

Decision 00-04-061 April 20, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the
Commission's Own Motion Into Competition For
Local Exchange Service.

Rulemaking 95-04-043
(Filed April 26, 1995)

Order Instituting Investigation on the
Commission's Own Motion Into Competition For
Local Exchange Service.

Investigation 95-04-044
(Filed April 26, 1995)

OPINION

Decision (D.) 98-10-058 adopted rules for nondiscriminatory access to utility poles, ducts, conduits and rights-of-way (ROW) by competitive local carriers (CLCs) and cable television corporations. By this decision, we grant in part the Petition for Modification of D.98-10-058 (Petition) filed jointly by the California Cable Television Association (CCTA) and Daniels Cablevision Inc. (Daniels). D.98-10-058 is modified to clarify that the Commission did not adopt an express exemption from the rules for transmission poles. We reaffirm our commitment in D.98-10-058 to ensure nondiscriminatory access to poles, ducts, conduits and ROWs for both CLCs and cable television corporations.

I. Background

CCTA is a trade association representing cable television operators, including both small rural systems and national multiple systems. By the authority of Pub. Util. Code § 767.5, CCTA is also the negotiating agent for cable television companies regarding pole attachment rates, terms and conditions for all investor-owned utility poles in California. Section 767.5 confers upon the

Commission authority to determine cable company rates, terms and conditions when cable operators or their agent, such as CCTA, are unable to reach agreement with investor-owned utilities for access to ROW.

Daniels¹ is a mid-sized cable company providing cable services to about 62,000 customers in Northern San Diego County. Daniels alleges that its rights to nondiscriminatory access to poles owned by an investor-owned utility are directly affected by D.98-10-058 and, consequently, the outcome of this petition.

D.98-10-058 adopted rules governing nondiscriminatory access to poles, ducts, conduits and ROW for both cable corporations and CLCs. Included in the rules are pricing principles and costing formulas which govern the price of wireline attachments to investor-owned utility poles. As to these rules, we determined that a single formula for calculating the appropriate pole attachment rate should be used regardless of the service provided over the attachment.

In addition, the Commission determined that all CLCs should be entitled to pole attachment rates comparable to those available to CLCs affiliated or owned by cable corporations, in order to ensure that all telecommunications carriers gain access to utility attachments under nondiscriminatory rates, terms, and conditions. While declining to address transmission "facilities" in the rules due to record concerns, the Commission likewise made no express exemption of transmission poles from the rules.

II. Parties Positions

The petition with the supporting declaration of the president and general manager of Daniels, Jodi Odum, was filed on June 25, 1999. ORA filed a

¹ A motion of Daniels for intervention in this proceeding was filed separately but concomitantly with the petition. No party opposes the motion to intervene. Accordingly, it is granted.

response generally supporting the modification on July 25, 1999. Responses in opposition were filed by San Diego Gas & Electric Company (SDG&E) on July 23, 1999, and by PG&E on July 26, 1999. Southern California Edison Company joined in the PG&E response. A third reply was filed by CCTA on August 2, 1999, with the permission of ALJ Pulsifer.

The petition alleges ambiguity in D.98-10-058 as to whether the Commission adopted an express exemption from the rules for transmission poles. Petitioners request that this Commission clarify that the language in D.98-10-058 does not exempt transmission poles from the Commission's rules, and that attachments to those poles must be available at rates based on historical cost, and that rates cannot be priced according to the type of wireline attached.

To further support the proposed modifications, petitioners draw a distinction between transmission towers and transmission poles. Petitioners argue that there would have been no legal basis for the Commission to forgo regulation of access to transmission poles, and that such a determination is inconsistent with the language of 47 U.S.C. § 224, upon which the Commission based its delineation of the scope of its rules, as well as Pub. Util. Code § 767.5. Both these statutes provide for access under regulated rates to all investor-owned utility poles, and do not restrict or prohibit the regulation of access to transmission poles.

Petitioners explain that the ambiguity first surfaced as a result of a dispute between Daniels and SDG&E. In 1991, Daniels began upgrading its plant and, in the process, attached cable to transmission and distribution poles owned by SDG&E. These attachments were made pursuant to the then-existing pole attachment agreement between Daniels and SDG&E. In 1998, Daniels continued a plant upgrade by planning to attach fiber optic lines to the same transmission poles to which Daniels had already attached coaxial cable in 1991. The upgraded

fiber replaced previously existing microwave connections between two clusters of cable television customers to increase system reliability and allow for the expansion of analog channels.

However, in 1998, SDG&E required Daniels to enter into a new, 20-year contract for the attachment of fiber optic plant before application for these pole attachments to be used for CATV upgrade would be considered. This new contract required an access fee for fiber optic lines attached to transmission poles, in addition to the pole attachment fee. CCTA claims that SDG&E never adequately explained why this fee is appropriate for fiber optic attachments but not required for coaxial attachments.

ORA supports the petition, provided that the modifications not alter or limit the requirements of General Order (G.O.) 95. ORA requests that the Commission clarify whether attachments to transmission poles should also be based on historical costs. ORA "concur[s] with [p]etitioners that pricing for all attachments should be based on historical costs." (ORA Comments, p. 4.)

