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Decision No. 87629 JUL 19 1977

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the promulgation of a General Order providing for the procedures and standards to be followed for the interconnection of customer-provided communications terminal equipment to the telecommunication facilities of intrastate telephone utilities.	Case No. 9625
And Related Matters.	Case No. 9177 Case No. 9265 Case No. 9271 Case No. 9323 Case No. 9360 Case No. 9546 Case No. 9600 Case No. 9610 Case No. 9637 Case No. 9652

(See Decision No. 84364 for appearances.)

O P I N I O N

Background

In Decision No. 85791 dated May 11, 1976, we modified and made permanent General Order No. 138 (GO 138) (rules for the connection of customer-provided equipment to public utility telephone company systems) as adopted in Decisions Nos. 84364 and 84461. That decision ordered that telephone utilities submit within 180 days data on the economic effect of certification of PBX systems, key telephone systems, (KTS) and extension telephones; that revenue from utility-provided protective arrangement (PCA) equipment held subject to refund

pursuant to Decision No. 82412 shall not be refunded; and that charges for utility-provided equipment shall no longer be collected subject to refund.

A petition for rehearing of Decision No. 85791 was filed on June 2, 1976 by Scott-Buttner Communications, Inc. (Scott-Buttner) citing numerous allegations of error in the decision. The Commission on July 19, 1976 in Decision No. 86151 denied rehearing. On August 18, 1976 Scott-Buttner filed a petition for Writ of Review with the California Supreme Court. Answers to the petition for Writ of Review were filed by the Commission, Continental Telephone Company of California (Continental), General Telephone Company of California (General), and The Pacific Telephone and Telegraph Company (Pacific).

On February 25, 1977 a Writ of Review of Decision No. 85791 was issued by the California Supreme Court (S.F. No. 23509).

On March 3, 1977, after a review of the petition for Writ of Review and answers thereto filed with the California Supreme Court, we determined there was cause to reconsider Decision No. 85791 and we reopened Cases Nos. 9625, 9177, 9265, 9271, 9323, 9360, 9546, 9600, 9610, 9637, and 9652.

On March 22, 1977 in Decision No. 87131 we determined that further evidentiary hearings were not necessary and requested the parties to submit briefs within 30 days on the following issues:

> "(a) Whether the Commission erred in ordering that the utilities need not refund, or collect subject to further refund, charges for protective connecting arrangements.
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> "(b) Whether the Commission adequately considered the antitrust issues in the continuation of the protective connecting arrangement program for non-utility-provided PBX, KTS, and telephone extensions without an alternative certification program."

Briefs were filed by General, Continental, Pacific, Scott-Buttner, and the Commission staff.

Summary of Briefs

General

General argues that Decision No. 87131 does not comply with Section 1708 because it fails to provide for hearings.[1/] General contends that since GO 138 establishes only the technical parameters for certification of data and ancillary equipment that further hearing is necesssry to determine adequate standards for PBX, KTS, and extension telephones.

General also argues that Decision No. 85791 is correct and that since ratemaking is prospective only, refunds of rates collected after formal Commission findings in Decision No. 84364 cannot be ordered. (PT&T v PUC (1965) 62 C 2d 634, 650-655.)

Finally General states that the charges for PCA's are not only necessary but are cost related and it is only fair that such costs be borne by the group of customers who use them.

Continental

Continental argues that the decision on refunds became final when Decision No. 85791 became effective June 1, 1976 and a timely petition was not filed, that Decision No. 85791 was not stayed under Section 1753 of the Public Utilities Code, and that a proceeding under Section 1708 is only prospective in operation. Citing the California Trucking Association case, supra, Continental further argues that further evidentiary proceedings are required.

Pacific

Pacific argues that the Commission committed no error in issuing Decision No. 85791 by ordering that no refunds be made or in its consideration of antitrust issues; that the retention of

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1/ Citing California Trucking Assn. v Public Utilities Commission (1977) 19 Cal 3d 240, which held that "opportunity to be heard" as used in Section 1708 requires further evidentiary hearing; hereinafter cited as CTA v PUC.

PCA's pending a final decision was reasonable and proper; that Section 1708 and the California Trucking Association case require an evidentiary hearing; that on the basis of a recent decision[2/] the Federal Communications Commission (FCC) through the adoption of its registration program preempted the states alternative action; and that the Commission should refrain from acting until the question of further appeal is resolved and if the decision of the Fourth Circuit Court of Appeal is final, the Commission should defer to the FCC registration program. Pacific also requested a hearing.

Scott-Buttner

Scott-Buttner contends that the Commission erred in ordering the utilities not to refund and not to collect further charges for

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2/ While the hearings on Case No. 9625 were being conducted the FCC in Telerent Leasing Corp. (1974) 45 FCC 2d 204 asserted primary jurisdiction over direct interconnection of all terminal equipment to the telecommunication network. The FCC decision was upheld in North Carolina Utilities Commission v FCC (1976) 537 Fed 2d 787, petition for cert. denied, 45 USLW 3257 (North Carolina I). The FCC on November 7, 1975 in Docket No. 19528 added a new Part 68 which provided for the direct connection of registered terminal equipment to the telecommunication network. This applied to all equipment except PBX, Key system, coin telephones, and main telephones. On March 18, 1976 the FCC in Docket No. 19528 issued its Second Report which proposed standards for direct connection of PBX, Key system, and main telephones.

On April 29, 1976 the Fourth Circuit Court of Appeals stayed the FCC's proposed standards and procedures pending judicial review.

After oral argument, the Fourth Circuit lifted the stay with respect to customer-provided ancillary and data equipment but continued the stay with respect to PBX, Key system, and main and extension telephones.

On March 22, 1977 the Fourth Circuit in North Carolina Utilities Commission v FCC (North Carolina II) upheld its North Carolina I decision affirming the FCC order in Docket No. 19528 establishing the registration program for customer-provided terminal equipment.

PCA's subject to refund because such charges were unreasonable and a restraint of trade in violation of the Sherman Act of 1890, 15 USC, §§ 1 through 7, and the Cartwright Act, California Business and Professions Code, §§ 16700 through 16758; that retention of such charges would result in unjust enrichment for the utilities at the expense of those paying the charges; and that the continued requirement that a PCA be used in conjunction with nonutility PBX, KTS, and extension telephones without an alternative certification program is unlawfully discriminatory, unreasonable, and violates the statutes of California and the United States.

