

Decision 98-12-018 December 3, 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Pacific Bell (U 1001 C) and Pacific Bell Information Services to notify the Commission to enter Electronic Publishing Services Market.

Application 93-11-031
(Filed November 12, 1993)

ORIGINAL

(See Appendix A for List of Appearances.)

O P I N I O N

Summary

Pacific Bell (Pacific) and its subsidiary, Pacific Bell Information Services (PBIS) filed an application to inform the Commission that PBIS planned to enter the electronic publishing services market. Prior to the evidentiary hearing, it was disclosed that another Pacific affiliate other than PBIS planned to offer those services. A motion to dismiss the application was filed by one of the protestants. Pacific and its related companies agreed that the application should be dismissed, but not for the reasons cited by the protestant.

Since the application did not name Pacific Telesis Electronic Publishing Services (PTEPS) as the entity that is going to pursue the electronic publishing services, this application should be dismissed without prejudice.

Background

On November 12, 1993, Pacific and its wholly owned subsidiary, Pacific Bell Information Services (PBIS), filed the above-captioned application with the

Commission.¹ Both the caption and the first paragraph of the application indicate that the purpose of the filing is to "notify" the Commission of Pacific's and PBIS's intention for PBIS to enter into the electronic publishing services market.² The applicants request authorization to account for these electronic publishing services on a below-the-line-basis.

The application at pages 3 and 4 described the electronic publishing services as follows:

"The electronic publishing services contemplated by PBIS will function as marketing communication services for businesses seeking to place targeted marketing messages before their customers interested in purchasing products and services. [Footnote omitted.] 'Electronic publishing' refers to the universe of services and products through which information, traditionally provided in print form (e.g., directories, newspapers, catalogs) is distributed or accessed over the basic telephone network using electronic devices (e.g., telephones, screen phones, personal computers)."

Protests were filed by the Association of Directory Publishers (ADP), California Bankers Clearing House Association and the County of Los Angeles

¹ Originally, Pacific and PBIS sought to use the Expedited Application Docket procedure. However, due to the time expiration provided for in the resolution, that procedure is no longer available to telecommunication utilities. (See Administrative Law Judge (ALJ) Resolution 161, 33 CPUC2d at 240-244.)

² Ordering Paragraph 11 of Decision (D.) 92-07-072 (45 CPUC2d 109, 139) ordered that "Pacific shall inform the Commission of any new services or lines of business that PBIS plans to enter prior to their implementation." Prior to that, in D.85-12-065 (19 CPUC2d 409), the Commission allowed Pacific to transfer its directory properties to Pacific Bell Directory (PBD) and ordered Pacific to obtain authority before PBD entered the electronic publishing business.

(CBCH/LA), California Newspaper Publishers Association (CNPA), the Division of Ratepayer Advocates (DRA), and Toward Utility Rate Normalization (TURN).³

Following the prehearing conference of March 28, 1994, the evidentiary hearing was set to begin on August 29, 1994.

In accordance with the prehearing conference schedule, Pacific and PBIS, and the protestants, served their prepared testimony prior to the start of the evidentiary hearing. In prepared rebuttal testimony Pacific and PBIS disclosed that in April 1994, the electronic publishing services business was transferred from PBIS to PTEPS. PTEPS was not mentioned in the application or described in any detail in the prepared testimony.

On August 9, 1994, Pacific and PBIS filed a motion to strike certain portions of the prepared testimony of the protestants. Among other things, the applicants sought to strike the protestants' references to PTEPS on the grounds that the activities of PTEPS were not subject to the jurisdiction of this Commission.

On August 26, 1994, TURN filed a motion to dismiss the application on the grounds that the application and the prepared testimony were deficient. TURN asserts that the application has failed to reflect or discuss the fact that electronic publishing services will be pursued by PTEPS, rather than by PBIS, as stated in the application. TURN requests that the application, as presently formulated, be dismissed, and that Pacific be ordered to amend the application to include PTEPS as the entity who will provide the electronic publishing services.

