ALJ/TIM/avs *

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Decision 99-05-013 May 13, 1999

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

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| Rulemaking on the Commission's Own Motion into Universal Service and to Comply with the Mandates of Assembly Bill 3643. | Rulemaking 95-01-020 (Filed January 24, 1995) |
| Investigation on the Commission's Own Motion into Universal Service and to Comply with the Mandates of Assembly Bill 3643. | Investigation 95-01-021 (Filed January 24, 1995) |

ORIGINAL

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## INTERIM OPINION

### 1. Summary

This decision orders telecommunications carriers ("carriers") to remit to the California High Cost Fund-B ("CHCF-B") and the California Teleconnect Fund ("CTF") any interest they may have earned on CHCF-B and CTF surcharge revenues prior to the effective date of Decision (D.) 98-01-023. The assigned Administrative Law Judge, in consultation with the assigned Commissioner, shall issue one or more rulings instructing carriers specifically when and where to remit any interest they earned on CHCF-B and CTF surcharge revenues.

### 2. Background

This proceeding was instituted for the two-fold purpose of complying with Assembly Bill (AB) 3643 (Polanco, Ch. 278, Stats. 1994) and developing rules to ensure ubiquitous and affordable telephone service.[1] To help achieve the latter purpose, the Commission, in D.96-10-066, created the CHCF-B and the CTF. The purpose of the CHCF-B is to provide affordable telephone service to residential customers located in high-cost areas served by the largest local exchange carriers (LECs) in California.[2] The purpose of the CTF is to provide advanced telecommunications services to schools, libraries, and other organizations.

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[1] AB 3643 required the Commission to initiate a proceeding to examine current and future definitions of universal telephone service. The legislation also mandated a series of policies, principles, and objectives that the Commission was to consider in the proceeding.

[2] D.96-10-066 designated the following LECs as eligible to draw from the CHCF-B: Citizens, Contel, GTE, Pacific Bell, and Roseville.

To fund the CHCF-B and CTF, the Commission ordered all carriers to collect the CHCF-B surcharge and the CTF surcharge from their customers beginning on February 1, 1997.[3] The CHCF-B surcharge was initially set at 2.87% in order to collect $352 million per year; and the CTF surcharge was initially set at 0.41% in order to collect $50 million per year.[4]

In D.97-01-020, the Commission ordered the formation of trusts and bank accounts for the CHCF-B and CTF. The Commission contemplated that carriers would accumulate CHCF-B and CTF surcharge revenues until April 1997 when the carriers would remit these revenues to CHCF-B and CTF bank accounts. Disbursements from the CHCF-B and CTF were to begin by May 30, 1997.[5]

Due to events beyond the Commission's control, neither trusts nor bank accounts for the CHCF-B and CTF have been established. As a result, carriers have accumulated hundreds-of-millions of dollars in CHCF-B and CTF surcharge revenues since the implementation of the surcharges on February 1, 1997. In D.98-01-023, the Commission found that it would be unreasonable for carriers to reap a potentially sizeable windfall by keeping any interest they earned on the large and growing amounts of CHCF-B and CTF surcharge revenues they were holding.[6] Accordingly, the Commission in D.98-01-023 ordered carriers to remit any interest they may have earned on CHCF-B and CTF surcharge revenues, including any interest earned prior to the issuance of D.98-01-023.[7]

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[3] D.96-10-066, Ordering Paragraphs (OPs) 8h and 9e.

[4] D.96-10-066, Appendix E.

[5] D.97-01-020, mimeo., pp. 2, 3, 4, and 8.

[6] D.98-01-023, mimeo., pp. 7-8.

[7] Ibid., OPs 7, 8, and 9. The Commission also ordered carriers to place the CHCF-B and CTF surcharge revenues they were holding into interest-bearing accounts. (Ibid., OP 6.)

Applications for rehearing of D.98-01-023 were filed by Los Angeles Cellular Telephone Company ("LACTC") and jointly by the California Association of Competitive Telecommunications Companies and the Cellular Carriers Association of California ("CALTEL/CCTA"). LACTC and CALTEL/CCAC claimed that D.98-01-023 violated Pub. Util. Code §728[8] by ordering carriers to remit any interest they earned on surcharge revenues prior to D.98-01-23; violated §1705 by concluding, without evidence, that carriers would reap a "windfall" if they were allowed to keep the interest they earned on surcharge revenues; violated §1708 by ordering carriers to remit interest without first giving carriers notice or an opportunity to be heard on this matter; and violated §1709 by making a collateral attack on D.96-10-066 which did not require carriers to remit interest on CHCF-B and CTF surcharge revenues.

The Commission ruled on the applications for rehearing in D.98-04-068. In that decision, the Commission found that D.98-01-023 had not violated §1705 by concluding that carriers would reap a windfall if they kept the interest they earned on CHCF-B and CTF surcharge revenues. The Commission reasoned that it is "hardly subject to dispute" that allowing carriers to keep interest earned on CHCF-B and CTF surcharge revenues would amount to a windfall for the carriers.[9] However, the Commission did find that D.98-01-023 had violated §1708 by not providing carriers with an opportunity to be heard on the matter of whether they should be required to remit any interest they had earned prior to D.98-01-023. Accordingly, the Commission vacated its order in D.98-01-023 requiring carriers to remit any interest they had earned prior to D.98-01-023, and directed the assigned Administrative Law Judge ("ALJ") to allow carriers to

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[8] All statuary references are to the Public Utilities Code unless otherwise indicated.
[9] D.98-04-068, mimeo., p. 8.

request a hearing on this matter. The Commission also stated that it would address in the hearings whether requiring carriers to remit any interest they had earned prior to D.98-01-023 would violate § 728 or § 1709.[10]

On May 13, 1998, assigned ALJ Kenney issued a ruling which allowed parties to submit written comments and legal arguments ("comments") on whether the Commission should require carriers to remit any interest they had earned on CHCF-B and CTF surcharge revenues prior to D.98-01-023 ("CHCF-B/CTF interest issues"). Parties filed opening comments on June 1, 1998, and reply comments on June 15, 1998.

