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MAIL DATE
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Decision 99-08-025 August 5, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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

ORDER GRANTING LIMITED REHEARING, MODIFYING DECISION, DENYING REHEARING OF D.98-12-023 AS MODIFIED, AND RESOLVING RELATED MOTIONS

On January 8, 1999, Pacific Bell filed an application for rehearing of Decision (D.) 98-12-023. D.98-12-023 ("Decision") resolves the complaint of Irvine Apartment Communities ("IAC"), CoxCom, Inc, and Cox California Telcom, Inc. ("Complainants"), and concludes that Pacific is obligated to reconfigure its wiring at IAC's expense to allow IAC to have a single Minimum Point of Entry ("MPOE") at each of its properties.

We have carefully considered all the arguments presented by Pacific, and are of the opinion that good cause exists for modifying certain of the Decision's holdings. We are therefore granting limited rehearing for the purpose of modifying these holdings. As modified, Pacific's application for rehearing of

D.98-12-023 is otherwise denied. We further deny Pacific's request for oral argument.

As an initial matter, we note that many of Pacific's arguments allege that the record fails to demonstrate that Pacific violated the law, or was specifically required to perform the rearrangement Complainants requested. Although we believe that the conclusions in the Decision are adequately supported, we are taking this opportunity to emphasize that the Commission has the jurisdiction to grant the relief requested by Complainants whether or not Pacific has violated the law.

The Commission has authority to affirmatively order changes to utility practices and facilities under Public Utilities Code sections 701, 761 and 762. We will modify the discussion in the Decision which declines to exercise authority under these Code sections, and instead emphasize that sections 701, 761 and 762 provide an independent basis supporting our decision ordering Pacific to perform the requested rearrangement.

I. SECTION 1702.1

Pacific argues that the Decision violates recently enacted Public Utilities Code section 1701.2, which provides:

> A decision different from that of the assigned commissioner or administrative law judge [ALJ] shall be accompanied by a written explanation of each of the changes made to the decision.

As Pacific points out, D.98-12-023 does not contain a separate statement explaining the changes to the ALJ proposed decision (POD).

We conclude that section 1702.1 contemplates a more explicit acknowledgement of changes to a POD than we provided. At the same time we agree with Complainants' response that the Decision itself essentially explains its reasoning, and we do not believe that section 1701.2 requires a restatement of the

entire Decision. Today's decision modifies D.98-12-023 to add a discussion which fulfills the section 1701.2 requirements.

II. SECTION 453

Pacific argues that the Decision errs in concluding that Pacific's conduct toward Complainants was discriminatory in violation of section 453. According to Pacific, "there is no evidence that Pacific has relocated an MPOE in similar situations or that Pacific has reconfigured network cable." (Pacific App., at p. 10.) Upon review we find that the record adequately supports the Decision's discrimination conclusions.

The Decision cites evidence that Pacific has performed rearrangements in response to customers' remodeling requests. (D.98-12-023, at p. 8.) Although Pacific argues that the other remodeling jobs were smaller and did not necessarily involve the transfer of cable, Pacific has failed to show that these remodeling jobs differed significantly from Complainants' request. There is no indication that whether cable transfer involved is significant. In fact, Pacific's witness testified that he did not know whether cable transfer was involved in the other reconfigurations, which casts doubt upon Pacific's assertion that the cable transfer is of great importance.

Furthermore, the evidence of the other remodeling rearrangements needs to be viewed in combination with: (1) evidence and arguments that Pacific's actions were motivated by competitive concerns; and (2) Pacific's failure to provide any other adequate rationale for denying Complainants' request. Taken as a whole, the record in this proceeding adequately supports the claim that Pacific's actions were discriminatory.

III. VIOLATION OF THE SETTLEMENT AND TARIFF INTERPRETATION

Pacific alleges that the Decision errs in concluding that Pacific violated the Demarcation Settlement Agreement ("Settlement") adopted in D.92-01-023. According to Pacific, the Decision mistakenly concludes that the Settlement requires it to honor all requests from property owners seeking to reconfigure MPOEs. In addition, Pacific maintains that its tariffs comply with the Settlement, and that these tariffs allow Pacific discretion to determine when it will perform "special construction" and when it will retain existing cable. We reaffirm that our conclusions that Pacific violated the Settlement are justified. However, we acknowledge that certain holdings regarding the requirements contained in the Settlement are overbroad. We will modify these holdings.