On the date set for the evidentiary hearing, the assigned Administrative Law Judge (ALJ) addressed TURN's motion to dismiss. Most of the other protestants joined in TURN's motion to dismiss. The ALJ, as well as the

³ DRA is now called the Office of Ratepayer Advocates, and TURN is now called The Utility Reform Network.

protestants, expressed a concern about holding a hearing on an application submitted by Pacific and PBIS, when the actual provider of the service was to be PTEPS. Due to this uncertainty, and to avoid an unnecessary hearing, the ALJ postponed the evidentiary hearing and ruled that the parties should file briefs on the issues of whether the Commission has jurisdiction over PTEPS, and over any of the electronic publishing services that PTEPS might offer.

Although it was not a party to the application and had not entered an appearance at the August 29, 1994 hearing, Pacific Telesis Group (PTG) filed briefs on its own behalf and for Pacific and PBIS. It also appeared specially for PTEPS, which PTG claims is not a utility under California law and is not subject to regulation by this Commission. PTG requests in its briefs that the Commission dismiss the application, but not for the reasons cited by TURN.

Position Of The Parties

PTG argues that the Commission is precluded from exercising any jurisdiction over PTEPS because PTEPS does not fall within the definition of a telephone corporation and therefore is not a public utility. In addition, PTG asserts that PTEPS will be offering enhanced services, and not a public utility service.⁴ PTG contends that no regulation is required for enhanced services because those kinds of services are competitive. PTG argues that it would amount to discrimination if the Commission were to regulate PTEPS as an

⁴ Enhanced services are defined by the Federal Communications Commission as "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol, or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." (D.91-11-023 [41 CPUC2d 647, 650, fn. 7]; D.92-07-076 [45 CPUC2d 158, 176, fn. 5].)

enhanced services provider, but failed to regulate other entities who offer similar enhanced services.

PTG also argues that regulating PTEPS, and the services that it offers, is contrary to the Commission policy of minimizing regulation and promoting competition. This policy was expressed in the November 1993 report to the Governor entitled "Enhancing California's Competitive Strength: A Strategy For Telecommunications Infrastructure." PTG contends that the arguments of the protestants reveal a desire on their part to return to rate of return regulation.

TURN contends that the Commission has jurisdiction over the services that PTEPS plans to offer under several theories. First, TURN argues that the services that PTEPS will offer are public utility services under Public Utilities Code Sections 216, 233 and 234, and that the Commission has jurisdiction over those services regardless of the entity that provides the services.⁵ Second, TURN contends that §§ 489 and 2282.5 confer special duties and responsibilities with respect to enhanced services that are offered by affiliates of local exchange carriers (LECs).⁶ Third, that under the case law, the Commission is free to disregard the corporate structures of the LECs and to view the entire operation as a whole. And fourth, even if the Commission concludes that the services PTEPS will offer are nonutility services, the Commission has the authority to ensure that those services do not burden basic telephone services sold by Pacific.

⁵ All code references are to the Public Utilities Code unless otherwise stated.

⁶ At the time of TURN's filing, § 489 was based upon Section 2 of Chapter 980 of the Statutes of 1992, and § 2282.5 was based upon Section 2 of Chapter 996 of the Statutes of 1992.

TURN also argues that the transfer from PBIS to PTEPS should have been disclosed to the Commission, and that the failure to do so amounts to a Rule 1 violation. DRA recommends that sanctions be imposed for this violation.

The other briefs filed by ADP, CBCH/LA, and DRA raise essentially the same arguments that TURN makes. In addition, CBCH/LA and DRA contend that, pursuant to § 728.2, the Commission has jurisdiction over any plans by PTEPS to enter the electronic yellow pages market.

Discussion

The ultimate question posed by this application appears to be quite straightforward, i.e., whether or not the application should be dismissed. We answer this question in the affirmative.

The most obvious reason for dismissing the application is because PTEPS was not named as an applicant in this proceeding. In both D.92-07-072 and D.85-12-065, Pacific was directed to inform the Commission of any new activities that PBIS and PBD were planning to enter. The application that was filed in this proceeding only named Pacific and PBIS. After Pacific's rebuttal testimony was submitted, and on the first day of the scheduled hearing, it became apparent that PBIS was no longer going to offer electronic publishing services. Instead, this service was to be offered by PTEPS. Since PTEPS was not named as one of the applicants, this application should be dismissed without prejudice.