Commission Staff

The staff argues that because of North Carolina the FCC has primary jurisdiction over the direct interconnection to the telecommunication network of all terminal equipment, that Decision No. 85791 does not adequately consider relevant antitrust issues and that the decision failed to discuss and make findings of fact and conclusions of law on all issues material to the order as required by Section 1705 of the code. The staff also contended that Decision No. 85791 sanctioned unfair competition practices by regulated telephone utilities in California and that it is unlawful for the Commission through its certification program to limit interconnection of customer-owned PBX, KTS, and extension telephones through utility-provided PCA's. Finally the staff argues that the Commission erred in ordering that the utilities need not refund or collect subject to refund charges for utility-provided PCA's and urges that a refund with interest be ordered for all PCA charges collected and held in segregated accounts.

DISCUSSION

We have read the briefs submitted and have carefully considered all of the positions. Before discussing the arguments presented, we believe it should be pointed out that our past action was but a step toward the resolution of a complex and important

matter. Further, the Fourth Circuit Court decision cited in the briefs of the staff and Pacific significantly affects our decision in this matter. In our opinion the decision of the Fourth Circuit may bring to an end the controversy over the regulation of interconnection of customer-provided terminal equipment to the telecommunications network.

The FCC has asserted primary jurisdiction over direct interconnection of all telecommunication terminal equipment (Telerent Leasing Corp., 45 FCC 2d 204 (1974)), and that decision was upheld on appeal (North Carolina Utilities Commission v. FCC, 537 Fed. 2d 787 (4th Cir. 1976), petition for cert. denied 45 U.S.L.W. 3257 (Nos. 76-331, 76-332, 76-336, U.S., Oct. 5, 1976)). The FCC proceeded to promulgate a terminal equipment registration program. The U.S. Court of Appeals for the Fourth Circuit upheld the FCC's registration program for all terminal equipment (including PBX, KTS, and extension equipment) (North Carolina Utilities Commission v. FCC (mimeo. 4th Cir., March 22, 1977)).[3/] The effect of the Fourth Circuit decisions cited above is that there is now a national registration program for all terminal equipment (including PBX, KTS and extension equipment. We, as a state regulatory commission, may adopt rules for direct interconnection; however, they may not be more onerous than those adopted by the FCC with its primary federal jurisdiction. In this decision we adopt interconnection rules and guidelines that do not contradict those of the FCC and which are not more onerous.

The Requests of Respondent Utilities for Further Hearings

We are issuing this opinion, which modifies substantially the result reached in Decision No. 85791, without further hearings. Our opinion is issued after careful review of the extensive evidentiary

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3/ The staff points out that in this decision the Court concluded that lengthy economic studies were not necessary before implementing the FCC's registration program. We reach the same conclusion herein.

record already developed, and consideration of the latest briefs filed by the parties. No party has demonstrated in the briefs filed that it has significant new evidence to offer. Were we to hold further hearings, the process would be time-consuming (in fact, further delay might be to the benefit of some of the respondents to the detriment of some of their subscribers) and our resolution of these important interconnect issues would be further delayed. As time passes it dilutes the effectiveness of our order directing the PCA rates to be collected subject to refund; subscribers move, relocate, or otherwise cannot be located to receive any refund that may be due them. Also, the possible effects on competition posed by prolonging PCA requirements may indeed be serious. We find it in the public interest to render an expeditious and equitable opinion which will lay to rest these remaining interconnect issues. This opinion will complete our resolution of fundamental interconnect issues; further, it will let telephone utilities, interconnect companies, and the subscribers who own terminal equipment or who contemplate the procurement of terminal equipment[4/] to finally know the regulatory ground rules that will be applicable in the foreseeable future. These issues have been unresolved too long, creating a confusing, uncertain marketing environment that is of no benefit to anyone (including telephone utilities).

It is then our opinion that the exhaustive evidentiary record already developed cannot be meaningfully supplemented by

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4/ Procured either by purchase from an interconnect company or obtained on a monthly charge basis from telephone utilities.

further hearings, and that delay[5/] only continues fundamental inequities that we can and should deal with today.

The respondent utilities all requested further hearings, citing Section 1708 and CTA v. PUC as authority. We are of the opinion the circumstances surrounding this decision are distinguishable from CTA v. PUC. Our decision which was annulled by CTA v. PUC was issued without our having held hearings; there was not a current evidentiary record. Here, however, there have been 30 days of hearing and extensive briefing. The issues of refunds, potential harm to the telephone network, and technical requirements adopted for certification of PBX, KTS, and extension equipment have been exhaustively addressed by the parties. Also, it is critical to note that our technical requirements which we adopt for the certification of PBX, KTS, and extension equipment are not more onerous than those adopted by the FCC (and, indeed, they could not be, as the FCC has asserted primary jurisdiction). The refund question is essentially a legal issue, which is most properly one for briefing. Although the respondent utilities might like to continue to prepare and present exhaustive studies on the long-range economic impact of direct interconnection on utilities, our policy determination that competition is in the overall public interest (recognizing economic repercussions will necessarily occur) renders such further hearings in this proceeding needless. It may be that every month of delay resulting from the

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5/ Our proceedings may seem to move slowly. However, to hold further hearings, we would be required to: (1) schedule a prehearing conference; (2) give the parties time to prepare and distribute their prepared testimony showings; (3) allow for what could be considerable cross-examination; (4) allow presentation of rebuttal testimony and cross-examination; (5) allow time to prepare and file briefs; and (6) allow time for the Administrative Law Judge to prepare and present the assigned Commissioner with a proposed decision. Despite our best intentions, our proceedings do not progress to resolution as rapidly as we would always prefer; given the complexities of issues, the number of parties involved, and existing workloads, delay is a fact of regulatory life.

preparation and presentation of utility studies would occur at the expense of slowing the advent of direct interconnect competition. Accordingly, we think the circumstances here are distinguishable from CTA v. PUC.