The Decision adequately explains our holdings that Pacific violated the Settlement by failing to "specify under what conditions additional Local Loop Demarcation Points [LLDPs] will be allowed," as the Settlement requires. (D.92-01-023, App. A, § IV. D (3).) We reiterate that Pacific's responsive tariff does not adequately specify these conditions. Although the tariff lists certain situations (the purposes of "service assurance, safety, security, and privacy") when the owner will be required to finance special construction, it does not state that these are the only allowable types of relocations. (Pacific Tariff A2, 2.1.20(B)(4)(d).) The Decision is justified in concluding that Pacific violated the Settlement in this respect.

Pacific also relies on certain of its tariffs which specify that "special construction shall be entirely at the option of the Utility, " (Tariff A2, 2.1.36 (B)(1)(e)), and that "The utility reserves the right to: Retain ownership of existing distribution cable facilities through continuous property as a network or loop

distribution facility that may be required for current or future use." (Tariff A2, D, 6 (b).) These Pacific tariffs also fail to specify the conditions for LLDP relocation.

Moreover, Pacific cannot rely on these tariff provisions to support its refusal of Complainants' request. Tariffs must be construed against the utility (D.92-08-028, 45 Cal.P.U.C.2d 263, 269) and, as with all laws, interpreted in such a manner to be legally valid. Therefore, Pacific's tariffs cannot be interpreted to allow Pacific to unreasonably discriminate against customers. In addition, since the tariffs fail to comply with the Settlement, they are therefore not valid as they pertain to MPOE relocation requests. Finally, even if Pacific's tariffs allowed it the right to discriminate against potential competitors, the Commission is well within its jurisdiction in requiring Pacific not to do so. (Pub.Util.Code § 532; D.97-02-027, at p. 36.)

Pacific specifically takes issue with the Decision's conclusion that we interpret "the 1992 Settlement to confer on the utility an obligation to effect changes to LLDPs or MPOEs if the customer requests a change, and so long as the customer pays for cable and facilities required to effect the change." (D.98-12-023, at p. 15.) Upon reconsideration, we acknowledge that this interpretation is unjustified. Although the Settlement requires that standards for MPOE/LLDP relocation be in place, we concede that the Settlement does not specify what these standards should be.

In light of our reconsideration we will delete the holdings stating that the Settlement requires the utility to honor all rearrangement requests. We emphasize that this does not alter our conclusions that the Settlement was violated by Pacific's failure to file the required tariffs, or that in the absence of having filed the required tariffs Pacific was required to honor all feasible requests.

We recognize that this leaves Pacific with no clear standards regarding the acceptable conditions for MPOE/LLDP relocation at the customer's

expense. We note that this generic issue, which was not resolved by the Settlement, affects parties outside of the Complainants and Pacific, and is therefore outside the scope of the instant complaint proceeding. Because the MPOE relocation issue is in need of definitive resolution we will open the issue for consideration in our Local Competition proceeding. (R.95-04-043; I.95-04-044.) We will direct the ALJ to issue a ruling detailing the manner in which parties can participate in consideration of the issue. In addition, we will delete the requirement that Pacific file tariffs in order to comply with our Settlement interpretation.

IV. SECTION 851

Pacific maintains that the Decision errs in its conclusions concerning Public Utilities Code section 851. According to Pacific, the Decision mistakenly concludes that section 851 does not apply to the cable transfer which would result when the Complainants' MPOEs are relocated. Pacific's arguments are unconvincing.

Section 851 requires utilities to obtain Commission authorization before disposing of utility property "necessary or useful" to its utility functions. Pacific argues that because the change in MPOE would result in a transfer of cable from Pacific to Complainant Pacific would have needed a Commission order prior to relocating the MPOE.