A prehearing conference (PHC) was held on September 23, 1998. At the PHC, the parties agreed that it was unnecessary to hold an evidentiary hearing on CHCF-B/CTF interest issues. On November 11, 1998, the ALJ issued a ruling which stated that an evidentiary hearing would not be held, and that parties could file additional comments on CHCF-B/CTF interest issues. Parties filed additional comments on November 25, 1998, and December 11, 1998.

The following parties submitted comments on CHCF-B/CTF interest issues in June, November, and/or December 1998: AT&T Communications of California (AT&T), CALTEL/CCAC, GTE California Incorporated (GTE), LACTC, MCI Telecommunications Corporation (MCI), Teleport Communications Group (TCG), the Office of Ratepayer Advocates (ORA), The Utility Reform Network (TURN), and jointly by several small local exchange carriers ("small LECs").[11]

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[10] Ibid., p. 5.

[11] The small LECs that jointly submitted comments were Calaveras Telephone Company, Cal-Ore Telephone Co., Ducor Telephone Company, Foresthill Telephone Co., The Ponderosa Telephone Co., and Sierra Telephone Company, Inc.

## 3. Issues to Decide

The first issue we must address is whether to require carriers to remit any interest they may have earned on CHCF-B and CTF surcharge revenues prior to the issuance of D.98-01-023 ("pre-D.98-01-023 surcharge revenues"). If the answer is in the affirmative, then we must address whether requiring carriers to remit interest on pre-D.98-01-023 surcharge revenues would violate §§ 728, 1708, and/or 1709. And if carriers are to remit interest on pre-D.98-01-023 surcharge revenues, we must instruct carriers how to do so. We will address each of these issues below.

### A. Whether Carriers Should Remit Interest Earned Prior to D.98-01-023

#### i. Position of the Parties

AT&T states that because carriers did not know they were supposed to remit any interest they earned on pre-D.98-01-023 surcharge revenues, it would be inequitable to retroactively impose this obligation upon them. The small LECs claim they should not have to remit any interest they earned on pre-D.98-01-023 surcharge revenues since the burden of complying with this mandate would not be justified by the small amount of interest earned by these carriers.[12]

ORA, TCG, and TURN oppose carriers' retaining any interest they earned on pre-D.98-01-023 surcharge revenues since this would allow the carriers to profit at the expense of the CHCF-B, the CTF, and the ratepayers who paid the surcharges. TURN also states that no party has shown why it would be

[12] The small LECs also request that they be relieved of their responsibility to remit interest on post-D.98-01-023 surcharge revenues. The requirement for all carriers to remit interest on post-D.98-01-023 surcharge revenues was decided by the Commission in D.98-01-023 and D.98-04-068, and will not be revisited here.

burdensome for the small LECs to remit any interest they earned on pre-D.98-01-023 surcharge revenues. TURN adds that there may be hundreds of other small carriers who earned interest on pre-D.98-01-023 surcharge revenues, and that allowing all small carriers to keep this interest could give the small carriers a significant windfall at ratepayers' expense.

ORA states that §701 provides the Commission with broad authority to order carriers to remit any interest they earned on pre-D.98-01-023 surcharge revenues. ORA also believes that the Commission may employ the remedy of a constructive trust to compel the carriers to remit any interest they earned on pre-D.98-01-023 surcharge revenues.

## II. Discussion

In D.97-01-020, we ordered carriers to collect the CHCF-B and CTF surcharges beginning on February 1, 1997.[13] We also anticipated that the carriers would begin to remit the surcharge revenues by March 31, 1997.[14] Thus, we never intended for the carriers to benefit in any significant fashion from the time value of money associated with holding CHCF-B and CTF surcharge revenues.[15] The carriers would, therefore, reap an unintended windfall if they were to keep any interest they earned on the hundreds-of-millions of dollars of CHCF-B and CTF surcharge revenues they held prior to D.98-01-023.[16]

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[13] D.97-01-020, mimeo., OP 1.a.13.f.

[14] Ibid., p. 8.

[15] In D.98-04-068, we stated that carriers were not supposed to benefit in any significant fashion from the time value of money associated with holding CHCF-B and CTF surcharge revenues. (D.98-04-068, mimeo., p. 8.)

[16] The CHCF-B and CTF surcharges were intended to raise $402 million every 12 months beginning February 1, 1997. (D.96-10-066, Appendix B) Thus, by the time D.98-01-023 was issued on January 7, 1998, the carriers had collected approximately eleven-twelfths of $402 million, or $368 million.

We can find no legitimate reason for allowing carriers to keep this windfall since the source of the windfall – the surcharge revenues – belongs to the CHCF-B and CTF, not to the carriers. In addition, if carriers kept the interest they earned on pre-D.98-01-023 surcharge revenues, ratepayers ultimately would have to pay higher surcharges to the CHCF-B and CTF to make up for the interest kept by the carriers. This would be unfair to the ratepayers since they would receive no benefit from the higher surcharges, and would only be paying the higher surcharges so that the carriers could keep the interest they had earned on surcharge revenues which did not belong to them.

AT&T is mistaken that it would be inequitable to now require carriers to remit any interest they earned on pre-D.98-01-023 surcharge revenues. There is no inequity because the carriers never had a reasonable expectation that they would profit from the CHCF-B and CTF surcharges. Our orders were clear that the sole purpose of the CHCF-B surcharge is to fund the provision of affordable telephone service to residential customers; while the sole purpose of the CTF surcharge is to fund the provision of advanced telecommunications services to schools, libraries, and other designated organizations.[17] Thus, the carriers should have realized that the CHCF-B and CTF surcharges were not meant to be a source of profit to the carriers. On the other hand, ratepayers had a reasonable expectation that the hundreds of millions of dollars in CHCF-B and CTF surcharges they paid prior to D.98-01-023 would be used exclusively to provide monies for the CHCF-B and CTF, and not as a source of profit to the carriers.

