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Decision 97-05-042 May 6, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

INDEPENDENT CONSULTING SERVICES, a Division of INDEPENDENT COMMUNICATIONS SERVICES, INCORPORATED, a California corporation, Complainant, vs. PACIFIC BELL (U 1001 C), a California corporation, Defendant.	ORIGINAL Case 85-07-008 (Filed July 1, 1985)
Order Instituting Investigation into the policies, practices, and compliance efforts of Pacific Bell, GTE of California, and Continental Telephone Company of California regarding the protective connecting arrangement program.	Investigation 95-11-030 (Filed November 21, 1995)

OPINION ADDRESSING SETTLEMENT AND UNCONTESTED TESTIMONY ON ISSUES REGARDING PROTECTIVE CONNECTING ARRANGEMENTS

In this decision, we consider the Joint Motion to Adopt Settlement and accompanying Settlement Agreement filed by the State Controller's Office of the State of California (State), Pacific Bell (Pacific) and GTE California Incorporated (GTEC). It is intended to settle all issues and claims arising out of Pacific's Advice Letter (AL) 16062, GTEC's AL 5348, and the above captioned proceedings, which relate to the companies' obligations to comply with Commission orders requiring refund to customers, or in the alternative, escheat to the State, those funds collected for protective connecting arrangements which were later found unnecessary. We also consider the uncontested direct testimony of Contel of California, Inc. (Contel) on the same subject.

1. Background

In the 1970s, Pacific, Contel, and GTEC required customers who owned independently manufactured telephone equipment to use utility-provided protective connecting arrangement equipment (PCAs) to connect customer equipment to the utility network. Customers were charged an installation fee and monthly service fees. When authorizing the collection of these fees in 1974, the Commission 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." (Decision (D.) 82412, 76 CPUC 382.)

In 1977, the Commission found that PCAs were not necessary for telephone customers who owned independently manufactured equipment which had been certified or registered in accordance with Commission or Federal Communications Commission standards. (D.87620, (82 CPUC 262).) Refunds to eligible customers, including installation charges, monthly service charges, taxes for the PCA, and interest, were ordered.

In 1985, Independent Consulting Services (ICS) filed a complaint against Pacific for, among other things, refusing to provide refunds to eligible customers when the request for refund was submitted after August 1, 1984. Pacific had decided to apply a two-year statute of limitations to the PCA refund program. Therefore, any requests for refund to eligible applicants were honored for the two years immediately preceding the refund request. The Commission issued a decision which granted the claims of ICS and established a termination date for Pacific's refund program. To be eligible for a refund of PCA charges, customers had to make a request by the program termination deadline which, after rehearing, stands at March 31, 1987 for Pacific. (D.86-05-071, D.86-06-085 which granted a stay of D.86-05-071; and D.86-09-025 which addressed Pacific's Application for Rehearing.)

GTEC's PCA refund program termination deadline was established in a March, 1988, decision (D.88-03-069). The deadline was subsequently extended, and now stands at September 9, 1988.

Contel's PCA refund program was never explicitly terminated in the manner Pacific's and GTEC's were.

Acting on Petitions to Modify, the Commission, in July 1991, ordered Pacific and GTEC to file ALs, including work papers, which would provide an accounting of unrefunded revenues resulting from the PCA refund program. Any unrefunded balances, it was ruled, should be delivered to the State. (D.91-07-053, in the complaint docket, Case (C.) 85-07-008.)

Pacific and GTEC filed ALs in September, 1991 (AL 16062 and AL 5348, respectively). GTEC estimated that of its $1.204 million PCA charge balance, $885,000 would have been eligible for refund but remains unrefunded due to an inability to locate the customers. Pacific asserted that it had not determined any unrefunded amounts associated with PCAs, and that such a determination is consistent with Commission findings in D.87620 (82 CPUC 262). Specifically, Pacific cited a Commission statement that it argued qualifies the utility obligations by stating "[w]here 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..." (Id. at 279, [Finding of Fact 15, emphasis added]). In an earlier report to the Commission, Pacific had estimated PCA funds that might be associated with customers that could not be located at $235,223, as of September, 1980. Pacific also informed the Commission that it had refunded $24.9 million between 1978 and March, 1988.

