third parties to information determined by the Commission to be proprietary after the third party has signed a nondisclosure agreement. Second, TURN alleges that the Commission incorrectly allowed a sharing of costs between ratepayers and shareholders for expenses related to political advocacy, dues and donations.

The responses of Pacific and GTEC oppose TURN on both issues. The responses of MCI supports TURN on the issue of shared costs but does not address the issue of access by third parties to proprietary information.

Discussion:

I. Access to Information.

TURN urges clarification of the procedures for access to information, which the Commission has determined to be proprietary, for third parties who have signed nondisclosure agreements. TURN contends that Conclusions of Law 30 and 31 and Ordering Paragraph 8 are inconsistent with the discussion in the Decision at pages 34-37a, especially Footnote 8 on page 37, and as a result the intention of the Commission is unclear.

TURN proposes changes to the conclusions of law and ordering paragraphs which would allow access to information which has been designated as proprietary to any third party so long as the party has signed a nondisclosure agreement. TURN argues that: 1) it would be inappropriate to "completely preclude"

access to non-competitors and 2) that there is "absolutely no risk" of harm once the nondisclosure agreement is executed. (TURN's Application for Rehearing, p.3.)

Pacific characterizes TURN's argument as requiring access to information, designated by the Commission as proprietary and under protective order, by third parties who have signed nondisclosure agreements "without further condition." (Pacific's Response, p.2.) Pacific spends the rest of its argument elaborating on the burden on a party to demonstrate that discoverable information must be relevant in a Commission proceeding.

GTEC argues that some information may be so sensitive that even if a third party signs a nondisclosure agreement, that the risk of intentional or inadvertent disclosure of such information to competitors is too great. GTEC also claims that since Commission staff will have access to all monitoring information the public interest in having the monitoring goals of D.89-10-031 followed is assured.

TURN is at least partially correct. The Decision must be in need of clarification since the parties seem to have misunderstood the procedure for dealing with proprietary information. In order to clear up some of the confusion, modifications should be made to the Decision.

Although we are not bound by formal rules of evidence in our proceedings, our rules require that "substantial rights of the parties shall be preserved." (Rule of Practice and Procedure No. 64.) To accomplish this end, we may use the relevant statutes and cases as a guide.

Normally, the claimant of a privilege cannot be compelled to disclose the information to a judge in order for the judge to rule on the claim. (Evidence Code sec. 915(a).) To preserve the privilege, the information is presumed to be confidential.

There are statutory exceptions for certain privileges which are protected only if the interest in secrecy "outweighs

the necessity for disclosure in the interest of justice." (Witkin, Evidence, sec. 1088.) Trade secrets represents one of these qualified privileges. (Evidence Code sec. 1060.) In camera inspection of the material in question by a judge is allowed to evaluate the merits of the claim and to set conditions on disclosure. (Civil Code sec. 3426 et seq.; Evidence Code sec. 1061.) The judge is given broad discretion to fashion protective orders, as necessary.

Monitoring information which is asserted to be proprietary should be afforded similar treatment. The judge in making determinations regarding what is proprietary and the scope of protective orders must balance competing considerations. This process has several steps, as described in the Decision.

The process as described in the text on pages 34-37a and pages 61-63 has several steps which move from the initial designation of material as proprietary first by the LECs, subject to approval by the Commission, to nondisclosure agreements between third parties and the LECs and then to protective orders issued by the Commission. These terms need to be used consistently to avoid confusion. The confusion arises, in part, because Conclusion of Law 31 on page 76 of the Decision uses the term "protective agreements" as well as the term "protective order." The first reference should have been to "nondisclosure agreements." Footnote 8 on page 37 also needs to distinguish between the proprietary designation and protective orders.

The use of the terms "truly" in Conclusion of Law 30 on page 76 and "highly restricted" in Ordering Paragraph 8 on page 85 to describe proprietary information adds to the confusion. There is no need for a class of "super-proprietary" information as is suggested on page 62 of the Decision. However, there may be situations where a protective order may limit which parties may have access to information, or at what time, or other conditions as the ALJ may deem appropriate. For example, certain proprietary information may have considerable competitive value for a limited time period, without a change in the regulatory

value of the information after the expiration of that time. The LECs should have have an opportunity to persuade a judge that the scope of discovery should be limited in such a case and that a protective order should be granted even where nondisclosure agreements have been signed. The burden should be on the LEC seeking any protective order and needs to be balanced against the "substantial rights" of the other parties.

It should also be noted that the designation of material as proprietary and the scope of protective orders are separate issues. Since the interests of non-competing third parties are so different from competitors, and to the extent they are aligned with our regulatory purposes and customer concerns, even where information is designated as proprietary, these so-called third parties should have ready access to information.