The underlying issue that all parties seem to want addressed is whether the Commission has jurisdiction over PTEPS or the services that it offers. We decline to address the first part of this issue in the context of this proceeding. PTEPS is not a party to this application and very little information was provided about PTEPS in the prepared testimony. For us to state in this decision whether PTEPS is a public utility or not would amount to declaratory relief, which is a remedy the Commission has always been hesitant to provide. (See D.97-10-087,

p. 63; D.95-01-045 [58 CPUC2d at p. 576, fn. 2].) As the Commission noted in D.92-07-072, the issue of whether a provider of enhanced services, such as PBIS or PTEPS, is a telephone corporation subject to our jurisdiction, should be resolved "in a generic proceeding that affords all interested parties an opportunity to be heard." The Commission also stated in that decision that the issue of whether PBIS has to tariff the enhanced services should be resolved in that generic proceeding as well. (45 CPUC2d 109, 128-129.)⁷

With respect to the issue of jurisdiction over the services that PTEPS plans to offer, our analysis is affected by the legislative changes that occurred after the issuance of D.92-07-072, and the filing of this application. When D.92-07-072 was issued, the Commission required PBIS to comply with the same tariffing requirements that would have been imposed on Pacific if Pacific had offered the enhanced services. This tariffing requirement for PBIS was to remain in effect in the absence of "any further Commission order to the contrary." The Commission noted that this tariffing requirement was not intended to prejudge a Commission decision on the tariffing issue, and that the issue should be looked at more thoroughly in the generic proceeding. (45 CPUC2d at p. 129.)

In D.92-07-072 the Commission also stated that it was "seeking legislation that would authorize us to waive the tariffing requirements of PU Code § 489(a), in full or in part, for enhanced services." (45 CPUC2d at p. 129.) The legislation that the decision was referring to was Chapter 980 and Chapter 996 of the Statutes of 1992, which amended § 489 and added § 2282.5, respectively. At the time the briefs were filed in this proceeding, § 489 consisted of nine separate

⁷ PBIS requested similar relief in Application 90-12-052. In that proceeding, PBIS filed a motion for a declaration that PBIS is not a public utility, or in the alternative, a request for a waiver of § 489. That motion has not been resolved yet.

subdivisions, as added by Section 2 of Chapter 980 of the Statutes of 1992. Among other things, former § 489 addressed the tariffing requirements for all public utilities and described a procedure for exempting enhanced services from the tariffing requirements. Also in existence at the time was former § 2282.5. That code section set forth a series of requirements that the LECs and their subsidiaries and affiliates would have to meet before they could offer enhanced services. Subdivision(d) of former § 489 specifically referenced the provisions contained in former § 2282.5.

Former § 489 was later reduced to two subdivisions when it was amended by Chapter 809 of the Statutes of 1995. Former § 2282.5 was repealed by its own terms on January 1, 1998.¹ A portion of Subdivision(c) of former § 489 was incorporated into § 495.7(b) by Chapter 809 of the Statutes of 1995.

At the time TURN submitted its brief in this proceeding, it argued that former §§ 489 and 2282.5 controlled how an affiliate of a LEC could offer enhanced services. These former code sections are no longer in existence. Had these former code sections remained in effect, our analysis of what PTEPS is required to do prior to the offering of any enhanced service offering might be different from what we conclude today. Since the Code no longer mandates that LECs and their subsidiaries and affiliates must abide by certain conditions when they offer enhanced services, our analysis must rely on the language in D.92-07-072 and the existing tariffing provisions which are found in § 489 and § 495.7.

¹ Subdivision(l) of former § 2285.2 stated: "This section shall remain in effect only until January 1, 1998, and as of that date is repealed, unless a later enacted statute, which is enacted before January 1, 1998, deletes or extends that date."

In D.92-07-072 the Commission expressed its clear intent to hold a generic hearing into whether a provider of enhanced services is a telephone utility subject to its jurisdiction, and whether such services should be tariffed. The Commission also intended to leave its options open until then by first requiring the tariffing of enhanced services by PBIS, and second, by announcing that it was seeking legislation to waive the tariff requirement of § 489(a) as it existed in July of 1992.

