

Decision 98-05-061 May 21, 1998

ORIGINAL
BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking on the Commission's Own Motion into the Third Triennial Review of the Regulatory Framework Adopted in Decision 89-10-031 for GTE California Incorporated and Pacific Bell.

Rulemaking 98-03-040
(Filed March 26, 1998)

In the Matter of the Application of PACIFIC BELL (U 1001 C) for a Third Triennial Review of the Regulatory Framework Adopted in Decision 89-10-031.

Application 98-02-003
(Filed February 2, 1998)

INTERIM OPINION ADDRESSING APPEAL OF CATEGORY

1. Summary

We grant the appeal of the Office of Ratepayer Advocates (ORA), The Utility Reform Network (TURN), the California Cable Television Association (CCTA), and AT&T Communications of California, Inc. (AT&T) of the Assigned Commissioner's Ruling on Category, and recategorize this proceeding as ratesetting (RS). We also waive Rule 6.5(b) of the Commission's Rules of Practice and Procedure (Rules) if the Assigned Commissioner later determines hearing is needed, and we dismiss Application (A.) 98-02-003.

2. Background

On February 2, 1998, Pacific Bell (Pacific) filed an application for its third triennial review of the new regulatory framework (NRF). Pacific proposed the proceeding be categorized as quasi-legislative (QL). The Commission made a preliminary determination that the category would be QL. (Resolution ALJ-176-2986, reported in the Daily Calendar, February 6, 1998, page 32.)

On March 26, 1998, the Commission adopted Order Instituting Rulemaking (OIR or R.) 98-03-040, naming Pacific and GTE California Incorporated (GTE) as respondents, and consolidating R.98-03-040 with A.98-02-003. The Commission categorized R.98-03-040 as QL. Responses to the OIR were filed by Pacific, GTE, ORA, TURN, AT&T, CCTA, MCI Telecommunications Corporation, Teleport Communications Group, Inc, and Sprint Communications Company. All parties, with the exception of respondents, objected to the preliminary determination of category.

On April 13, 1998, the Assigned Commissioner filed and served a Scoping Memo and Ruling categorizing the consolidated proceeding as QL, and addressing the responses in opposition to the preliminary categorization. On April 21, 1998 ORA filed an appeal of the categorization. On April 23, 1998, TURN, AT&T, and CCTA filed an appeal. On April 28, 1998, Pacific filed a response in support of the QL categorization. On May 4, 1998, with permission from the Administrative Law Judge Division, GTE filed a late response in support of the QL categorization.

3. Discussion

3.1. *Appeal of Category*

ORA contends that as a matter of law and public policy the category of this proceeding must be RS. TURN, AT&T, and CCTA assert, among other things, that cases which establish mechanisms for setting rates must be categorized as RS. Pacific and GTE argue, among other things, that proper reading and application of the category definitions in the PU Code and our Rules support the QL categorization.

Both sides make good arguments. We will neither repeat, nor dissect, each argument here, since many arguments in some variation have

already been addressed in the OIR and the Assigned Commissioner's Scoping Memo and Ruling.

We are confident that a QL categorization would be sustainable for all the reasons already stated in the OIR and Assigned Commissioner's Ruling and Scoping Memo, as well as those stated in the responses filed by Pacific and GTE. Nonetheless, after giving the matter thorough consideration, we grant the appeal of category, and recategorize this proceeding as RS. We do this because Rule 5(c) specifically says in relevant part:

"Ratesetting' proceedings are proceedings in which the Commission...establishes a mechanism that in turn sets the rates for a specifically named utility (or utilities)."

We are here considering a mechanism that in turn sets the rates for specifically named utilities, namely Pacific and GTE.

Similarly, PU Code Section 1701.1(c)(3) includes cases in the ratesetting category which consider ratesetting mechanisms for a specific company. This proceeding includes two specific companies - Pacific and GTE. The proceeding primarily deals with whether the ratesetting mechanisms previously adopted for these two companies should be modified. Moreover, Issue 5 may result in establishing a specific rate for these two companies if we decide to cap the price at the existing level without further adjustment. Accordingly, we conclude that the proceeding fits within the RS category under both the statute and our rules.

3.2. No Other Matters Are Subject to Appeal Now

The only matter subject to appeal at this time is that of category. (Rule 6.4.) That is, the parties' appeals of the Assigned Commissioner's decisions regarding the need for hearing, notice, ex parte rules, and other matters, are not

now timely for appeal under our rules. Rather, those matters are subject to appeal as part of an application for rehearing when the proceeding is completed.

As we have often said, we do not entertain interlocutory appeals of rulings of the presiding officer.¹ This is particularly true now, when we seek to complete all proceedings within specific 12- and 18-month time periods.

When A.98-02-003 was filed, we preliminarily determined that a hearing was expected. (Resolution ALJ-176-2986, reported in the Daily Calendar, February 6, 1998, page 32.) We preliminarily found no need for hearing in the Order Instituting Rulemaking 98-03-040, and, in consolidating A.98-02-003 with R.98-03-040, reversed the preliminary determination regarding A.98-02-003. The Scoping Memo and Ruling of Assigned Commissioner dated April 13, 1998 agrees with our preliminary ruling and finds no hearing is needed, but provides an opportunity for parties to move for hearing after comments and reply comments are filed.

Pursuant to Rule 87, we will waive Rule 6.5(b) in the event that the Assigned Commissioner grants a motion for hearing.² We will waive Rule 6.5(b) in the interest of letting the Assigned Commissioner efficiently manage this proceeding, and in recognition of the necessary schedule for completing this case.