In order to clarify the confusion which TURN has pointed out in its Application the Decision should be modified as specified on the attached pages. These modifications are minor in nature and are designed to clarify the original intention of the Commission. Additional hearings on the issue of access to information are unnecessary and the Application for Rehearing of this issue should be denied. The policy of the Commission will be elaborated as rulings are made implementing the monitoring decision. Just as any party seeking a protective order must follow Rule 61, any party aggrieved by an ALJ ruling on a motion related to monitoring information may seek review as provided for in Rule 65 of the Rules of Practice and Procedure.

## II. Sharing of Costs for Donations, Dues, Political Contributions and Advocacy.

TURN contends in its Application that the discontinuation of the disallowance for donations, dues, political contributions and advocacy (expenses) is contrary to law. They allege that the resulting sharing of costs between shareholders and ratepayers is in conflict with Pacific Tel. & Tel. v. Public Util. Comm., (1965) 62 Cal. 2d 634, 668-669

(PT&T). TURN also refers to the argument raised in their comments, and discussed in the Decision at pages 64-65, that Public Utilities Code sec. 1708 requires evidentiary hearings prior to the discontinuation of any ratemaking adjustments. TURN argues that these adjustments affect both the setting of price cpas and the calculation of shared earnings.

Pacific argues that the PT&T case involved traditional ratemaking and not the calculation of sharable earnings in the context of NRF and is therefor inapplicable. Pacific maintains that the efficiency incentive mechanism under NRF assures the prudent management of expenditures by the utility for the benefit of both its ratepayers and shareholders. Pacific argues that these adjustments do not affect the price cap but are appropriately reflected in shared earnings.

GTEC joins Pacific in distinguishing PT&T as a "rate-fixing" case. GTEC also notes that most of the expenses referred to by TURN are booked below the line as a result of the adoption of Part 32 of the FCC's Uniform System of Accounts, which was adopted in substantial part for intrastate purposes in D.88-12-063. Therefore, most of these expenses "will not be reflected in the calculation of GTEC's results of operations." (GTEC Response at p. 4.)

MCI joins TURN's application for rehearing solely on the question of shared expenses for Dues. MCI agrees with TURN's reading of PT&T and asserts that allowance of expenses would result in unjust and unreasonable rates in violation of Public Utilities Code sec. 451. MCI argues that although the California Supreme Court did not discuss the basis for its decision in PT&T, the issue implicates questions of the violation of constitutional rights of ratepayers under the First Amendment to the U.S. Constitution and Article 1, Section 2 of the California Constitution. MCI relies on a New York case in support of this argument. (Cahill et al. v. Public Service Commission and New York Telephone 556N.Y.S. 2d 840, 842-843; 112 P.U.R. 4th 240 (N.Y. Ct. of Apps. 1990); U.S. cert. den., 111 S.Ct. 344 (1991).)

Last of all MCI considers the Decision's finding and conclusions inadequate in violation of Public Utilities Code sec. 1705. Specifically MCI questions the adequacy of the discussion in the Decision at pages 64-65 and the failure of Finding of Fact 60, Conclusion of Law 52 and Ordering Paragraph 3.s. to explain what special circumstances might justify departure from the Part 32 exclusion of expenses.

The PT&T case discusses the issues of donations, charitable contributions and service club dues separately from expenses for legislative advocacy, but does not reach the question of political contributions. With regard to expenses for legislative advocacy, the court concludes that ratepayers should have "...the opportunity to make their own judgments on what legislative proposals they would or would not favor..." without citing any authority. (PT&T, pp. 669-670.) The rationale for approval of the disallowance of charitable donations calls such expenses a form of involuntary and unauthorized tax levy and cites Maryland authority in support of this position. (Chesapeake & Potomac Tel. Co. v. Public Service Com. (1963) 230 Md. 395; 187 A.2d 475, 485.) The concurring opinion of Justice Mosk helps elaborate the issue of corporate charitable contributions. (PT&T, pp. 676-677.)

In City of Los Angeles v. Public Utilities Commission (1972) 7 C.3d 331; 102 Cal.Rptr. 313, the court reviewed and applied the PT&T case. The concurring and dissenting opinion of Justice Mosk in City of L.A. would have disallowed expenses for advertising relying on PT&T and using a similar tax levy rationale.

We have referred to the various expenses at issue here collectively as "expenses." However, different issues are raised by expenses for corporate charitable contributions than for political contributions. The constitutional questions of free speech raised by MCI were not considered in the PT&T case. These are issues which not only generate heated sentiments, but are also likely to result in protracted litigation.

The rationale for disallowing expenses is more important than whether it is done in the context of traditional rate-setting or NRF incentives. Whether ratepayers support activities which are constitutionally prohibited is an issue which transcends regulatory frameworks.

