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Decision 98-12-023 December 3, 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Irvine Apartment Communities, Inc., by and through its agent, CoxCom, Inc., dba Cox Communications Orange County, and Cox California Telcom, Inc., Complainants, vs. Pacific Bell, Defendant.	ORIGINAL Case 98-02-020 (Filed February 13, 1998)

Lee Burdick, Attorney at Law, for complainants.
Colleen M. O'Grady, Attorney at Law, for defendant.

OPINION

1. Summary

Complainants allege that Pacific Bell (Pacific) was required by statute, by its tariffs, and by Commission decisions to reconfigure network cable at the request of a multi-unit commercial property owner so as to relocate the demarcation point separating the property owner's facilities from those of Pacific. Complainants further allege that once the demarcation point is relocated, by operation of law, the property owner assumes responsibility for the maintenance and repair of the network cable between the original demarcation point and the new demarcation point.

Pacific responds that it is not required by statute, by law or by its tariffs to comply with a request to relocate a demarcation point. Further, Pacific responds that should it be required to do so, the action would constitute a "forced sale" of its network cable, in violation of its tariffs.

Complainants have met their burden of showing a violation of Public Utilities (PU) Code § 453, as well as a violation of a Commission order. Further, complainants have demonstrated a need for Pacific to revise its tariffs so as to conform with § 453 and Decision (D.) 92-01-023. The relief the complainants request is granted; we hereby enjoin Pacific from refusing to or failing to reconfigure its telecommunications facilities at the request of the property owner.

2. Procedural History

This case was filed on February 13, 1998. Notice of the filing appeared in the Daily Calendar on February 18, 1998. A prehearing conference was held on April 1, 1998. In a Scoping Memo dated April 7, 1998, Commissioner Knight named Administrative Law Judge Walker as presiding officer for hearing. An evidentiary hearing was conducted June 9-12, 1998, at which time the Commission heard from six witnesses and received 21 exhibits into evidence. The case was deemed submitted on July 27, 1998, following receipt of opening and reply briefs.

3. Background

In September 1997, complainant CoxCom became the agent for Irvine Apartment Communities (IAC) for the purpose of developing advanced telecommunications systems at 45 IAC apartment complexes in and around Orange County, California. CoxCom provides cable television service in Southern California, including cable service to the IAC properties. CoxCom and IAC intended to open the properties to telephone service providers other than

Pacific. Cox California Telcom II, L.L.C., an affiliate of CoxCom, stood ready to provide local exchange service in competition with Pacific.

As agent for IAC, CoxCom in the fall of 1997 asked Pacific to reconfigure telephone cabling at an initial eight of the IAC properties to enable Cox California Telcom and others to offer telephone service to residents. Under the proposal, IAC would pay Pacific's reasonable costs of reconfiguration.

The key to CoxCom's proposal was that, at each IAC property, Pacific would rearrange its cable to provide a single point of entry near the perimeter of each property to which Cox California Telcom could cross-connect. The single point of entry or demarcation point on commercial property is known as the Minimum Point of Entry (MPOE) or the Local Loop Demarcation Point (LLDP).[1] Under both Federal and California law, the MPOE is the point at which the network cable and facilities of the telephone utility and those of the property owner meet.

In November 1997, Pacific notified CoxCom that only one of the eight designated properties had a single MPOE lending itself to cross-connection in the manner sought by CoxCom on behalf of IAC. At each of the other seven properties, Pacific identified a primary MPOE and one or more additional or "secondary" MPOEs, with all of the MPOEs located at individual buildings on the properties. At hearing, the parties agreed that four of the 45 IAC properties have a single MPOE and 41 of the properties have multiple MPOEs. (Complainants subsequently arranged cross-connect facilities and began offering service at the four properties that have single MPOEs.)

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[1] In the case of residential property, the demarcation point is the Standard Network Interface, or SNI.

On behalf of IAC, CoxCom requested that Pacific relocate the MPOEs, asserting that Pacific was required by law and by tariff to honor the reconfiguration request of the property owner, provided the owner would pay for the work and the request was technically feasible. CoxCom stated further that once the cable had been reconfigured and a single MPOE was established, all cable on the owner's side of the MPOE would as a matter of law become the responsibility of the property owner. CoxCom also stated that, pursuant to a settlement adopted in our D.92-01-023, Pacific could recover the value of the cable from all ratepayers through accelerated depreciation of the equipment.

Pacific responded to IAC's request by asserting that the telephone cable leading to the primary and secondary MPOEs was network cable, since in each case the cable connected in a local loop to Pacific's central office facilities. Pacific stated that this cable was and is owned by Pacific, is used and useful in serving Pacific customers, and that Pacific was neither willing nor required to sell its network cable to the property owner for purposes of reconfiguration. As an alternative, Pacific proposed an access agreement between itself and Cox California Telcom by which Cox California Telcom could connect to Pacific's network facilities in order to offer service to end users.

4. Issues Before the Commission

Because this is a complaint case, the Commission's principal inquiry is whether Pacific violated "any provision of law or of any order or rule of the Commission." (PU Code § 1702.) The Commission's inquiry involves the following principal questions:

1. Has Pacific engaged in anticompetitive or discriminatory conduct in violation of PU Code § 453 by refusing to reconfigure cable at 41 of the IAC properties in the manner requested by complainants?

