

Decision 95-08-036 August 11, 1995

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
Investigation on the Commission's
own Motion into the Establishment
of a Forum to Consider Rates, Rules,
Practices, and Policies of Pacific
Bell and GTE California Incorporated.

1,90-02-047
(Filed February 23, 1990)

OPINION

ORIGINAL

Summary
the petition. First, it claims that the Forum Docket is the
A petition and protest filed in the Forum Docket are
changed to a formal complaint and answer. The Forum Docket is
reserved for matters that would formerly have been considered in
general rate cases.

Background
Metropolitan Fiber Systems of California, Inc. (MFS), a
public utility telephone company holding a certificate from this
Commission, filed a petition under the "Forum Docket" established
in Investigation (I) 90-02-047. The purpose of this docket is to
accommodate matters that would formerly have been a part of a
general rate case, but under the New Regulatory Framework must now
be considered in another proceeding. (Alternative Regulatory
Frameworks, 33 CPUC 2d 43, 206 (209).)

MFS offers telecommunication services in part of the Los
Angeles area served by protestant GTE California Incorporated
(GTEC) and will be competing with GTEC for customers. MFS made
requests to GTEC to have access to conduit owned by GTEC so that it
might place its own fiber lines in this conduit, thereby saving the
expense of burying its own conduit under the city streets. This
proposal would also save the community the inconvenience of
disruption while the construction was taking place.

Following GTEC's refusal to lease space in its conduit
MFS approached the Commission Advisory and Compliance Division

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(CACD) for help in obtaining this lease. CACD was unable to persuade GTEC to lease space to MFS. CACD advised MFS that a petition should be filed under the Forum Docket. MFS asserts that it is legally entitled to excess capacity under the provisions of Public Utilities (PU) Code Section 767. It also alleges that other companies have leased space within GTEC's conduits, and that refusal to lease to MFS constitutes unlawful discrimination.

In its protest, GTEC offers three grounds for dismissing the petition. First, it claims that the Forum Docket is the wrong proceeding for resolving the dispute in question. It asserts that this should have been a formal complaint.

Second, GTEC says that MFS has not pleaded sufficient facts to create a cause of action under Section 767. Next, GTEC claims that MFS has not shown that the public convenience and necessity require the relief requested, rather than the convenience and necessity of MFS. GTEC states that MFS has neglected to show an absence of irreparable injury to GTEC. GTEC also asserts that there has been no showing that the result of MFS's petition, if granted, would not result in a substantial detriment to the service of GTEC's customers, both present and future.

Third, GTEC protests that granting the petition would be against public policy, in that it would create a financial windfall for MFS at the expense of a competitor and would take GTEC's property without just compensation.

PU Code Section 767

A major factor in this dispute revolves around the wording of Section 767. MFS argues that as a public utility it is entitled to the use of another utility's conduits. GTEC argues that there have not been allegations that would permit such a finding under Section 767. For purposes of clarity, I shall reprint the entire section.

Following GTEC's refusal to lease space in its conduit MFS approached the Commission Advisory and Compliance Division

Whenever the commission, after a hearing had upon its own motion or upon complaint of a public utility affected, finds that public convenience and necessity require the use by one public utility of all or any part of the conduits, subways, tracks, wires, poles, pipes, or other equipment, on, over or under any street or highway, and belonging to another public utility, and that such use will not result in irreparable injury to the owner or other users of such property or equipment, or in any substantial detriment to the service, and that such public utilities have failed to agree upon such use or the terms and conditions of compensation therefor, the commission may by order direct that such use be permitted, and prescribe a reasonable compensation and reasonable terms and conditions for the joint use. If such use is directed, the public utility to whom the use is permitted shall be liable to the owner or other users for such damage as may result therefrom to the property of the owner or other users thereof, and the commission may ascertain and direct the payment prior to such use of fair and just compensation for damage suffered, if any."

