

Decision 83 09 006 SEP .7 1983**ORIGINAL**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, for authority to increase certain intrastate rates and charges applicable to telephone services furnished within the State of California due to increased depreciation expense.

Application 82-11-07
(Filed November 4, 1982)

In the Matter of the Application of THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, for authority to increase certain intrastate rates and charges applicable to telephone services furnished within the State of California.

Application 83-01-22
(Filed January 17, 1983)

Investigation on the Commission's own motion into the rates, tolls, rules, charges, operations, costs, separations, inter-company settlements, contracts, service, and facilities of THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a California corporation; and of all the telephone corporations listed in Appendix A, attached hereto.

OII 83-04-02
(Filed April 20, 1983)

In the Matter of the Application of THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, for authority to adopt intrastate access charge tariffs applicable to telephone services furnished within the State of California.

Application 83-06-65
(Filed June 30, 1983)

TELEPHONE ANSWERING SERVICES
OF CALIFORNIA,

Complainant,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH
COMPANY,

Defendant.

Case 82-10-09
(Filed October 28, 1982)

(See Appendix A for appearances.)

SECOND INTERIM OPINION ON
PROCEDURAL MOTION

Nature of Request

The Pacific Telephone and Telegraph Company (PT&T), the applicant in these consolidated proceedings, has, by a pleading filed July 25, 1983 entitled "Emergency Petition for Modification of Decision No. 83-04-021 and Motion for Interim Relief" asked that:

1. Interim relief in the amount of \$837,900,000 per annum be granted as soon as possible but in no case later than November 1, 1983.
2. The interim relief be accomplished by means of a surcharge to the utility's presently effective rates.
3. The Commission order that set forth the procedure and schedule for considering PT&T's rate applications be modified to accommodate PT&T's request for expedited interim relief.

PT&T suggests that any interim relief could be granted subject to refund after a final revenue requirement is established in the decision in Phase II, the divestiture phase, which decision is scheduled to be rendered on May 30, 1984.

PT&T's Justification of Motion

PT&T gave four reasons for its motion. The company contended that it had demonstrated that:

1. PT&T has not earned its cost of capital for 1981 or 1982, and will not do so in 1983;
2. The current uncertainty concerning the Commission's intention to award interim rate relief in a timely manner must be resolved immediately in order to alter the financial community's negative perception of PT&T's financial prospects;
3. PT&T's financial results have been below those needed to ensure favorable investor assessment of the investment quality of PT&T. At divestiture PT&T will have a new equity investor body. These investors will be making decisions about the relative merits of investments in PT&T, the other regions and American Telephone and Telegraph Company before the end of 1983. Thus, granting this petition and motion is of critical importance in influencing investors to retain their ownership of PT&T; and
4. Without positive Commission action in 1983, the depreciation expense PT&T will recover in 1983 will not be sufficient to allow for adequate capital recovery.

Most of the motion was devoted to expanding on the third point. PT&T's primary concern was that "when issued" trading of the divested Bell System companies' stock will commence in November. PT&T must therefore announce its 1984 dividend policy and file its prospective 1984 financial results with the Securities and Exchange Commission in early November. PT&T is most anxious that its common stock be well received by the market.

PT&T contends that the necessity of early substantial interim relief to offer a favorable financial prospect to potential investors under the extraordinary circumstances of divestiture constitutes "the overriding financial need" required by Decision (D.) 83-04-021 to justify of interim relief. It quoted its now retired treasurer as emphasizing that "in order to set a favorable tone in the market for [PT&T's] securities, it is critically important that

the Commission take early action on the company's request for interim rates and give a clear signal to the financial community that the Commission is being supportive and responsive."

Affidavits by two corporate officers of PT&T were attached to the petition. Each alleged financial information from various sources outside the record of this proceeding.

Schedule Established by D.83-04-021

In response to a motion by PT&T, D.83-04-021 modified this Commission's Rate Case Plan (RCP) by bifurcating consideration of PT&T's consolidated revenue increase requests into two phases. The first phase would consider PT&T's requests as they were filed to establish a 1983 rate base and revenue requirement so that adjustments could be made in a second phase for the effects of divestiture and access charges. The Commission declared that "only if the results of the proceeding so warrant, will we consider adjusting present rates on an interim basis to take effect January 1, 1984," and later in the decision said:

"The Commission's decision to proceed to examine the [Results of Operations] as filed should not be construed as a predetermination that rate relief will be granted. Our primary goal is to provide a baseline R/O to account for the effects of divestiture and access charges, as discussed previously. The following discussion of the mechanics of implementing rate relief should not be misunderstood; we merely intend to keep the option of granting rate relief open in the event PT&T sustains its burden, and demonstrates overriding financial need for rate relief. Assuming that PT&T sustains this heavy burden, we will then have the flexibility to act."

