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Decision 98-04-068 April 23, 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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| Rulemaking on the Commission's own Motion into Universal Service and to Comply with the mandates of Assembly Bill 3643. | R.95-01-020 (Filed January 24, 1995) |
| Investigation on the Commission's own Motion into Universal Service and to Comply with the Mandates of Assembly Bill 3643. | I.95-01-021 (Filed January 24, 1995) |



# ORDER GRANTING A LIMITED REHEARING, MODIFYING DECISION NO. 98-01-023, AND SUBSEQUENTLY DENYING REHEARING OF THE DECISION AS MODIFIED

## I. INTRODUCTION

In Decision (D.) 98-01-023, the Commission resolved several issues necessary to pursue tax exempt status for the California High Cost Fund-B (CHCF-B) and the California Teleconnect Fund (CTF). The funds were established by an earlier decision, D.96-10-066. Pursuant to that decision, telecommunications carriers have been collecting the CHCF-B and CTF surcharges set by the Commission from their customers since February 1997. (D.96-10-066, Ordering Paragraphs 8.h and 9.e). In January 1997, another decision instructed carriers to hold these monies until trusts for the CHCF-B and CTF could be formed, financial institutions retained, and bank accounts opened. (D.97-01-020, p.7.) Disbursements of the funds from the CHCF-B and CTF was to begin no later than May 30, 1997. (Ibid., p. 8). However, to date no trusts have been formed, no financial institutions retained, and no bank accounts have been opened. All revenues

collected by the CHCF-B and CTF surcharges since February 1997 have remained with the carriers.

In the portions of D.98-01-023 that are relevant to the applications for rehearing, the Commission directed carriers to immediately invest all of the CHCF-B and CTF revenues they collected to date in interest-bearing accounts, and made them responsible for remitting interest on accumulated surcharge revenues equal to the average seven-day compound yield on taxable money market funds as published in the Wall Street Journal each Thursday. The Commission also directed carriers to remit to the CHCF-B and CTF any interest they may have earned prior to the date of the order.

Applications for rehearing were timely filed by Los Angeles Cellular Telephone Company ("LA Cellular") and jointly by California Association of Competitive Telecommunications Cos. and Cellular Carriers Association of California ("CALTEL/CCAC"). Both LA Cellular and CALTEL/CCAC claim legal error on the grounds that the Commission violated Public Utilities Code §1705 as the decision is not based on separately stated factual findings supported by evidence in the record. CALTEL/CCAC further allege the following legal errors: the Commission violated Public Utilities Code §1708 when it ordered telecommunications carriers to pay interest on CHCF-B and CTF surcharge revenues collected and held prior to the issuance of D.98-01-023, since the Commission did not give carriers notice or an opportunity to be heard; by ordering carriers to pay interest on revenues collected and held prior to the issuance of D.98-01-023, the Commission engaged in retroactive ratemaking in violation of P.U. Code §728; and the Commission violated P.U. Code §1709 since its collateral order is contrary to the Commission's order in D.96-10-066. LA Cellular's application also recommends that the Commission, on a going-forward basis, adopt a uniform rule regarding the interest earned on collected funds. The Office of Ratepayer Advocates ("ORA") and The Utility Reform Network ("TURN") filed responses to both applications.

We have reviewed each and every allegation raised in both rehearing applications. We find that there is merit in the applicants' claim that the decision lacks a rationale regarding the Commission's choice of interest rate in establishing interest-bearing accounts for the funds. We shall accordingly grant a limited rehearing on this issue, and modify the decision to insert our reasons for selecting this particular rate of interest, as well as insert additional findings of fact on this issue. We also believe that the argument raised by CALTEL/CCAC regarding the Commission's violation of §1708 has merit, and we will grant a limited rehearing in order to modify the decision by vacating the order requiring carriers to remit interest they may have earned prior to the issuance of D.98-01-023 so that the carriers may first request hearings on this matter. By modifying the decision, the issues raised by CALTEL/CCAC concerning retroactive ratemaking and the violation of §1709 are made moot. The remainder of the allegations raised in CALTEL/CCAC's joint application, as well as the remaining issues raised in LA Cellular's application for rehearing are without merit.

## II. DISCUSSION

### 1. CALTEL/CCAC's argument that the Commission violated §1708 when it issued an order requiring carriers to pay interest on CHCF-B and CTF funds they collected and held preceding the issuance of D.98-01-023 prior to holding hearings has merit.