With the repeal of § 2282.5, it could be argued that the Commission was no longer interested in imposing conditions on the offering of enhanced services by the LECs' subsidiaries and affiliates because the Commission did not seek to extend or delete the § 2282.5 repeal date. However, Ordering Paragraphs 13 and 14 of D.92-07-072 suggest that the Commission was planning to open a generic proceeding to consider whether PBIS, or other affiliates or subsidiaries of Pacific, are subject to regulation as public utilities, and whether the enhanced services offered by such entities should be tariffed. Also, with the enactment of § 495.7, the Legislature contemplated that "certain telecommunications services" offered by "telephone or telegraph corporations" can be partially or completely exempted from the tariffing requirements. The issues, however, of who is considered a telephone or telegraph corporation, and what are considered "certain telecommunications services," remain unresolved.

Since this proceeding did not hold an evidentiary hearing on the kinds of electronic publishing services that PTEPS plans to offer, or what kind of entity PTEPS is, this decision is not the appropriate "generic proceeding" to decide whether a LEC affiliate or subsidiary should be considered a telephone corporation for the purposes of § 495.7, or whether the enhanced services offered by PTEPS should be exempted from the tariffing requirements.

With the lapse and repeal of former § 2282.5, and the addition of § 495.7, it remains an open question whether enhanced services offered by a LEC affiliate or subsidiary should be tariffed. One thing is clear however. Ordering Paragraph 11 of D.92-07-072 requires Pacific to inform the Commission "of any new services or lines of business that PBIS plans to enter prior to their implementation." It is clear from the context of D.92-07-072 that the reference to "new services or lines of business" have to do with the offering of enhanced services. Since this Ordering Paragraph remains in effect, Pacific is still required to inform us of any enhanced services that its subsidiaries or affiliates enter into. We expect Pacific to continue to abide by that requirement.

We are cognizant of the desire to minimize regulation in a fast changing telecommunications environment and that many technological changes have occurred since D.92-07-072 was first issued. However, any regulatory changes must be accommodated within existing legislative mandates and Commission decisions. Since the Commission has not yet opened the generic proceeding, Pacific is free to file a petition for modification of D.92-07-072 to clarify whether enhanced services offered by its affiliate or subsidiary must be tariffed. Or, Pacific can raise this issue when it submits any future application notifying the Commission of the plans of its affiliate or subsidiary to offer enhanced services.

We will grant TURN's motion to dismiss the application. This proceeding should be dismissed without prejudice.

Turning to the alleged Rule 1 violation, we have reviewed and considered the arguments of TURN, DRA and PTG. We recognize that plans evolve and change over time. It appears that the plans as to which Pacific affiliate should

* If PTEPS plans to enter the electronic yellow pages market, PTEPS must notify the Commission of its intent to enter this market pursuant to D.85-12-065.

enter the electronic publishing services market evolved over time and after the application was originally filed. Due to this uncertainty, we cannot conclude that a Rule 1 violation occurred.

Findings of Fact

1. On November 12, 1993, Pacific and PBIS filed an application notifying the Commission of PBIS' intent to enter the electronic publishing services market.

2. Protests to the application were filed.

3. Prior to the start of the evidentiary hearing, the prepared rebuttal testimony of Pacific and PBIS disclosed that in April 1994, the electronic publishing services business was transferred from PBIS to PTEPS.

4. Pacific and PBIS filed a motion to strike the protestant's references to PTEPS in their prepared testimony.

5. TURN filed a motion to dismiss the application on the grounds that it was deficient because the application failed to name PTEPS as the entity who was planning to pursue the electronic publishing services.

6. On the date scheduled for the evidentiary hearing, the ALJ postponed the hearing and allowed the applicants and the protestants to file briefs on the issues of whether the Commission has jurisdiction over PTEPS, and over any of the electronic publishing services that PTEPS might offer.

7. PTG filed briefs on behalf of Pacific, PBIS, and itself, and appeared specially on behalf of PTEPS.

8. PTG's position is that the application should be dismissed for the reasons that PTEPS is not subject to the Commission's jurisdiction because it is not a public utility, and it is not planning to offer a public utility service.

9. TURN's position is that the Commission has jurisdiction over the services that PTEPS plans to offer.

10. TURN and DRA allege that Pacific and PBIS violated Rule 1 by failing to inform the Commission that PTEPS is the entity that is now planning to offer the electronic publishing services.

11. PTEPS was not named as an applicant in the application.

12. D.92-07-072 stated that the issue of whether a provider of enhanced services is a telephone corporation subject to Commission jurisdiction should be resolved in a generic proceeding that affords all interested parties an opportunity to be heard.