GTEC acknowledges that most of these expenses are booked below the line, but does not specify which ones. MCI's criticism that the Decision does not explain what special circumstances justify a departure from Part 32 is especially disturbing.

Even though the issue of the discontinuance of the disallowance was raised in the Decision and reviewed in the comments, it was not adequately resolved. MCI has raised new issues which merit further hearing. Therefore, we will grant limited rehearing on discontinuation of the disallowance for these expenses.

## ORDER

1. Decision 91-07-056 is modified as specified in the attached pages showing strikeouts and additions to clarify our original intention regarding access to monitoring information.

2. Limited rehearing is granted on the discontinuation of the disallowance for expenses related to donations, dues political advocacy and contributions. The rehearing should be limited only to briefing and oral argument at the discretion of the ALJ.

3. The limited rehearing should include consideration of the following issues:

   1. A separate explanation of the rationale for disallowance of each different category of expenses.

   2. A review of the federal treatment of these expenses for interstate purposes.

3. A review of the treatment of these expenses in other states.

4. Consideration of the constitutional questions raised by the discontinuation of the disallowance for these expenses.

5. The development of criteria for deviation from Part 32 treatment of these expenses.

6. The effect on the calculation of price caps and shared earnings of the discontinuation of the disallowance for these expenses.

7. Other related issues as the ALJ deems appropriate.

This order is effective today.

Dated February 5, 1992 at San Francisco, California.

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

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

NEAL J. SHULMAN, Executive Director

licensed information from unwarranted disclosure."

In this spirit, and consistent with current Commission rules, monitoring information, like most public utility reports to the Commission, is open to public inspection unless a protective order is issued. Accordingly, we will prescribe the following process for the LECs to obtain an order or orders protecting particularly private data they want to hold proprietary under NRF:

1. LECs will have 60 days from the effective date of this order to file motions for a protective order covering data or reports they consider proprietary.[8] During these 60 days and while these motions are pending, we will consider all monitoring information designated proprietary by Pacific or GTEC to be proprietary and staff (which must receive all monitoring reports and which always has access to all LEC data and reports) is instructed to respect the proprietary nature of the material.

2. Following the normal procedures, and giving an opportunity for other parties to file answers to LEC motions, determinations as appropriate will be made on the motions and staff will release material to interested parties accordingly.

3. Pacific and/or GTEC may in future years file for additional motions for similar protection. All data and reports which we originally determined nonproprietary will remain nonproprietary, however, pending outcome of such additional motions.

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8. The LECs may require that parties sign a nondisclosure agreement to obtain any material on which the Commission places a proprietary designation absent a further a protective order.

4. The assigned administrative law judge (ALJ), for good cause shown, may, at any time, make any ruling to designate material as proprietary and to fashion protective orders to protect confidential, proprietary, or licensed information from unwarranted disclosure.

Pacific and GTEC are admonished not to abuse the process and to ask protection only where revelation of information would cause significant and irreparable harm. The judge should have broad discretion in reviewing such requests and in determining the scope of protective orders.

In essence, the utilities will have an annual opportunity to identify reports that should be kept proprietary and to provide justification for that request; the 60-day period following the effective date of this order relates to reports that will be filed during 1991 and until the utilities, if they choose, make a motion during 1992. We strongly prefer to handle this motion, if needed, on a consolidated basis rather than with regard to one or a few reports at a time; the utilities may wish to coordinate their motion with the delivery of the bulk of their reports in a given year.

Just as we condemn the indiscriminate characterization of information as "proprietary," we are determined to avoid abuse of our discovery process. To this end, parties seeking access to information judged proprietary must demonstrate that the information is relevant to establishing a fact or policy contention before the Commission in a formal proceeding.

## VI. Specific Monitoring Requirements

The bulk of the report is a discussion of the specific reports recommended by parties to be used as the monitoring tools designated in D.89-10-031, and recommendations by CACD as to the appropriate reports for each monitoring tool.

for nondisclosure agreements. Third parties should have similar access upon execution of ~~proprietary (nondisclosure)~~ agreements as recommended by Centex. This places the burden on the LECs to seek a protective ~~agreement~~ order, in those rare cases, when providing the information sought by a specific third party would cause irreparable harm to the LEC. This does not create a new class of "super-proprietary" information. It does place an additional, and fairly heavy, burden upon the LECs to demonstrate why third parties with a legitimate, and not competing, interest should be denied access to monitoring infor on once they have executed a nondisclosure agreement.