CALTEL/CCAC argue in their application for rehearing that the decision violated §1708, as it failed to give the parties notice and opportunity to be heard on the issue of remitting interest earned on the surcharge revenues collected prior to the issuance of D.98-01-023. (See CALTEL/CCAC's Joint Application for Rehearing, pp. 7-8). Applicants argue that since the order to remit interest is in effect now, holding hearings after the effective date of the order constitutes post hoc adherence to §1708. In their response, both TURN and ORA argue that §1708 is not implicated in this case, since D.98-01-023 neither modifies, rescinds, nor amends D.96-10-066. In the alternative, they

argue that even if D.98-01-023 does modify or amend D.96-10-066, the carriers' rights have not been compromised since the carriers will be afforded the opportunity to be heard through evidentiary hearings. (See TURN's Opposition, p. 6; ORA's Response, pp. 3-4).

In discussing whether carriers should be required to remit interest they may have earned on surcharge revenues collected, the Commission stated:

> "It is also our intent that carriers should remit to the CHCF-B and CTF any interest they may have earned prior to the date of this order on the hundreds-of-millions of dollars in surcharge revenues they are holding. We realize, however, that this is a 'new' requirement. Therefore, pursuant to Public Utilities Code §1708, we shall instruct the assigned ALJ to issue one or more rulings allowing parties to request evidentiary hearings on whether carriers should be required to remit any interest they may have earned thus far on the surcharge revenues they hold." (D.98-01-023, pp. 7-8).

The relevant ordering paragraph states:

> "Each carrier shall remit to the CHCF-B and CTF any interest it has earned prior to the date of this order on the CHCF-B and CTF surcharge revenues collected by the carrier. This requirement may be altered or rescinded depending on the outcome of any evidentiary hearings that may be held in accordance with Ordering Paragraph 15 of this order." (D.98-01-023, p. 15, Ordering Paragraph No. 8).

Having considered the arguments on both sides, we find that the applicants' argument has merit. It is clear from the discussion of the opinion where we expressly implicated §1708, as well as the Ordering Paragraphs, that we intended to give the carriers notice and opportunity to be heard on the issue of whether carriers should be required to remit interest they may have earned on revenues held prior to the issuance of D.98-01-023. However, while a decision may put a party on notice that a prior decision may be changed subject to hearings pursuant to §1708, the order modifying the decision must come after the hearing is complete. (See, e.g., Re Post-Retirement Benefits Other Pensions, etc., [D.95-10-018] (1995) 61 Cal.P.U.C.2d 687). That being the case, it was

legal error to order the carriers to pay interest prior to having hearings on whether carriers should be required to remit interest earned on surcharge revenues held preceding the issuance of the decision. As such, the decision shall be modified as follows: (1) Conclusion of Law No. 15 should be changed to read: "Carriers should retain their rights under §1708 to request a hearing on whether they should remit any interest they may have earned prior to this order on the CHCF-B and CTF surcharge revenues they have collected since February 1997." (2) Ordering Paragraph No. 8 should be deleted.

The Decision as modified renders several of CALTEL/CCAC's allegations of legal error moot, including their claim the Commission engaged in retroactive ratemaking in violation of §728, and their argument that D.98-01-23 was contrary to the Commission's order in D.96-10-066 in violation of §1709. As such, we will not address the merits of those allegations at this time. Instead, these arguments can be raised by the parties in their request for hearings pursuant to the ALJ's ruling on this matter.

**2. Selection of the rate of interest based on the average seven day compound yield on taxable money market accounts as published each Thursday in the Wall Street Journal.**

In ordering carriers to deposit CHCF-B and CTF surcharge revenues in interest bearing accounts, the Commission required carriers to remit interest equal to the surcharge revenues multiplied by an annual rate of interest to be determined by reference to the average seven-day compound yield on taxable money market funds published in the Wall Street Journal each Thursday. (D.98-01-023, pp. 14-15, Ordering Paragraph Nos. 5, 6, & 7). CALTEL/CCAC specifically claims that the amount of interest that carriers will be required to remit is a "material" issue which requires separately stated findings and must include a discussion explaining how or why it selected this particular rate of interest. LA Cellular similarly argues that there is no evidence that the Wall Street Journal interest rate is an appropriate or reliable benchmark.