We disagree with the small LECs that they should be relieved of the obligation to remit any interest they earned because of the burden this would

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[17] D.96-10-066, mimeo., pp. 72 and 92.

impose on them. TURN is correct that the small LECs have not shown why it would be particularly burdensome for them to comply with this obligation. TURN is also correct that there may be many other small carriers who collected interest on pre-D.98-01-023 surcharge revenues, and that granting all the small carriers an exemption could give them a significant windfall at the expense of the CHCF-B, the CTF, and the ratepayers who paid the CHCF-B and CTF surcharges.

For the foregoing reason, we conclude that all carriers should be required to remit any interest they may have earned on CHCF-B and CTF surcharge revenues prior to the issuance of D.98-01-023. Therefore, pursuant to our authority under §701, we shall order the carriers to remit any interest they earned on pre-D.98-01-023 surcharge revenues. Section 701 states as follows:

> "The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

We agree with ORA that we may also use a constructive trust to require the carriers to remit any interest they may have earned on pre-D.98-01-023 surcharge revenues. A constructive trust is defined as a remedy that may be used by a court of equity to compel a person who has property to which he or she is not justly entitled to transfer it to the person entitled thereto. All that must be shown to impose a constructive trust is that acquisition of the property was wrongful, and that keeping the property would constitute unjust enrichment. The trust is passive, the only duty being to convey the property.[15]

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[15] 11 Witkin, *Summary of California Law*, Trusts, §§ 305(1) and 305(3).

The interest earned by carriers on pre-D.98-01-023 surcharge revenues meets all the requirements for a constructive trust. In particular, the carriers do not own the CHCF-B and CTF surcharge revenues, are not entitled to receive interest on the surcharge revenues, and would be unjustly enriched if they were allowed to keep any interest they earned on the pre-D.98-01-023 surcharge revenues. Therefore, the carriers have a duty under the constructive trust to convey to the CHCF-B and the CTF any interest they earned on pre-D.98-01-023 surcharge revenues.

In its comments on the ALJ's draft decision, CALTEL/CCAC asserts that the decision erred in its use of a constructive trust since the Commission cannot exercise equitable powers in a quasi-legislative proceeding.[19] To support its assertion, CALTEL/CCAC relies on the decision by the California Supreme Court in Consumer's Lobby Against Monopolies v. Public Utilities Commission[20] (CLAM) in which the Court held that the Commission's "equitable jurisdiction to award attorney's fees in a quasi-judicial repartition actions does not extend to its quasi-legislative ratemaking duties."[21]

CALTEL/CCAC is mistaken in its assertion that we cannot exercise equitable powers in a quasi-legislative proceeding. First, in CLAM, the Court's ruling was narrowly focused on the Commission's equitable power to award attorney's fees in a quasi-legislative "ratemaking" proceeding. Since this decision does not award of attorney's fees and is not being issued in a

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[19] Joint Comments of the California Association of Competitive Telecommunications Carriers and the Cellular Carriers Association of California on the Proposed Decision of ALJ Kenney (Comments of CALTEL/CCAC), pp. 14-15.

[20] (1979) 25 Cal. 3d 891. At the time CLAM was issued, § 1801 et seq., which provides the Commission with explicit authority to award attorney's fee in quasi-legislative proceedings, had not yet been enacted.

ratemaking proceeding, the relevance of CLAM to this decision is remote at best.[22] Second, contrary to CALTEL/CCAC's suggestion, the Court did not find in CLAM that the Commission lacked equitable powers in quasi-legislative proceedings and thus could not award attorney's fees in these types of proceedings. Rather, as we explained in D.93724 and D.83-04-017, the Court found that a potential "administrative quagmire" in administering the award of attorneys fees in quasi-legislative proceedings bared the award of such fees.[23] Finally, since the issuance of CLAM, we have repeatedly found that "we do have general authority to compensate public participants in all proceedings before the Commission."[24] Thus, CALTEL/CCAC is simply wrong in its suggestion that we lack equitable power to award attorney's fees in quasi-legislative proceedings and, therefore, lack all equitable powers in such proceedings.[25]

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[21] Ibid., p. 909.

[22] The case at issue in CLAM was one in which the Commission had awarded attorney's fees in a proceeding that was setting rates for the future. Due the prospective nature of the rates being set, the Court characterized that proceedings as "quasi-legislative." (25 Cal. 3d 891, at 910) In contrast, this decision orders a remedy which is primarily retrospective in effect. Because of this, we do not believe the Court in CLAM would have would characterized this decision as quasi-legislative.

[23] D.93724, 7 CPUC 2d 75, at 77, 78, 89-91, and Conclusion of Law 2; D.83-04-017, 11 CPUC 2d 177, at 185-86.

[24] D.93724, 7 CPUC 2d 75, at 77. See also D.83-04-017, 11 CPUC 2d 177, at 185-86 and Conclusion of Law 5; and D.84-09-006, 16 CPUC 2d 142, at 143-146 and Conclusions of Law 1 through 7.

[25] In CLAM, the Court explicitly recognized the Commission's broad authority to regulate utilities. (25 Cal. 3d 891, at 905) Because of this, we do not believe the Court in CLAM would have disallowed our direct regulation of utilities, as is the case here, simply because the regulatory action that we take herein could be characterized as an equitable remedy.

