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MAIL DATE
6/17/98

Decision 98-06-031

June 4, 1998

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Ted E. Deitenhofer,

Complainant,
vs.

Pacific Bell,

Defendant.

Case 95-11-021
(Filed November 15, 1995)

ORDER DENYING REHEARING OF D.97-11-068

On December 23, 1997, Pacific Bell filed an application for rehearing of Decision (D.) 97-11-068. D.97-11-068 resolves the Dieterhofer complaint in complainant's 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.97-11-029 (Bayside Village v. Pacific Bell) and D.97-11-069 (Vista Montana Apartments v. Pacific Bell), which are the subjects of separate orders today.

We have carefully considered all the arguments presented by Pacific, and are of the opinion that good cause for rehearing has not been shown. We incorporate our discussion in D.98-06-029, our decision issued today in Bayside Village, and conclude that no legal error has been demonstrated. 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.

Therefore, **IT IS ORDERED** that:

1. Rehearing of D.97-11-068 is hereby denied.
2. Pacific's request for oral argument is denied.
3. This proceeding is closed.

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

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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.98-06-031

C.95-11-021

Commissioners Duque and Neeper, dissenting:

In dissenting on D.98-06-029, we concluded that it contained legal error. This decision to deny rehearing follows from D.98-06-029, and its errors infect this analysis.

/s/ HENRY M. DUQUE

Henry M. Duque
Commissioner

/s/ JOSIAH L. NEEPER

Josiah L. Neeper
Commissioner

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San Francisco

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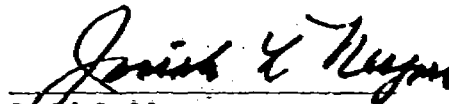
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Henry M. Duque
Commissioner



Josiah L. Neeper
Commissioner

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