2. Is Pacific required by its tariffs or by the settlement adopted in D.92-01-023 (1992 settlement) to relocate and reconfigure the MPOEs on IAC's property?

3. If Pacific is required to relocate and reconfigure the MPOEs as IAC requests, does Pacific retain ownership of any cable and/or facilities which remain on the property owner's side of the new MPOE?

As discussed more fully below, this decision concludes that Pacific is required by § 453 and by the terms of the 1992 Settlement to relocate the MPOE on IAC's property at IAC's request, provided that IAC pays for the reconfiguration. In addition, we conclude that, once the MPOEs on IAC's properties are relocated and reconfigured as IAC requests, by operation of law the facilities on IAC's side of the MPOE become the property of IAC. Thus, contrary to Pacific's claims, reconfiguration of Pacific's existing MPOEs at the request of a property owner does not constitute a forced sale of Pacific's property. Further, because Pacific is not disposing of property "necessary or useful in the performance of its duties to the public," we conclude that § 851 of the Public Utilities Code is not invoked or applicable to the facts presented here.

5. Deregulation of Telephone Wiring

Requirements for establishing demarcation points, or MPOEs, at multi-unit properties (also called "continuous properties") like those of IAC are governed by regulations adopted by this Commission and by the Federal Communications Commission (FCC).

On June 14, 1990, the FCC released a report in CC Docket No. 88-57 establishing a new definition for demarcation points.[2] This Commission in

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[2] The FCC's definition of "demarcation point" is contained in the Code of Federal Regulations as follows:

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D.90-10-064 and D.92-01-023 added clarification to the demarcation point ruling, including approval of a Demarcation Settlement Agreement (1992 Settlement) among Pacific and other parties. The terms of the 1992 Settlement, which became effective on August 8, 1993, were intended to foster competition by transferring ownership of certain telecommunications facilities to property owners. The property owners then would become responsible for maintaining and repairing their telecommunications facilities, using whatever service provider the owners choose.

For multi-unit properties built or extensively remodeled after August 8, 1993, the rules of the Settlement required Pacific to establish a single MPOE as close as practical to the property line. The MPOE became the physical location where the telephone company's regulated network facilities ended and the point at which the building owner's responsibility for cable, wire, and equipment began. Pursuant to the 1992 Settlement, and to the FCC's rules, facilities on the building owner's side of the MPOE are designated as Intrabuilding Network Cable, or INC. In all instances, INC was, and is, to be owned by the property owner.

For existing buildings -- that is, those constructed before August 8, 1993 -- Pacific was required to convey to property owners any cabling that was identified as INC on Pacific's books.[3] Pacific's investment in this transferred INC

Demarcation point: The point of demarcation and/or interconnection between telephone company communications facilities and terminal equipment, protective apparatus or wiring at a subscriber's premises. (47 C.F.R. Part 68.3.)

[3] The Demarcation Settlement Agreement defined INC as "sheathed cables located on utility's side of the current demarcation point inside buildings or between buildings on one customer's continuous property." (See D.92-01-023, Appendix A, p. 10.) The INC that the local carriers were obligated to relinquish was identified by their then-existing

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was to be recovered over a five-year amortization period (from August 1993 to August 1998) from the general rate base.

Pacific Bell did not rearrange its demarcation points at the pre-1993 multi-unit properties owned by IAC and at issue here. Pacific contends that the law did not require it to do so then, nor does the law require it to do so now. Generally, the company's practice prior to 1993 was to install a local loop demarcation point at each building in a multi-unit complex. This means that Pacific maintains ownership (and responsibility) for underground cables that may run hundreds of feet into multi-unit property until reaching an MPOE. It also means that competing telephone companies have no single point at which to cross-connect to the owner's cabling in these properties. Other carriers are free, of course, to purchase and install their own cable at these properties.

6. Applicability of PU Code § 453

Complainants contend that Pacific violated the nondiscrimination provisions of PU Code § 453 because its "failure to act upon IAC's request and to reengineer its MPOE and construct a cross-connect facility prohibits Cox and other (competitive local carriers) from competing against Pacific, and thus subjects Cox and other CLCs to prejudice and unfair competitive disadvantage with respect to Pacific." (Complaint, ¶ 40.) Pacific denies these claims, asserting that different legal standards apply to existing and to new continuous property. Pacific says it has met the relevant standard for IAC's property.

PU Code § 453 reads in relevant part as follows:

> (a) No public utility shall, as to rates charges, service, facilities, or in any other respect, make or grant any preference or advantage to any

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specified accounting treatment, i.e., that which was booked to "Part 32 capital account 2426 and expense account 6426." (Id., at p. 10.)

> corporation or person or subject any corporation or person to any prejudice or disadvantage.

