

Decision 00-03-042 March 16, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Pacific Bell (U 1001 C), a Corporation, for Authority for Pricing Flexibility and to Increase Prices of Certain Operator Services, to reduce the Number of Monthly Directory Assistance Call Allowances, and Adjust Prices for four Centrex Optional Features.

Application 98-05-038
(Filed May 5, 1998)

INTERIM OPINION

I. Summary

This interim order grants the joint motion of The Utility Reform Network (TURN), Office of Ratepayer Advocates (ORA), and County of Los Angeles (County of LA) to make Pacific Bell's rate increase approved in Decision (D.) 99-11-051 subject to refund.

II. Subject to Refund Motion

On December 23, 1999, TURN, ORA, and County of LA ("joint parties") filed an emergency motion to make the D.99-11-051 rate increase for Directory Assistance (DA), Busy Line Verification (BLV), Emergency Interrupt (EI), and four Centrex Optional subject to refund pending resolution of their companion rehearing application in this matter. The motion was filed pursuant to Rule 45 of the Commission's Rules of Practice and Procedure (Rules). It is alleged in their rehearing application that the rate increase was based on legal error.

III. Pacific Bell's Opposition

On January 7, 2000, Pacific Bell filed its opposition to the joint parties' emergency motion pursuant to Rule 45(f). Pacific Bell argues that the joint parties' motion is meritless, and that approval of the motion will result in an outcome that is burdensome, excessive and punitive.

IV. Subject to Refund Discussion

The joint parties cite D.95-03-021¹ as precedent for approval of the subject to refund motion. In that decision, the Commission granted the California Assembly's request for a stay of the distribution of funds ordered by the Commission. A stay was granted because the Commission concluded that it would be practically impossible to recover any disbursed funds in the event that the California Supreme Court disagreed with the Commission and ruled in the Assembly's favor. The joint parties also cite D.99-09-068 in support of the proposition that rates should be subject to refund pending the resolution of a related proceeding.

The joint parties emphasize that it "is particularly important that the Commission make the rate increase subject to refund in light of the fact that no reviewing court may issue a stay of a Commission ratemaking decision, regardless of whether or not legal error in the Commission's decision is readily apparent." (Joint Parties' Motion, p. 3.)

However, Pacific Bell argues that the joint parties fail to cite any authority for granting their subject to refund motion and contends that there is no authority to grant such a motion for a rate increase that has completed the

¹ Re Pacific Telesis Group, 59 CPUC2d 54 at 57 (1995).

18 month litigation cycle. That litigation cycle encompassed evidentiary hearings, public witness hearings, ex parte communications, and extensive deliberations by the Commissioners that included consideration of proposed and alternate decisions. Given the extensive litigation that took place, Pacific Bell opposes any order to make its new revenue subject to refund unless the joint parties can demonstrate a high likelihood of success on the underlying merits of their rehearing application.

The decision cited by the joint parties as precedent for approval of the motion, D.95-03-021, was based on a request to stay or defer the implementation of a Commission approved action. However, in this instance, the joint parties do not seek to stay or defer the implementation of a Commission approved action. Rather, the joint parties seek to impose a subject to refund condition on a Commission approved action that has already been implemented. Given the dissimilarity between D.95-03-021 and the subject to refund motion in this proceeding, we are not convinced that D.95-03-021 established a precedent for granting the subject to refund motion pending resolution of a rehearing application.

Although Pacific Bell believes that the joint parties merely seek to relitigate disputed issues of fact and policy from the underlying proceeding, that issue is more appropriately resolved in a decision addressing the rehearing application. Irrespective of the merits or lack of merits of the joint parties' rehearing application, we cannot disregard the impact that a favorable decision on the rehearing application would have on the rate increases that were authorized in D.99-11-051.

In the other decision cited by the joint parties, D.99-09-068, the Commission dismissed the application (A.98-01-015) of Southern California Gas Company to sell one of its gas storage facilities. Hearings were held in that

proceeding and the matter was submitted and briefed. Prior to the issuance of a decision on the application to sell the facility, the Commission opened an investigation (I.99-04-022) to determine whether the utility had engaged in a pattern of providing inaccurate information to the Commission and its staff regarding the plans for this facility. In D.99-09-068 at page 2, the Commission stated that the application to sell the storage facility "cannot be efficiently processed while I.99-04-022 is pending, because the relief applicant seeks in this application, and the Commission's review thereof, may be affected by the outcome of I.99-04-022." The Commission then dismissed the application without prejudice, and provided that the cost of maintaining the storage facility should be subject to refund pending resolution of the issues surrounding the facility.

