

Decision 00-04-062 April 20, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Bayside Village, The Fillmore Center and North
Point Apartments,

Complainants,

vs.

Pacific Bell,

Defendant.

Case 95-08-039
(Filed August 8, 1995)

O P I N I O N

Summary

This decision concludes that the implementation issues to be addressed on rehearing should be resolved in the Local Competition Rulemaking (R.) 95-04-043/Investigation (I.) 95-04-044.

Background

On June 17, 1998, the Commission issued Decision (D.) 98-06-029 in which it held that:

Limited rehearing of D.97-11-029 is granted on the specific issues raised in Pacific's application regarding: (a) the implementation of the ordered changes to Pacific's practices; (b) the propriety of refunds to the general body of Pacific customers who Pacific charged for work on the cross-connects at issue; and (c) implementation issues relating to those refunds. These issues include the necessity of rate

adjustments and any difficulties involved in Pacific regaining control of the cross-connects. Pacific may raise other implementation issues in this rehearing, but may not raise issues concerning the interpretation of the cross-connect provisions in the Settlement adopted in D.92-01-023 and D.93-05-014.

On October 13, 1998, the assigned Administrative Law Judge (ALJ) convened a prehearing conference (PHC). Representatives from Pacific Bell (Pacific), the Commission's Telecommunications Division, and certain complainants attended. The ALJ set a schedule that required Pacific to file a comprehensive implementation proposal no later than March 31, 1999. The ALJ also directed that such a proposal include Pacific's plan to reassert control over cross-connects¹ that may be under the control of building owners and/or other carriers.

On January 8, 1999, Cox California Telcom, L.L.C., dba Cox Communications (Cox), filed its "Petition to Intervene or, in the alternative, Application for Rulemaking Regarding Access to Cross-connects at Multiple Dwelling Unit Properties" (Petition). In its Petition, Cox stated that the issues to be resolved in Pacific's implementation proposal regarding control of the cross-connects would directly affect its and other facilities-based Competitive Local Carriers' (CLCs) ability to provide facilities-based competitive telephone service at multiple dwelling unit properties. Should the Commission deny its request to intervene, Cox requested that the Commission institute a rulemaking to establish industry-wide rules regarding access to and control and maintenance of cross-connects at multiple dwelling units. Cox suggested that the Local

¹ "Cross-connects" are the wires that connect the utility-owned building entrance terminal to the utility-placed network access termination.

Competition docket, R.95-04-043/I.95-04-044, would be an appropriate docket to resolve the industry-wide issues.²

On January 25, 1999, Pacific filed its response to Cox's Petition. Pacific stated that while it had no objection to initiating a rulemaking, the decisions in this docket clearly ordered Pacific to regain exclusive control over the cross-connects. As a result, Pacific asserts, Cox's requested relief is barred by these previous decisions and Cox's petition to intervene should, therefore, be denied.

On February 1, 1999, the assigned ALJ in this proceeding as well as the ALJ assigned to the Local Competition docket issued a joint ruling. The ruling solicited comments from parties to both dockets on the most efficient procedural means to resolve the issues regarding the cross-connects in the complainants' buildings, and issues about industry-wide access to cross-connects.

On February 16, 1999, Pacific filed its comments in response to the joint ruling. Pacific stated that the Commission should stay all action in the complaint cases pending resolution of the broader issues in the Local Competition docket. Cox, along with Time-Warner Telecom of California, also filed comments that advocated limiting the complaint case to the complainants and using rulemaking to resolve broader issues. The Commission's Office of Ratepayer Advocates (ORA) filed comments that advocated limiting the scope of the complaint case to implementation and refund issues specific to complainants' properties only. Any generic issues regarding the configuration, ownership, and control of

² On January 5, 1999, Cox also filed an application in the Local Competition dockets seeking Commission resolution of these issues.

telecommunications facilities on multiple dwelling unit properties, ORA contended, should be resolved in the Local Competition docket. GTE California Incorporated's comments echoed ORA's.

On February 23, 1999, Optel (California) Telecom, Inc. (Optel), filed a motion to intervene.

On March 31, 1999, Pacific filed its Implementation Proposal. The Proposal stated that vendors, building owners, CLCs, and customers routinely access and use cross-connects. To regain control, Pacific recommended that the Commission issue orders condemning the non-Pacific property, nullifying contracts between vendors/CLCs/building owners regarding the cross-connects, and ordering CLCs to cease using the cross-connects as a means to provide facilities-based local exchange service. Pacific also stated that it would need to conduct an on-site inspection of every one of its 412,283 building terminal locations in its service areas. The purpose of such inspection would be to determine the work necessary to lock up every building entrance terminal location. Pacific also determined that it would need to undertake an extensive notification plan to reach customers, building owners, vendors, and CLCs to inform them of Pacific's need for control over the cross-connects, and the need to make appointments with Pacific for any access to the cross-connects. Pacific concluded its proposal with tariff and ratemaking modifications.