In the hearings in this case, Pacific's witness Michael Shortle testified that Pacific has, in fact, received requests from continuous property owners to move the MPOE or to add an MPOE. (3 RT 299-300.) Explaining that a move is "typically . . . for remodeling purposes," Mr. Shortle went on to explain the circumstances under which Pacific has responded to such requests. His answer was couched in the language of Pacific's tariff A2, 2.1.20(B)(4)(d), which reads as follows:

> If a property owner desires an additional Local Loop Demarcation Point(s) at a specified location on a customer's premises for specific purposes of providing service assurance, safety, security and privacy of data communications over the cable (generally known as "Direct Feed"), the owner will be required to pay for additional network cable and network facilities through special construction arrangements. In particular, additional Local Loop Demarcation Points cannot be used to extend any cable pairs served from any Local Loop Demarcation Point from one location to another location. (Emphasis added.)

We see from Mr. Shortle's testimony, as well as from Pacific's Response to Appeal, that Pacific has honored a customer's request to relocate an MPOE if the customer was remodeling continuous property. (See Pacific's Response to Appeal, p. 10, fn. 12.) Mr. Shortle's apparent reliance on Pacific's tariff Schedule Cal. P.U.C. No. A.2.1.20(B)(4)(d) for justifying the disparate treatment is misplaced. Tariff A.2.1.20(B)(4) refers to "Exceptions" to placement of the LLDP. Tariff A.2.1.20.(B)(3) states that the LLDP "is located at the MPOE/MPOP to any single or multi-story building, and includes the Utility's entrance facility, except as set forth in 4. Following." Thus, B.4 simply says that the LLDP need not be located at the MPOE/MPOP if the property owner requests that it be located elsewhere for reasons of "service assurance, safety, security, and privacy of data

communications." Further, if the property owner requests that the LLDP be located at some place other than at the MPOE/MPOP, the property owner must pay for "additional network cable and network facilities through special construction arrangements."[4] This language cannot support Pacific's claim that it may honor one customer's request and reject another customer's request when the essential changes being requested are substantially similar.

More importantly, we note that the 1992 Settlement contains the following provision:

> The utilities' tariffs will specify under what conditions additional Local Loop Demarcation Points will be allowed. (43 CPUC2d at 128, D.92-01-023, Appendix A, § IV.D(3).)

We note also that Pacific's tariffs do not contain any provision which specifies "under what conditions additional Local Loop Demarcation Points will be allowed". In failing to file a tariff which addresses the conditions under which Pacific will allow additional LLDPs or MPOEs, Pacific has failed to comply with this provision of the 1992 Settlement. Further, because Pacific has not incorporated into its tariffs any standards which would govern under what circumstances Pacific will "allow" a customer to add an MPOE, Pacific seems to assume that it can decide arbitrarily whether or not it will comply with a continuous property owner's request to add an MPOE. If a utility is arbitrarily honoring one customer's request for a service, but denying a similarly-situated customer the same service, the utility is engaging in discriminatory activity in violation of § 453. We conclude that Pacific has acted in a discriminatory manner by failing to incorporate standards for adding MPOEs into its tariffs, and then

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[4] We note that the language in A.2.1.20(B)(4)(d) requiring the customer to pay for the added facilities parallels the language in tariff A.2.1.20(E)(5).

honoring one customer's reconfiguration request but denying another similarly-situated customer's request.

Pacific further asserts that it can refuse IAC's request because "[n]either the special construction tariffs [A2, 2.1.36(B)(e)] nor [D.92-01-023] required Pacific to honor any and all requests for changes to existing demarcation points on continuous property built before August 8, 1993." (See Pacific's Response to Appeal, p. 11.) We disagree. By relocating an MPOE for another customer, but failing to do so for IAC, Pacific is performing a service and granting a preference for one "corporation or person . . . to the prejudice or disadvantage" of another. (PU Code § 453.) Given that Pacific has failed to establish any "condition" for adding an LLDP, we also see no reason why a customer's decision to remodel its premises should be the factor which determines whether Pacific honors or denies that customer's request to reconfigure an existing MPOE or to add an MPOE. We do not construe remodeling of property to constitute a substantial difference which would justify disparate treatment of similarly-situated customers. Were Pacific still a monopoly provider, we could not condone its attempt to advantage one customer at the expense of another. We can no more readily condone this type of behavior in the newly emerging competitive markets for telecommunications and electric services.

By its refusal to comply with IAC's request, Pacific is preventing other telecommunications service providers from gaining equal access to IAC's properties for purposes of providing local exchange and other telecommunications services. As CoxCom explained, by reconfiguring the facilities on IAC's properties, all telecommunications providers, including Pacific, will be able to compete to offer service directly to the occupants of IAC's properties. (See Exhibits F and I to IAC's Complaint.) If we allow Pacific to exclude other providers from equal access to IAC's properties, we would be

contravening the policies established in the Commission's 1993 Infrastructure Report,[5] as well as D.96-03-020 and other subsequent orders in the Local Competition docket (R.95-04-043/I.94-04-044) intended to foster competition in all segments of the telecommunications marketplace.

Further, we note that in D.98-10-058, our recent order in the Local Competition docket on rights-of-way (ROW), we addressed the issue of third-party access to customer premises. There we stated that we are prohibiting all carriers from entering arrangements with private property owners that would effectively restrict the access of other carriers to the owners' properties or would discriminate against the facilities of other carriers, such as CLCs.