### B. Whether Requiring Carriers to Remit Interest Violates § 728

#### 1. Position of the Parties

AT&T, CALTEL/CCAC, and MCI argue that requiring carriers to remit any interest they earned on pre-D.98-01-023 surcharge revenues would be retroactive ratemaking and thus violate § 728. In support of their contention that § 728 prohibits retroactive ratemaking, CALTEL/CCAC and MCI cite the ruling by the California Supreme Court in Pacific Telephone and Telegraph Co. v. Public Utilities Commission.[26] In that decision, the Court held that § 728 allows the Commission to set rates only on a prospective basis since rate changes are legislative in character and, therefore, must be prospective in application. According to CALTEL/CCAC, it does not matter that the Commission would be requiring carriers to remit interest retroactively rather than lowering an established rate retroactively. According to CALTEL/CCAC, the unlawful nature of both directives is the same.

ORA, TCG, and TURN argue that the interest earned by the carriers on pre-D.98-01-023 surcharge revenues is not a "rate or classification" as those terms are used in § 728. Because of this, they believe § 728 does not apply to a Commission order directing carriers to remit any interest they may have earned on pre-D.98-01-023 surcharge revenues.

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[26] 62 Cal. 2d 634, at 650 (1965).

### ii. Discussion

Section 728 is the foundation for the general rule against retroactive ratemaking.[27] Section 728 states, in relevant part, as follows:

> "Whenever the commission, after a hearing, finds that the rates or classifications demanded, observed, charged, or collected by any public utility for or in connection with any service, product, or commodity, or the rules, practices, or contracts...are insufficient, unlawful, unjust, unreasonable, discriminatory, or preferential, the commission shall determine and fix, by order, the just reasonable, or sufficient rates, classifications, rules, practices, or contracts to be thereafter observed and in force." (emphasis added)

We agree with ORA, TCG, and TURN that § 728 applies only to "rates or classifications," and that the interest earned by carriers on pre-D.98-01-023 surcharge revenues is not a rate or classification. More specifically, the terms "rates or classifications" as used in § 728 refer to the prices charged by utilities for products or services. The interest earned by carriers on pre-D.98-01-023 surcharge revenues, in contrast, was never part of any price that utilities charged for products or services. Therefore, since the interest on pre-D.98-01-023 surcharge revenues is not a rate or classification, we may require carriers to remit this interest without triggering, let alone violating, § 728.

Even if the interest earned by carriers on pre-D.98-01-023 surcharge revenues were a rate or classification, the rule against retroactive ratemaking embodied in § 728 would still not apply. The California Supreme Court has consistently held that the rule against retroactive ratemaking applies to "general ratemaking," and that the Commission may take actions that have retroactive

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[27] D.95-10-028, 61 CPUC 2d 687, at 690.

effect if such actions do not constitute "general ratemaking."[28] Since requiring carriers to remit any interest they earned on pre-D.98-01-023 surcharge revenues is clearly not an act of "general ratemaking," the rule against retroactive general ratemaking does not apply here, and we may order carriers to remit this interest without violating § 728.[29]

Moreover, the present situation is highly analogous to that addressed by the Court in Southern California Edison. In that decision, the Court upheld the Commission's order requiring the utility to disgorge monies. The basis for the Court's decision was that (1) the utility had not collected the monies at issue in

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[28] In Southern California Edison Co. v. Public Utilities Com., the Court found that while general ratemaking is governed by the rule against retroactive ratemaking, other proceedings are not. ((1978) 20 Cal. 3d 813, 816, 828-830.) The Court went on to describe general ratemaking as a comprehensive review of a utility's rate base, revenues, expenses, and earnings, as distinguished from other Commission actions of a more limited nature. (Ibid., at 816-817, 828-830.) In California Manufacturers Association v. Public Utilities Com., the Court stated that even if a Commission proceeding involves a major policy determination, that by itself does not make the proceeding subject to the rule against retroactive ratemaking. ((1979) 24 Cal.3d 251, at 256-258, 261.) In Toward Utility Rate Normalization v. Public Utilities Com., the Court reiterated its previous rulings that the rule against retroactive ratemaking applies to general ratemaking, and that the Commission may take other actions that have retroactive effects. ((1988) 44 Cal 3d 870, at 873, Fn. 1.)

[29] Today's decision is not the first time we have noted the Court's distinction between general ratemaking, which is subject to the rule against retroactive ratemaking, and other kinds of Commission proceedings. In D.95-10-018, we determined that we had authority to retroactively adjust a utility's rates for costs involving post-retirement benefits other than pensions (PBOP) because, among other reasons, the "PBOP proceeding...involves a review of the eligibility of a specific expense (PBOP costs) for a specific type of carefully restricted rate recovery (Z factor treatment)." (61 CPUC 2d 687, at 690-691.) In D.97-09-060, we determined that we had authority to retroactively adjust a utility's rates for intraLATA pay phone calls where only one specific rate was affected. (D.97-09-060, mimeo., pp. 7-8.) And in D.97-10-063, we found that the prohibition against retroactive ratemaking does not apply to utility "practices." (D.97-10-063, mimeo., pp. 15-16.)

its general rates, and (2) it would be unjust if the utility kept the monies at issue. As described previously in this decision, the carriers did not collect interest on pre-D.98-01-023 surcharge revenues as part of their general rates, and retention of these interest monies by the carriers would be unjust.

For the foregoing reason, we conclude that requiring carriers to remit any interest they earned on pre-D.98-01-23 surcharge revenues does not violate § 728.

### C. Whether Requiring Carriers to Remit Interest Violates § 1708

#### I. Position of the Parties

CALTEL/CCAC argues that carriers cannot be required to remit interest on pre-D.98-01-023 surcharge revenues because to do so would violate § 1708. CALTEL/CCAC asserts that even where the procedural requirements of § 1708 are met, the statute does not permit the Commission to retroactively modify an order, absent extrinsic fraud or other extraordinary circumstances. (D.74141, Golconda Utilities Company (68 Cal. P.U.C. 296, at 305 (1968).)