The Question of Whether the Commission Can Order Refunds

Continental, Pacific, and General contend in their briefs that we may not now modify the determination in Decision No. 85791 and order refunds. The rationale of the respondent utilities is that Decision No. 85791 (which determined refunds were not in order and that rates should not continue to be collected subject to refund) became "final". The utilities are mistaken in thinking that decision was or is final. Clearly that decision is not final in the sense that the appellate review process has been exhausted. The Supreme Court could order Decision No. 85791 annulled totally, or in part, and direct that refunds are in order. All we do by this order today is rectify, after notice to all parties and considering their responses, what we believe to be errors in Decision No. 85791 prior to the close, and as a part, of the appeal process.

Further Economic Studies

We announced in Decision No. 85791 that we would hold further hearings on the economic impact of direct interconnection of customer-owned PBX, KTS, and extension equipment. The respondent utilities have asked for and have been granted extensions of time to prepare studies on such economic impact. By our order today the studies are no longer necessary in this proceeding. We find that extending the GO 138 certification program to cover such equipment is in the overall public interest and to require PCAs where they are not technically required to protect the telephone network necessarily constitutes a barrier to competition (as well as creating needless charge to the ratepayer who owns equipment). Competition tends to promote product development and improvements. Better and more advanced state-of-the-art telecommunications equipment should be

available as fast as it can be developed, produced, and offered. We hope our order today will serve that goal. We recognize that telephone utilities offer equipment in competition with unregulated interconnect companies. Accordingly, it is foreseeable that there could be economic effects on regulated utilities (e.g., shorter revenue producing lives for competitive equipment).[6/] For example, in Application No. 55492, Pacific Telephone, we are faced with the question of whether to pass on to all ratepayers the depreciation expense effect of shortening service lives of Account 234 equipment (large PBX equipment) or, in the alternative, whether only tariff charges on such equipment should absorb any increase (or, in essence, whether to pass the economic effects of competition on to terminal equipment subscribers). Questions like this that will arise in the future are difficult. We hope to resolve them fairly and in the overall public interest. Regulators, telephone utilities, and the interconnect industry find themselves in an era of transition as competition comes to the terminal equipment market. Ultimately, fundamental questions must be resolved on the national level; certainly the outcome of the U.S. Justice Department's divestiture suit against The American Telephone and Telegraph Company, Western Electric and Bell Telephone Laboratories will be a catalyst in the national arena.

Extension of the General Order No. 138 Certification Program to All Terminal Equipment

Scott-Buttner urges that the Commission order immediate establishment of a certification program for any and all equipment not covered by existing programs, i.e., PBX, Key system, and extension telephones.

6/ Likewise, it is foreseeable that manufacturing companies affiliated with telephone utilities will probably take whatever steps are necessary to meet and attempt to outmatch competitive interconnect companies; those affiliated companies may spend more or maximize efficiency to meet competition.

We agree with the general thrust of Scott-Buttner's request. It is highly desirable that a full range of telecommunications terminal equipment be available to the public for connection to the public switched telephone network. Such a result can be obtained by extending the equipment certification provisions of GO 138 to all classes of equipment rather than ancillary equipment only as provided by Decisions Nos. 84364, 84461, and 85791.

In considering whether to extend our order, we must first give consideration to actions by the FCC in this matter and determine whether it has preempted the field.[7/]

Decision No. 85791 provided for the certification of ancillary and data equipment and direct connection of such certified equipment to the telephone network. Since this order was issued subsequent to the FCC's second report and order, no purpose would be served in extending the General Order if the FCC rules provided full coverage of all types of terminal equipment.

Because of court appeals, the FCC rules did not become fully effective when issued. On April 29, 1976 the U.S. Court of Appeals for the Fourth Circuit partially stayed the implementation of the FCC's proposed standards and procedures. The FCC registration program for main and extension telephones and for PBX and KTS service, the subject of the Scott-Buttner petition, was suspended pending court review.

7/ On June 14, 1972 the FCC instituted Docket No. 19528 by Notice of Inquiry and Proposed Rule Making, 35 FCC 2d 539 (1972), to determine whether and under what terms, conditions, or limitations the interstate MTS and WATS tariffs should be revised to allow customers to have the option of furnishing any needed network control signalling units and to determine what rules, if any, the Commission should adopt with respect to the foregoing. A Federal-State Joint Board was also established pursuant to Section 410 of the Federal Communication Act to submit its recommendations. Part 68 of the FCC Rules and Regulations adopted a registration program for the interconnection of terminal equipment to the telecommunication network.

On March 22, 1977 the Fourth Circuit Court of Appeals in North Carolina II issued its decision upholding the FCC registration program in all respects and lifted its stay of the registration program with respect to main and extension telephones and PBX and KTS equipment. The FCC equipment registration program would now be applicable to all terminal equipment except for coin telephones and equipment connected to party lines.

On April 28, 1977 the Fourth Circuit stayed its mandate to put into effect its prior upholding of the FCC's terminal equipment registration and certification program. The order staying the mandate came in response to motions filed on behalf of the U.S. Independent Telephone Association (USITA) and other parties. The effect of this order is to allow 30 days for an appeal to the U.S. Supreme Court. During that time, the June 16, 1976 stay order holding in abeyance the certification and registration program as it applies to main stations, extensions, PBX's and KTS systems remains in effect. If USITA and other parties are planning an appeal to the Supreme Court, when those motions are filed, the June 16, 1976 stay order will automatically continue until the U.S. Supreme Court has acted.

Notwithstanding uncertainties surrounding the FCC orders, we will make clear the position of this Commission. Should there be termination, either by court action or legislation, of the FCC program for interconnection of customer-owned equipment, it is our intention to provide a full program for interconnection of all classes of equipment. Further, because of continuing delays in implementing the FCC rules, we are herein taking further interim steps to provide expansion of the scope of GO 138.

Certification of Extension Telephone Equipment

Telephone instruments present no problem in redefining our rules. GO 138 contains standards for all functions of telephones, e.g., signal level and dialing speed. It is only necessary to

specify telephone instruments as a class of equipment covered by the order. Accordingly, telephone instruments will be designated as Class 3 equipment under Rule 5.1. Class 3 equipment, certified pursuant to GO 138, may be directly connected to the telephone network through a jack and plug arrangement for use as an extension telephone.