On April 16, 1999, the assigned ALJ and Commissioner held a second PHC. Nine new parties appeared at the PHC essentially to protest Pacific's proposal to take control of the cross-connects. As an example, Optel explained that in order to serve multiple dwelling unit properties, it needs to be able to rearrange cross-connects, to install its own cross-

connects, and to disconnect cross-connects. Optel emphatically stated that it could not go forward with its business under the terms for Pacific's proposal.

Also at the second PHC, Pacific stated that it had regained control over the cross-connects in the complainants' buildings and had made all needed refunds to tenants and former tenants.

At the conclusion of the second PHC, the assigned ALJ and Commissioner invited parties to submit petitions to modify the D.98-06-029. The ALJ and Commissioner requested that any such petitions contain (1) a specific plan for complainants' apartment buildings, (2) a procedural plan for addressing broader statewide issues including identification of the appropriate docket in which these issues may be addressed, and (3) a proposal for Pacific's ongoing operations under the 1997 decision.

On May 17, 1999, the Facilities-Based Competitors³ filed their "Petition to Modify Decisions 97-11-029 and 98-06-029." The Petition requested that the Commission modify the two decisions to limit their effects to the complainants' properties, and to transfer issues regarding statewide implementation of Pacific's plan to regain control over cross-connects to the Local Competition dockets. The Facilities-Based Competitors also stated that the Commission should recognize that Pacific has established a memorandum account to track costs associated with cross-connects. They urge that all other operational issues should be deferred pending resolution of the entire statewide implementation issues

³ Cox, MCI Worldcom, California Cable Television Association, AT&T Communications of California, Electric Lightwave, Inc., ICG Telecom Group, Inc., Nextlink California, and MediaOne Telecommunications of California.

in the Local Competition dockets. The Petition contained specific recommended changes to D.97-11-029 and D.98-06-029.

Pacific filed its "Petition to Modify Decisions 97-11-029 and D.98-06-029" on May 17, 1999. In the Petition, Pacific stated that D.97-11-29 should be suspended, Pacific should resume charging for work on cross connects, and it should also be reimbursed for all charges it did not impose while the decision was in effect. Pacific did not include any proposed changes to the text of either decision.

On June 16, 1999, the Facilities-Based Competitors submitted their opposition to Pacific's Petition. The Facilities-Based Competitors contended that Pacific's Petition merely sought to revisit issues previously raised in Pacific's application for rehearing of D.97-11-029. The Facilities-Based Competitors opposed Pacific's request to suspend D.97-11-029 and, instead, advocated maintaining the status quo pending the outcome of the upcoming investigation or rulemaking.

Pacific filed its response to the Facilities-Based Competitors' Petition on June 1, 1999. Pacific argued that unless the Commission suspends D.97-11-029 and revisits the determination that cross-connects are inside wire, any rulemaking is pointless and the Commission should simply order Pacific to enact its implementation proposal. Pacific also stated that it needed authorization to establish a memorandum account to preserve ratemaking issues regarding its costs to service cross-connects.

ORA filed a response to both petitions to modify. ORA supported modifying D.97-11-029 and D.98-06-029 to apply the holdings only to the specific complainants. ORA also supported transferring the broader issue of cross-connects in multiple dwelling unit buildings to a rulemaking or investigation. ORA did not oppose Pacific's request for a memorandum

account, but only effective on the date the rulemaking or investigation is established.

Discussion

This proceeding is currently on rehearing to consider implementation issues. Pacific provided an implementation proposal that appears consistent with the underlying decisions. Pacific's proposal, however, has significant implications for competitive local carriers and other users of cross connects. These users should have an opportunity to participate in the Commission's consideration of Pacific's implementation proposal.

The Commission established R.95-04-043/I.95-04-044 to comprehensively consider issues relating to competition for local exchange service. Pacific's implementation proposal clearly raises such issues, and these issues should be considered in the existing docket to maintain consistency with other rules and policies. Relying on the existing docket rather than starting anew will also enhance administrative efficiency.

Therefore, we will direct Pacific to file and serve its implementation proposal on the service list from R.95-04-043/I.95-04-044. The assigned ALJ and Commissioner are directed to address all issues arising from the proposal.