> For example, an agreement which provides for the exclusive marketing of ILEC services to building tenants may be improper if the agreement has the effect of preventing a CLC from accessing, and providing service to, a building because of the building owner's financial incentives under the marketing agreement. Similarly, a situation in which a building owner, either for convenience or by charging disparate rates for access, favors the access of the ILEC to the detriment of a CLC will also be in violation of our rules herein. Such arrangements conflict with our stated policy promoting nondiscriminatory ROW access. (D.98-10-058, mimeo., p. 100.)

We have now adopted a policy which prohibits property owners from discriminating against providers of telecommunications services. Given that, allowing an ILEC to refuse a property owner's request for facilities' reconfiguration intended to allow access to the property by other providers would frustrate our policy against discrimination. It would, instead, allow the ILEC to discriminate by preventing the property owner from obtaining

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[5] Enhancing California's Competitive Strength: A Strategy for Telecommunications Infrastructure, November, 1993.

telecommunications service(s) from alternate providers as has occurred in the case before us.[6]

We reject Pacific's claim that it may relocate an MPOE at one customer's request, but refuse a comparable claim from another customer, and find that PU Code § 453 specifically prohibits just this type of discrimination among customers. We direct Pacific to file a tariff which contains the conditions under which an owner of continuous property may request reconfiguration of existing MPOEs or the adding of MPOEs.

7. Treatment of MPOE at Pre-1993 Properties

Complainants argue that the manner in which Pacific locates MPOEs on continuous property leaves "a significant amount of cable on the utility's side of the MPOE to which Pacific denies the owner control or access, and to which CLCs are denied access, [and thus] is inherently unreasonable and discriminatory". We conclude that the issue is not where Pacific located MPOEs on property treated as "existing" pursuant to the 1992 settlement. The settlement required utilities to unbundle Intrabuilding Network Cable, or INC, on all continuous property, both commercial and residential. (D.92-01-023, 43 CPUC2d 115, 124-25.) Once INC was unbundled, the property owner would assume responsibility for the maintenance and repair of INC on the property owner's side of the MPOE. (Id.) Because the settlement involved a conveyance

[6] We recognize that Pacific offered to enter into a "co-carrier" agreement with CoxCom to enable CoxCom to use Pacific's facilities to reach customers residing at IAC's properties. In effect, this would require CoxCom and other competitors to lease facilities from Pacific, thus making Pacific the gatekeeper for competitors wishing to serve customers at IAC's properties. Notwithstanding potential implications pertaining to the 1996 Federal Telecommunications Act regarding unbundled access, we consider this type of arrangement to be less than optimal. We prefer arrangements which allow all providers equal access to end users.

of facilities from utilities to property owners, the settlement provided for the utilities to be reimbursed for the value of the transferred facilities through a depreciation formula adopted in D.92-01-023. (Id. at 129-30.)

The 1992 settlement did not require utilities to relocate MPOEs on existing property at the time the settlement became effective. Nor did the settlement require utilities to reconfigure facilities on existing property so as to create a single MPOE. The settlement, however, did mandate that utilities "designate the main distribution terminal which is the Local Loop Demarcation Point [or MPOE], for each local loop serving the property, for purposes of the unbundling of INC in each building". (Id. at 128.) It appears from the record before us that Pacific did designate a "main distribution terminal" or MPOE for each of the IAC properties which are the subject of this complaint.

Whether Pacific was required to move MPOEs on existing property in 1993, however, is a different question from whether Pacific is now obligated by the terms of the 1992 settlement or by its tariffs to relocate the MPOEs at the request of the property owner. We note that Section IV of the settlement was entitled "Proposed Locations of Demarcation Points." That section contains definitions of the Local Loop Demarcation Point (LLDP) (Section IV.A), the INC Demarcation Point (Section IV.B), and the Inside Wire Demarcation Point (Section IV.C). (43 CPUC2d 115, 127-28.) Section IV.D of the settlement is entitled "Location of Demarcation Points on Continuous Property." Section IV.D(1) addresses demarcation points (LLDPs or MPOEs) on "new continuous property," which was property built or remodeled on or after August 8, 1993. Section IV.D(2) addresses demarcation points on "existing continuous property," which was property existing before August 8, 1993. Section IV.D(3) is set forth below.

> 3. If a continuous property owner desires additional Local Loop Demarcation Points or changes in existing Local Loop Demarcation Points, the owner will be required to pay for the additional network cable and network facilities required to install the additional Local Loop Demarcation Points through special construction agreements in accordance with the utility's special construction rules in the utility's exchange tariffs, except as provided in Section VIII.C.3, below.[7] The utilities' tariffs will specify under what conditions additional Local Loop Demarcation Points will be allowed. In particular, additional Local Loop Demarcation Points cannot be used to extend any cable pairs served from any LLDP from one location to another.[8]

Section IV.D(1) refers explicitly to "new continuous property," and Section IV.D(2) refers explicitly to "existing continuous property." In contrast, Section IV.D(3) refers simply to "continuous property." The lack of specificity leads to two possible interpretations of Section IV.D(3): the section refers to both existing and new continuous property, or the section does not refer to either new or existing continuous property. We reject the latter interpretation as it would give no effect to the entire section, and we must, if at all possible, construe the language of the settlement to have meaning. Therefore, we conclude that Section IV.D(3) applies to both new and existing continuous property.