Consistent with the similar provisions of the FCC's Part 68 rules, coin telephones and telephones or other equipment connected to party lines are excluded from GO 138. Customer-owned coin telephones will not be permitted for connection to the network because of the requirement that they be under the full control of the utility for collection of coin box revenues. Customer-owned equipment on party lines will not be permitted at this time because of problems with signaling and station identification. For party lines there are a number of different signaling arrangements including divided ringing, biased ringing, harmonic ringing, and decimonic ringing. Different telephone systems use different methods, and each station on a party line may have a different specification. Connection of any telephone to a party line may cause improper service to other subscribers on the line. Other difficulties are occasioned by characteristics of party line telephones which are used to identify stations in connection with toll ticketing and billing. Such arrangements as simplex identification and spotter dial require individually adjusted telephone parameters for each subscriber. Lack of proper parameters may cause either loss in telephone utility revenues or charging customers for calls made by others.

Jack and plug arrangements used with customer-owned telephones and other terminal equipment should be consistent with the jack and plug specifications prescribed in Subpart F, Section 68.500 of Part 68 of the FCC rules. The jack and plug specifications therein in effect constitute a national standard. Such a standard has been adopted by major utilities for wiring station connections

in new installations. For the future, equipment certified under GO 138 shall use the FCC specified plugs. For existing equipment utilizing the older-type plugs we will expect the utilities to provide adaptors, at a reasonable charge, to permit such equipment to be connected to the newer jacks. We will likewise expect the utilities to provide adaptors, at a reasonable charge, to permit connection of equipment with newer-type plugs to older-type jacks. In addition, customers should be permitted to provide such adaptors.

Certification of PBX and KTS Equipment

The remaining issue of interconnection and equipment certification relates to KTS and PBX equipment. Those classes of equipment do not readily apply themselves to the certified equipment with a jack and plug arrangement. KTS and PBX equipment is usually wired in place on a customer's premises. In the wiring process the system may come in contact with supply wiring or other hazards. Mere certification of equipment modules would not provide adequate protection in such circumstances. Several answers to this problem are suggested. One is to provide for final inspection of installation as is now the general practice with electric supply wiring. Another is to provide for licensed installers to insure that the personnel involved are adequately trained and skilled to recognize and avoid hazards. Either of these two alternatives would require establishment of a sizable bureaucracy, an unpalatable choice.

When confronted with this problem, the FCC in its Second Report and Order (FCC 76-242, Adopted March 18, 1976) commented as follows:

> "27. PBX and KT Installation Problems. Unlike ancillary and data equipment, and telephone sets, which are generally connected only to the telephone network and to no other equipment, PBX and KT systems consist of common equipment which is directly connected to the telephone network, and remote terminal equipment (such as telephone sets) which is indirectly connected to the telephone network through the common equipment. If protective circuitry is employed at the point of

connection with the telephone network, then no harm can result from improper installation of wiring between the common equipment and remote equipment. However, if protective circuitry is not connected between such intra-system wiring and the common equipment, and there is no protective circuitry at the point of connection to the telephone network, then the network is vulnerable to inadequate intra-system wiring, and improper installation of such wiring.

"28. Wiring is passive. It cannot, of itself, generate any signals. It can, however, become connected with earth ground or power lines through inadequate insulation, or marginally adequate insulation and improper installation. We have received no adequate proposals for certifying the installation of wiring. Even if we were to make the leakage current requirements applicable to intra-system wiring (which would assure adequate insulation), there still would be no assurance of adequate separation from power lines at the time of installation of such adequately insulated wiring. Thus, we are faced with a quandry; the common equipment may be perfectly acceptable without protective circuitry, and yet leave the telephone network vulnerable to the vagaries of installation of wiring connected with the common equipment.

"29. We have not received adequate recommendations for appropriately addressing this problem in the scope of the F.C.C. registration program. Therefore, we are requiring that (1) PBX and KT equipment be connected to the telephone network through protective circuitry at the point of connection with the telephone network which assures compliance with the hazardous voltage, longitudinal balance and leakage current requirements regardless of the design and installation of the common equipment and intra-system wiring (in which case, no further information concerning the design of the common equipment need be furnished, except as noted below); or (2) that such protective circuitry be located within the common equipment such that it is electrically in the path of all wiring between the common equipment and remotely

> located equipment (such as telephones),[11/] or (3) PBX and KT equipment be connected to the telephone network through fully protective circuitry at the point of connection with the telephone network (in which case, there would be no limitation on the remote terminal equipment which might be connected through the intra-system wiring, except possibly for data equipment). In each of the first two alternatives (1) the common equipment may only be used with remotely located terminal equipment which itself is registered as conforming with the signal power requirements of Part 68, or which is connected to the remote end of the intra-system wiring through registered protective circuitry, and (2) information would have to be furnished concerning the loop current furnished remote equipment, to determine whether equipment registered as conforming to the signal power requirements when connected to a loop simulator circuit would similarly conform to these requirements as connected with the loop currents furnished by the common equipment. Since the Bell-initiated revised signal power limitations do not control in-band power for live voice accousto-electrical transducers (such as telephone sets), this approach will require no additional power limiting components to be added to PBX's if used only with remotely located telephone instruments.
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> "11/ Many PBX designs already incorporate such circuitry as is called for under options (1) and (2), e.g., 'repeat coil' PBXs."

We agree with the conclusions of the FCC in this matter and will adopt this solution to our revision of GO 138. In view of the protective features obtained thereby, we will not require connection of PBX and key systems by jacks and plugs. Connection may be made by terminal block or otherwise as appropriate.

Refunds

By Decision No. 82412 in this proceeding, issued January 29, 1974 (and effective February 17, 1974), we directed that:

> "All charges for protective connecting arrangements or equipment collected by the respondent telephone utilities pursuant to such tariffs shall be recorded and kept in separate accounts according to customer and shall be subject to refund."

There was a reason why we made PCA charges subject to refund. Some of the parties requested that the proposed general order go into effect during the pendency of hearings. Telephone utilities wished us to continue to order the use of PCA's while hearings on the proposed general order progressed. The concern we had was whether ratepayers with PCA equipment should be subject to applicable tariff charges for a potentially long period of time if, in the final analysis, such PCA's were shown to be not necessary. Respondent General Telephone suggested that we exercise our authority to make PCA charges conditional (or subject to refund) as a means of alleviating any alleged economic hardship. We adopted General Telephone's suggestion as a means of insuring that the equities of those providing and using customer-owned terminal equipment could be protected.[8/] It was on that basis that we proceeded to examine the proposed general order and determine whether there were alternatives to PCA's; it was foreseeable that for some customers the outcome could be that PCA equipment for which they were being charged was unnecessary.

