

DECISION NO. 98-06-029 CASE NO. 95-08-039 APP. NO. _____

Decision 98-06-029 June 4, 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Bayside Village, The Fillmore Center
and North Point Apartments

Complainants,

vs.

Pacific Bell,

Defendant.

ORIGINALCase 95-08-039
(Filed August 8, 1995)**ORDER GRANTING LIMITED REHEARING OF D.97-11-029 ON
SPECIFIC ISSUES AND OTHERWISE DENYING REHEARING**

On December 10, 1997 Pacific Bell filed an application for rehearing of Decision (D.) 97-11-029. D.97-11-029 ("Decision") resolves the Bayside Village complaint in complainants' favor, concluding that certain cross-connects are part of Pacific's network and are not inside wire. Pacific also filed applications on two related decisions, D.97-11-068 (Dieterhofer v. Pacific Bell) and D.97-11-069 (Vista Montana Apartments v. Pacific Bell), which are the subjects of separate orders issued today.

We have carefully considered all the arguments presented by Pacific, and are of the opinion that good cause exists for additional hearing on refunds to apartment residents and certain specific issues regarding implementation of the decision's holdings. We will grant limited rehearing on these issues. However, no legal error has been demonstrated concerning the decision's conclusions that the cross-connects at issue are a part of Pacific's network. Therefore, aside from the specific implementation and refund issues discussed in this order, rehearing of

D.97-11-019 is otherwise denied. We further deny Pacific's request for oral argument.

We note that this is a complaint case not challenging the reasonableness of rates or charges, and so this decision is issued in an "adjudicatory proceeding" as defined in Public Utilities Code section 1757.1.

I. SETTLEMENT INTERPRETATION

A number of Pacific's arguments challenging the decision center around the premise that we misinterpreted the Settlement Agreement adopted by this Commission in D.92-01-023, and modified in D.93-05-014. The Settlement adopts a demarcation point for the utility's local loop beyond which equipment is considered inside wire. We reaffirm our holdings that the cross-connects at issue are on Pacific's side of the demarcation point. We further conclude that our interpretation is the only reasonable interpretation of the Settlement's provisions.

Pacific takes issue with our interpretation of the Settlement's provision that, "NTW [network wire] also includes wire that connects the building entrance terminal to the utility-placed network access termination. This wire connection is called a 'cross-connect'." (Settlement, p. 10.) Pacific alleges we were mistaken in concluding that the cross-connect referred to in the Settlement is the same type of cross-connect which is at issue in this complaint, the connection between the utility board and the customer board. According to Pacific the "building entrance terminal" referred to in the Settlement is in fact the "building entrance facility," a portion of Pacific's network which is on the other side of the network access termination.

Pacific provides no evidentiary or legal support for its contention that the building entrance terminal is in fact the entrance facility. We note that the record indicates that the building terminal and the entrance facility are separate pieces of

equipment, and that the building entrance terminal includes the customer board, as the decision concludes.

Furthermore, viewed in the context of the Settlement, Pacific's interpretation is implausible. There is no reason why the Settlement would need to specify, in two separate places, that a connection between one part of the utility network and another, both of which are on the utility's side of the demarcation point, is the utility's responsibility. There is no way such a connection could be the property owners' responsibility. Therefore there is no reason the Settlement would need to specify this not once, but twice. This is particularly true since, as Pacific acknowledges, this is a rare configuration. It is much more plausible that the Settlement was referring to the connection between utility property and non-utility property. As this complaint illustrates, this is the connection which needed to be classified as utility or non-utility property.

Pacific also argues that the decision erred in relying on the diagram attached to the Settlement (Settlement, Attachment A, p. 2), since the complaint does not have the wiring configuration depicted in the diagram. Pacific fails to understand that the decision discusses the cross-connects at issue in general terms, and our holdings are not dependent on any particular configuration. The decision concludes that those cross-connects between the utility network and the building owners' terminal in a multi-unit building are part of the utility's network, however they are configured. We disagree with Pacific's assertion that the significance of the diagram should be limited to the exact configuration it depicts. We further note that the diagram does not need to definitively resolve the cross-connect issue standing by itself. The decision relies on a number of portions of the Settlement to support its conclusions.