Protests of these ALs were filed in October, 1991, by the State and ICS. Both protestants called upon the Commission to reject the ALs and require the utilities to provide a full and detailed accounting of the unrefunded PCA charges.

2. Recent Activities

Recent activities in this proceeding arise largely from these ALs and the related protests. At a prehearing conference on June 27, 1995, before the assigned Administrative Law Judge (ALJ) and the Assigned Commissioner, parties were encouraged to pursue discussions that would resolve the outstanding issues in this case.

Parties were given an additional 60 days for such discussion. A follow-up prehearing conference was held, at which time parties reported that settlement was not possible, so a proceeding schedule, including dates for serving testimony and hearings, was announced and calendared.

In preparation for the hearings and to clarify who bore the burden of proof and who were respondents, a companion investigation was adopted, Investigation (I.) 95-11-030. The investigation was instituted into:

> "...the policies, practices and compliance efforts of respondents [Pacific, GTEC, and Contel] regarding the protective connecting arrangement program, including but not limited to the establishment and maintenance of separate accounts for PCA associated revenues and an account for unrefunded balances, as embodied in Commission decisions." (I.95-11-030, Ordering Paragraph 1.)

It provided the Commission with a proper procedural forum and vehicle to fully act on issues relating to the PCA accounts and utility compliance with Commission orders which may be beyond the confines of the relief that the utilities requested in the ALs arising from the complaint, C.85-07-008.

With the prospect of testimony and hearings imminent, Pacific and the State, and GTEC and the State, arrived at a Settlement Agreement. The Settlement Agreement and a Joint Motion to Adopt Settlement were filed February 23, 1996. Contel served testimony February 23, 1996. By letter dated February 26, ICS notified the Commission that it was withdrawing its protests to Pacific's and GTEC's ALs and would no longer participate in the proceeding.[1] On March 26, 1996, the State indicated that it has no basis on which to either confirm or deny the statements made by Contel in its prepared testimony.

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[1] ICS indicated that it met periodically with Pacific since the investigation was instituted and developed a better understanding of the basis for Pacific's claims that it had fully complied with the PCA-related orders. It found Pacific's explanation and analysis of unrefunded PCA revenues reasonable and consistent with the terms of the settlement agreement. Through participation in the settlement conference, ICS indicated it became satisfied that the proposed

Footnote continued on next page

A prehearing conference on May 21, 1996, afforded the assigned Commissioner and ALJ the opportunity to ask questions about the motion, settlement terms, and testimony. Parties were given the opportunity to respond to these questions in writing. In its response, the State, among other things, clarified that it is prepared to let Contel's prepared testimony stand uncontested. It does not feel that any audit of the books and records of Contel would be materially beneficial to the State. (Response of State to ALJ's Ruling, pp. 1-2.)

3. The Settlement Agreement

The settlement is intended to resolve all claims and issues with respect to, related to, or arising out of Pacific's AL 16062, GTEC's AL 5348, and these consolidated proceedings. It specifically addresses the quantification of PCA revenues and refunds and the utilities' compliance with Commission decisions regarding the PCA program.

3.1 Quantification of PCA Revenues and Refunds

In the settlement, the State and Pacific stipulate to certain previously contested facts. With respect to the quantification of PCA revenues and refunds, Pacific and the State stipulate that:

total PCA revenues collected	= $62 million
total PCA revenues refunded	= $27 million
applicable interest refunded	= $10.6 million
applicable taxes refunded	= unspecified.

The settlement provides that Pacific will pay the State $18.45 million, plus 7% interest beginning February 23, 1996, and ending on the date payment is made.

