

DEC 16 1992

Decision 92-12-053 December 16, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Pacific Bell (U 1001 C), a corporation, for authority to increase certain intrastate rates and charges applicable to telephone services furnished within the State of California.

ORIGINAL

Application 85-01-034 (Filed January 22, 1985)

And Related Matters. (Telesis Audit Phase)

I.85-03-078 Case 86-11-028

O P I N I O N

1. Summary

The Division of Ratepayer Advocates (DRA) petitions to modify Decision (D.) 92-09-044 on grounds that it is internally inconsistent and should be changed to require a refund to ratepayers of development costs related to Pacific Bell's public packet switching service. DRA also requests modification of D.90-05-045. The petition is denied.

2. Background

On July 22, 1992, the Commission approved and adopted a settlement agreement between DRA and Pacific Bell resolving most remaining issues in a five-year-old DRA audit of Pacific Telesis affiliates. The audit had concluded that certain competitive products were improperly subsidized with ratepayer funds. Pacific Bell denied this. Nevertheless, the settlement required Pacific Bell to refund approximately \$57 million to ratepayers, to reduce rates prospectively by \$19.1 million, and to implement new tracking and reporting procedures.

The settlement left one issue for subsequent briefing and decision. That issue was whether a refund should be required for

public packet switching costs in light of seemingly inconsistent treatment of those costs in earlier Commission decisions.¹ The parties briefed that issue. On September 2, 1992, D.92-09-044 resolved it.

In D.92-09-044, the Commission concluded that public packet switching had properly been treated like any other above-the-line service until, following five days of hearing, our decision in D.90-05-045 changed its designation to a below-the-line category. We found that a refund for costs prior to the 1990 decision was not warranted. However, we did require Pacific Bell to refund an additional \$2.253 million, plus interest, for research and development costs of protocol conversion, the enhanced service portion of packet switching.²

3. Position of DRA

In D.92-09-044, the Commission found that an early packet switching decision, D.87-03-087, had determined that the product should be treated like other above-the-line services offered by Pacific Bell. We interpreted D.87-03-087 to have "directed without reservation that packet switching costs be recorded above the line..." (D.92-09-044, p. 23.)

DRA in its petition argues that D.87-03-087 retained strong reservations about whether ratepayers should bear the risk of packet switching development. The Division states:

"Nowhere in the decision is there a discussion, finding or conclusion that PPS expenses are reasonable and are included in ratebase and in revenue requirement without reservation. To the contrary the decision clearly holds that

1 Specifically, it was noted that D.87-12-067 and D.86-01-026 appeared to make public packet switching costs subject to refund pending the audit results, while D.90-05-045 held that no refund was required for these costs. (See, generally, D.92-07-076, p. 7.)

2 Pacific Bell states that this refund has begun and was to have been completed at the end of November 1992.

the Commission will carefully examine any questions related to the profitability of the service or the prudence of management's actions in any rate proceeding where PPS may affect the rates of other customers.

"Accordingly, it must be concluded that the Commission had placed a strong reservation upon PPS expenses and that their reasonableness would be tested and possibly excluded in any [subsequent] rate proceeding..." (DRA Petition, p. 4.)

DRA states that since a Pacific Bell rate case (Application (A.) 85-01-034) was in process at the time, and since rates in that case were set subject to refund pending DRA audit results, packet switching costs were among those subject to review and possible refund. Thus, the division concludes, given its interpretation of D.87-03-087, it is internally inconsistent for D.92-09-044 to conclude that packet switching costs were not among those that should be refunded based upon the audit recommendations.³

DRA raises other arguments in its petition, but we find that these arguments duplicate those that DRA raised in its initial and reply briefs in this matter and are adequately dealt with in D.92-09-044.

4. Response by Pacific Bell

Pacific Bell responds that DRA has missed the point of D.87-03-087. It states that the decision actually clarified that

³ DRA also objects that the decision cites no authority for its statement that public packet switching "had been offered for more than 20 years." (D.92-09-044, p. 22.) The statement, which contrasted packet switching with enhanced products new to the market, was based upon the finding in Resolution T-11070 (November 5, 1986) that "(p)acket switching of data records has been performed on government and private data networks since the late 1960s." (Id., p. 1.)

public packet switching was to be treated like any other above-the-line service. Shareholders were not at risk for losses related to the service, except where such losses were traceable to imprudent business decisions. The utility states:

"Decision 87-03-087 was issued in response to Pacific's Application for Rehearing of Resolution T-11070.... The Commission stated that it did not intend to depart from the philosophy that risks are to be taken by those who can profit by them. Thus, the Commission concluded that 'shareholders are to be held responsible for only those losses which we find, in the next general rate case, to be traceable to imprudent business decisions on the part of their management.'

"DRA apparently is attempting to rely upon the statement...that 'losses traceable to imprudent decisions on the part of Pacific's management' would be subject to review by the Commission. However, DRA is not claiming that PPS expenses should be refunded because Pacific was imprudent in incurring those expenses. Rather, DRA is simply attempting to transfer PPS losses prior to 1990 to Pacific's shareholders, even though ratepayers would have received PPS profits during that period if PPS had been profitable. DRA's attempt to transfer pre-1990 losses to Pacific's shareholders is exactly what D.87-03-087 was designed to prevent." (Protest of Pacific Bell to DRA's Petition, pp. 3-4.) (Emphasis is Pacific Bell's.)