The schedule established by D.83-04-021 called for hearings on "R/O as filed" to end on June 24, 1983; briefs to be filed on July 29; replies to briefs on August 5; Administrative Law Judges' (ALJ) draft, if required, by September 29; and an interim decision, if required, issued on December 7, 1983, to be effective January 1, 1984. The Commission observed that:

"We believe our adopted schedule will allow the case to proceed in an orderly manner, and permit the parties to decide on the extent of their participation. With the cooperation and good will of the parties, this case, which probably is the most procedurally unusual the Commission has encountered, can progress as expeditiously and efficiently as the regulatory process allows."

The first phase did move according to the schedule. The hearings concluded on June 23, briefs were filed as scheduled on July 29, and oral replies were heard before four Commissioners on August 5. The next scheduled procedural event is the completion of the ALJs' decision draft on September 29.¹ Ten weeks would then be available for consideration by the Commissioners, preparation of alternative proposals, and satisfaction of statutory agenda notice requirements prior to a decision's issuing on December 7. Should the Commission require less time for its deliberation, a decision could issue sooner than December 7.

The schedule established by D.83-04-021 has since been modified in minor respects through revised notices of hearing issued April 13, 1983 and July 13, 1983 and by adding procedural dates for matters relating to the Bell System California Interexchange Organization through a ruling of the assigned Commissioner issued July 1, 1983. None of these changes affect the schedule for reaching an interim decision, if required.

PT&T's Original Scheduling Proposal

The original schedule proposed by PT&T in its "Motion to Establish a Phased Proceeding" would have provided for hearing and briefing dates very similar to those adopted by the Commission in D.83-04-021. Hearings would have commenced, as they did, on April 18, and concluded on July 1, seven days after the adopted

¹ Two ALJs are assigned to this proceeding, one for results of operations and one for rate design.

June 24 date. Briefs would have been filed August 1, with oral replies on August 10, compared to the July 29 and August 5 dates adopted by the Commission.

The time that would have been allowed for a decision was, however, unbelievably compressed. PT&T's schedule called for a decision to issue on September 20, a mere 35 working days after the oral replies. Statutory agenda notice requirements would reduce this to 20 days, including time for typing and reproduction.

The Commission rejected this part of PT&T's schedule, together with a similar proposal for the rate design phase that would have allowed the Commission a total of 17 working days, at the height of the Christmas season, to draft, reproduce, and issue a completed decision. The Commission noted that the times proposed for decision processing appeared to have been prepared without consultation with the Commission staff regarding the capabilities of this agency and characterized them as unrealistic expectations.

Prior Petition for Modification

PT&T's July 25 motion was its second such motion. Earlier, on May 5, 1983, the utility filed a similar pleading in which it stated that because the case was proceeding much more expeditiously than was initially anticipated, the Commission would be in a position to authorize interim relief sooner than contemplated by D.83-04-021. PT&T was confident that the record would show that interim relief should be granted before December of this year. While not, at that time, requesting such interim relief, PT&T requested that D.83-04-021 be modified to make clear that the Commission had not prejudged the question and had retained the authority to grant interim relief at any time upon a proper showing.

The ALJ assigned to the results of operations as filed phase, sharing neither PT&T's optimistic appraisal of the progress of the proceeding nor its interpretation of D.83-04-021 as precluding interim relief prior to December 7, 1983, and having his hands full

with the ongoing conduct of the case, after consultation with the Presiding Commissioner did not prepare a draft decision on this first motion for the Commission's consideration.

Scope of this Decision

This decision will confine itself to the question of whether the decision scheduled for December 7, 1983 should be issued earlier to grant, by November 1, interim relief, if any is justified by the record which was submitted to the Commission on August 5. The propriety of granting interim relief must be treated in that decision, and must be based on carefully considered findings of fact and conclusions of law. (California Motor Transport Co. v PUC (1963) 59 C 2d 270.)

The review of the justification of PT&T's petition will be confined to the granting of such an accelerated decision. Separation of the issue of granting interim relief on an accelerated schedule from the issue of granting interim relief at all is difficult since the establishment that interim relief is not justified by the record as submitted would obviate the necessity of considering whether accelerated interim relief is appropriate. The opposition of the parties to accelerated interim relief was intertwined with the necessity of any interim relief at all, but the Commission will attempt to untangle the two issues and review and consider the acceleration issue alone.