#### II. Discussion

Section 1708 states as follows:

> "The commission may at any time, upon notice to the parties, and with an opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it. Any order rescinding, altering, or amending a prior order or decision shall, when served upon the parties, have the same effect as an original order or decision."

CALTEL/CCAC is mistaken that § 1708 precludes us from requiring carriers to remit any interest they earned on pre-D.98-01-023 surcharge revenues. Section 1708 provides the Commission with broad authority to rescind, alter, or

amend any prior order or decision after providing parties with notice and an opportunity to be heard.[30]

As described previously in this decision, CALTEL/CCAC has been provided with notice and an opportunity to be heard on whether carriers should be required to remit any interest they earned on pre-D.98-01-023 surcharge revenues. Therefore, since the procedural requirements of §1708 have been met, we may use our authority under § 1708 to now require carriers to remit any interest they earned on pre-D.98-01-023 surcharge revenues.

CALTEL/CCAC is also mistaken that Golconda prevents us from requiring carriers to remit any interest they earned interest on pre-D.98-01-023 surcharge revenues. In Golconda, we concluded that § 1708 did not allow the Commission to void the transfer of utility property to the Golconda Utilities Company because the transfer had been previously approved by the Commission. We reasoned that "absent extrinsic fraud or other extraordinary circumstances...Section 1708 does not permit the Commission to readjudicate the same transaction differently with respect to the same parties."[31] Golconda is inapplicable to the present situation since we are not readjudicating "the same transaction differently with respect to the same parties." Prior to D.98-01-023, we never explicitly addressed, let alone adjudicated, the issue of whether carriers should remit interest on pre-D.98-01-023 surcharge revenues.

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[30] In City of Los Angeles v. Public Utilities Com., the California Supreme Court held that §1708 "permits the commission at any time to reopen proceedings even after a decision has become final." (15 Cal.3d 680, at 706 (1975)) In William A. Sale v. Railroad Com., the Court held that the Commission has continuing jurisdiction to rescind, later, or amend its prior orders at any time. (15 Cal.2d 612, at 616 (1940))

[31] D.74141, 68 Cal. P.U.C. 296, at 305.

Assuming, arguendo, that we were readjudicating the issue of whether carriers should remit interest on pre-D.98-01-023 surcharge revenues, Golconda does not bar us from now requiring carriers to remit this interest. This is because in D.97-04-049 we found that "extrinsic fraud or other extraordinary circumstances" are not the only situations in which we may use our authority under § 1708 to modify a prior order. We stated that if there are new facts or circumstances which create a strong expectation that we would have made a different decision in a prior order, then we may modify the prior order to reflect the new facts or circumstances.[32] As explained earlier in this decision, carriers were not supposed to earn significant interest income from the CHCF-B and CTF surcharge revenues. The fact that carriers might now earn substantial interest income from CHCF-B and CTF surcharge revenues certainly falls within the realm of new facts or circumstances that would cause us to modify a prior order.

In its comments on the ALJ's draft decision, CALTEL/CCAC asserts that the decision improperly used § 1708 to retroactively modify a prior Commission order.[33] To support its assertion, CALTEL/CCAC relies on City of Los Angles v. Public Utilities Commission[34] (City of Los Angeles) in which the Court held that the Commission may modify a prior order on rehearing because "rehearing [under § 1731], unlike reopening [under § 1708], prevents an order from becoming final."[35]

Contrary to CALTEL/CCAC's assertion, the Court in City of Los Angles did not prohibit Commission decisions modified pursuant to § 1708 from having

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[32] D.97-04-049, 1997 Cal. PUC LEXIS 427, *16.
[33] Comments of CALTEL/CCAC, pp. 11-12.
[34] (1975) 15 Cal. 3d 680.
[35] Ibid., at 707.

any retroactive effect. Nor did the Court say in City of Los Angles that there are any additional prohibitions against retroactive ratemaking in proceedings under § 1708 then there are in Commission proceedings generally.[36] Rather, the Court held in City of Los Angles that § 1731 permits a decision to have retroactive effect even though the principles of retroactive ratemaking would otherwise prohibit that effect.[37] Therefore, CALTEL/CCAC is wrong when it asserts that § 1708, as interpreted by the Court in City of Los Angles, prohibits carriers from now being required remit any interest they may have earned on pre-D.98-01-023 surcharge revenues.

For the foregoing reason, we conclude that requiring carriers to remit any interest they earned on pre-D.98-01-23 surcharge revenues does not violate § 1708.

### D. Whether Requiring Carriers to Remit Interest Violates § 1709

#### 1. Position of the Parties

CALTEL/CCAC and MCI argue that the Commission cannot require carriers to remit any interest they earned on pre-D.98-01-023 surcharges since this would be a "collateral attack" on D.96-10-066 and D.97-01-020 and violate § 1709.

ORA states that the Commission's directive in D.97-01-020 for carriers to remit CHCF-B and CTF surcharge revenues to separate bank accounts expresses the Commission's intent that surcharge revenues should accrue interest. In ORA's view, the Commission's intent that surcharge monies accrue interest undermines any argument that ordering carriers to remit accrued interest is a collateral attack on prior decisions.

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[36] For the reasons described previously in this decision, requiring carriers to remit any interest they may have earned on pre-D.98-01-023 surcharge revenues does not violate any of the principles of retroactive ratemaking.

[37] 15 Cal. 3d 680, at 707.

TCG states that requiring carriers to remit interest does not violate § 1709 since this requirement would not alter in any material way D.96-10-066 which established the CHCF-B and CTF and their associated surcharges. Rather, the Commission is continuing to refine the exact methods necessary to administer the Funds. TCG adds that Commission decisions requiring carriers to bill and collect the CHCF-B and CTF surcharges are clear that carriers may not use these revenues for any purpose other than remitting these monies to the Commission.