There is no statutory requirement that the Commission adopt any specific rate of interest. In setting interest rates for unpaid rate refunds, for example, we have broad discretion to select an appropriate rate of interest. (See, e.g., Assembly v. Public Utilities Com. (1995) 12 Cal.4th 87.) However, we note that when we establish interest-bearing accounts, we often require the rate of interest to be based on the short term commercial paper rate. While we have the discretion to adopt interest rates other than the short term commercial paper rate, we usually offer a reasonable explanation for the deviation. We note that our underlying reasoning for adopting this particular rate as an appropriate rate of interest is not stated in the decision, and therefore we agree that the requirements of §1705 are not met.

In this case, there are several justifications for deviating from the short term commercial paper rate. Commercial paper is a short-term, unsecured promissory note generally issued by large, well-known corporations and finance companies. (Black's Law Dictionary, Sixth Edition (1990)). Traditionally, the Commission has used the commercial paper rate of interest for large utilities, like Pacific Bell, where the rate of interest is a reasonable approximation of the cost of capital for a large, credit-worthy utility. However, there are many small utilities collecting surcharge revenues for the CHCF-B and CTF funds. These carriers are too small to efficiently invest their surcharge monies in commercial paper, which usually is issued in institutional lots. There are also high transaction costs associated with the purchase and sale of commercial paper, such as obtaining a credit rating for an issuance of commercial paper. These transaction costs would be unduly burdensome for smaller carriers. On the other hand, the average seven day compound yield on taxable money market funds as evidenced in the Wall Street Journal is available to all investors, with very low transaction costs, if any. These factors provide a rational basis for the adoption of the interest rate in this proceeding.

We also find no merit in CALTEL/CCAC's claim that finding this type of account would be burdensome and could subject the carriers to financial penalties. This interest rate was chosen as it is relatively easily obtainable for all investors. The

applicants have failed to show that it would be particularly onerous or burdensome to "shop around" for the best rates available. Additionally, the 10% annual rate penalty only applies to carriers that are late in remitting surcharge revenues to the funds.

Therefore we will modify D.98-01-023 to insert in the discussion of the decision the above rationale for choosing this particular rate of interest in order to comply with the requirements of §1705. Accordingly, new findings of fact shall also be inserted in the decision to reflect this reasoning.

**3. The Commission's determination that carriers would experience a windfall if they were allowed to keep any interest earned on CHCF-B and CTF surcharge revenues is based on separately stated findings of fact which support the decision.**

CALTEL/CCAC and LA Cellular also argue that there is no evidence in the record which indicates that carriers have earned any interest, and that there are no findings which indicate that carriers would experience a "windfall." CALTEL/CCAC's reasoning is that without findings of fact regarding the level of interest actually earned by carriers, it is impossible to find that they earned a windfall. LA Cellular similarly argues that there is no record upon which the Commission can reach a conclusion that carriers would reap a sizeable windfall if they were to keep all interest they may have earned or will earn from the surcharge revenues accumulated since February 1997. These arguments are without merit.

In D.98-01-023, we noted that:

> "since February 1997, every customer of intrastate telecommunications services in California has been paying CHCF-B and CTF surcharges of 2.87% and 0.41%, respectively. These two surcharges are intended to collect $402 million per year. We believe it would be unreasonable for carriers to reap a potentially sizeable windfall by keeping any interest they may be earning on the hundreds-of-millions of dollars in surcharge revenues they currently hold." (D.98-01-023, pp. 6-7 (citing D.96-10-066, mimeo., Appendix B)).

It is self evident and hardly subject to dispute that any amount of interest earned on that amount would be "sizeable." As the rehearing applications acknowledge, the structure put in place by D.96-10-066 and D.97-01-020 contemplated that carriers would remit their collections to the administrators shortly after obtaining those sums from customers. Carriers were not supposed to benefit in any significant fashion from the time value of the money because they were not expected to hold the money for anything but a very short time period. Finding that carriers would reap a windfall if they were allowed to keep any interest earned on these surcharge revenues is simply a matter of applying the definition of 'windfall' to the facts: a 'windfall' is an "unexpected or sudden gain or advantage." (Webster's Third New International Dictionary (1971)). These facts provide ample evidence for the Commission to find by implication that, if carriers had been collecting interest and were not required to remit it to the funds, the carriers would reap a windfall.