Use of The Forum Docket

Whether or not this is a proper matter for the Forum Docket is a close question. There is no dispute that MFS was advised to file its petition under this docket, rather than a traditional complaint. This advice was not improper in that MFS was asking for a solution to a special problem. Requests for relief from special problems is what we contemplated to be the venue of the Forum Docket. On the other hand, Section 767 indicates that relief under that section can occur after hearing on the Commission's own motion or as a result of a complaint. Thus there would appear to be an avenue for individual action by MFS other than the Forum Docket. That would lead one to the conclusion that the Forum Docket was inappropriate for this matter. In this case, we assume that this must include the precise conduct

Were the question of the appropriate docket brought to us today we would advise that a formal complaint be filed. Competition for telephone customers is increasingly fierce. This matter has every indication of being a bitterly litigated proceeding involving highly contested facts. As such it is administratively easier for us to consider the case in its own docket, rather than a part of the Forum Docket. However, because of the delay in issuing this decision we are reluctant to order outright dismissal. Therefore we shall order our Docket Office to convert this matter into a formal complaint and change the docket numbers of the petition and protest accordingly. These shall be considered as a complaint and an answer.

Compliance With Section 767

Section 767 does not give a public utility the automatic right to use the facilities of another utility. There must first be proof that the public convenience and necessity require such use. Note that it is the public convenience and necessity that is at issue, not that of the utility. Note also that this public convenience and necessity must be required, not merely desirable. The only requirement alleged is avoidance of the "disruptive effect that installing and maintaining a separate duplicative telecommunications infrastructure would have on the public domain." (Petn. pp. 5.) What this effect would be, and whether it equates to a requirement under Section 767 is a matter of proof.

Section 767 also demands that the Commission "prescribe a reasonable compensation" should it find that one public utility should be allowed to use property of another. This is certainly a matter that will provoke differing views if it cannot be settled between the participants. There is nothing in either the petition or the protest that addresses the actual amount of compensation that would be appropriate. Similarly, what Section 767 refers to as the "terms and conditions of the usage" must be worked out. In this case, we assume that this must include the precise conduits

that are involved, whether any facilities other than conduits (are) contemplated, who will make the installations, the terms of payment and insurance, and tax proration. Finally, there is GTEC's contention that such a forced sharing with a competitor is contrary to public policy, citing Pacific Telephone Co. v. Eshleman, 166 Cal. 640 (1913). This is not a trivial issue. It is a concern that may reoccur as new entrants in the communications market attempt to compete against established service providers.

Discrimination

MFS alleges that the (are) currently entities that lease conduit space from GTEC. GTEC does not deny this, but says these leases are longstanding and were instituted (before) the present corporate structure of GTEC. A determination of this issue can only be made after exposition of the facts, either by hearing or by agreement.

Findings of Fact

1. MFS and GTEC are public utilities;
2. MFS seeks to use conduit space belonging to GTEC;
3. GTEC refuses to offer such space to MFS unless ordered by this Commission;
4. MFS sought the assistance of CACD;
5. CACD was unable to obtain GTEC's voluntary lease of its facilities to MFS;
6. CACD advised MFS to file a petition under the Forum Docket;
7. MFS filed under the Forum Docket and the petition was protested by GTEC;
8. The proceeding gives every indication of being a long and bitterly fought matter;
9. Section 767 contemplates a formal complaint by one public utility against another for use of excess conduit space.

Acting Executive Director

Conclusions of Law

This petition should be converted into a formal complaint and assigned its own separate docket number. In order to minimize what could otherwise be lengthy hearings, we expect the parties to utilize discovery procedures to the greatest extent possible. We also expect the use of conferences and other reasonable procedures in an effort to obtain agreements on issues, rather than litigating each item in the hearing room.

IT IS ORDERED that this matter is converted into a formal complaint. The petition shall be considered as the complaint and the protest shall be considered as the answer.

2. The Docket Office shall amend the petition and protest to show the complaint number and so notify the parties and the Commission. This order is effective today.

Dated August 11, 1995, at San Francisco, California.

DANIEL Wm. FESSLER
P. GREGORY CONLON
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE

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

Wesley Franklin
Acting Executive Director