Pacific's contention that the decision's interpretation of the relevant Settlement provision is based on insufficient evidence also lacks merit.

Interpretation of the Settlement is primarily a question of law, and not an evidentiary question. The decision bases its conclusion on the language of the Settlement, and the basic configuration and function of the cross-connects in question. No additional evidence is necessary.

We also reject Pacific's argument that Commission staff ratified its understanding that the cross-connects were inside wire. We note that there is no evidence in record to support Pacific's contention. Furthermore, Pacific should be aware by virtue of its years of practice before the Commission that staff opinions are not binding on the Commission. Even if there were a conflict between the staff representations and the Settlement, the Settlement terms would take precedence. We note, however, that the record indicates that Pacific was aware that staff did not accept its interpretation of the Settlement by January 1995 at the latest. This is less than one and a half years after implementation of the Settlement.

For the foregoing reasons, we find that the decision does not err in its interpretation of the Settlement, or in its conclusion that the cross-connects at issue are part of Pacific's network.

II. DUE PROCESS

Pacific argues that the decision violates Pacific's due process rights, because it orders remedies beyond those requested by complainants. It appears Pacific is referring to both: (1) the requirement that Pacific change its tariffs and practices to be consistent with the decision; and (2) the proposal for refunds to the general body of Pacific's residential customers.

The Constitutional due process requirement of the Fourteenth Amendment of the federal Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." In quasi-judicial administrative proceedings due process requires that affected parties receive "such notice and

proceedings as are adequate to safeguard the right for which the constitutional protection is sought." (Anderson Nat. Bank v. Lockett (1944) 321 U.S. 233, 246.)

Pacific was not deprived of due process regarding the ordered changes to its tariffs and practices. Pacific had ample notice that its practices pursuant to the Settlement and the relevant demarcation point were in question. From the testimony in the proceeding it appears that Pacific was aware that interpretation of the Settlement provisions was at issue, and it should have been reasonably clear to Pacific that the interpretation could affect Pacific's general practices.

We acknowledge, however, that refunds to the general body of Pacific's customers may not have been as foreseeable. Therefore, the failure to provide specific notice of the refunds could constitute legal error. The decision does not actually order these refunds, but rather requires that Pacific submit a proposal to refund the mistaken cross-connect charges. We note that an additional order of the Commission would be required prior to the refunds in any event. We will order further hearings to allow Pacific, and other affected parties, the opportunity to comment on any relevant issues concerning the refunds. The Office of Ratepayer Advocates (ORA) is urged to participate in this proceeding. The decision's ordering paragraph concerning those refunds is hereby vacated.

Pacific also argues that the decision violates Public Utilities Code sections 728 and 1708 because it changes rates, and modifies a prior Commission decision without the required hearing. Pacific's arguments are misplaced because, as the decision explains, the holdings do not modify or change any Commission authority. Rather, the decision's holdings identify Pacific's mistaken interpretation of previous Commission authority. Moreover, there was, in fact, a hearing in this case.

Finally, we dismiss Pacific's argument that the decision violates the due process rights of others. Pacific lacks standing to make this claim. (See California Trucking Assn. v. Public Utilities Com., (1994) 19 Cal.3d 240, 246.)

III. IMPLEMENTATION ISSUES

According to Pacific, since it has treated the cross-connects at issue as inside wire, it no longer recovers expenses from its regulated accounts. Therefore, Pacific argues, a taking will occur if the surcredit applied to customers' bills is not reduced.

This issue did not arise in the underlying proceeding. We need not resolve whether Pacific should have been on notice that it needed to raise issues related to its cross-connect practices. The fact remains that there is no information in the record regarding the rate treatment of the cross-connects. Therefore, we cannot effectively analyze Pacific's claim. We will allow Pacific to raise the issue of whether a change in the surcharges is appropriate in the additional hearings in this proceeding.

