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ORIGINAL

Decision 97-05-090 May 21, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application for Rehearing of)	
Commission Resolution No. T-15627)	Application 94-11-039
by the Division of Ratepayer)	(Filed November 28, 1994)
Advocates.)	
)	

O P I N I O N

By this decision, we deny the request of the Office of Ratepayer Advocates (ORA) to modify Commission Resolution T-15627.

Background

On November 28, 1994, the Division of Ratepayer Advocates¹ filed a pleading entitled "Application for Rehearing of Resolution T-15627."² No party filed a reply in response to the pleading. Pursuant to Resolution T-15627, dated October 26, 1994, the Commission granted Pacific Bell's (Pacific) request to refund to customers those costs associated with the early development work for retail Personal Communications Systems (PCS) which was included in Pacific's 1986 General Rate Case and in the 1989 New Regulatory Framework Start-Up Revenue Requirement.

¹ The Division of Ratepayer Advocates has been reorganized as the Office of Ratepayer Advocates (ORA).

² Although denominated an "application for rehearing," this is, as noted in the first paragraph, actually only a request to modify a resolution. When a non-utility party requests that the Commission modify a prior resolution, a formal proceeding is initiated for that purpose. Under the Commission's current procedures, the only way to initiate such a formal proceeding is to file pleading called "an application for rehearing" even when, as here, this is not the pleading described in Public Utilities Code § 1731. The Commission may consider revising these procedures in its ongoing review of its Rules of Practice and Procedure.

The Commission also found in Resolution T-15627 that PCS was a federally preempted service with respect to rate and entry regulation,³ not subject to the New Regulatory Framework (NRF) revenue sharing formula⁴ and stated that it expected that tariffs resulting from PCS products would be placed in Category III.⁵ The Commission removed all costs related to PCS from above-the-line treatment, ordered the refund and directed ORA to audit Pacific's accounting of PCS-related expenses to confirm the pre-NRF amounts referred to in Pacific's advice letter and to identify any other expenses incurred on PCS before and after the institution of NRF.

ORA asks the Commission to modify Resolution T-15627 in various respects. ORA claims that the Commission based its determination of Category III and below-the-line treatment of PCS on an inaccurate understanding of federal preemption. ORA requests that the Commission examine the appropriate regulatory treatment of PCS after Pacific has the authority to offer PCS and more clearly defines that offering. ORA believes that the Commission should examine the impact of its regulatory treatment of PCS on Pacific's

³ Under the Omnibus Budget Reconciliation Act of 1993, state commissions are preempted from rate and entry regulation of all commercial mobile radio services (CMRS), presumptively including PCS.

⁴ In Decision (D.) 89-10-031, the Commission set in place a framework which divided telephone services into three categories (I, II, and III) which corresponded roughly to monopoly services, partially competitive services, and competitive services. Categories I and II were subject to pricing oversight. The combined revenues of these two categories were subject to a sharing formula set in place by the Commission, and modified in subsequent decisions which reviewed the framework. In D.89-10-031, the Commission provided guidance on Category III products and services which should be exempt from any pricing oversight and excluded from the sharing mechanisms.

⁵ In D.96-12-071, the requirement was terminated that CMRS services be subject to the filing of tariffs with the Commission.

revenues and should modify existing affiliate transaction rules to fit the offerings of PBMS, once they are defined. Finally, ORA asks the Commission to modify Resolution T-15627 to require Pacific to track activities of its affiliate, Pacific Bell Mobile Services (PBMS).

A. Effects of Federal Preemption of
PCS Rate and Entry Regulation on
Category III and Below-the-Line
Treatment of PCS

The Commission determined in Resolution T-15627 that tariffs resulting from PCS products and services will be placed in Category III on the grounds that PCS is a federally preempted service.⁶ ORA agrees that state rate and entry regulation for PCS is preempted under Section 332(c)(3) of the Communications Act as amended by the Omnibus Budget Reconciliation Act of 1993. However, ORA claims that states are not preempted from accounting for the costs and revenue of PCS.