Since the information contained in the two affidavits, filed with PT&T's petition, is in the nature of testimony, and was not subjected to cross-examination, it will not be considered in this decision. In any event, it was not of a startling nature and does not appear to contain information not already generally known or readily available to the public concerning the divestiture of the Bell operating companies and the regulation of California utilities.

Opposition to Motion

PT&T's motion was filed four days before the deadline for filing briefs, making it difficult for the parties to respond.

Nevertheless the staff, in its brief, was able to reply. Towards Utility Rate Normalization (TURN), a consumer group, also filed a written reply. Other parties opposed the motion as part of their oral replies. They argued against both the granting of interim relief and the acceleration of an interim relief decision. As was discussed under the heading "Scope of Decision", this decision will only consider the arguments pertaining to acceleration.

Staff Opposition

The staff referred to its opposition to PT&T's earlier, May 5, petition for modification, and argued that the Commission set a schedule that does not allow for an earlier interim decision date.

The staff insisted that PT&T has not demonstrated overriding financial necessity and that the appraisal of PT&T's "when issued" shares by the financial community was not a controlling consideration. The staff concluded its brief by saying,

"Finally, trading in when issued shares is usually the province of professionals engaging in arbitrage operations. It can be reasonably predicted that the when issued trading in the unseasoned shares of the seven new Bell Operating Companies (BOC's) will generate activity tantamount to a massive dice game. The actual shares will not trade until January after the Commission's currently scheduled decision date on December 7. The Commission should not lend its prestige and credibility merely to hype the arbitrage market for the high rollers."

The staff also questioned the granting of relief on procedural and due process grounds, arguing,

"Moreover the company is now basing its request for an accelerated decision and increase on the basis of facts not in this record as represented by the two affidavits attached to the petition. The record was closed on June 23, 1983 (33 Tr. 3996). The Commission will deprive the ratepayers of substantial rights of due process

to test the facts alleged in such affidavits on a record if the petition is granted without a hearing. The effect of granting the petition without such an evidentiary hearing could have precisely the opposite effect of that desired by the company. Such an order would be vulnerable to an appeal to the State Supreme Court thus raising the prospect of the rate increase being disallowed. The possibility of such a court suit would be well-known to sophisticated investors familiar with the California regulatory climate. For the Commission to proceed on such a basis could very well have the effect of depressing the company's shares when the when issued trading commences. Moreover, the company requests the interim increase be subject to refund which in itself casts a cloud over the market for the shares."

The staff submitted that the PT&T petition should be denied in all respects.

TURN's opposition

TURN, in its written reply, reviewed the scheduling considerations related by the Commission in D.83-04-021 and urged the Commission to hold to its earlier resolve, maintaining that PT&T is ignoring the magnitude of the evidentiary burden set before it by the April decision (D.83-04-021) and that the petition does not make a strong argument for accelerating the interim decision date.

TURN recites the relief given PT&T in the Commission's last general rate case and reminds the Commission that PT&T failed to file a timely application for rate relief, as it was entitled to do under the Commission's RCP. TURN defines the Commission's role as including responsibility for processing general rate cases in expeditious fashion, once they are filed. The Commission must also provide the utility with the opportunity to earn a reasonable return on its invested capital. The utility's role is to earn that return,

while providing adequate service at reasonable rates. One way to accomplish this end is to file and proceed with rate requests in timely fashion.

TURN asked: How will the financial community's "negative perception" be improved by an increase that is made subject to refund? If the answer is optimistic, TURN could only infer that PT&T has drawn at least one of two conclusions: (1) The financial community does not read the fine print of Commission decisions; or (2) the interim decision would serve to close consideration of the issues, so that the threat of subsequent refund would be a charade.

TURN observed that it would appear from the July 25 filing that PT&T's ability to establish a 1984 dividend policy, or at least some important element of that policy, depends on the Commission's decision here. TURN reminded the Commission that dividend decisions are made by company management, based on management's perceptions of the company's financial status and need to market its securities and asked: If any interim increase were made subject to refund, how much certainty would it provide?

Concluding, TURN asserted that PT&T would eliminate over half of the review time by requiring a Commission decision no later than November 1. This acceleration raises issues similar to those cited by the Commission in its April scheduling decision. If the Commission were to deny itself time to review the draft decision, it would be less likely that the final decision would reflect the reasoned judgment of the Commissioners.

Opposition of San Francisco
And San Diego

Counsel for the City and County of San Francisco, also representing the City of San Diego, agreed with PT&T's contention that the Commission was empowered to grant interim relief but only

upon a proper showing, which has to be an extraordinary showing, of financial emergency. PT&T's reasons for accelerating an interim decision do not constitute a financial emergency. Were the company to be unable to issue debt or equity, a negative perception would be important, but PT&T does not intend to go to the market. It wants to "hype the market price."