In its opposition, SDG&E claims the petition fails to comply with Rule 47 of the Commission's Rules of Practice and Procedure (Rules). SDG&E argues that petitioners fail to make any specific citation to the record to support their allegations. The declaration of Joni Odum, attached to the petition as Attachment A, addresses a contract (or contracts) Daniels either has entered into or proposes to enter into with SDG&E to attach its facilities to transmission poles and to use transmission ROW. Whether Odum's allegations about SDG&E's actions are true, SDG&E claims they provide no "new or changed facts" as required by Rule 47 to justify the request of petitioners to "modify or clarify" the decision to include transmission poles within the scope of the rules. SDG&E claims the Odum declaration addresses none of record problems which resulted in the Commission excluding transmission facilities from the rules.

SDG&E opposes the petition on substantive grounds as well. To the extent Petitioners seek to justify the modification based on the claim that D.98-10-058 is unclear or ambiguous, SDG&E disputes this claim. SDG&E points to language in the decision as well as comments of CCTA to show there was no lack of clarity that transmission poles were excluded from the adopted rules.

PG&E similarly argues that the petition is procedurally defective in the following respects: (1) a petition to modify is not the appropriate procedural vehicle to explicitly or implicitly reverse a Commission decision by arguing alleged legal error; (2) CCTA has already filed on behalf of its members a petition for rehearing and did not raise the issue of inclusion of transmission facilities; (3) CCTA had ample opportunity, and used that opportunity, to make its arguments to the Commission for the inclusion of transmission facilities in the comments and replies on the proposed decisions; and (4) appropriate procedures exist in Pub. Util. Code §§ 767 and 767.5 to resolve Petitioners' factual disputes with SDG&E.

III. Discussion

We conclude that the petition is both procedurally and substantively sufficient to support modification of D.98-10-058. As established below, the petition is the proper vehicle to address the alleged ambiguities in the application of D.98-10-058. Applications for rehearing are "restricted" to allegations that a Commission decision contains legal error. (Investigation on the Commission's Own Motion into the Matter of Post-Retirement Benefits Other than Pensions (1996) 67 CPUC 2d 394 [D.96-08-035].) Petitions for modifications are not so restricted and may seek "reconsideration of the policy or other discretionary content of a Commission decision or order." (*Id.*)

We first address whether the petition is procedurally sufficient. As stated in Rule 47(a): "A petition for modification asks the Commission to make changes

to the text of an issued decision." Rule 47(b) states in part: "A petition for modification must state concisely the justification for the requested relief and must propose specific wording to carry out all requested modifications to the decision."

The specific wording changes relevant to D.98-10-058 are contained in the petition, as required by Rule 47(b). The text of the petition identifies the sentence at page 18 of D.98-10-058 to be modified. (Petition, p. 2, 14.) The petition then requests that the term "transmission facilities" in the sentence be clarified so as to exclude transmission poles. Hence petitioners proposed wording is adequate to effectuate the proposed modifications.

Contrary to the proposed decision, the petition does not seek redress of alleged legal errors in D.98-10-058. The petitioners are, in effect, arguing that it would not have been the intent of the Commission to unlawfully exempt transmission poles. The petitioners and ORA merely reference the legal basis as further support for the proposed modifications.

Additionally, the Odum declaration provides the "new or changed facts" required by Rule 47(b) to support the modifications of D.98-10-10-058. The Odum declaration sets forth a specific example of the ambiguous application of D.98-10-058. Ms. Odum describes how SDG&E is utilizing the alleged D.98-10-058 ambiguity as a loophole to charge exorbitant rates for transmission pole attachments. (Odum Decl., p. 3.) As also noted in the AT&T comments, it would be "short-sighted of the Commission to assume that Daniels Cablevision will be the only company to encounter an electric utility either preventing access to its transmission poles, or granting access at excessive, if not extortionate rates" in reliance on the D.98-10-059 ambiguity.

We therefore clarify that D.98-10-058 was not intended to create any loophole which would threaten facilities-based competition. Rather, D.98-10-058

was intended to encourage facilities-based competition. The Commission in D.98-10-058 did not "carve out" transmission poles from regulation. The rules we adopted were derived from and clarified "previously existing access rights and obligations" (D.98-10-058, p. 5.)

That we declined to adopt rules does not remove transmission poles from the requirements of Pub. Util. Code § 767.5. Although Pub. Util. Code § 767.7(b) states that utilities should be compensated for use of their rights-of-way, Pub. Util. Code § 767.7(c) clarifies that Section 767.7(b) does not change the existing law regarding pole attachment rates, terms and conditions under Section 767.5. Section 767.7(c) states in part: "Nothing in this section shall be deemed to change existing law with respect to Section 767.5."

To the extent petitioners request modification to resolve potential reliability and operational issues associated with transmission poles, we decline to do so here. We continue to work in cooperation with the Independent System Operator (ISO) and Federal Energy Regulatory Commission (FERC) with respect to transmission facilities.