ORA believes that the Commission erroneously concluded that it cannot regulate the revenues received from PCS products and services, thereby necessitating below-the-line treatment, because states are preempted from such regulation. ORA contends that states can regulate all terms and conditions of CMRS, except rate and entry, and that, therefore, the Commission can regulate the accounting for the costs and revenues of CMRS.

ORA believes that any decision the Commission makes regarding the treatment of PCS revenues and costs is thus outside the purview of federal preemption, and that such a decision should be based on a careful analysis of the type of PCS services offered once Pacific has obtained requisite authority.

⁶ See second footnote on page 1.

ORA claims that the Commission was premature in placing PCS below the line. Before reaching that conclusion, ORA believes the Commission should at least investigate the impact of below-the-line treatment on Pacific's existing infrastructure and revenue base. ORA suspects that Pacific has modified or plans to substantially modify its network to accommodate the potentially lucrative offering of PCS retail services. As a result, ORA claims that the potentially less profitable PCS wholesale services would remain as ratepayer funded operations even though wholesale services are just as risky and could be bypassed by any future PCS provider at any time. ORA believes such an arrangement could have a negative impact on the profitability of Pacific.

B. Applicability of Existing Affiliate Transaction Rules for PBMS

The Commission found in Resolution T-15627 that existing affiliate transaction rules are sufficient for PCS.⁷ ORA claims that finding is wrong as it ignores the effort the parties and the Commission made in the Pacific Bell Information (PBIS) proceeding (A.90-12-052) to adapt existing affiliate transaction rules to the transactions with a wholly-owned subsidiary of Pacific. Since the adaptations to the rules made for PBIS were specific to that transaction,⁸ ORA believes the Commission should determine if specific adaptations of the affiliate transaction rules are necessary to maintain ratepayer indifference in Pacific's dealings with its affiliate, PBMS.

ORA believes it is premature to modify the affiliate transaction rules, since Pacific had not defined PBMS services or the affiliate transactions at issue at the time Resolution T-15627

⁷ Resolution T-15627, p. 8.

⁸ D.92-07-072, mimeo. at 2.

was made effective. Once the Commission knows the extent of PBMS service offerings, ORA proposes the Commission should begin to address and determine what modifications of existing affiliate transaction rules are necessary.

C. Modification of Resolution T-15627 to Clarify that Pacific is Required to Track PBMS Services

Even if the Commission does not modify Resolution T-15627, ORA believes it should clarify that Pacific is required to separately track the expenses related to wireless services incurred by Pacific and its affiliates and offered by PBMS. Although the Commission requires separate tracking on page 1, that requirement is not found in an ordering paragraph.

Discussion

We find no basis to modify Resolution T-15627, as requested by ORA, except to clarify Pacific's obligation to separately track all PCS costs and revenues below the line, as noted below.

Although the Budget Act left in place the states' authority to regulate "terms and conditions" of service other than rates, we concluded in D.96-12-071 (I.93-12-007) that the administrative burdens associated with the filing of tariffs containing other terms and conditions outweigh any advantages. We stated that "[e]ffective and streamlined regulation, as well as the growth of a competitive market, will be enhanced by an environment which minimizes the regulatory filing and paperwork burdens for CMRS providers." (Decision at 20.)

We did not specifically address the issue of CMRS accounting requirements in D.96-12-071, but we did set forth the general principle that our regulation of CMRS terms and conditions other than rates should be focused on those areas where consumer protection issues were involved. We expressed our intention to shortly issue a procedural ruling to address CMRS consumer protection rules.

Our principal consumer protection concern regarding the accounting for PCS costs and revenues is that there be clear separation between the accounting for PCS and LEC regulated operations. Both the revenues and costs for PCS should be assigned below the line solely to shareholders, with no ratepayer responsibility. Without proper separation of costs, captive ratepayers might inadvertently be charged for PCS expenses. We have already addressed this concern in Resolution T-15627 by previously directing DRA (now ORA) to audit Pacific's PCS expenses to confirm that the refund to customers captured all PCS expenses. (See Resolution Ordering Paragraph 5.) For the sake of clarity, however, we shall add an ordering paragraph explicitly directing Pacific to separately track all revenues and expenses related to PCS services to be offered through PBMS.

We find no basis to make any further study regarding whether specific adaptations of the existing affiliate transaction rules are necessary to maintain ratepayer indifference in Pacific's dealings with PBMS. We have previously addressed this same concern regarding the adequacy of our affiliate transaction rules in D.95-10-032. In that decision, we addressed a motion filed by PBMS on June 19, 1995, in I.93-12-007 requesting a Commission order stating that any Commission approvals of the PCS network were preempted under the Budget Act. In its reply to that motion, AirTouch requested that the Commission undertake an investigation to determine, among other things, the adequacy of existing affiliate transaction rules.

After considering parties' arguments in I.93-12-007, we concluded in D.95-10-032 that no good cause had been shown to justify instituting a formal investigation of affiliate rules. Consistent with our conclusion already reached in D.95-10-032, we find no basis to grant ORA's request to undertake further study of existing affiliate transaction rules. As stated in Resolution T-15627, our affiliate transaction rules were created to cover

situations where utilities provided services to unregulated entities in which the utility had some financial interest. PBMS is obligated to comply with existing rules with respect to affiliate activities involving its PCS network. Those rules do not need to be separately revised to fit every new service.

Findings of Fact

1. In Resolution T-15627, the Commission granted Pacific's request to refund to customers those costs associated with the early development work for retail PCS which were included in Pacific's 1986 General Rate Case and its 1989 Start Up revenue requirement pursuant to the New Regulatory Framework.

2. In Resolution T-15626, the Commission stated its expectation that once PCS products were eventually offered, they would be treated as a Category III service.

3. In D.96-12-071 (I.93-12-007), the Commission concluded that the administrative burdens associated with the filing of tariffs for CMRS services outweigh any advantages, and terminated the CMRS tariff filing requirements.

4. While the Commission did not specifically address accounting requirements for PCS in D.96-12-071, it did state that prospective regulation of CMRS terms and conditions other than rates should be focused on those areas where consumer protection issues are involved.

5. The Commission previously addressed the adequacy of its affiliate transaction rules in D.95-10-032 in its ruling on a motion filed by PBMS requesting a Commission order stating that any Commission approvals of the PCS network were preempted under the Budget Act.

6. In its reply to the PBMS motion, AirTouch requested that the Commission undertake an investigation to determine, among other things, the adequacy of existing affiliate transaction rules.

7. After considering parties' arguments, the Commission concluded in D.95-10-032 that no good cause had been shown to justify instituting a formal investigation of affiliate rules.

Conclusions of Law

1. ORA has provided no basis to justify a modification to Resolution T-15627, except to add an ordering paragraph explicitly directing Pacific to separately track PCS costs and revenues.

2. Under the Omnibus Budget Reconciliation Act of 1993, this Commission's authority to regulate rates and entry of all CMRS, including PCS, is preempted.

3. No basis has been shown to warrant further study regarding whether specific adaptations of the existing affiliate transaction rules are necessary to maintain ratepayer indifference in Pacific's dealings with PBMS.

4. The Commission's affiliate transaction rules were created to cover situations where utilities provide services to unregulated entities in which the utility has some financial interest.

5. The Commission's affiliate transaction rules do not need to be separately revised to fit every new service.

ORDER

IT IS ORDERED that:

1. Resolution T-15627 shall be modified to add the following new Ordering Paragraph 6: "Pacific Bell shall separately track all revenues realized and costs incurred in connection with PCS activities and account for them below the line."

2. With the exception of the modification adopted in Ordering Paragraph 1 above, Application 94-11-039 is denied.

3. Application 94-11-039 is closed.

This order is effective today.

Dated May 21, 1997, at Sacramento, California.

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