Counsel pointed out that other California utilities are able to make dividend declarations without rate orders, and because PT&T must decide on a dividend by November 1 does not require a rush to judgment by the Commission.

Opposition of Other Parties

The City of Los Angeles and California Farm Bureau Federation (Farm Bureau) also opposed acceleration of the schedule.

Counsel for City of Los Angeles stated that there was no negative perception of the Commission by the financial community and noted that PT&T's now retired treasurer, a witness in the proceeding, agreed with him. Counsel said that the evidence in the case did not support interim rate relief.

Counsel for the Farm Bureau pointed out the distinction between an extraordinary event and extraordinary financial need. She emphasized that the event by itself did not establish any financial need.

Consideration of PT&T Scheduling Proposal

The schedule adopted by the Commission in D.83-04-021 is an adaptation of the Commission's RCP. The RCP is itself an accelerated schedule and the adaptation further accelerated the schedule until it is taxing the Commission's capabilities.

The schedule originally proposed by PT&T in its motion for a phased proceeding would have allowed even more time than provided by D.83-04-021 for PT&T to present its case. The compression of the

RCP was proposed in the time the Commission reserved to itself for the decision-making process.

Despite the long standing relationship between this Commission and PT&T, the utility apparently has no appreciation of the workings of the Commission's decision-making process. The Commission is its own best judge of the minimum time required for this process. For PT&T to continue to persevere, and to repeat for the third time, its proposal that the Commission's long-standing decision-making process be short circuited, is taxing the patience and forbearance of the Commission and is forcing it to spend time that could be more profitably used to resolve the issues of the proceeding. PT&T's proposal presupposes that its case is so compelling that its ratification by the Commission is a foregone conclusion. Such is not the case. Important and difficult issues are before the Commission for resolution, including claims of excessive maintenance expense, overbuilt plant, inadequate performance of the pension plan, and proposals for sizable reduction in the last allowed return on equity. The time provided by D.83-04-021 is the absolute minimum required for the Commission to formulate a reasoned and responsible decision.

As pointed out by the parties, the time bind that PT&T feels itself in as regards the dividend declaration is of its own making. Also, it is naive to believe that the most sophisticated of all investors, those purchasing and selling when-issued stocks, would be moved by a hastily awarded rate increase issued complete with a Damocles refund sword.

The credibility that this Commission now enjoys with the investment community has been built up by a careful balance of the interests of investor and consumer over the past decade, which decade is certainly the most turbulent experienced by regulated utilities. It would not be further enhanced by acceptance of PT&T's

transparent increase subject to refund proposal and probably would be damaged, as investors look for substantive deeds upon which to base their commitment of funds.

PT&T has not convinced the Commission that there is a financial emergency justifying modification of the schedule established by D.83-04-021. The utility's petition will be denied and the Commission will reaffirm the schedule established by D.83-04-021. The Commission will proceed to determine, in a decision scheduled to be issued, if required, on or before December 7, 1983, whether PT&T has demonstrated overriding financial need for interim rate relief.

Findings of Fact

1. PT&T has not provided sufficient justification for modification of D.83-04-021.

2. The schedule established by D.83-04-021, as modified by revised notices of hearing issued April 13, 1983 and July 13, 1983 and by the assigned Commissioner's ruling issued July 1, 1983, is as expeditious as the Commission can meet.

Conclusions of Law

1. The request of PT&T for an expedited decision in Phase I of this case should be denied.

2. The Commission should reaffirm the schedule established by D.83-04-021, as modified by revised notices of hearing issued April 13, 1983 and July 13, 1983 and by the assigned Commissioner's ruling issued July 1, 1983, and proceed to determine, in a decision scheduled to be issued, if required, on or before December 7, 1983, whether PT&T has demonstrated overriding financial need for interim rate relief.

SECOND INTERIM ORDER

IT IS ORDERED that:

1. The request of The Pacific Telephone and Telegraph Company to modify the schedule established by D.83-04-021 to provide for a decision before November 1, 1983 is denied.

2. The schedule attached to D.83-04-021, as modified by revised notices of hearing issued April 13, 1983 and July 13, 1983 and by the assigned Commissioner's ruling issued July 1, 1983, is reaffirmed.

This order is effective today.

Dated SEP 7 1983, at San Francisco, California.

I dissent.