TURN states that § 1709 is not implicated because this is not a collateral action or proceeding, but rather the same proceeding in which D.96-10-066 was issued. TURN also notes that § 1708 expressly permits the Commission to amend prior decisions as long as parties are provided the requisite notice and an opportunity to be heard as has occurred here.

## II. Discussion

CALTEL/CCAC and MCI are mistaken that our requiring carriers to remit any interest they earned on pre-D.98-01-023 surcharge revenues would be a collateral attack on D.96-10-066 and D.97-01-020, and thus violate § 1709. Section 1709 states as follows:

> "In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive."

Section 1709 must be read in conjunction with § 1708, which explicitly grants the Commission broad authority to modify or to set aside its past orders. As a regulatory body, the Commission has continuing jurisdiction over utilities.

It is not bound even by its own past decisions so long as it meets the procedural requirements of § 1708.[38]

As discussed previously in this decision, the procedural requirements of § 1708 have been met by providing carriers with notice and an opportunity to be heard on the matter of whether they should be required to remit any interest they may have earned on pre-D.98-01-023 surcharge revenues. Therefore, we may now require carriers to remit such interest without violating § 1709.

### E. Procedure for Remitting Interest Earned Prior to D.98-01-023

#### 1. Position of the Parties

AT&T, CALTEL/CCAC, GTE, ORA, and TURN propose that each carrier submit a sworn declaration, made under penalty of perjury, that states the amount of interest, if any, the carrier earned on pre-D.98-01-023 surcharge revenues. They also propose that carriers remit any interest they earned when they ultimately remit their accumulated surcharge revenues. In addition, TURN recommends that carriers should not be allowed to receive funds from either the CHCF-B or CTF until they have submitted their sworn declarations and remitted any interest they collected. ORA also states that the Commission should order carriers to submit detailed workpapers to justify the amount of interest remitted.

AT&T, GTE, and ORA see no need for the Commission to audit carriers' declarations. GTE believes that audits are unnecessary because Rule 1 of the Commission's Rules of Practice and Procedure requires that parties not mislead the Commission. ORA believes that rather than requiring audits, the

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[38] See D.98-11-067, mimeo., pp. 25-26; D.97-04-049, 1997 Cal. PUC LEXIS 427, *7; and D.97-02-53 1997 Cal. PUC LEXIS 115, *8.

Commission should grant interested parties broad discovery privileges, so that parties can determine the accuracy of carriers' declarations.

## II. Discussion

We agree with the parties that each carrier should submit a sworn declaration, made under penalty of perjury, stating the amount of interest the carrier earned on CHCF-B and CTF surcharge revenues prior to the effective date of D.98-01-023. To ensure the accuracy of these declarations, we shall require each carrier to have its declaration signed by an officer of the company who is thoroughly knowledgeable about whether the carrier earned interest on CHCF-B and CTF surcharge revenues, and if so, how much interest was earned. The assigned ALJ, in consultation with the assigned Commissioner, shall issue a ruling instructing carriers when and where to (1) submit their sworn declarations and (2) remit any interest they earned on CHCF-B and CTF surcharge revenues."[9] The Director of the Telecommunications Division ("TD") shall have authority to require carriers to submit workpapers and other information or documents to justify the amount of interest reported by the carriers in their declarations. The carriers shall retain records regarding any interest they earned on pre-D.98-01-023 surcharge revenues for a period of at least five calendar year after such interest was earned, i.e., until at least December 31, 2002.

We believe it is premature to decide whether there should be an audit of carriers' remittance of interest on pre-D.98-01-023 surcharge revenues. The proper time for making this decision is after the carriers have remitted the interest. We note that TD and the Administrative Committees for the CHCF-B

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[9] D.97-01-020 stated that "the assigned ALJ, in consultation with the assigned Commissioner's office, shall issue a ruling notifying carriers where and when to remit these accumulated monies." (D.97-01-020, mimeo., p. 8.)

and the CTF ("Committees"),[40] which are responsible for overseeing carriers' remittance of surcharge revenues and associated interest on the revenues, already have authority to audit carriers' remittances.[41] Therefore, if TD and the Committees believe that carriers have not remitted interest on CHCF-B and CTF surcharge revenues in accordance with this decision, then they should audit the carriers.[42] If TD and the Committees believe an outside auditor should be hired to examine carriers' remittance of interest, they may seek our permission in accordance with the procedures set forth in D.98-06-045 to use monies from the CHCF-B and CTF to pay the auditor.[43]

Finally, we shall adopt TURN's recommendation that no carrier will be able to receive funding from either the CHCF-B or the CTF until the carrier has submitted its sworn declaration and remitted any interest it has collected.[44]

In its comments on the ALJ's draft decision, CALTEL/CCAC states that if the Commission requires carriers to remit any interest they earned on pre-D.98-01-023 surcharge revenues, then the Commission must clarify what it

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[40] The CHCF-B and CTF Administrative Committees were formed by the Commission to oversee the day-to-day administration of the CHCF-B and CTF. (D.97-01-020, OP 1.a.13)

[41] Each Committee is authorized by Article 4.1.(k) of its Charter to audit carriers' remittance of interest. (D.98-06-065, Attachments B and C.)

[42] Senate Bill (SB) 1217, which is currently pending in the State Legislature, would require financial and compliance audits of the CHCF-B and CTF. If SB 1217 is enacted, any audits conducted by TD and/or the Committees should be coordinated, as appropriate, with the audits required by SB 1217. In addition, if any parts of this decision conflict with the legislation that is ultimately enacted, then the legislation shall supercede this decision.