The State and GTEC similarly stipulate to certain previously contested facts regarding quantification of PCA revenues and refunds. The State and GTEC stipulate that:

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settlement between GTEC and the State constituted a reasonable resolution of all claims and issues.

total PCA revenues collected	= $7.3 million
total PCA revenues refunded	= $2.3 million
applicable interest refunded	= $1.0 million
applicable taxes refunded	= unspecified.

GTEC agrees to pay the State $4.625 million. The settlement provided that this amount was placed in an interest-bearing escrow account within 10 days of submission of the agreement to the Commission. If the settlement is approved by the Commission, the full escrow-account amount will be payable to the State, and will relieve GTEC of the obligation to accrue further interest on refundable PCA charges. Otherwise, it will be returned to GTEC.

The settling parties agree that these payable amounts represent reasonable quantifications of the total amounts to be delivered to the State from each company.

The settlement indicates that the State requested Pacific and GTEC to provide the names and addresses of customers, to the extent reasonably available from their books and records, which the companies believe are still owed PCA refunds. Pacific and GTEC each presented the State with a declaration of a responsible senior officer which states that after diligent search, the companies were unable to locate any such records. Further, GTEC and Pacific agree to provide the State information reasonably available to assist the State in evaluating any PCA refund claim the State may receive.

3.2 The Utilities' Compliance

The settling parties also stipulate that certain actions were taken by Pacific and GTEC in compliance with Commission decisions. These stipulated facts pertain to notice to subscribers, the establishment of specific accounts, and reports to the Commission.

In a July, 1977, decision (D.87620, 82 CPUC 262), the Commission required Pacific and GTEC to, among other things, notify their PCA customers of the equipment that had been certified, and advise these customers that if they had certified equipment they should notify the utility, which would discontinue PCA-related charges and refund previous amounts collected. These notices were required to be sent out, in updated form, every 6 months following the decision until three years after its effective

date. (Id., Ordering Paragraph 8 at 280.) The State agrees with Pacific and GTEC that each utility sent the required customer notifications.

Pacific was required to give notice to customers who may qualify for refunds of the termination date of the PCA program and the subscribers' possible eligibility for refund. (D.86-05-071, Ordering Paragraph 4.) GTEC was required to notify all PCA customers who may qualify for a refund, including certain customers who were previously denied refunds, of their eligibility for a refund, of the program termination date, and of a verification process that would be applied to customers requesting a refund. (D.88-03-069, Ordering Paragraph 2.) The State agrees with Pacific and GTEC that each utility sent the required customer notifications.

With respect to the establishment of specific accounts, the State agrees with Pacific and GTEC that "documentation shows that Pacific and GTE[C] appropriately recorded data that identified the amount of PCA charges billed to PCA customers in accordance with the Commission's directives." (Settlement at 10.) Specific reference is made to a requirement in D.82412" that all charges for PCAs collected by Pacific and GTEC pursuant to tariffs were to be recorded and kept in separate accounts beginning in February 1974." (Id.)

Finally, the settling parties stipulate that Pacific and GTEC made the filings required in D.87620. In that decision, the Commission required, among other things, that any refundable amount not refunded due to an inability to locate a customer be maintained in a separate fund, and that each utility shall report the balance of such funds to the Commission at a specified time. (D.87620, (82 CPUC 262, 280-281) Ordering Paragraph 12.)

4. The Motion

In the Joint Motion to Adopt Settlement, after summarizing the terms of the settlement, Pacific, GTEC and the State argue that the settlement is reasonable and in the public interest. They argue that the settlement allows a more timely and effective resolution of the issues than would occur through protracted, costly litigation; that it achieves finality for issues associated with a refund program that dates back to the

1970s; and that it reflects the Commission's general encouragement of the use of alternatives-to-litigation in resolving disputes.

The settling parties point out the differences in position which would be the basis for the litigation avoided by settlement. The State's position was that the Commission had ordered the utilities to account for all unclaimed refunds, which the State contended were all unrefunded PCA revenues, and that the utilities were to report these unrefunded revenues, as unclaimed property, to the State under the Unclaimed Property Law (Code of Civil Procedure 1500, et. seq.).

