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Decision 97-03-012 March 7, 1997

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**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

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| Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service. | Rulemaking 95-04-043 (Filed April 26, 1995) |
| Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service. | Investigation 95-04-044 (Filed April 26, 1995) |

## O P I N I O N

The California Telecommunications Coalition (Coalition)[1] has petitioned for modification of Decision (D.) 96-09-089, *Opinion on the Franchise Impacts of Pacific Bell and GTE California, Inc., Resulting from the Authorization of Local Exchange Competition,* Conclusion of Law 5. Responses to the petition were filed by ICG Telecom Group, Inc. (ICG); Office of Ratepayer Advocates (ORA); Pacific Bell (Pacific); and the Smaller Local Exchange Carriers (Smaller LECs).[2] By this decision, we deny the Coalition's Petition, but we modify Conclusion of Law 5 to clarify our intent.

In Conclusion of Law 5 we state:

> "A public utility has no constitutional right to be protected from competition but is entitled a hearing before the Commission may grant a certificate to a competitor."

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[1] The members of the Coalition joining in this petition are AT&T Communications of California, Inc.; California Cable Television Association; MCI Telecommunications Corporation; Teleport Communications Group; Time Warner AxS of California, L.P.; and Sprint Communications Company, L.P.

[2] The Smaller LECs include Calaveras Telephone Company; California-Oregon Telephone Company; Ducor Telephone Company; Foresthill Telephone Company; Happy Valley Telephone Company; Hornitos Telephone Company; The Ponderosa Telephone Company; Sierra Telephone Company, Inc.; and Winterhaven Telephone Company.

In arriving at this conclusion, we rely on two decisions of the California Supreme Court discussed in the parties' briefs, *San Diego and Coronado Ferry Co. v. Railroad Commission* (210 Cal. 504 (1930)) and *Ventura County Waterworks v. Public Utilities Commission* (61 Cal.2d 462 (1964)). These decisions are discussed in our Franchise Impacts Decision at pages 43 through 45, in the context of addressing whether utilities are protected from competition.

The Coalition requests that the Commission delete the latter part of Conclusion of Law 5 because it is legally incorrect and has no foundation in the record. The Coalition contends that in concluding that a utility is entitled to a hearing, the Commission has newly instituted a requirement that a hearing be held in granting certificates to competitors, in contravention to Public Utilities (PU) Code §§ 709, 1005 and 1013 and prior Commission decisions, D.94-02-046 and D.89-05-071.

The responding parties share the view that Conclusion of Law 5 does not require that a hearing be held when the Commission is considering a competing application for a certificate, and they regard the conclusion well grounded in the record and in the law. Pacific emphasizes that the plain language of PU Code § 1005 indicates a hearing would only be held "...upon timely application for a hearing by any person entitled to be heard..." The Smaller LECs take pains to state that a hearing would not be automatic every time a competing local carrier seeks to provide service in one of their service territories. ORA points out that in *Ventura County Waterworks*, the court was not taking a position on whether a utility is entitled to a hearing before one had been requested. ICG argues that Conclusion of Law 5 includes an unstated, mistaken suggestion that a hearing must always be held whenever a protest is filed in opposition to a certificate application.

In adopting Conclusion of Law 5, it was our intent, consistent with the court's findings in *Ventura County Waterworks*, to establish that a public utility has no constitutional right to be protected from competition; and to establish that a utility is entitled to a hearing before the Commission may grant a certificate to a competitor. Only the latter aspect of our conclusion is at issue in this petition. This entitlement is not a requirement that a hearing be held, nor is it a guarantee that if a hearing is requested,

it will be held. Such a guarantee would, as ICG argues, conflict with our Rules of Practice and Procedure and prior Commission decisions which address our discretion in determining when hearings are appropriate.[3] It was not our intent in adopting this conclusion to guarantee a hearing to any competitor that protests an application for a certificate. We will modify Conclusion of Law 5 so that our above stated intent is clear.

## O R D E R

**IT IS ORDERED** that:

1. Conclusion of Law 5 of Decision 96-09-089 is modified to clarify our intent. The resultant conclusion of law shall state:

> "A public utility has no constitutional right to be protected from competition but is entitled to request a hearing before the Commission may grant a certificate to a competitor."

2. The Petition of the California Telecommunications Coalition for Modification of Decision 96-09-089, *Opinion on the Franchise Impacts of Pacific Bell and GTE California, Inc., Resulting from the Authorization of Local Exchange Competition*, is denied.

This order is effective today.

Dated March 7, 1997, at San Francisco, California.

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners

[3] See for example Rule 44.4 and D.89-05-071 and D.94-02-046 (53 CPUC 2d 302 at 305, 1994).