¹ See, for example, D.98-03-073, citing from D.87070 (81 CPUC 389, 390) and D.90-02-048, mimeo p. 4. Relatedly, also see Rule 65, which states that rulings by the presiding officer on the admissibility of evidence "may be reviewed by the Commission in determining the matter on its merits" (i.e., when a decision is presented for adoption by the whole Commission). In extraordinary circumstances, rulings on admissibility of evidence may also be reviewed by the Commission when the presiding officer refers the matter to the Commission for determination. No such referral has been made here.

² Rule 6.5(b) requires that: "If the Assigned Commissioner...changes the preliminary determination on need for hearing, the Assigned Commissioner's ruling shall be placed on the Commission's Consent Agenda for approval of that change."

To require placing any ruling granting a motion for hearing before the full Commission for approval may add several weeks to the schedule, which we do not believe either necessary or prudent. We are satisfied that no hearing is needed based on the issues as now framed, and our review of the contentions of the parties to the contrary. Nonetheless, the schedule provides a reasonable opportunity for parties to seek reversal of the decision that no hearing is needed, and parties' rights are fully protected if motion for hearing is granted. Therefore, we need not revisit the issue pursuant to Rule 6.5(b).

3.3. *ORA Appeal of Categorization*

ORA argues that the Assigned Commissioner has not made a final determination that no hearing is needed, and, therefore, cannot declare Article 2.5 ceases to apply. ORA thereby asserts that it cannot be denied its right under Rule 6.5 to appeal the ruling on category. We here consider and grant the appeals of category. ORA's concern need not be addressed further.

3.4. *Dismiss Application 98-02-003*

The OIR states that the Commission "will not carry out the 1998 NRF Review employing the vehicle suggested by Pacific, i.e., A.98-02-003." (R.98-03-040, p. 7.) We continued:

"We hereby affirm that 'the application process wastes a substantial amount of time in a NRF review... We wish to immediately focus the parties and get the maximum amount of participation from those interested parties...' [footnote deleted] in the 1998 NRF Review. The rulemaking [footnote deleted] we adopt today, by setting forth the issues in which we are interested and making Pacific and GTEC respondents, will be more efficient, maximize the parties' and the Commission's resources, and be completed in a more timely fashion." (R.98-03-040, p. 8.)

The Commission must manage its resources efficiently, including the number of open dockets. While we originally believed it most efficient to consolidate A.98-02-003 with R.98-03-040, we now reconsider. Pacific is a respondent to R.98-02-003, and, therefore, the application need not be retained for the purpose of including Pacific. The OIR and assigned Commissioner's Scoping Memo and Ruling direct all parties to file comments and reply comments on the issues using the same outline. It is the comments and reply comments that will be the foundation of this proceeding. Pacific will submit its comments and reply comments using the common outline, and include relevant material from its application in its comments and reply comments within that common outline. Any motions for hearing must be based on these comments and reply comments. Therefore, there is no need for a separate application covering Pacific. It is now apparent that A.98-02-003 can be dismissed, and we do so.

Findings of Fact

1. On April 13, 1998 the Assigned Commissioner filed and served a Scoping Memo and Ruling categorizing this proceeding as QL, consistent with the Commission's preliminary categorization of A.98-02-003 and R.98-03-040.
2. Appeals of the Assigned Commissioner's categorization were filed by ORA, TURN, AT&T, and CCTA.
3. This proceeding will establish a mechanism that in turn sets the rates for specifically named utilities.
4. To require placing a ruling changing the determination of the need for hearing before the Commission for approval would add several weeks to the schedule of this proceeding, and is not necessary since the schedule provides a reasonable opportunity for parties to seek reversal of the decision that no hearing is needed, and parties' rights are fully protected if hearing is granted.

5. Pacific is a respondent to R.98-03-040; A.98-02-003 need not be retained for the purpose of including Pacific in this NRF review; the OIR and Assigned Commissioner's Scoping Memo and Ruling direct all parties to file comments and reply comments using a common outline to address the issues; the comments and reply comments will be the foundation for this proceeding; Pacific will submit its comments and reply comments using the common outline (including relevant material from A.98-02-003 in its comments and reply comments); and parties' motions for hearing must be based on the comments and reply comments.

Conclusions of Law

1. Rule 5(c) states that ratesetting proceedings are proceedings in which the Commission establishes a mechanism that in turn sets the rates for specifically named utilities.
2. The only matter subject to appeal to the full Commission is that of category (Rule 6.4.), and we should not here entertain appeals of the need for hearing, notice, ex parte rules, or other matters.
3. The category for this proceeding should be changed from QL to RS.
4. Rule 6.5(b) should be waived if hearing is required pursuant to the grant of a motion for hearing.
5. A.98-02-003 should be dismissed.
6. This order should be effective immediately to facilitate efficient management of this proceeding.

O R D E R

IT IS ORDERED that:

1. This proceeding shall be categorized as ratesetting for purposes of Article 2.5. Rule 6.5(b) is waived if the Assigned Commissioner determines that hearing is needed.

2. Application 98-02-003 is dismissed.

This order is effective today.

Dated May 21, 1998, at San Francisco, California.

RICHARD A. BILAS
President

P. GREGORY CONLON

JESSIE J. KNIGHT, JR.

HENRY M. DUQUE

JOSIAH L. NEEPER

Commissioners