In contrast, Pacific and GTEC held the view that the Commission had made it clear that not all customer-provided equipment used in connection with a PCA qualified for a refund; that only those customers with qualifying equipment were entitled to a refund. The utilities argued that it was necessary for customers to submit claims and provide proof of entitlement to a refund because Pacific's and GTEC's records did not indicate whether the customer had qualifying equipment.

The settling parties also state that they believe the settlement is consistent with the law, and that they complied with Rule 51.1 of the Commission's Rules of Practice and Procedure which requires a settlement conference. No response to the Motion was filed.

5. Contel's Uncontested Testimony

In its testimony, Contel asserts that it has complied in all material respects with the Commission's PCA refund program requirements embodied in D.87620 described above (82 CPUC 262).

Contel states that it had minimal customer-provided equipment connected through PCAs of the equipment type subject to the refund program. It asserts that such equipment was installed pursuant to individual contracts with customers, 15 in all, approved by the Commission by resolution and filed as part of Contel's Schedule X-1. Contel believes that its Schedule X-1 records support its contention that it tracked the certification or registration of equipment and made any appropriate refunds. Contel includes a few examples of the tracked information in its testimony.

Contel believes that if there were any PCA program compliance concerns, they would have been resolved in 1980 when staff conducted an extensive audit of Contel's operations in connection with an AL and general-rate-case filing. Contel believes that if there had been an unrefunded amount due to the PCA refund program, it would have been reflected and adjusted for in the 1981 test-year revenue requirement.

6. Discussion

As stated in our Rules of Practice and Procedure, the Commission will not approve a settlement unless it is reasonable in light of the whole record, consistent with law, and in the public interest. We will, therefore, consider whether the settling parties' conclusions on utility compliance and quantification of PCA revenues and refunds are reasonable in light of the whole record, consistent with law, and in the public interest.

It is clear from the plain language of D.82412, Ordering Paragraph 2 (*In re: Interconnection of Customer-Provided Communications Equipment* 76 CPUC 382 (1974)) that all charges for PCAs collected by Pacific, GTEC, and Contel were to be recorded and kept in separate accounts *according to customer* and were subject to refund. When the Commission ordered the utilities to refund all amounts collected in connection with PCA equipment which had been certified, it clearly stated that some customers were due refunds and some were not, depending largely on the specific equipment the customer had in place. (D.87620, *In re: Reconsideration of D.85791 Rules for Interconnection of Customer-Provided Equipment*, 82 CPUC 262, specifically pp. 274-277 (1977).) However, ambiguity arises in that some of the language implies that the company, when establishing the separate accounts according to customer, does not know the specific model type of PCA or equipment utilized by the customer and some language implies the utility has that information. For example, the Commission states "[s]ubscribers having PCA's are identifiable and the utilities were directed by Decision No. 82412 to maintain records to facilitate refunds to those subscribers." (Id. at 275.) The Commission then continues that:

> "[t]here 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." (Id.)

This language implies the utility is able to determine which among its customers are due a refund from the information it holds. Further, the Commission states that"[t]hese customers [with customer-owned PBX, KTS, or extension equipment] shall be contacted by the respondent utilities *as particular models are certified* and given refunds" (Id. at 277.) which implies the company knows the particular model a PCA customer owns.

In contrast, the Commission orders the companies to send to each customer having equipment connected through a PCA a list of all certified equipment so that the customer can then notify the company and receive a refund. (Id. at 280.) Some ambiguity also arises in D.91-07-053 (*In re: ICS v. Pacific Bell and Re: GTE California*, 41 CPUC2d 65 (1991), affirmed on rehearing in D.91-10-051). In that decision, the Commission states:

> "We concur with the Controller that unrefunded PCA charge balances must be delivered to the Controller pursuant to the Unclaimed Property Law." (Id., slip op. p. 5.)