[43] D.98-06-065, mimeo., pp. 8, 9, 12, and 13.

[44] Until the large LECs are directed to remit their sworn declarations and interest, they may continue to draw from their accumulated CHCF-B surcharge revenues in accordance with the provisions of D.98-09-039.

means by the term "earned." According CALTEL/CCAC, clarification of the term "earned" is important since some carriers "employed the [surcharge] revenues for working capital and retained a memorandum account to determine how much to remit to the trusts."[45]

We agree with CALTEL/CCAC that we should clarify what we mean by the term "earned." Accordingly, we define interest "earned" on pre-D.98-01-023 surcharge revenues as follows:

(1) The actual amount of interest earned on any pre-D.98-01-023 surcharge revenues placed into a segregated interest-bearing account.

(2) The proportional amount of interest earned on pre-D.98-01-023 surcharge revenues commingled with other funds in one or more interest-bearing accounts. For example, if a carrier placed $1,000 of pre-D.98-01-023 surcharge revenues and $1,000 of other funds into an interest-bearing account, then half of all interest earned by the money in that account would be attributable to the pre-D.98-01-023 surcharge revenues.

(3) If a carrier used pre-D.98-01-023 surcharge revenues as working capital (i.e., made an interest-free loan to itself), the carrier should impute the amount of interest earned on the surcharge revenues by using either one of the following two methods: (i) The amount of interest that would have been earned if the surcharge revenues had been placed in the highest yielding checking, savings, or money market account used by the carrier for its other funds; or (ii) The amount of interest that would have been earned if the surcharge revenues had been placed in an account earning the seven-day compound yield on taxable money market funds as published in the Wall Street Journal each Thursday.

[45] Comments of CALTEL/CCAC, p. 15.

### 4. Service of Decision

This decision affects all telecommunications carriers in California. So that carriers are informed of this decision, we shall require our Executive Director to cause a copy of this decision to be served on all carriers.

### 5. Public Utilities Code Section 311(g)

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g) and Rule 77.1 of the Commission's Rules of Practice and Procedure. CALTEL/CCAC filed opening comments on April 28, 1999, and ORA filed reply comments on May 3, 1999. We have incorporated the parties' comments, as appropriate, in finalizing the decision.

### Findings of Fact

1. The CHCF-B and CTF were created by the Commission in D.96-10-066. The purpose of the CHCF-B is to provide affordable telephone service to residential customers located in high-cost areas served by California's largest LECs. The purpose of the CTF is to provide advanced telecommunications services to schools, libraries, and other designated organizations.

2. Pursuant to D.96-10-066 and D.97-01-020, carriers have been collecting the CHCF-B and CTF surcharges since February 1, 1997. The CHCF-B surcharge was initially set at 2.87% in order to collect $352 million per year; and the CTF surcharge was initially set at 0.41% in order to collect $50 million per year.

3. In D.97-01-020, the Commission expressed its intent for carriers to start remitting CHCF-B and CTF surcharge revenues to the CHCF-B and CTF by no later than April of 1997.

4. In D.97-01-020, the Commission instructed carriers to hold CHCF-B and CTF surcharge revenues until trusts for the CHCF-B and CTF could be formed, financial institutions retained, and bank accounts opened. To date, none of these

steps have been completed, and the carriers continue to collect and accumulate CHCF-B and CTF surcharge revenues.

5. CHCF-B and CTF surcharge revenues belong to the CHCF-B and the CTF, and not to the carriers.

6. The CHCF-B, CTF, and ratepayers would be worse off if carriers were allowed to keep any interest they earned on pre-D.98-01-023 surcharge revenues.

7. In D.98-01-023, the Commission found that it would be unreasonable for carriers to reap a potentially sizeable windfall by keeping any interest they may have earned on the CHCF-B and CTF surcharge revenues they were holding.

8. In D.98-01-023, the Commission ordered carriers to remit any interest they may have earned on CHCF-B and CTF surcharge revenues, including any interest earned prior to the effective date of D.98-01-023.

9. In response to applications for rehearing of D.98-01-023 filed by LACTC and CALTEL/CCTA, the Commission issued D.98-04-068 in which the Commission held that: (i) carriers would reap a windfall if they were allowed to keep any interest they earned on CHCF-B and CTF surcharge revenues; (ii) there was no intent by the Commission for carriers to benefit in any significant fashion from the time value of money associated with CHCF-B and CTF surcharge revenues; and (iii) D.98-01-023 had violated §1708 by not providing carriers with an opportunity to be heard on the matter of whether carriers should be required to remit any interest they had earned on CHCF-B and CTF surcharge revenues prior to the issuance of D.98-01-023.

10. In D.98-04-068, the Commission vacated its order in D.98-01-023 requiring carriers to remit any interest they had earned on CHCF-B and CTF surcharge revenues prior to D.98-01-023, and directed the ALJ to allow carriers to request a hearing on this matter. The Commission also stated that it would

address in these hearings whether requiring carriers to remit any interest they had earned prior to D.98-01-023 would violate § 728 or § 1709.

11. Pursuant to rulings by the ALJ dated May 13, 1998, and November 11, 1998, parties were provided with an opportunity to file comments and legal briefs on the issue of whether carriers should be required to remit any interest they may have earned on pre-D.98-01-023 surcharge revenues.

12. At the PHC held on September 23, 1998, no party requested an evidentiary hearing on the issue of whether carriers should be required to remit any interest they may have earned on pre-D.98-01-023 surcharge revenues.

13. The California Supreme Court has consistently held that the rule against retroactive ratemaking applies only to "general ratemaking," and that the Commission may take actions that have retroactive effect if such actions do not constitute general ratemaking.

14. The Commission never addressed in D.96-10-066 or D.97-01-023 the issue of whether carriers should be required to remit any interest they earned on CHCF-B and CTF surcharge revenues.