Section IV.D(3) states quite plainly that if a continuous property owner "desires additional . . . or changes in existing" demarcation points (LLDPs or

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[7] The exceptions addressed in Section VIII.C.3 are inapplicable in this case.

[8] Pacific's tariff Schedule Cal.P.U.C.No.A2.1.20.E.5 contains language virtually identical to the first sentence of Section IV.D(3):

> Where an owner of continuous property requests additional local loop demarcation points or changes [in] an existing local loop demarcation point, the owner will be required to pay for any additional network cable and facilities required through special construction agreements set forth in Schedule Cal.P.U.C. No. A2.1.36 except as provided in B.4. preceding.

MPOEs), the owner must pay for the "additional network cable and network facilities required to install the additional" LLDPs. We interpret the word "additional" so as to include changed LLDPs as well new LLDPs. In light of our conclusion that Pacific is prohibited by § 453 from discriminating among customers seeking to reconfigure MPOEs, we further interpret this term of the 1992 Settlement to confer on the utility an obligation to effect changes to LLDPs or MPOEs if the customer requests a change, and so long as the customer pays for the cable and facilities required to effect the change.[9] At the same time, we recognize that a customer's request to add or change an LLDP or MPOE may not be technically feasible. In such a situation, the utility would be obligated to work with the customer to accommodate the customer's request in a manner that is technically feasible. Pacific has not asserted anywhere in the record before us that it is technically constrained from making the change requested, so we presume the changes IAC requests are technically feasible.

Pacific does claim, however, that its tariffs allow it to "consider requests for additional MPOEs and rearrangement of demarcation points on existing continuous property, but the tariffs do not require us to honor each and every such request." (See Pacific's Response to Appeal, p. 19.) Pacific cites to its tariff A2, 2.1.36 which refers to the "Special Construction of Exchange Facilities". Tariff A2, 2.1.36(B)(1)(e) does state that "[t]he provision of any of the above listed special construction shall be entirely at the option of the Utility [footnote omitted]". We have already concluded that because Pacific has honored the

[9] While we do not consider the language in Pacific's tariff to be ambiguous, to the extent that it does not explicitly require Pacific to make LLDP changes at a customer's request, we note that where a tariff is unclear or ambiguous, we construe the tariff against the utility. (45 CPUC2d 263, 269 (D.92-08-028), citing 4 CPUC2d 26, 33 [D.91934] and 60 CPUC2d 74, 75 [D.64022].)

request of one or more property owners to reconfigure MPOEs on existing continuous property, but is refusing to honor IAC's request, Pacific is acting in violation of § 453. Consequently, to the extent that Pacific's tariff allows it to discriminate between customers seeking to relocate one or more MPOEs on existing continuous property, Pacific must revise this tariff language.

The facts before us show that the property owner, IAC, entered into an agreement with "CoxCom, Inc., a Delaware corporation d/b/a Cox Communications Orange County" whereby CoxCom would provide telecommunications facilities and services to IAC. (See Exhibit B to IAC's Complaint.) CoxCom and IAC also entered into an agency agreement to enable CoxCom to act on IAC's behalf in arranging for Pacific to "provide a single Minimum Point of Entry" to IAC's properties. (See Exhibit A to IAC's Complaint.) On IAC's behalf, CoxCom repeatedly asked Pacific to reconfigure Pacific's facilities on the IAC properties so as to create a single MPOE as IAC requested. In its communications, CoxCom stated clearly that it was requesting a reconfiguration of Pacific's facilities on behalf of the property owner. (See Exhibits A, F, and I to IAC's Complaint.) In each instance, Pacific ignored the fact that CoxCom was acting as an agent for the property owner. Instead, Pacific insisted that CoxCom was seeking itself to purchase facilities from Pacific. Based on that premise, Pacific consistently refused to "sell" its facilities to CoxCom.

IAC has requested, and is entitled to obtain, a reconfiguration of telecommunications facilities on existing continuous property pursuant to both the terms of the 1992 Settlement as we interpret those terms in light of § 453. Pacific is entitled to be compensated for the additional network cable and facilities, again, pursuant to both the Settlement and Pacific's tariffs. IAC has stated its willingness to pay for the network cable and facilities required to effect the reconfiguration it requests. (See Exhibits F and I to IAC's Complaint.)

Despite this, Pacific continues to refuse to perform the reconfiguration a property owner has rightfully requested.

For these reasons, we reject Pacific's claim that IAC and/or CoxCom have requested to purchase Pacific's facilities. Rather, we order Pacific to effect promptly the reconfiguration IAC has requested.

8. Applicability of PU Code § 851

Pacific asserts that IAC's request for reconfiguration of MPOE's on IAC's properties constitutes a forced sale of Pacific's facilities, invoking PU Code § 851. In a letter to CoxCom's attorney, dated January 15, 1998, Pacific noted that in 1993, it "turned over to the building owner's control" the INC cable which existed on IAC's properties, but had retained Network Distribution Cable "as Pacific's cable". (See Exhibit G to IAC's Complaint.) We note also Pacific's configuration of its facilities on IAC's properties, which include "primary MPOEs" and "secondary MPOEs".