8/ Although we did not allow direct interconnection without PCA's we find that our solution of making the rates subject to refund substantially afforded the same ratepayer protection that the Supreme Court provided in Phonetele, Inc. v. PUC, 11 Cal 3d, 125, 132 (1974): "In the interim, since damage to the telephone system has not been demonstrated, telephone subscribers who choose to use phone masters should be permitted to do so without incurring additional charges for connecting devices."

Our alternative to General's proposed approach at the outset of Case No. 9625 would have been to implement the proposed general order (which would have allowed certification of ancillary PBX, KTS, and extension equipment) on an interim basis and proceed with extended hearings. It is because we did not proceed with the latter course of action that we must now retrospectively order the refunds contemplated when we issued Decision No. 82412. Customers who own equipment that meets GO 138 requirements, and who posed no threat of harm to the network, should not have been assessed charges for what turns out to be needless PCA's. The PCA's and associated charges have been shown to be unnecessary for certain customers, which means the PCA rates were unreasonable pursuant to Section 451. Also, as background, it should be pointed out that certain customer-owned equipment was eligible for interconnection without PCA charges during the pendency of this proceeding. Phonetele was granted such relief by the Supreme Court, Phonetele, supra, Com-U-Trol by Decision No. 82789, and Telephonic Equipment Corporation by Decision No. 82788 (the latter two manufacturers were authorized such relief following the Phonetele decision). We find that it would indeed be unduly discriminatory if PCA charges paid by the users of other customer-owned equipment, where appropriate, were not refunded.

We are by this decision, after a careful reevaluation, ordering refunds for certain customers who paid PCA charges after February 17, 1974 (the effective date of Decision No. 82412). We now discuss which customers should receive refunds and how the refund procedure should operate. Administering the refund program the order herein will, we recognize, be time-consuming and involve expenses to the respondent telephone utilities. However, we ordered the PCA rates collected subject to refund at the behest of General, and such administrative problems were foreseeable at that time.

Refunds for Subscribers Having PCA's for Customer-Owned Ancillary Equipment

Which customers should be eligible for refunds? We recognize that not all customer-owned equipment that was and is interconnected with a PCA could, in the absence of a PCA, meet our GO 138 standards. Those customers still need PCA's and should not, in fairness, be given refunds. However, after GO 138 became effective, certain ancillary equipment types that had been on the market before its effectiveness were certified retrospectively. The result is that directly connected equipment that was at one point illegally connected became legally connected upon subsequent certification by the manufacturer. The owners of this equipment are the subscribers who should receive refunds.

What about the subscriber who owns equipment for which the manufacturer has yet to seek retrospective certification? We are concerned about these subscribers and their not being able to receive refunds because an equipment manufacturer has not yet sought or obtained certification. To protect their interests, we are directing that for a three-year period from the effective date of this order the respondent telephone utilities shall make refunds whenever equipment is retrospectively certified. We are directing the respondent telephone utilities to review the accounts of their subscribers having PCA's and make the appropriate refunds. When a subscriber has retrospectively certified equipment, the utility shall, without charge to the subscriber, remove the PCA. Those customers should not be subject to PCA charges in the future. However, applicable utility tariffs now require a utility-installed plug and jack connection, which is standardized, to prevent tampering with utility company wiring. In the course of removing an unnecessary PCA, the utilities should collect the applicable charge for installing the plug and jack (but not the charge for making a premises visit); the utilities can offset the amount of refund by the plug and jack charge, in accordance with the above, where applicable.

Should the refunds be in the form of a credit for telephone service or cash? Subscribers having PCA's are identifiable and the utilities were directed by Decision No. 82412 to maintain records to facilitate refunds to those subscribers. With the exception of subscribers who have terminated service, or otherwise have had their PCA's disconnected, we are directing the refunds be made by a credit against prospective telephone service charges. However, for the subscriber who has or will discontinue service before realizing the full amount of refund credit, we are directing the utilities to make a cash refund. If a qualifying subscriber has had his PCA removed since February 17, 1974, and prior to this order, he shall be refunded any charge for disconnecting the PCA as well as the applicable monthly PCA charges. There will probably be subscribers who discontinued service and are due a cash refund that the utilities, after a diligent effort, cannot locate. The refunds due these subscribers shall be placed in a separate account and distributed pursuant to Commission direction.

Refunds to Subscribers Having PCA's for Customer-Owned PBX, KTS, and Extension Equipment

Should refunds be made to subscribers who have customer-owned PBX, KTS, or extension equipment? The direct interconnection of that equipment (after certification) is first provided for by this order although the proposed general order issued with Case No. 9625 covered such equipment, and the FCC's direct interconnection solution (on which we substantially rely) was issued in March 1976. The question then becomes: Should we allow refunds hereafter for PCA charges on PBX, KTS, and extension equipment which is retrospectively certified (refunds from February 17, 1974 to the date of such certification)? Refunds are in order. We should treat such subscribers in the same manner as those having PCA's for customer-

owned ancillary equipment.[9/] And for good reason. The proposed general order issued with our Order Instituting Investigation in Case No. 9625 covered PBX, KTS, and extension equipment as well as the ancillary equipment that has up to this date been subject to certification under GO 138. Retrospective certification for PBX, KTS, and extension equipment has, of course, not been accomplished (as with ancillary equipment), so we must establish a procedure to operate for a reasonable period of time so that these qualifying PCA customers can realize the refunds. We recognize, as with ancillary equipment, that there will be customer-owned PBX, KTS and extension equipment installations which will not qualify for certification and may always require an externally fitted PCA; those PCA customers should not receive refunds. PBX systems which were designed and manufactured so that the internal circuitry and construction without an external PCA are the systems,which, if they are retrospectively certified, qualify customers for refunds. Any on-premises modifications or retrofitting of apparatus to enable the system to meet certification without a PCA after the date of this