We will also allow Pacific to raise issues related to regaining control over the cross-connects in question. Pacific complains that others have access to and perform work on these cross-connects. This is understandable since Pacific has represented to others that the cross-connects are inside wire. Practical difficulties which may be involved with Pacific reasserting control over the cross-connects do not alter the interpretation of the Settlement. However, Pacific is free to raise any such difficulties so we can determine whether any additional action on the part of the Commission is required to assist Pacific in implementing its changes.

IV. FCC PREEMPTION

Pacific's argument that the Commission's interpretation of the demarcation point conflicts with FCC mandates is incorrect. In essence, the relevant portion of the FCC regulation states that the demarcation point should be at the "closest

practicable point" to the entry of the wiring into the building. (47 C.F.R. § 68.3.) As discussed in the decision, any point closer than the customer end of the cross-connect is not practicable. Moreover, the FCC purposely left the demarcation point flexible to allow room for different types of situations. (5 FCC Rcd 4692.)

Pacific also alleges that the decision conflicts with FCC directives by treating residential and commercial properties differently. This is not the case. Naturally, since the complaints involved residential properties the specific holdings concerned residences. However, to the extent the relevant passage of the Settlement applies to both commercial and residential properties, the decision's interpretation would apply to both. Pacific does not point to any specific holding in the decision which would lead to disparate treatment between the two types of properties.

Pacific also contends that the decision's interpretation undermines the FCC goal of establishing a competitive inside wire market. This contention is similarly unpersuasive. As Pacific acknowledges it needs access to the cross-connects in order to use them and move them. Keeping essential wiring within the utility's network does not interfere with creating a healthy inside wire market. In fact, the FCC acknowledged that wiring should only be deregulated to the extent it would not interfere with the network. (5 FCC Rcd 4692.)

V. PUBLIC UTILITIES CODE SECTION 2883

According to Pacific, the decision interprets "usable jack" for the purposes of a landlord's obligations under Civil Code section 1941.4 to mean that the appropriate cross-connect must be attached at the building terminal. Pacific alleges that this conflicts with Public Utilities Code section 2883 which mandates that telephone companies provide 911 service when facilities are available.

There is no conflict between the decision and section 2883. The decision does not define "usable jack" as Pacific suggests. Rather, the decision holds that if

the cross-connects were considered inside wire it would place landlords in an impossible position of failing to comply with the law due to Pacific's actions removing the cross-connects. The decision says nothing about Pacific's responsibility to keep cross-connects in place once they are considered part of Pacific's network.

VI. UNIQUE FACTS

Pacific maintains that the unique facts involved in this case and the other complaint cases should not have formed the basis for a general restructuring of the industry. However, Pacific does not point to any legal error in the Commission's decision to change Pacific's practices through the complaint process. As discussed, there was no due process violation, no previous Commission decision was altered, and no new rule was promulgated. Except for additional hearings which may be warranted on implementation and refund issues, there is no legal requirement to hold generic proceedings to support the decision's conclusions.

Moreover, the decision does not base its interpretation of the Settlement on any unique circumstances. It is true that this complaint, and the others, have unique aspects since the specific problems were dependent on the properties involved. The decision's conclusions and orders, however, are based on Pacific's misinterpretation of the Settlement agreement, a common thread running through all the problems which were presented.

No further discussion of the allegations of error raised by Pacific is required.

Therefore, **IT IS ORDERED** that:

1. Limited rehearing of D.97-11-029 is granted on the specific issues raised in Pacific's application regarding: (a) the implementation of the ordered changes to Pacific's practices; (b) the propriety of refunds to the general body of Pacific customers who Pacific charged for work on the cross-connects at issue; and (c)

implementation issues relating to those refunds. These issues include the necessity of rate adjustments and any difficulties involved in Pacific regaining control of the cross-connects. Pacific may raise other implementation issues in this rehearing, but may not raise issues concerning the interpretation of the cross-connect provisions in the Settlement adopted in D.92-01-023 and D.93-05-014. ORA is urged to participate in this limited rehearing.

2. Limited rehearing shall be held at such time and place and before such Administrative Law Judge as shall hereafter be provided.