We also agree with ORA that G.O. 95 should not be altered or changed without affording all parties the opportunity to be heard and to develop a complete record. G.O. 95 currently governs the construction, maintenance and safety requirements of transmission facilities. Any safety or reliability concerns associated with attachments to transmission poles are therefore governed by G.O. 95.

As to any particular factual disputes existing between SDG&E and Daniels, this rulemaking is not the proper forum. Such contractual disputes are better addressed through an arbitration or the complaint proceeding contemplated under Pub. Util. Code § 767. A complaint or arbitration would allow the facts of

a particular contract dispute to be adjudicated based on a full record. Section 767 provides that:

"Whenever the commission, after a hearing upon its own motion or upon complaint of a public utility affected that public convenience and necessity require the use by one public utility of all or any part of the conduits, subways, tracks, wires, poles pipes other equipment . . . belonging to another public utility, and that such use will not result in irreparable injury to the owner or other users of such property or equipment or in any substantial determinant to service, and that such public utilities have failed to agree upon such use or the terms and conditions of compensation therefor, the commission may by order direct that such use be permitted, and prescribe a reasonable compensation and reasonable terms and conditions for the joint use." (Pub. Util. Code § 767.)

By contrast, D.98-10-058 involves a generic rulemaking, and any modifications thereto could only address generic rulemaking issues. The rules adopted in D.98-10-058 were to be applied as "preferred outcomes." Accordingly, any modification of D.98-10-058 would merely constitute a revision in our "preferred outcomes" applicable generically in parties' negotiations. The "preferred outcomes" do not preclude parties from negotiating different terms and conditions based on the particular conditions at hand. It is also clear that the exemption of transmission poles from the statutory protections is not a preferred outcome.

In summary, we find a sufficient basis to adopt in part limited modifications of D.98-10-058 as set forth in the order below. The record, however, does not support a finding of whether the rules concerning compensation for attachments to transmission poles would provide adequate compensation for the costs of transmission easements. Daniels may file a complaint against SDG&E to resolve its specific factual disputes. We recognize

that further deliberations, as outlined above, may be needed before any new generic rulemaking could be considered for adoption in the Local Competition Docket concerning transmission easements and related compensation. We reserve the option to consider in a subsequent phase of this proceeding a generic rulemaking, but the lack of rules does not negate the applicability of the above-referenced statutes.

Comments

This alternate draft decision of Commissioner Duque in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g) and Rule 77.1 of the Rule of Practice and Procedure. Comments were jointly filed by CCTA, Daniels and AT&T on March 30, 2000.

In general, the Comments characterize the Alternate as "fundamentally sound." (Comments, p. 1.) Yet the Comments request clarifying revisions to dispel any notion that the utilities might be able to obtain additional compensation for fiber optic cables or transmission easements. The Comments state that it would be legal error for the Alternate to construe Pub. Util. Code § 767.7 as mandating compensation beyond that provided for in Pub. Util. Code § 767.5.

Neither the Alternate nor the Proposed Decision reach this issue, however. The Comments note that the issue was not even raised in the underlying Rights of Way Decision. (Comments, p. 2.) Additionally, allegations of legal error are better addressed in an application for rehearing. (*Id.*)

Findings of Fact

1. D.98-10-058 adopted rules for nondiscriminatory access to utility poles, ducts, conduits, and ROW applicable to competitive local carriers and cable television corporations.

2. In D.98-10-058, the Commission declined to address transmission facilities in the rules due to potential unresolved concerns in terms of logistics, system reliability, and safety associated with mandatory access to transmission facilities.

3. After the issuance of D.98-10-058, at least one electric utility has attempted to charge rates for fiber optic attachment to transmission poles in reliance on the purported exemption of transmission poles from the rules.

Conclusions of Law

1. The petition satisfies the procedural and substantive requirements of Rule 47(b).

2. Safety and reliability issues concerning transmission poles are addressed by GO 95.

3. Although Pub. Util. Code § 767.7(b) states that utilities should be compensated for use of their rights-of-way, Pub. Util. Code § 767.7(c) clarifies that Section 767.7(b) does not change the existing law regarding pole attachment rates, terms and conditions under Section 767.5.

4. An ambiguity exists in the application of D.98-10-058 with respect to a purported exemption of transmission poles from our rules.

5. The parties' specific factual disputes, if any, are properly dealt with through an arbitration or complaint proceeding.

O R D E R

IT IS ORDERED that:

1. The Petition for Modification of Decision 98-10-058 filed by the California Television Association and Daniels Cablevision Inc. is granted in part.

2. The language at page 18 of D.98-10-058 is modified as follows: "In view of the potential problems with the record in terms of logistics, system reliability and

safety associated with mandatory access to electric transmission facilities, we decline to adopt rules for transmission facilities. This is not to be construed as an express exemption from our rules or statutory requirements, however. At this time, we shall include only electric utilities' distribution and transmission poles, support structure, and rights of way within the scope of these rules."

3. In all other respects, the Petition for modification is denied.

This order is effective today.

Dated April 20, 2000, at San Francisco, California.

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