D.99-09-068 recognized that the application to sell the storage facility could be affected by the outcome of the investigation, and that it was uncertain whether ratepayers should pay the costs of maintaining this storage facility in the future. A similar sort of circumstance confronts us in the joint parties' motion. Even though the Commission authorized rate increases in D.99-11-051, some of those increases are being challenged in the rehearing application. If the joint parties prevail on their rehearing application, and the motion is not granted, the rate increases that were previously authorized may not be recoverable due to the rule against retroactive ratemaking. However, the granting of the joint parties' motion recognizes that the rate increases may be impacted by the rehearing application.

Although the joint parties argue that irreparable harm will result if the motion is not granted, and Pacific Bell argues that the motion should not be granted "unless the requesting party has shown a high likelihood of success on the underlying merits," those are concepts that apply to a request for an injunction. (54 CPUC2d 244, 259; 59 CPUC2d 665, 674-676.) As D.99-09-068 and

D.95-03-021 indicate, the concern of the Commission should be the impact of other related proceedings and the effect upon ratepayers.

Pacific Bell contends that if such refunds are ordered on a retroactive basis, that this would require Pacific to rerun all of its bills for the months in question. We are not convinced by Pacific Bell's argument that making the revenues from D.99-11-051 subject to refund will be burdensome and oppressive. Pacific Bell has not sufficiently explained in their opposition to the motion why the rerun of the bills is necessary, or why the costs would be so high. Pacific Bell has other avenues available to it to recover any direct costs that may be incurred as a result of the granting of the motion, for example, through its Category II pricing flexibility.

For the reasons stated above, the joint parties' subject to refund motion should be granted.

V. Comments on Draft Decision

The assigned Administrative Law Judge draft decision in this matter was mailed to all parties of record in accordance with Section 311(g)(1) of the Public Utilities Code. Comments were received from the joint parties and Pacific Bell. Reply comments were also received from Pacific Bell. These comments were carefully received and considered. However, the comments did not result in any changes to the draft decision.

Findings of Fact

1. The joint parties filed a motion to make the D.99-11-051 rate increase subject to refund.
2. The joint parties motion was filed pursuant to Rule 45.
3. Pacific Bell filed an opposition to the joint parties motion pursuant to Rule 45(f).

4. The rate increase was granted after completion of an 18-month litigation cycle. That litigation cycle encompassed evidentiary hearings, public witness hearings, ex parte communications, and extensive deliberations by the Commissioners that included consideration of proposed and alternate decisions.

5. D.95-03-021 authorized a stay of a prior Commission action.

6. The joint parties' motion seeks to impose a subject to refund condition on a previously approved Commission action that has already been implemented.

7. The issue of whether the joint parties are seeking to relitigate disputed issues of fact and policy is more appropriately resolved in a decision on the rehearing application.

8. The Commission cannot disregard the impact that a favorable decision on the rehearing application would have on the previously approved rate increases.

Conclusions of Law

1. Irreparable harm and the likelihood of success on the underlying merits are concepts that apply to a request for an injunction.

2. In deciding whether to grant a motion to make a rate increase subject to refund, the Commission should consider the impact of other related proceedings and the effect upon ratepayers.

3. The joint parties' motion should be granted.

INTERIM ORDER

IT IS ORDERED that:

1. The Directory Assistance, Busy Line Verification, Emergency Interrupt, and four Centrex Optional services rate increase granted by Decision (D.) 99-11-051, dated November 18, 1999 shall be subject to refund pending resolution of a December 23, 1999 application for rehearing of that decision.

A.98-05-038 ALJ/MFG/avs

2. Application 98-05-038 remains open to resolve the December 23, 1999 application for rehearing of D.99-11-051.

This order is effective today.

Dated March 16, 2000, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
CARL W. WOOD
LORETTA M. LYNCH
Commissioners