We also find no merit in the applicants' complaint that the decision fails to address administrative costs associated with the accounting and maintenance of the CHCF-B and CTF surcharge revenues incurred by the carriers. The applicants have not shown that the expenses would be any more onerous or burdensome than those contemplated by D.96-10-066. In that decision, the administrative expenses associated with assessing, collecting, and remitting monies to the funds were considered part of the carriers' "contribution" to the fund. (See D.96-10-066, p. 185, Conclusion of Law No. 122).

**4. LA Cellular's recommendation "that the Commission, on a going-forward basis, adopt a uniform rule regarding the interest earned on collected funds" fails to establish legal error and is without merit.**

LA Cellular's final argument in its application for rehearing is that from and after the date of the decision, the Commission should direct carriers to impute interest at a

rate keyed to the published rate for 30-day U.S. Treasury Bills. LA Cellular further argues that if the Commission determines that interest ought to be imputed for the period preceding the decision, such interest ought also to be calculated on a uniform basis, rather than on different rates which vary from carrier-to-carrier. LA Cellular's "recommendations" fail to allege legal error and are without merit.

## III. CONCLUSION

Therefore, we find that the argument raised by CALTEL/CCAC regarding §1708 has merit, and we will grant a limited rehearing in order to modify the decision as specified below. We also find merit in the argument raised by the applicants regarding the basis for selecting the rate of interest for interest-bearing accounts for the fund, and will accordingly modify the decision to insert our reasons for selecting the interest rate in question. By modifying the decision, the issues raised by CALTEL/CCAC concerning retroactive ratemaking and the violation of §1709 are made moot. The remainder of the allegations raised in CALTEL/CCAC's joint application, as well as the remaining issues in LA Cellular's application for rehearing are without merit.

**THEREFORE, GOOD CAUSE APPEARING, IT IS ORDERED** that a limited rehearing is granted and D.98-01-023 is modified as follows:

1. Conclusion of Law No. 15 is modified to read: "Carriers should retain their rights under §1708 to request a hearing on whether they should be required to remit any interest they may have earned prior to the date of this order on the CHCF-B and CTF surcharge revenues they have collected since February 1997."

2. Ordering Paragraph No. 8 is deleted.

3. On page 7 of the Discussion, after the second sentence of the first paragraph, the following language should be inserted:

> "There is no statutory requirement that we adopt any specific rate of interest. However, we note that when we establish interest-bearing accounts, we often require the rate of interest to be based on short-term commercial paper rates. In this

case, there are several justifications for deviating from the short term commercial paper rate. Commercial paper is a short-term, unsecured promissory note generally issued by large, well-known corporations and finance companies. (Black's Law Dictionary, Sixth Edition (1990)). Traditionally, the Commission has used the commercial paper rate of interest for large utilities, like Pacific Bell, where the rate of interest is a reasonable approximation of the cost of capital for a large, credit-worthy utility. However, there are many small utilities collecting surcharge revenues for the CHCF-B and CTF funds. These carriers are too small to efficiently invest their surcharge monies in commercial paper, which usually is issued in institutional lots. There are also high transaction costs associated with the purchase and sale of commercial paper, such as obtaining a credit rating for an issuance of commercial paper. These transaction costs would be unduly burdensome for smaller carriers. On the other hand, the average seven day compound yield on taxable money market funds as evidenced in the Wall Street Journal is available to all investors, with very low transaction costs, if any. In the aggregate, these factors provide a rational basis for the adoption of the interest rate in this proceeding, and this decision is therefore a proper exercise of the Commission's discretion."

4. Additional findings of fact shall be inserted after Finding of Fact No. 28 and numbered as follows:

29. There are many small utilities collecting surcharge revenues for the CHCF-B and CTF funds.
30. The smaller carriers would not be able to efficiently invest their surcharge monies in commercial paper, which is usually issued in institutional lots by large, well-known corporations, and involves high transactional costs.
31. The average seven day compound yield on taxable money market funds, as published each Thursday in the Wall Street Journal, is available to all investors.

5. The remaining findings of fact commencing with previously numbered Finding of Fact No. 29 shall be renumbered accordingly.

**IT IS FURTHER ORDERED** that rehearing of D.98-01-023 as modified above is denied in all other respects.

This order is effective today.

Dated April 23, 1998, at Sacramento, California.

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