This procedural change will allow the implementation issues to be addressed in an industry-wide forum, as requested in the Facilities-Based Competitors' Petition. Accordingly, there is no reason to engage in the exercise of modifying the text of D.98-06-029. This decision is simply a further procedural order. Having otherwise granted the requested relief, we will therefore deny the Facilities-Based Competitors' Petition.

Pacific's Petition seeks substantive revision of the outcome of the underlying decision on the merits, D.97-11-029, in addition to the decision granting rehearing, D.98-06-029. Both requests are denied.

Pacific's Request for a Memorandum Account

Pacific has been tracking the costs of its compliance with D.97-11-029 in a specific account. Pacific states that it is performing work on the cross-connects without charge to the tenants, and without inclusion of those costs in revenue requirement. Pacific seeks memorandum account treatment of these costs to allow Pacific the potential to recoup these costs, if later authorized by the Commission.

A memorandum account will allow Pacific to seek (but not guarantee) recovery of the uncompensated costs it alleges it is incurring. We will grant Pacific's request for a memorandum account for the costs it incurred to provide such service but did not recover. Any ratemaking treatment of amounts so recorded will be by further order of the Commission.

Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties to this proceeding as well as parties to R.95-04-043/I.95-04-044, in accordance with Section 311(g) of the Public Utilities Code and Rule 77.1 of the Rules of Practice and Procedure.

Cox California Telecom, L.L.C., dba Cox Communications, California Cable Television Association, and Electric Lightware, Inc. submitted joint comments on the draft decision. The joint comments contended that the issue of refunds of Pacific charges for work on the

cross-connects should not be referred to the Local Competition Dockets, but should be resolved in this docket.

On March 27, 2000, Pacific submitted its reply comments. Pacific stated that ordering refunds on a statewide basis is inconsistent with the Facilities-Based Competitors' Petition for Modification, which sought to limit this proceeding to complainants only. Pacific also stated that making refunds is premature given its memorandum account treatment of associated costs. Finally, Pacific noted that its costs exceed the funds it collected such that refunds are unwarranted.

The issue of statewide refunds is a general issue with broad effects. The joint comments stated no compelling rationale for treating this issue apart from the other statewide issues. Accordingly, no changes were made to the draft decision.

Findings of Fact

1. Pacific filed an implementation proposal which set out its plans for regaining control of the cross-connects located in all multiple dwelling unit properties in its service territory.
2. Several parties intervened to protest Pacific's plan stating that the implementation plan would severely and negatively impact competition in the local exchange service market.
3. General issues that have broad industry-wide effects are best addressed in a rulemaking or investigation.
4. The Facilities-Based Competitors filed a petition for modification requesting changes to D.97-11-029 and D.98-06-029 that would allow the general implementation issues to be addressed in a rulemaking or investigation proceeding.

5. Pacific reports that it is in full compliance with D. 97-11-029 regarding the specific buildings owned by complainants.

6. Pacific states that it is incurring uncompensated costs by complying with D. 97-11-029, and requests memorandum account treatment for such recorded costs.

Conclusions of Law

1. Pacific's implementation proposal should be addressed in R.95-04-043/I.95-04-044.

2. Due to the relief otherwise ordered herein, the Facilities-Based Competitors' Petition should be denied.

3. Pacific's Petition should be denied.

4. Pacific should be granted memorandum account treatment for the costs Pacific incurred to provide such service but did not recover.

O R D E R

Therefore, **IT IS ORDERED** that:

1. Pacific Bell (Pacific) shall comply fully with Decision (D.) 97-11-029, as modified by D.98-06-029 and this decision.

2. No later than 20 days after the effective date of this order, Pacific shall file with the docket office and serve on all parties to Rulemaking (R.) 95-04-043/Investigation (I.) 95-04-044 its proposal for implementing D.97-11-029 and D.98-06-029.

3. The Administrative Law Judge and Commissioner assigned to R.95-04-043/I.95-04-044 shall establish a procedural schedule to address all issues arising from the implementation proposal.

4. Beginning with the effective date of this order, Pacific may establish a memorandum account for the costs Pacific incurred to provide such service but did not recover.

5. Pacific is prohibited from including, directly or indirectly, any costs recorded in the memorandum account in its tariffed rates, absent further explicit order of this Commission.

6. The Executive Director shall serve a copy of this order on all parties to R.95-04-043/I.95-04-044.

7. This proceeding is closed.

This order is effective today.

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

LORETTA M. LYNCH
President

HENRY M. DUQUE

JOSIAH L. NEEPER

RICHARD A. BILAS

CARL W. WOOD

Commissioners