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9/ With respect to extension telephone stations, the certification provisions adopted herein are essentially identical with those previously adopted for ancillary equipment. Extension telephones are amenable to this treatment as they are generally not connected to external sources of power, do not generate signals other than that provided by voice or dialing, and are connected on a plug-in basis. Furthermore, many extension telephones may be identical to utility-provided telephones for which no protective connecting arrangement was required. Accordingly, it is our view that the treatment of refunds for customers with extension telephones should be parallel with the treatment given to customers with ancillary equipment. In other words, for all telephone instruments that are certified pursuant to this order, refunds should be provided to customers for PCA's which had previously been required on such equipment since February 17, 1974.

order shall not qualify the owner for refund of PCA charges back to February 17, 1974. However, for a three-year period from the effective date of this order, we are directing that respondent telephone utilities contact PCA users who have customer-owned PBX, KTS, and extension equipment as the particular models qualify for direct interconnection after certification and:

1. Compute the amount of refund due from February 17, 1974.
2. Remove the PCA's without charge to the customer.
3. Connect the customer-owned equipment as provided in Revised Section 5.1.c or 5.1.e, as applicable, of GO 138 (Appendix A of this decision), without charge.10/

The refund due these subscribers shall be in the form of a credit against telephone service. There may be PCA customers who, it turns out, would have been eligible for retrospective certification of customer-owned PBX, KTS, or extention equipment but who have modified service or terminated service so that they are not now paying PCA charges. These customers shall be contacted by the respondent utilities as particular equipment models are certified and given refunds. Where it is determined that an otherwise refundable amount cannot be refunded due to inability to locate the customer, the refund due shall be credited to a reserve to be subsequently distributed as directed by the Commission.

Interest on Refund Amounts

The respondent utilities shall calculate the amount of refund due and apply interest at the rate of 7 percent per annum.

10/ Revised Section 5.1.e provides for direct interconnection via a terminal block. Telephone utilities will be compensated for its cost of terminal block equipment when it is capitalized and put into rate base.

Ratemaking Treatment for the Refunds

It will be three years before the full amount of the refunds to PCA subscribers is known. Each year the respondent utilities shall advise the Commission of the amount refunded during that year. For ratemaking purposes hereafter, we will not recognize these amounts. Our rationale is that the utilities are, by the refunds, rectifying the charging of unreasonable and needless rates for PCA's since February 17, 1974. Utility shareholders, not ratepayers, should absorb this expense.

Revisions to General Order No. 138

Our revisions to GO 138 are set forth in Appendix A of this decision.

Findings

1. The Order Instituting Investigation in Case No. 9625 presented a proposed general order that would enable direct interconnection of customer-owned ancillary terminal equipment, PBX, KTS, and extension telephones.

2. By Decision No. 82412 in this proceeding issued January 29, 1974 and effective February 17, 1974, we directed that rates and charges for PCA's on customer-owned terminal equipment be collected by respondent telephone utilities subject to refund, and that such charges should be recorded in separate accounts according to customer.

3. Decisions No. 84364 and 85791 established GO 138 whereby a certification program was implemented for the direct interconnection of customer-owned ancillary equipment.

4. By Decision No. 87046 we reopened this proceeding for the purpose of reconsidering certain issues addressed in Decision No. 85791. Decision No. 85791 is still in the process of review by the Supreme Court (S.F. No. 23509).

5. Decision No. 87131 set out the issues to be reconsidered as follows:

"(a) Whether the Commission erred in ordering that the utilities need not refund, or collect subject to further refund, charges for protective connecting arrangements.

"(b) Whether the Commission adequately considered the antitrust issues in the continuation of the protective connecting arrangement program for non-utility provided PBX, KTS, and telephone extensions without an alternative certification program."

6. These issues, and this order modifying Decision No. 85791, do not require further evidentiary hearings because:

(a) Our technical requirement for extending GO 138 to encompass PBX, KTS, and extension equipment are not more onerous than those adopted by the FCC.

(b) Extensive evidentiary hearings (30 days) have resulted in an adequate record.

(c) The question of refunds to PCA customers is a legal issue adequately covered in briefs.

(d) No party in the briefs filed pursuant to Decision No. 87131 proposed to introduce substantive new evidence or made an offer of proof as to why further hearings should be held.

7. Subsequent to reopening those proceedings on March 3, 1977 the United States Court of Appeal for the Fourth Circuit affirmed that the FCC had the jurisdiction to establish its registration program for the interconnection of customer-provided terminal equipment to the telecommunication network.

8. The FCC has exercised primary jurisdiction with respect to the interconnection of customer-owned terminal equipment; state regulatory commissions may establish rules and regulations so long as they are not more burdensome than those adopted by the FCC.

9. The amendment to GO 138 which is attached as Appendix A to this decision establishes a reasonable means whereby PBX, KTS, and extension equipment may be certified for direct interconnection.

10. The further hearings ordered in Decision No. 85791 relative to receiving economic impact studies by the respondent telephone utilities are no longer necessary.

11. Any anticompetitive questions that affect interconnect companies are, with respect to barriers to competition posed by PCA requirements, rendered moot by this decision.

12. Refunds should be made to customer-owned terminal equipment subject to PCA charges from February 17, 1974 (effective date of Decision No. 82412) where such equipment is retrospectively certified for a period of three years from the effective date of this order. Interest computed at the rate of 7 percent per annum is reasonable and should be applied to the refund.

13. Some models of customer-owned ancillary PBX, KTS, and extension equipment cannot meet GO 138 standards without PCA's. Customers owning such equipment should not receive refunds, and PCA's will still be required on such equipment subject to the applicable tariff charges.

14. The respondent telephone utilities shall advise subscribers periodically when particular models of customer-owned terminal equipment are certified and notify the customers that upon notice to the utility PCA charges will be discontinued with refund of previous amounts collected.

15. Where customers who are owed refunds since February 1974 cannot be located, the utilities shall establish a reserve account and within three years and two months from the effective date of this order advise the Commission of the accrued amount this refund reserve shall be distributed as directed by the Commission.

16. Because further delay in implementing this order may result in subscribers not being located to receive the refund due them, and result in continuing PCA requirements that may impair competition, we should issue this order effective the date hereof.