Neither the Settlement nor D.92-01-023 specifically addressed "primary" and "secondary" MPOEs. Indeed, we cannot find the words "primary MPOE [or LLDP]" and "secondary MPOE [or LLDP]" anywhere in the Settlement document. An MPOE, or LLDP, is defined in the Settlement as follows:

> 1. The purpose of the Local Loop Demarcation Point is to separate the responsibility of the utility from the responsibility of the building owner/customer by
>
> a. designating the end of the local loop or end of the network facility and by
>
> b. defining the beginning of the INC, if any, provided by the building owner.

direction of Pacific's facilities rather than towards the property owner's facilities, Pacific will no longer own the facilities on IAC's side of the MPOE. Thus, the facilities will no longer be used and useful to Pacific. Therefore, PU Code § 851 is not applicable, as it pertains to the disposition or encumbrance of property "necessary or useful in the performance of [the utility's] duties to the public."

Pacific claims that, pursuant to the 1992 Settlement, it was required to transfer only embedded INC to property owners.

> Neither the Settlement Agreement nor our implementing tariffs require us to relinquish or sell other useful network plant. Indeed, our tariffs expressly reserve our rights to retain network distribution cable for current or future use. (See Pacific's Response to Appeal, p. 22.)

Pacific relies on tariff language which reserves to Pacific "the right to . . . retain ownership of existing distribution cable facilities . . . that may be required for current or future use." (See Schedules Cal. P.U.C. A2, 2.8.1(D)(6); A8, 8.4.1(B)(3).) Because we conclude that Pacific must relocate the MPOEs on IAC's property as IAC requests, and any affected network distribution cable becomes by operation of law intrabuilding network cable, Pacific will no longer own the affected network distribution cable. Consequently, it cannot choose to retain ownership of facilities which, by operation of law, have transferred to the property owner.

This result is entirely consistent with the 1992 Settlement's treatment of the INC transferred to the incumbent utilities effective August 8, 1993. Pacific's network distribution cable was transferred to property owners, and became intrabuilding network cable. At that time, Pacific did not request review of the transfer of INC pursuant to § 851, nor did Pacific assert that it retained

ownership of the NDC. No § 851 review is necessary now.[13] Further, even if we were to apply § 851, no review of this transfer of facilities would be necessary, as the section states that no public utility will dispose of or encumber necessary or useful property "without first having secured from the commission an order authorizing it to do so." In D.92-01-023, by approving the 1992 Settlement, we authorized this very type of network reconfiguration at a customer's request.

This is not a forced sale of Pacific's facilities. Indeed, this is not a sale of facilities at all. Rather, this case involves a customer's request for reconfiguration of facilities and relocation of MPOEs on the properties. Indeed, in a letter to CoxCom, dated February 3, 1998, Pacific's attorney, Theresa L. Cabral, acknowledged that a sale of facilities was not at issue: "We do agree that Cox is not 'purchasing' any part of Pacific's distribution network". (See Exhibit J to IAC's Complaint.) In addition, Pacific's witness, Michael Shortle, testified in response to a question from Pacific's counsel as follows:

> Q. Does relocation of an MPOE involve sale of Pacific's network distribution cable to your knowledge?
>
> A. No, not to my knowledge.
> (Vol. 3, Reporter's Transcript [RT], p. 306.)

Despite these concessions, Pacific has continued to assert, even in its Response to IAC's Appeal, that CoxCom and/or IAC seek a "forced sale" of Pacific's facilities. In light of its own admission that relocating an MPOE does not involve or constitute a sale of network distribution cable, we find Pacific's claim to be without merit.

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[13] We disagree, however, with CoxCom's assertion that § 851 applies only to utility property transferred to another utility.

9. Applicability of PU Code §§ 761 and 762

Complainants claim that PU Code §§ 761 and 762 are invoked by their complaint. Sections 761 and 762 state in pertinent part as follows:

> 761. Whenever the Commission, after a hearing, finds that the rules, practices, equipment, appliances, facilities, or service of any public utility, or the methods of manufacture, distribution, transmission, storage, or supply employed by it, are unjust, unreasonable, unsafe, improper, inadequate, or insufficient, the Commission shall determine and, by order or rule, fix the rules, practices, equipment, appliances, facilities, service, or methods to be observed, furnished, constructed, enforced, or employed.
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> 762. Whenever the Commission, after a hearing, finds that additions, extensions, repairs, or improvements to, or changes in, the existing plant, equipment, apparatus, facilities, or other physical property of any public utility...ought reasonably to be made, or that new structures should be erected...to secure adequate service or facilities, the Commission shall make and serve an order directing that such additions, extensions, repairs, improvements, or changes be made or such structures be erected in the manner and within the time specified in the order.

While these standards may be more applicable in a rulemaking proceeding, they nonetheless can be applied to a complaint case. Indeed, §§ 761 and 762 are often used in complaints raising environmental issues. We note also, however, that the language of these sections, on its face, is not limited to environmental issues. As competition unfolds in both the telecommunications and electricity markets, we may need to authorize parties to file complaints raising issues of fairness and equity pursuant to these sections. Because we are resolving this complaint on other grounds, we decline at this time to invoke these sections to support this complaint.