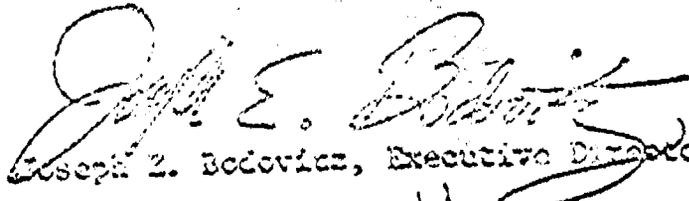
LEONARD M. GRIMES, JR. Commissioner

VICTOR CALVO
PRISCILLA C. GREN
DONALD VIAL
Commissioners

I dissent.

WILLIAM T. SAGLEY Commissioner

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


Joseph Z. Bedovian, Executive Director

APPENDIX A

LIST OF APPEARANCES

(See Prehearing Conference Memorandum, Attachment A, Decision 83-04-021, for previous appearances.)

Additional Appearances

Protestants: Herman Mulman, for Seniors for Political Action; Edward Duncan, for himself; and Burt Wilson, for California Association for Utility Service Equality.

Interested Parties: Palmer & Willoughby, by Michael F. Willoughby, Attorney at Law, for ICS Communications; Robert H. Wyman and Richard M. Cahill, Attorney at Law (New York, Maryland, Florida, and Hawaii), for General Telephone Company of California; Patricia A. Tilley, for the University of California; Stewart Weinberg, Attorney at Law, for Service Employees Union, Local 87; Ira Reiner, City Attorney, by Ed Perez, Deputy City Attorney, for City of Los Angeles; Milton Morris and Richard A. Bromley, Attorneys at Law, for American Telephone and Telegraph Company; Graham & James, by Thomas J. MacBride and James Squeri, Attorneys at Law, for U.S. Tel, Inc., Combined Network, Inc., and CALTEL (California Association of Long Distance Telephone Companies); John E. Dennis, for Bell System California Interexchange Organization; Charles J. Beck, Attorney at Law, for Sonitrol Security, Inc.; Morrison & Foerster, by Leigh R. Shields, Attorney at Law, for Telephone Answering Services of California; Steve Vogelsang, for himself and Southern California Section Professional Golfers Association of America; Lawrence P. Keller, for The Western Union Telegraph Company; Thomas Vargo, for Jay Randolph McPherson, Office of General Counsel, Code 105, Defense Communications Agency; William G. Irving, for the County of Los Angeles; Ann C. Pongracz and Mitchell F. Brecher, Attorneys at Law, for GTE Sprint Communications Corp.; August A. Sairanen, for State of California, Department of General Services; and Sidney J. Webb, for himself.

Commission Staff: Michael Galvin, Louis G. Andrego, and J. Douglas Dade.

(END OF APPENDIX A)

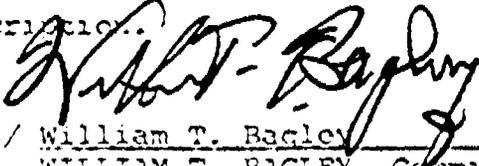
WILLIAM T. BAGLEY, Commissioner, Dissenting:

The primary reason for this dissenting opinion is procedural but none the less important. The direct implication of the majority opinion is that this Commission is not in control of its own agenda, and, further that an on-the-record, quasi-judicial evidentiary hearing, meeting certain criteria, is necessary to alter our schedule. Since I am concerned that someone, someday, may take that proposition seriously, I am impelled to state the following.

The burden that Pacific must undertake to justify the requested interim rate relief - an overriding financial need - is clearly set forth in D.83-04-021. That burden remains in the substantive aspects of this case. But the majority refuses to alter the Commission schedule because it finds "no financial emergency". That is a non-relevant legalistic facade, at best.

Clearly, no such burden need be met in order for this Commission to agree to change its schedule. Empirically, this Commission is in charge of its own agenda. It can agree to decide any matter submitted to it when a majority of its members are ready or prospectively believe they will be ready to make such a decision. To state or argue otherwise would fly in the face of whatever logic is left in what we call the governmental process. That is the whole point of this dissenting opinion.

As a matter of fact, this very point was acknowledged by our very thoughtful colleague Commissioner Don Vial when, at Conference, he stated that he would be ready to decide this matter when he discerned that others were, regardless of the earlier adopted schedule. Since President Grimes joined me in proposing an alternate decision which followed the above reasoning, I feel secure in stating that three Commissioners agree that we are, in reality, in charge of our own agenda. Now that that is settled, we shall go about our prescribed business of deciding matters on the merits without inordinate and unnatural procedural proscriptio.


/s/ William T. Bagley
WILLIAM T. BAGLEY, Commissioner

September 7, 1983
San Francisco, California