O R D E R

IT IS ORDERED that:

1. General Order No. 138 is hereby modified by the changes set forth in Appendix A hereto.

2. Within sixty days after the effective date hereof respondent utilities are directed to file and make effective, on not less than five days' notice to the Commission and the public in accordance with General Order No. 96-A, tariffs to provide for jack and plug connecting devices consistent with the specifications prescribed in Subpart F, Section 68.500 of Part 68 of the rules of the Federal Communications Commission. Such tariffs shall also make available to the public adaptors, at a reasonable charge, to permit equipment with older type plugs to be connected to the newer jacks. In addition, the tariffs shall make available adaptors, at a reasonable charge, to permit connection of equipment utilizing newer type plugs to telephone terminations equipped with older style jacks. The tariffs shall also contain conditions permitting customers to provide their own adaptors for converting between one and another type of jack.

3. Ordering Paragraph 3 of Decision No. 85791 requiring respondent utilities to file studies of the economic effect of certification is hereby vacated.

4. Ordering Paragraph 4 of Decision No. 85791 providing for cancellation of refund provisions is hereby rescinded.

5. Ordering Paragraphs 1, 2, 5, and 6 of Decision No. 85791 are hereby affirmed.

6. Respondent telephone utilities are directed to refund all amounts collected, including installation and monthly charges and taxes plus interest computed at a rate of 7 percent per annum, for protective connecting arrangements (PCA's) heretofore provided in connection with customer-owned terminal equipment which has been subsequently certified pursuant to General Order No. 138.

7. Respondent telephone utilities shall provide refunds in the manner prescribed in paragraph 6 of this order in connection with monies collected for PCA's used with any terminal equipment of a class which is subsequently certified pursuant to General Order No. 138 within three years following the effective date of this order.

8. Respondent telephone utilities shall send to each customer having terminal equipment connected through a utility-provided PCA a list of all terminal equipment which has been registered as certified with this Commission pursuant to General Order No. 138. Such lists shall be classified by type of equipment and shall show the make and model of equipment that has been certified. Customers shall be advised that if they have equipment of the make and model specified they should notify the utility which will discontinue charges for PCA's and refund previous amounts collected. Customers having such equipment shall not be required to obtain labels showing the certification number, and certified equipment shall be identified by the make and model number. Notices pursuant to this paragraph shall be sent out six months after the effective date hereof with additional up-to-date notices being sent out every six months thereafter until three years after the effective date hereof.

9. In lieu of following the procedures in paragraphs 7 and 8, utilities may discontinue charges for all PCA's of a given class and refund all monies collected therefor.

10. No refunds will apply in those instances where a customer-owned certified PCA is substituted for a utility-provided PCA.

11. No charge shall be made for the removal of PCA's that are no longer required pursuant to this order.

12. Any refundable amount pursuant to this order which are not refunded due to inability to locate former customers shall be maintained in a separate fund to be disbursed as may be directed by the Commission. Each utility shall report to the Commission the balances of such funds three years and two months after the effective date hereof.

13. Case No. 9625 is hereby discontinued.

The effective date of this order is the date hereof.

Dated at San Francisco, California, this 19th day of JUN, 1977.

Robert Batinovich
President

I dissent.
William Symons Jr.

I dissent
Vernon L. Sturgeon

Richard D. Gravelle
Leonard M. Grimes, Jr.
Commissioners

Modifications to General Order No. 138

The following sections of General Order No. 138 are amended as provided herein:

Sec. 1.3
Sec. 2.3 c(8)
Sec. 5.1 c and e
Sec. 5.2 b(3) and b(5)
Sec. 5.11

Section 1.3 Definitions - The definition of Ancillary Equipment is changed as follows:

Ancillary Equipment - Line or Station Auxiliary Device Equipment fulfilling the needs of customer to improve the value of utility-provided telephone service in a way which is privately beneficial to him without causing harm to the network. This category includes but is not restricted to answering devices, automatic dialers, conferencing devices, call diverters, call restrictors, traffic monitoring equipment, and similar equipment connected with other customer-provided equipment or utility-provided equipment. Ancillary equipment does not include main or extension telephones; however, the features of an extension telephone may be included in ancillary equipment where such features are an integral part of the device and secondary to the functions provided by the ancillary device.

Revised Section 2.3 c(8)

(8) Which class the device belongs to as defined in Section 5 of this General Order.

Revised Section 5.1 c

c. Class 3 - Customer Provided Station Equipment

Telephone instruments on a single central office line. Such equipment shall have a customer-provided plug to be connected to the telecommunications network only through a utility-provided jack. The jack and plug shall be arranged in such a way as to permit disconnection of the customer-provided equipment without disrupting the utility's facilities. Coin telephones are excluded from this class.

Revised Section 5.1 e

e. Class 5 - Protective Interfaces for Customer-Provided Primary Station Equipment

For interconnecting multiple line telephone instruments or other terminal equipment such as PBX or Key Telephone Systems, which may be selectively connected to two or more central office lines. The interface shall be directly wired to a connecting block. The disconnection facilities shall be arranged in such a way as to permit disconnection of the customer-provided equipment without disruption of the utility's facilities.

Revised Section 5.2 b(3) and b(5)

(3) Class 3 - No specific maintenance requirement

(5) Class 5 - No specific maintenance requirement

Revised Section 5.11 a(1)

a. On-hook Impedance

(1) Customer-provided equipment shall have an on-hook impedance between tip and ring terminals of not less than the equivalent impedance of four ringers of 2,500 ohms resistance in series with a capacitance of 0.5 microfarad in the frequency range between 16 and 67 hertz.

C. 9625)
C. 9177)
C. 9265)
C. 9271)
C. 9323)
C. 9360) - D. 87620
C. 9546)
C. 9600)
C. 9610)
C. 9637)
C. 9652)
Pacific Telephone and Telegraph Co.: Interconnection

COMMISSIONER WILLIAM SYMONS, JR., Dissenting

I. To order refunds on this record requires the Commission to distort the law. This decision can be used to undermine the established state policy against retroactive ratemaking.