10. Recovery Of Pacific's Investment

Pursuant to the 1992 Settlement, Pacific transferred all INC to property owners. D.92-01-023 summarized the utilities' recovery of investment as follows:

> Recovery of embedded INC investment may be accomplished either by way of standard depreciation expense recovery over the remaining life of the investment, or by way of accelerated depreciation over five years. At the end of the recovery period, the utility will relinquish ownership of the embedded INC to the building owner and will retire the investment from its books of account. (43 CPUC2d at 117.)

Pacific's investment in the transferred INC was recovered over a five-year amortization period (from August 1993 to August 1998) from the general rate base.

We are presented here with the question of how Pacific should be compensated for the embedded facilities which will become INC, by operation of law, once Pacific completes the reconfiguration IAC has requested. Because Pacific is a utility subject to the New Regulatory Framework (NRF) we must assess any compensation in light of NRF rules.

Prior to implementation of NRF on January 1, 1990, the Commission performed an evaluation of Pacific's embedded rate base. This process was referred to as the "start-up revenue requirement." (34 CPUC2d 155, D.89-12-048.) All of Pacific's embedded rate base, including outside plant and facilities, were included in the start-up revenue requirement. Subsequently, in D.94-09-065, our decision in the Implementation Rate Design phase of NRF, we adjusted rates for all of Pacific's services based on the start-up revenue requirement. (See 56 CPUC2d 117.) Consequently, Pacific is already recovering its investment in the embedded facilities included in the start-up revenue requirement which Pacific will transfer to IAC once the MPOEs on IAC's properties are reconfigured.

Some of the properties at issue in this proceeding, however, may have been constructed since NRF was implemented on January 1, 1990. In that event, those embedded facilities would not be included in the start-up revenue requirement. Pacific is entitled to be compensated for its investment in those facilities. We direct Pacific to disclose and identify the specific facilities that will become INC after the MPOEs on IAC's properties are reconfigured. We will further order the Director of the Telecommunications Division to publicly notice a workshop within 30 days of this order. The subject of the workshop will be methods of determining the value of the post-NRF facilities that will convert to INC upon reconfiguration of the MPOEs on IAC's affected properties. Based on the results of the workshop, the Telecommunications Division shall make a recommendation in a draft resolution for the Commission to consider.

12. Covenant of Good Faith and Fair Dealing

Because we have resolved this dispute on other grounds, we need not reach the question of whether Pacific has violated the covenant of good faith and fair dealing.

13. Conclusion

We find here that Pacific has violated the terms of the 1992 Settlement by failing to file a tariff setting forth the conditions under which a continuous property owner may add MPOEs. Because Pacific has failed to establish in its tariffs any conditions for adding MPOEs, Pacific has relied solely on its discretion in determining which customer requests for reconfiguring or adding MPOEs to honor and which to deny. By honoring some requests and denying others for similarly-situated customers, with no standards set forth governing these determinations, Pacific has engaged in preferential or discriminatory conduct in violation of § 453 of the PU Code. In the newly-developing competitive telecommunications marketplace, we must discourage discriminatory activity,

especially when it prevents competitors from offering their services directly to customers, thus limiting customer choice. Therefore, we direct Pacific to honor the request by IAC to reconfigure its MPOEs so as to add a new MPOE closer to the property line of each of the affected IAC existing continuous properties. We also direct that Pacific is to be compensated for network facilities built after NRF began, that is, after January 1, 1990, at net book value of the facilities which transfer to IAC. We conclude that for properties built before NRF commenced, Pacific already is recovering through standard depreciation schedules the value of its facilities and no additional compensation is warranted.

Findings of Fact

1. CoxCom is the agent for IAC for the purpose of developing advanced telecommunications systems at 45 IAC properties in Southern California.

2. As agent for IAC, CoxCom in the fall of 1997 asked Pacific to reconfigure telephone cabling at IAC properties to provide a single demarcation point, or MPOE, to which other carriers, including CoxCom's affiliate Cox California Telcom, could cross-connect.

3. Four of the IAC properties have a single MPOE, but 41 of the properties have multiple MPOEs, commonly with one local loop MPOE reaching to each building on the properties.

4. Pacific refused the CoxCom/IAC request to reconfigure network cable into a single MPOE at IAC properties where multiple MPOEs existed, and to transfer ownership of the cable on the owner's side of the new MPOE to the owner.

5. CoxCom filed this complaint on February 13, 1998, alleging that Pacific is required by law, by Commission order, and by tariff to comply with the property owner's request and to convey reconfigured cable to the property owner.

6. Pacific has honored one or more customer's request to relocate, reconfigure, or add an MPOE.

7. The 1992 Settlement states that utilities' tariffs will "specify under what conditions additional" LLDPs or MPOEs will be allowed.

8. Pacific's tariffs do not specify the conditions under which a customer may add an MPOE.

9. Pacific has not asserted that the changes IAC requests are technically infeasible.

10. The 1992 Settlement states that if a continuous property owner desires additional MPOEs or changes in existing MPOEs, the property owner must pay for the additional network cable and network facilities required to install the additional LLDPs or MPOEs.

11. By reconfiguring the MPOEs as IAC requests, all telecommunications providers, including Pacific, will be able to compete to offer service directly to the occupants of IAC's properties.

12. In D.98-10-058, our decision in the Local Competition Docket concerning rights-of-way, we adopted a policy which prohibits property owners from discriminating against providers of telecommunication services other than incumbent local exchange carriers.