This implies that all funds remaining in the PCA account at that point were to escheat to the State. But the Commission continued:

> "Whether or not Pacific was able to identify customers who qualified for refunds, those who qualify are nevertheless owners of the overcharges they paid." (Id.)

Here, the Commission seems to be making Pacific responsible for escheating the full PCA account balance, and this could be interpreted, together with the prior decision, to say that Pacific should have kept records which would allow it to determine who had a right to a refund and who did not, and that having failed to make such a determination, the full amount of the PCA balance was to be turned over to the State.

Ultimately, in this decision the Commission ordered "all unrefunded balances for PCA overcharges" to be delivered to the State. (Id., Ordering Paragraph 2.) But the Commission is silent on how the company was to determine whether the balance in the PCA account was an "overcharge" or a valid charge.

The record shows that Pacific has previously presented the Commission with PCA-related quantifications. In compliance with Ordering Paragraph 12 of D.87620, cited above, on September 19, 1980, Pacific submitted a report which stated that over $6 million had been refunded; that approximately $235,223 remained refundable but were not refunded due to inability to locate the customers (and thereby escheatable to the State). In its AL 16062, filed September 23, 1991, in compliance with Ordering Paragraph 1 of D.91-07-053, cited above, Pacific asserted that it had refunded over $39 million and that the refundable amount escheatable to the State was zero. Prior to filing the settlement, Pacific has not provided any figure for the total amount of PCA charges collected.

GTEC has also previously presented the Commission with PCA-related quantifications. In compliance with Ordering Paragraph 12 of D.87620, cited above, GTEC submitted on September 25, 1980, a report which stated that, at that time, an amount of $197.48 had not been refunded due to the inability to locate former customers. In its AL 5348, filed September 23, 1991, in compliance with Ordering Paragraph 1 of D.91-07-053, cited above, GTEC stated that it had refunded $3.336 million, and that at the end of the refund program, the unrefunded balance was $1.204 million. It estimated that of this unrefunded balance, $885,000 was escheatable to the State. GTEC also reported at that time that it had collected a total of $4.54 million in PCA charges since February 1974.

The State took strong exception to these figures in its response to the 1991 ALs. It stated that a December 12, 1986, audit of GTEC revealed $1.5 million in unrefunded PCA charges. It did not provide its own quantification of Pacific's balance. The State has relied, rather, on the Commission's determination that "...unrefunded PCA charge balances must be delivered to the Controller pursuant to the Unclaimed Property Law." (Id., slip op. p. 5.)

Pacific and the State, through the Joint Motion, seek a finding that it is consistent with the law and reasonable in light of the record for Pacific to escheat to the State $18.45 million, plus interest commencing February 23, 1996, from the approximately $35

million in PCA revenues the settling parties agree Pacific collected but did not refund.[2] GTEC and the State, through the Joint Motion, seek a finding that it is consistent with the law and reasonable in light of the record for GTEC to escheat to the State $4.625 million, plus the interest accruing from the deposit of these funds in an escrow account, from the approximately $5 million in PCA revenues the settling parties agree GTEC collected but did not refund.

In D.87620, the Commission ordered the following:

> "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." (D.87620, Ordering Paragraph 6, 82 CPUC 262 at 280.)

In so ordering, the Commission stated that "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," and that the refunds ordered were for customers who paid these charges after February 17, 1974. (Id. at 274.)

It is clear from this decision that the refund was to be for charges collected from February 17, 1974, and that the refund was to include interest computed at a rate of 7 percent per annum. The settlement does not specifically state that interest was applied as directed. The settling parties do state, however, that they agree the settlement amounts "represent reasonable quantifications of the *total* amounts to be delivered to the State from each company." (Settlement Agreement, p. 8, §1.c., emphasis added.)