The prohibition against retroactive ratemaking is clear. As the Supreme Court stated in the City of Los Angeles v. Public Utilities Commission, 7 C.3d 331 (1972), at p. 356:

> "We were confronted with a similar question in Pacific Tel. & Tel. v. Public Util. Com., /62 C.2d 6347 ... We concluded after an extended review of the relevant statutes that the Legislature had given the commission power to establish rates prospectively and has not given it power to order refunds of amounts collected by a public utility pursuant to an approved order which has become final.
>
> "We pointed out that the fixing of a rate is prospective in its application and legislative in its character, that under section 728 of the Public Utilities Code, as well as other sections of the code, the commission is given power to prescribe rates prospectively only, and that the commission could not, even on grounds of unreasonableness, require refunds of charges fixed by formal finding which had become final. (62 Cal. 2d at pp. 650-655.) We recognized that there may be policy arguments for giving power to the commission to order refunds retroactively where rates are found to be unreasonable or to prevent unjust enrichment, but we concluded that such 'arguments should be addressed to the Legislature from whence the commission's authority derives, rather than to this court.' (62 Cal. 2d at p. 655.) The Legislature has not changed any of the relevant statutory provisions. (Emphasis added.)

In the discussed Pacific Telephone case, the Supreme Court upheld the Commission's order directing rate reductions prospectively of $41 million per annum. The court invalidated the Commission's order of $80 million in refunds. In today's case the amount of refunds approximates $11 million. Although here the refund amount is smaller, the desire to order refunds is just as large, and legal consequences of the precedent established is just as important.

To legitimatize this order the majority uses a rationale which will impair the finality of all Commission decisions. Instead of Commission decisions being deemed "final" when the statutory period for rehearing has expired or a petition for rehearing has been decided (a period which may extend as long as ninety days), "final" is interpreted to mean when the appellate process is finally concluded (a period which may extend as long as one to two years).

Proceeding with this meaning for "final", the rationale goes to step two. Public Utilities Code Section 1708 is cited. This section grants the Commission power to reopen a case and "rescind, alter and amend" a decision. The majority combines its definition of "final" with Section 1708 to assert that the Commission can change any order under appeal retroactive to the original decision date. This expands the uncertainty as to the ultimate content of a Commission decision from a few months to as long as one to two years. It also permits Commission decisions already effective to be undone by a change in Commissioners due to retirement and new appointments. Such instability is not intended by statute and would be deplorable if allowed to stand.

I understand a decision to be "final" when the issues raised by the parties to a proceeding have been determined by Public Utilities Commission, the statutory provisions concerning right to petition the Commission for rehearing have been exhausted (Public Utilities Code Section 1731-1736) and the order has become effective.

In this proceeding before us, Decision No. 85791 is a final Commission decision: It was properly issued on May 11, 1976; the Commission received a Petition for Rehearing on June 2, 1976, which it considered; and on July 19, 1976 in Decision No. 86151 the Commission denied rehearing. The Commission decided the rights and interests of the parties, including a determination that refunds would not be granted and that the utility could cease recordkeeping.

To view "final" in this way is consistent with oft-used argument of the Commission before the California Supreme Court that a writ of review should not be granted because there is a failure on the part of petitioner to exhaust his administrative remedies: that is, because a petition for rehearing under Public Utilities Code Section 1731 had not been filed, or not yet been ruled on. The Commission relies on the general rule that an order is not appealable until it is final.

The right to reopen under Public Utilities Code Section 1708 is different. It operates prospectively only. If the Commission spontaneously reopens on its own motion, after the time for rehearing has passed and an order is effective, notice and rehearing are required before changes are made. And, once decided, unless a refund condition is in effect, we order prospectively. This is exactly the logic and procedure we enunciated earlier this month in The Pacific Telephone & Telegraph case concerning Single Message Rate Timing. (See Decision No. 87584 dated July 12, 1977.)

The outside possibility that the Commission may at any time reopen under Section 1708 does not make final Commission decisions something other than final. So also, the appellate power of the Supreme Court to review a final Commission decision does not make it impossible for them to be considered final Commission orders.

The Commission majority also confuses its right to rescind and amend under Section 1708, which operates prospectively, with the Supreme Court's power to annul which can invalidate a Commission's rate increase order. The Court exercised this power in City of Los Angeles v. Public Utilities Commission 7 C.3d 331 (1972). As this decision states at page 336, the Court issued a stay along with its writ so it could effect refunds if necessary. This precaution was taken despite the fact the Commission's Decision No. 78851 had conditioned the rate increase upon acceptance by Pacific Telephone of a refund provision. (72 CPUC 327, p. 370, Ordering Paragraph 3)

Here, Decision No. 85791 terminated previous refund provisions in 1976. Decision No. 86151 denied rehearing. The petitioner requested writ of review from the court, but no suspension. The Court granted the writ, but unlike City of Los Angeles v. Public Utilities Commission cited above, granted no stay. Given the present posture of the case, with the Commission's action and the petitioner's court order for review, no right to order refund is available to the Commission. To allow the Commission to reach back and reconstruct such a right would sanction a scheme that lets retroactive ratemaking in by the back door. It will allow a plague of uncertainty to descend upon many major decisions affecting the enterprises we regulate in the communication, transportation and energy sectors.

II. When a final Commission order is modified using Section 1708 "the opportunity to be heard as provided in the case of complaints" should not be denied the parties.

This Commission just had its knuckles rapped by the Supreme Court for misusing Section 1708. We substantially changed a standing decision of the Commission, but did so denying protestants a hearing. California Trucking Association v. Public Utilities Commission, 19 Cal. 3d 240 (1977)

In the CTA case we only allowed protestants to submit written comments on a staff white paper. In the instant case protestants were only allowed to submit briefs. The parties requested hearings but were improperly denied this right. The majority rejoinder that we have had thirty days of hearing in this case so far is misleading. Hearings to date were "phased", with certain issues being developed on the record, but other issues, such as certification procedures for PBX, KTS, and extension telephones, being deferred. Also deferred up until this point was the question of economic impact which has been a material issue since the initial Order Instituting Investigation in 1973. The Commission majority attempts to recast these matters as legal issues or irrelevant issues and in that way avoid hearings. This facile attempt to evade the hearing requirements present in Section 1708 is improper and transparent.

San Francisco, California
July 19, 1977

William Symons, Jr.
WILLIAM SYMONS, JR.
Commissioner