13. Hearing on the complaint was conducted on June 9-12, 1998, and the case was submitted on July 27, 1998, following receipt of opening and reply briefs.

Conclusions of Law

1. The Commission's principal inquiry in a complaint case is whether there is a violation by the defendant of any provision of law or of any order or rule of the Commission.

2. Requirements for establishing MPOEs at continuous property are governed by regulations adopted by this Commission and by the FCC.

3. In D.92-01-023, the Commission approved a Settlement Agreement among Pacific and other parties, which contains a definition of Local Loop Demarcation Point (LLDP), also known as the Minimum Point Of Entry (MPOE).

4. The 1992 Settlement treated differently continuous properties built before August 8, 1993, and those built or extensively remodeled on or after August 8, 1993.

5. Pacific was required to create a single MPOE for continuous properties built or extensively remodeled on or after August 8, 1993.

6. For continuous properties built prior to August 8, 1993, known as "existing continuous property," Pacific was required to convey to property owners any cabling identified as Intrabuilding Network Cable, or INC, that had been booked by Pacific to Part 32 capital account 2426 and expense account 6426.

7. We interpret Section IV.D(3) of the 1992 Settlement to apply to both existing and new continuous property.

8. We interpret Section IV.D(3) of the 1992 Settlement so as to include changed LLDPs or MPOEs, as well as new LLDPs or MPOEs.

9. We further interpret Section IV.D(3) of the 1992 Settlement to confer on the utility an obligation to effect changes to LLDPs or MPOEs if the customer requests a change, so long as the customer pays for the network cable and facilities required to effect the change.

10. Because IAC's properties are existing continuous properties, Pacific is required by the 1992 Settlement and by § 453 to relocate the MPOE(s) on IAC's property at IAC's request, provided that IAC pays for the reconfiguration.

11. Pursuant to the definitions of MPOE established by the FCC (47 C.F.R. 68.3) and by the 1992 Settlement, the utility cannot continue to own facilities on the property owner's side of the MPOE once the MPOE on existing continuous property is reconfigured at the request of the property owner.

12. Once the MPOEs on IACs properties are relocated and reconfigured as IAC requests, by operation of law, the facilities on IAC's side of the MPOE become the property of IAC.

13. Reconfiguration of Pacific's existing MPOEs at the request of the property owner does not constitute a forced sale of Pacific's property.

14. Pacific is recovering the value of network facilities on IAC's properties built before January 1, 1990 as part of its start-up revenue requirement, which was established in D.89-12-048.

15. Pacific should be compensated for its network facilities on IAC properties built between January 1, 1990 and August 8, 1993.

16. Because Pacific is not disposing of property "necessary or useful in the performance of its duties to the public," § 851 is not applicable to the facts underlying this complaint.

17. Pacific has acted in a discriminatory manner by failing to incorporate into its tariffs, as required by the 1992 Settlement, standards for adding LLDPs or MPOEs, then by honoring requests by one or more customers to reconfigure MPOEs, but denying IAC's request.

18. Because it has refused to reconfigure and convey cable at IAC properties in the manner requested by complainants, and by failing to incorporate into its tariffs the conditions under which it will allow additional LLDPs or MPOEs, Pacific has violated the anti-discrimination provisions of P.U. Code § 453.

19. Complainants have met their burden of showing that Pacific has violated a law, rule, or Commission order.

20. The proceeding should be closed.

21. The Revised Complainants' Appeal of the Presiding Officer's Decision filed October 13, 1998 is granted to the extent discussed here.

ORDER

IT IS ORDERED that:

1. The complaint of Irvine Apartment Communities, Inc. (IAC), by and through its agent, CoxCom, Inc. dba Cox Communications Orange County, and Cox California Telcom, Inc., Complainants, vs. Pacific Bell (Pacific), Defendant, is granted.

2. Pacific is directed to reconfigure IAC's property as IAC requests, provided that Pacific is compensated both for any additional network cable and facilities, as well as for the facilities which convert to INC on any IAC properties built between January 1, 1990 and August 8, 1993. Pacific shall continue to recover, through standard depreciation schedules, the value of network facilities on IAC continuous properties built before January 1, 1990.

3. Pacific is further directed to file with the Commission, within 30 days of the date of this order, an advice letter establishing a tariff which specifies the conditions under which Pacific will add or reconfigure MPOEs on existing continuous property.

4. Pacific is further directed, within 30 days of the date of this order, to file documentation with the Director of the Telecommunications Division identifying the facilities that will become INC after reconfiguration of the MPOEs on IAC's existing continuous properties addressed by this complaint.

5. Within 30 days of this order, the Director of the Telecommunications Division shall publicly notice a workshop. The subject of the workshop will be methods of determining the value of the post-NRF facilities that will convert to INC upon reconfiguration of the MPOEs on IAC's affected properties. Based on the results of the workshop, the Telecommunications Division shall make a recommendation in a draft resolution for the Commission to consider.

6. The Revised Complainants' Appeal of the Presiding Officer's Decision is granted.

7. Case 98-02-020 is closed.

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

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

I dissent.

/s/ HENRY M. DUQUE
Commissioner

I dissent.

/s/ JOSIAH L. NEEPER
Commissioner