In addition to opposing the DRA petition substantively, Pacific Bell objects procedurally that the petition is governed by Rule 43 of the Rules of Practice and Procedure, and Rule 43 limits

a petition for modification to "minor changes." Pacific Bell argues that DRA's request that D.92-09-044 be modified to reverse the result is hardly a minor change.⁴

Like DRA, the utility addresses a number of other subjects that it had argued earlier in its initial and reply briefs in this case. D.92-09-044 dealt with those matters, and there is no need to examine them again.

5. Discussion

The inconsistency that DRA would have us find in D.92-09-044 would require us to accept the division's contention that D.87-03-087 placed reservations on public packet switching that effectively moved this service from above the line to below the line. In fact, D.87-03-087 did the opposite. It deleted the language in Resolution T-11070 (November 5, 1986) that placed risks of the product on shareholders, and substituted language applicable to all above-the-line services. As stated in D.92-09-044,

"As of March 1987, therefore, the Commission had made it clear that packet switching was a basic service, and that its plant and other costs were to be treated like those of any other basic service--that is, included in rates. Profits from the service, if any, would be reflected in utility income." (D.92-09-044, p. 15.)

DRA criticizes the statement in D.92-09-044 that packet switching had been included in rates "without reservation." (D.92-09-044, p. 22.) In context, however, it is clear that the reference was intended to distinguish the treatment of public

⁴ DRA in its petition does not refer to the Rules of Practice and Procedure. Instead, it states that its petition is brought under Public Utilities Code § 1708, which permits the Commission, upon notice and opportunity to be heard, to rescind, alter or amend any earlier decision. Because we have elected to decide the substantive objection made by DRA, we do not in this decision address Pacific Bell's procedural objection.

packet switching from the Commission's treatment of other services that specifically had been made subject to refund, or for which memorandum account treatment was required.⁵

As it did in earlier briefs, DRA continues to argue that D.90-05-045 (which recategorized packet switching from an above-the-line service to a below-the-line service) did not fully address the subject of refunds. What would seem to be a definitive conclusion of law in that decision ("Pacific should not be required to refund to ratepayers past expenditures associated with PPS services") is, in DRA's view, simply a preliminary assessment pending the results of other proceedings. The words, as Humpty Dumpty might have put it,⁶ mean something other than what they say. Even DRA has difficulty with that reasoning, to the point that it ultimately asks that D.90-05-045 also be modified to permit refund of past expenditures. (DRA Petition, pp. 9-10.)

6. Conclusion

DRA has not shown that D.92-09-044 is internally inconsistent. What it has shown is that it disagrees with the

5 See, e.g., D.92-09-044, p. 22: "Because of the pendency of the new regulatory framework proceeding, we deferred decision on categorizing the [enhanced services], but we signaled our preliminary assessment by requiring memorandum accounts to track product development costs, and by making rates subject to refund if and when we later determined that the products should be developed below the line."

6 "When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean -- neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master -- that's all." (Lewis Carroll, Through the Looking-Glass, ch. 6.)

Commission's decisions in D.87-03-087, which placed packet switching costs above the line; in D.90-05-045, which recategorized packet switching to a below-the-line service and concluded that no refunds were due for past expenditures; and in D.92-09-044, which concluded that past decisions had not, until 1990, treated packet switching differently than other basic services. While we accept the fact that DRA disagrees with those decisions, we cannot find on that basis that D.92-09-044 and D.90-05-045 should be modified.

Findings of Fact

1. On September 2, 1992, the Commission in D.92-09-044 found that treatment of costs for the public packet switching service offered by Pacific Bell was consistent with prior decisions of the Commission, and that no refund of pre-1990 packet switching costs was justified.

2. DRA on October 5, 1992, filed a petition to modify D.92-09-044, stating that the decision appeared to be internally inconsistent in its application of facts and prior decisions with respect to public packet switching. DRA also requested modification of D.90-05-045.

3. Pacific Bell on November 4, 1992, filed a protest to DRA's petition.

Conclusion of Law

DRA has failed to show inconsistency in D.92-09-044, and its petition for modification should be denied.

ORDER

IT IS ORDERED that:

1. The petition of the Division of Ratepayer Advocates to modify Decision (D.) 92-09-044 and D.90-05-045 is denied.

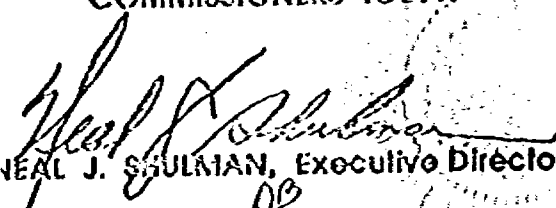
2. This matter is closed.

This order becomes effective 30 days from today.

Dated December 16, 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
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