13. D.92-07-072 also stated that the issue of whether Pacific's affiliate should be required to tariff the enhanced service should be resolved in the generic proceeding.

14. Legislative changes have occurred since the issuance of D.92-07-072 and the filing of this application.

15. When D.92-07-072 was issued, the Commission required PBIS to comply with the same tariffing requirements that would have been imposed on Pacific if it had offered the enhanced services, and that such a requirement was to remain in effect in the absence of any further Commission order to the contrary.

16. D.92-07-072 stated that the Commission was seeking legislation to waive the tariffing requirements for enhanced services.

17. The legislation that D.92-07-072 was referring to was Chapter 980 and Chapter 996 of the Statutes of 1992, which amended § 489 and added § 2282.5, respectively.

18. Former § 489 was later amended by Chapter 809 of the Statutes of 1995 and former § 2282.5 was repealed by its own terms on January 1, 1998.

19. A portion of Subdivision(c) of former § 489 was incorporated into § 495.7(b) by Chapter 809 of the Statutes of 1995.

20. Since no hearing was held on the kinds of electronic publishing services that PTEPS plans to offer, this decision is not the appropriate generic proceeding to decide whether PTEPS is a telephone corporation for the purposes of § 495.7 or whether the enhanced services offered by PTEPS should be exempted from the tariffing requirements.

21. Plans evolve and change over time.

Conclusions of Law

1. Since PTEPS was not named as one of the applicants, this application should be dismissed without prejudice.

2. The Commission has always been hesitant to provide any declaratory relief.

3. The Commission left open the issue of whether enhanced services offered by an affiliate or subsidiary of a LEC should be tariffed.

4. D.92-07-072 clearly suggests that the Commission was planning to open a generic proceeding to consider whether PBIS, or affiliates or subsidiaries of Pacific, are subject to regulation as a public utility, and whether the enhanced services offered by such entities should be tariffed.

5. With the enactment of § 495.7, the issues of what kind of telecommunications services can be exempted from the tariffing requirements, and who is a telephone or telegraph corporation for the purposes of that section, remain unresolved.

6. D.92-07-072 requires Pacific to inform the Commission of any enhanced services that its subsidiaries or affiliates enter into.

7. For the reasons stated in this decision, TURN's motion to dismiss the application should be granted, and A.93-11-031 should be dismissed without prejudice.

8. No Rule 1 violation resulted from omitting PTEPS from the application as the entity who will provide electronic publishing services because the plans as to which Pacific affiliate should enter the electronic publishing services market evolved over time and after the application was originally filed.

9. The motion of Pacific and PBIS to strike certain portions of the proposed testimony of the protestants is moot in light of today's dismissal.

O R D E R

IT IS ORDERED that:

1. Toward Utility Rate Normalization's motion to dismiss Application (A.) 93-11-031 is granted for the reasons stated herein.
2. A.93-11-031 is dismissed without prejudice.
3. This proceeding is closed.

This order is effective today.

Dated December 3, 1998, at San Francisco, California.

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

APPENDIX A

List of Appearances

Margaret deB. Brown, Colleen O'Grady and Bruce Ramsey, Attorneys at Law, for Pacific Bell and Pacific Bell Information Services, Applicant.

Peter A. Casciato, Attorney at Law, for Association of Directory Publishers, Protestant.

Joseph S. Faber, Attorney at Law, of Jackson, Tufts, Cole & Black, for the County of Los Angeles and California Bankers Clearing House Association, Protestants.

Thomas Long, Attorney at Law, for Toward Utility Rate Normalization, Protestant.

Thomas W. Newton, Attorney at Law, for California Newspaper Publishing Association, Protestant.

Rufus G. Thayer, Attorney at Law, and Dan Sanchez, for the Division of Ratepayer Advocates, Protestant

Karen Potkul, Attorney at Law, for AT&T Communications of California, Inc., Interested Party.

Suzanne Toller and James Tobin, Attorneys at Law, of Morrison & Foerster, for Morrison & Foerster, Interested Party.

Margaret deB. Brown, Attorney at Law, for Pacific Telesis Group, Interested Party.

Special Appearance

Margaret deB. Brown, Attorney at Law, for Pacific Telesis Electronic Publishing Services.