Assuming the settlement amounts, $18.5 million for Pacific and $4.625 million for GTEC, include interest at 7 percent per annum since February 1974, the Commission may infer the amount of PCA revenues refundable in February 1974, but not refunded. For Pacific, the amount of PCA revenues refundable, but not refunded, is

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[2] The $35 million figure is a simple subtraction of the settling parties' figures of $62 million total PCA revenues collected since February 18, 1974, and $27 million total PCA revenues refunded.

approximately $4.164 million from the $35 million collected but not refunded. For GTEC, the amount of PCA revenues refundable, but not refunded, is $1.043 million from the $5 million collected but not refunded.

Given the settling parties' statement that the amounts represent the total to be delivered to the State, it appears that this amount includes all financial components, including interest, that the State Controller (represented by the Attorney General) believes should reasonably accrue to the people. Given the ambiguities in our orders we describe above, the settling parties have arrived at an agreed upon quantification. We find the settlement is consistent with the law and that it is reasonable in light of the record for Pacific to escheat to the State $18.45 million, and for GTEC to escheat to the State $4.625 million. We adopt the settlement as a reasonable resolution of issues outstanding in these dockets with respect to Pacific and GTEC.

Now we will address Contel's compliance with our PCA program. Since Contel's testimony is uncontested, and the Assigned Commissioner and ALJ took the opportunity to ask questions about the testimony at the May 21, 1996, prehearing conference, hearings are not necessary. After review of the testimony, we conclude Contel's uncontested testimony reasonably assures us that Contel has complied with our PCA program requirements.

Findings of Fact

1. A settlement agreement between Pacific and the State, and GTEC and the State, was filed February 23, 1996, along with a Motion to Adopt Settlement, which is intended to resolve all claims and issues with respect to, related to, or arising out of Pacific's AL 16362, GTEC's AL 5348, C.85-07-008 and I.95-11-030. No response to the motion was filed.

2. ICS, Complainant in C.85-07-008 and interested party in I.95-11-030, notified the Commission by letter of February 26, 1996, that it was withdrawing its protests to Pacific's and GTEC's ALs and would no longer participate in the proceedings.

3. Contel served testimony February 23, 1996, which was uncontested. This testimony reasonably assures us that Contel complied with the Commission's PCA program decisions.

4. Given the ambiguities in the PCA orders, the settling parties have agreed upon quantifications of PCA revenues which should escheat to the State that are reasonable in light of the record and in the public interest.

5. Pacific and the State stipulate that:

total PCA revenues collected	= $62 million
total PCA revenues refunded	= $27 million
applicable interest refunded	= $10.6 million
applicable taxes refunded	= unspecified.

6. Pacific and the State agree that Pacific will pay the State $18.45 million, plus 7% interest beginning February 23, 1996, and ending on the date payment is made.

7. The State and GTEC stipulate that:

total PCA revenues collected	= $7.3 million
total PCA revenues refunded	= $2.3 million
applicable interest refunded	= $1.0 million
applicable taxes refunded	= unspecified.

8. GTEC and the State agree that GTEC will pay the State $4.625 million. This amount was placed in an interest-bearing escrow account within 10 days of submission of the settlement to the Commission. If the settlement is approved, the full escrow-account amount will be payable to the State, and will relieve GTEC of the obligation to accrue further interest on refundable PCA charges.

Conclusions of Law

1. Since the Joint Motion to Adopt Settlement and the Direct Testimony of Contel were uncontested, hearings are not necessary.

2. The settlement is reasonable in light of the whole record, consistent with the law, and in the public interest.

ORDER

IT IS ORDERED that:

1. The Joint Motion to Adopt Settlement filed by the State Controller's Office of the State of California (State), Pacific Bell (Pacific), and GTE California, Incorporated (GTEC) is granted.

2. Pacific shall pay to the State the $18.5 million, plus interest, described in the settlement, not later than thirty days from the effective date of this order.

3. GTEC shall pay to the State the $4.625 million, plus interest, described in the settlement, not later than thirty days from the effective date of this order.

4.These proceedings are closed.

This order is effective today.

Dated May 6, 1997, at San Francisco, California.

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