3. Ordering Paragraph 8 of D.97-11-029 is vacated. All other ordering paragraphs of D.97-11-029 remain in effect.

4. Rehearing of all holdings of D.97-11-029, other than the implementation and refund holdings specified in Ordering Paragraph 1, above, is denied.

5. Pacific's request for oral argument is denied.

6. Pacific's Motion for Stay of D.97-11-029 is denied.

This order is effective today.

Dated June 4, 1998, at San Francisco, California.

RICHARD A. BILAS
President
P. GREGORY CONLON
JESSIE J. KNIGHT, JR.
Commissioners

I will file a dissent.

/s/ HENRY M. DUQUE
Commissioner

/s/ JOSIAH L. NEEPER
Commissioner

D.98-06-029

C.95-08-039

Commissioners Duque and Neeper, dissenting:

This decision fails to identify or to remedy the full scope of legal errors contained in D.97-11-029. D.97-11-029 reaches its results based on a selective reading of the settlement documents. Thus, the majority's order contains legal error.

Today's decision on Pacific's application for rehearing holds that Pacific's interpretation of the settlement – which claims that the cross connections are customer and not utility property – is implausible. Today's decision reaches this conclusion by giving a primacy to one part of the settlement adopted in D.97-11-029, the settlement text while ignoring other elements.

The settlement consists of three integral parts: Text, Diagrams, and Tariffs. Interpretation of the Settlement requires reference to all three documents. As Commissioner Duque's dissent to D.97-11-029 points out, the text is not a model of clarity. Of the five explanatory diagrams, two contradict, one supports, and two are silent on D.97-11-029's interpretation of the status of the inside wire.¹ Finally, the vague language of the tariffs provide no resolution of this matter. Thus, the conclusion reached in today's decision, that D.97-11-029 does not err in its interpretation designating the disputed cross connects as inside wire, is not supported by a full reading of all three of the settlement documents. We therefore conclude that today's decision to deny rehearing of this issue repeats the legal error of D.97-11-029. The appropriate legal remedy would include granting rehearing on interpretation of the settlement and opening an Order Instituting Investigation to resolve the ambiguities in the settlement documents.

In addition, selecting the demarcation point for the end of the legal carrier's network is a major policy decision that affects the inside wire industry and the facilities-based competitors to a local exchange carrier. In a situation such as this where a policy affects consumers, the regulated utility, and competitors, the common Commission practice is to notify those affected by a policy and provide an opportunity to be heard.

Pacific argues that D.97-11-029 commits legal error by failing to provide this notice. Although Pacific lacks standing to make this claim, as today's decision points out, today's decision fails to note that Commission rules of procedure have led the Commission to reject two petitions to intervene by affected parties. This failure to permit affected parties to participate in our proceedings, even if it does not constitute legal error, marks a departure from our practice of facilitating the participation of affected parties in all our proceedings.

On one important point, today's decision orders rehearing to correct a legal error identified in Commissioner Duque's dissent on D.97-11-029. In particular, today's decision concludes that D.97-11-029 committed legal error because it failed to provide Pacific Bell notice that the Commission was considering whether to order refunds going back to 1993 concerning its billing for work affecting cross connects and therefore grants limited rehearing on this point. Although this is a step in the right direction, it fails to go far enough to correct all the legal errors in D.97.11-029.

¹ These are referenced in Commissioner Duque's dissent to D.97-11-029.

D.98-06-029

C.95-08-039

For these reasons, we must dissent.

/s/ HENRY M. DUQUE

Henry M. Duque
Commissioner

/s/ JOSIAH L. NEEPER

Josiah L. Neeper
Commissioner

June 4, 1998

San Francisco

D.98-06-029

C.95-08-039

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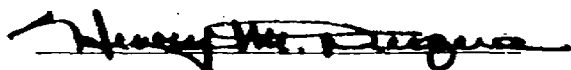
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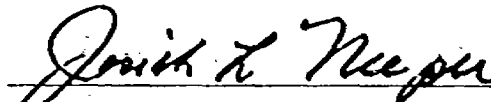
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C.95-08-039

For these reasons, we must dissent.



Henry M. Duque
Commissioner



Josiah L. Neeper
Commissioner

June 16, 1998

San Francisco