C. Computer Link

GTEC believes that the proposed computer link between the two LECs and CACD and DRA is unreasonable. GTEC disputes whether the benefits of this link outweigh the inconvenience and cost to GTEC and Pacific, and whether the Commission's monitoring abilities will be significantly improved through such a link. GTEC also argues that recurring as well as nonrecurring costs of the link should be recoverable in a Z-factor filing. Pacific concurs on this point. Pacific also would like clarification that the link is only available to DRA and CACD.

Citizens believes there are less expensive, more expeditious, and as-accurate methods of providing monitoring information; this would be through the use of modems and floppy diskettes. Citizens raises the issues of security, privacy, and proprietary information as concerns. Further, Citizens asks that, if a link is established, this method of obtaining monitoring information not be applied to mid-sized or smaller LECs if they propose an alternative regulatory framework in the future.

DRA would like the PD to clarify that DRA should be involved in the computer link's development and that DRA should be provided with its own link.

We have already addressed the rationale for requiring a computer link. We will clarify that the computer link should be accessible to DRA and CACD for all monitoring information, and only to DRA and CACD. We will not comment on Citizen's request in terms of applicability to smaller and mid-sized LECs as these companies

25. Streamlining of reports should be accomplished as discussed in CACD's Workshop II Report, and as modified by this order.

26. The streamlining of reporting requirements for Pacific and GTEC reduces the number of reports to those which are currently needed for effective implementation of the NRF. These needs should be re-evaluated in the 1992 review of NRF.

27. CACD, as the compliance arm of the Commission, is fully empowered to implement and is authorized under PU Code §§ 582 to 584 to obtain any information, from any utility, at any time and to make minor modifications, as may be necessary in the reporting requirements of the monitoring program from time to time in accordance with the spirit and intent of the NRF.

28. At the commencement of the 1992 NRF review, CACD should produce a written assessment explaining who prepares each monitoring report the utilities provide to our staff, and what purpose each of these reports serves for the utility and for the staff. In the assessment, CACD should recommend which reports, if any, should be eliminated. CACD should obtain the information it needs to develop its assessment and its recommendation from DRA, the Executive Division, the Safety Division, the Public Advisor's Office, the Consumer Affairs Branch, and the utilities.

29. Parties should have access to all nonproprietary monitoring information, as anticipated by I.90-02-047.

30. Pacific and GTEC may seek a protective order from the Commission to preclude third party access to ~~truly~~ proprietary information based upon the proposed rule set forth herein. Parties may respond to these motions, and the ALJ may take legal argument or technical evidence at limited hearings (if needed) on such motions. All monitoring information should be considered nonproprietary if no protective order is issued after this process.

31. Parties who have signed nondisclosure protective agreements with Pacific and GTEC should have access to all assertedly proprietary materials for which no protective order is issued by the Commission.

32. Major service interruptions should be reported monthly by Pacific and GTEC.

v. The rate base components and procedures (excluding below-the-line services) recommended by CACD shall be used in the annual earnings calculations.

w. Future penalties imposed on LECs will be implemented pursuant to determinations in further orders of this Commission as individual circumstances dictate.

4. Two copies of each monitoring report shall be sent to the CACD LEC Monitoring Coordinator and two copies shall also be sent to the Director of DRA.

5. CACD and the LECs shall continue with efforts to streamline reporting requirements.

6. CACD shall produce, at the commencement of the 1992 NRF review, a written assessment explaining who prepares each monitoring report the utilities provide to our staff, and what purpose each of these reports serves for the utility and for the staff. CACD's assessment shall recommend which monitoring reports, if any, should be eliminated. DRA, the Executive Division, the Safety Division, the Office of the Public Advisor, the Consumer Affairs Branch, and the utilities shall provide to CACD the information it needs to develop its assessment and recommendation.

7. Pacific and GTEC shall work with CACD to develop the hardware and software necessary to create a direct computer link with CACD. Pacific and GTEC may recover their nonrecurring costs of setting up this computer link through a Z factor adjustment. This computer link will be accessed only by CACD and DRA.

8. Within 60 days after the effective date of this order, Pacific and GTEC may file motions for protective orders, along with their respective monitoring reports, seeking to preclude access to ~~highly restricted~~ proprietary information. If necessary, the assigned administrative law judge will schedule a hearing to take further oral argument or testimony on the motions, after having reviewed all timely filed responses thereto. All monitoring

information shall be considered nonproprietary if no protective order is issued after this hearing process, absent further proceeding.

9. CACD is hereby directed to place one copy of each of the three workshop reports, together with any and all opening and reply comments received relative to each of the reports, in the formal file of this proceeding (I.87-11-033).

10. GTEC and Pacific shall file their respective annual sharable earnings calculations 1990 in accordance with this order on or before August 23, 1991.

This order is effective today.

Dated July 24, 1991, at San Francisco, California.

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

END OF ATTACHMENT