15. This decision affects all telecommunications carriers in California.

## Conclusions of Law

1. Carriers would reap a sizable windfall if they were able to keep any interest they may have earned on the hundreds of millions of dollars of CHCF-B and CTF surcharge revenues they accumulated prior to D.98-01-023.

2. The Commission never intended for carriers to benefit in any significant fashion from the time value of the money associated with the CHCF-B and CTF surcharge revenues collected by carriers.

3. The small LECs have not shown that it would be burdensome for them to remit any interest they earned on CHCF-B and CTF surcharge revenues.

4. Parties were provided with notice and an opportunity to be heard on the matter of whether carriers should be required to remit any interest they may have earned on pre-D.98-01-023 surcharge revenues.

5. All carriers should be required to remit to the CHCF-B and CTF any interest they may have earned on pre-D.98-01-023 surcharge revenues.

6. Carriers did not have a reasonable expectation that they would profit from the CHCF-B and CTF surcharge revenues they were ordered to collect.

7. The Commission has authority under §701 to order carriers to remit any interest they may have earned on pre-D.98-01-023 surcharge revenues.

8. The carriers have an obligation pursuant to a constructive trust to remit any interest they may have earned on pre-D.98-01-023 surcharge revenues.

9. Interest earned by carriers on CHCF-B and CTF surcharge revenues does not constitute a "rate or classification" as these terms are used in § 728.

10. Requiring carriers to remit any interest they may have earned on pre-D.98-01-023 surcharge revenues does not constitute general ratemaking.

11. This decision does not readjudicate whether carriers should be required to remit any interest they earned on pre-D.98-01-023 surcharge revenues.

12. The fact that carriers would reap an unintended windfall if they kept the interest they earned on pre-D.98-01-023 surcharge revenues to the detriment of ratepayers, the CHCF-B, and the CTF, falls within the realm of new facts or a major change in material circumstances that would cause the Commission to modify a prior order.

13. Requiring carriers to remit any interest they may have earned on pre-D.98-01-023 surcharge revenues does not violate § 728, § 1708 or § 1709.

14. Each carrier should submit a sworn declaration, made under penalty of perjury, stating the amount of interest, if any, that the carrier earned on CHCF-B and CTF surcharge revenues prior to the effective date of D.98-01-023. Each

carrier's declaration should be signed by an officer of the company who is thoroughly knowledgeable about whether the carrier earned interest on CHCF-B and CTF surcharge revenues, and if so, how much interest was earned.

15. The assigned ALJ, in consultation with the assigned Commissioner, should issue a ruling instructing carriers when and where to (i) submit their sworn declarations and (ii) remit any interest they earned on CHCF-B and CTF surcharge revenues.

16. The Director of TD should have authority to require carriers submit workpapers and other information or documents to justify the amount of interest reported by carriers in their sworn declarations.

17. The carriers should retain records regarding any interest they earned on pre-D.98-01-023 surcharge revenues for a period of five calendar year after such interest was earned.

18. TD and the Administrative Committees ("Committees") for the CHCF-B and CTF have authority to audit carriers for the purpose of determining if carriers have remitted the interest they earned on CHCF-B and CTF surcharge revenues in compliance with this decision and D.98-01-023.

19. Decision 98-08-065 sets forth the procedures that TD and the Committees may use to seek authority from the Commission to use monies from the CHCF-B and CTF to hire auditors to examine if carriers have remitted interest on CHCF-B and CTF surcharge revenues in compliance with this decision and D.98-01-023.

20. The CHCF-B and CTF should not disburse money to any carrier that has failed to comply with Ordering Paragraphs 1 and 2 of the following order.

21. The Executive Director should cause a copy of this decision to be served on all telecommunications carriers in California.

## INTERIM ORDER

IT IS ORDERED that:

1. Each intrastate telecommunications carrier (carrier) shall remit to the California High Cost Fund-B (CHCF-B) any interest it earned on CHCF-B surcharge revenues prior to the effective date of Decision (D.) 98-01-023. Each carrier shall also remit to the California Teleconnect Fund (CTF) any interest it earned on CTF surcharge revenues prior to the effective date of D.98-01-023.

2. Each carrier shall submit a sworn declaration to the CHCF-B, made under penalty of perjury, stating the amount of interest, if any, that the carrier earned on CHCF-B surcharge revenues prior to the effective date of D.98-01-023. Each carrier shall also submit a sworn declaration to the CTF, made under penalty of perjury, stating the amount of interest, if any, that the carrier earned on CTF surcharge revenues prior to the effective date of D.98-01-023. Each carrier shall have its declarations signed by an officer of the company who is thoroughly knowledgeable about how much interest, if any, that was earned by carrier on CHCF-B and CTF surcharge revenues prior to the effective date of D.98-01-023.

3. The assigned Administrative Law Judge, in consultation with the assigned Commissioner, shall issue one or more rulings instructing carriers when and where to (i) submit the sworn declarations described in Ordering Paragraph (OP) 2, and (ii) remit all interest earned by the carriers on CHCF-B and CTF surcharge revenues prior to the effective date of D.98-01-023.

4. No carrier shall receive disbursements from either the CHCF-B or the CTF until the carrier has (i) remitted interest, if any, in accordance with OPs 1 and 3, and (ii) submitted its sworn declarations in accordance with OPs 2 and 3.

5. The Director of the Commission's Telecommunications Division may require carriers to submit workpapers and other information or documents to justify the amount of interest reported by the carriers in their sworn declarations.

6. The carriers shall retain records regarding any interest they earned on pre-D.98-01-023 surcharge revenues for a period of five calendar year after such interest was earned.

7. The Executive Director shall cause a copy of this order to be served on all telecommunications carriers in the State of California.

This order is effective today.

Dated May 13, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners