

ALJ/MAB/gab

Mailed  
SEP 4 1997

Decision 97-09-007 September 3, 1997

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

Pacific Bell, (U 1001 C)

Complainant,

vs.

MCI Telecommunications Corporation, (U 5001 C)

Defendant.

**ORIGINAL**

Case 97-03-042  
(Filed April 3, 1997)

**O P I N I O N**

**Background**

On April 3, 1997, Pacific Bell filed a complaint and motion for temporary restraining order and preliminary injunction against MCI Telecommunications, Inc., (MCI) alleging that MCI had made false, misleading, and unfair representations regarding the fees Pacific Bell, and other local operating companies, charge long-distance carriers for the use of their local networks to carry long-distance calls. Specifically, Pacific Bell stated that MCI had placed advertisements in the local newspapers which contained representations that Pacific Bell was "overcharging" customers, that customers "deserved a refund" and should "demand" their money back, and "demand that Pacific Bell stop their access charge ripoff." Pacific Bell contended that MCI's representations constituted violations of the federal Lanham Act, 15 U.S. C. § 1125(a)(1), the California Business and Professions Code, § 17200 *et seq.*, and Commission directives. Pacific Bell sought a temporary restraining order and preliminary injunction forbidding MCI from further publication of these advertisements.

On June 4, 1997, MCI filed its answer and a motion to dismiss the complaint in both of which it stated that its representations regarding access fees were public

comment on a political issue such that the First Amendment to the U.S. Constitution prohibited the Commission from granting the relief requested by Pacific Bell.

On June 19, 1997, Pacific Bell filed its response to MCI's motion in which it stated that MCI's advertisements were commercial speech, and thus were not entitled to the high level of protection afforded to political speech by the First Amendment.

With the permission of the assigned Administrative Law Judge (ALJ), MCI filed a reply presenting its legal analysis showing that the speech was indeed protected political speech.

On June 30, 1997, the Assigned Commissioner and Assigned ALJ held oral argument. During the argument, counsel for MCI indicated that MCI is not now running the troublesome advertisements, nor does it have any plans to do so in the future. Counsel for Pacific Bell agreed that the actions which were the subject of the complaint have ceased, such that this case is largely moot.

#### **Discussion**

##### **A. Useful Expenditure of Commission Resources**

Conducting contested cases before the Commission requires an expenditure of substantial resources by the parties and the Commission and its staff. The Commission is unwilling to expend its limited resources on cases in which little, if anything, is at stake. This case would appear to be such a case.

The complained of actions have ceased. An injunction forbidding such advertisements at this point would be meaningless.

The primary remedy contemplated by the Lanham Act and the Business and Professions Code is monetary damages. The Commission is without jurisdiction to award damages.

Moreover, pursuing this matter would undoubtedly require an unusually high level of Commission resources due to the importance of the legal issues, the parties' willingness to pursue the issues, e.g., MCI's nearly 300 data requests, and the novelty of such issues before the Commission.

Finally, should the Commission decide that Pacific Bell is entitled to an injunction, such a remedy is very disfavored, especially where speech is the activity enjoined. Such an injunction would need to be narrowly tailored to ensure compliance with the First Amendment and resulting case law. Only selected portions of the advertisements could be prohibited. As suggested by counsel for Pacific Bell, disclaimers could also fill this function.

In sum, this case is legally complex and will undoubtedly be very expensive for the parties and the Commission staff to litigate. At this time, however, nothing is at stake and any resulting decision would be largely advisory. For these reasons, the public interest would not be served by continuing to litigate this case.

#### **B. Further Advertisement By MCI**

We are mindful of the potential for MCI, or other long distance carriers, to engage in advertisements which may misrepresent charges imposed by Pacific Bell and other local exchange companies. As guidance for such advertising, we observe that terms and phrases such as "overcharge," "overtax," "entitled to a refund," particularly when the reader is encouraged to take actions against a local exchange company, and not the FCC, appear to be misstatements of fact.

#### **Findings of Fact**

1. Litigating this case before the Commission will require an expenditure of substantial resources by the Commission staff and the parties.
2. Counsel for MCI represented that MCI is no longer displaying the complained-of advertisements and has no immediate intention to do so.

#### **Conclusions of Law**

1. The Commission lacks the authority to order damages.
2. No substantial legal right is currently at issue in this proceeding.
3. Injunctions, where speech is the activity enjoined, are disfavored.
4. The public interest would not be served by further litigating this case.
5. This case should be dismissed, without prejudice to refile should similar conduct occur.

**O R D E R**

Therefore, **IT IS ORDERED** that:

1. This case is dismissed, without prejudice to Pacific Bell to refile should any similar conduct occur.

2. This proceeding is closed.

This order is effective today.

Dated September 3, 1997, at San Francisco, California.

**P. GREGORY CONLON**

President

**JESSIE J. KNIGHT, JR.**

**HENRY M. DUQUE**

**JOSIAH L. NEEPER**

**RICHARD A. BILAS**

Commissioners