Pacific's arguments are misplaced for two reasons. First, Pacific's section 851 argument is essentially moot since D.98-12-023 is a Commission order authorizing the MPOE relocation and associated cable transfer. Therefore, section 851 does not create an obstacle to the relief we granted Complainants in the Decision.

Moreover, as we stated in the Decision, the Commission already authorized this type of cable transfer. "In D.92-01-023, by approving the 1992

Settlement, we authorized this very type of network reconfiguration at a customer's request." (D.98-12-023, at p. 20.) In authorizing LLDP changes, the Settlement is also authorizing network cable transfers, since, as the Settlement provides, the cable transfers may automatically result from the movement of the LLDP.

We note that the Settlement provision that "The utilities' tariffs will specify under what conditions additional Local Loop Demarcation Points will be allowed" does not undercut the Commission's authorization. The Settlement authorized almost unlimited LLDP relocations. It was Pacific that chose to narrow the scope of the LLDP relocations it would perform.

Although the Decision correctly concludes that section 851 does not require that Pacific obtain authorization prior performing the reconfiguration, we concede that some of our rationale concerning the application of section 851 is circular, as Pacific suggests. We will therefore delete the portion of our discussion which holds that section 851 does not apply to the MPOE reconfiguration because the transferred cable will no longer be used and useful.

V. TAKING

Pacific contends that the Decision's requirement that Pacific honor Complainants' reconfiguration request violates the Takings Clause of the U.S. Constitution. According to Pacific, the resulting transfer of network cable constitutes a taking of Pacific's property without adequate compensation. We disagree.

The Fifth Amendment of the U.S. Constitution provides that private property shall not be taken for public use without just compensation. Court cases have recognized two types of government takings. One involves a physical invasion or actual taking of property. (See Loretto v. Teleprompter Manhattan CATV Corp. (1982) 458 U.S. 419, 427.) The other type is government regulation

which "goes too far" and substantially impairs property value. (Pennsylvania Coal Co. v. Mahon (1922) 260 U.S. 393, 415.)

We agree with Pacific that the instant cable transfer involves a physical type of property interference. However, we need not resolve at this time whether a "taking" event occurred, and whether that event occurred at the time of the Federal Communication Commission Orders, the Settlement, or the instant Decision. We hold that regardless of whether a "taking" is involved in the cable transfer, it is not an impermissible taking since Pacific is receiving just compensation.

Pacific argues that the compensation provided is inadequate since Pacific is only receiving compensation regarding rates, but is not being compensated for the loss of the actual cable. In discussing Pacific's compensation for the transfer of network cable, the Decision cites the Settlement's provisions on cost recovery. (D.98-12-023, at p. 22.) Pacific is foreclosed from claiming that this is inadequate compensation, because the form of compensation for INC transferred to building owners is controlled by the Settlement, to which Pacific was a party. The INC transfer at issue in this case is a subset of the INC transfers the Settlement contemplated. In addition to the fact that Pacific agreed to these provisions, the time for challenging the holdings in D.92-01-023 has long past. Moreover, from a common sense point of view, there is no reason why compensation which was adequate at the time of the Settlement for the extensive transfers which occurred then, would be insufficient for the limited transfers of cable involved in the current complaint.

For these reasons, even if the Decision constituted a current taking of Pacific's cable, there is no Fifth Amendment violation because just compensation is being provided. Because changes in economic circumstance may affect this conclusion, we will allow parties to revive the issue of appropriate compensation

for transferred INC on a prospective basis when the MPOE relocation issue is examined in the Local Competition proceeding.

VI. MOTION FOR STAY AND MOTION FOR SANCTIONS

On July 1, 1999 Pacific filed a motion for stay of D.98-12-023. In its motion Pacific did not provide any adequate explanation for the seven-month delay in its claim that an immediate stay is necessary. Moreover, Pacific has failed to demonstrate irreparable harm, and, as discussed in this decision, Pacific did not succeed on the merits in most respects. In any event, Pacific's motion is made moot by our resolution of Pacific's application for rehearing. Therefore, we are denying Pacific's motion for stay.

Complainants filed a related motion for sanctions against Pacific for alleged rule 1 violations of July 16, 1999. According to complainants, Pacific made a number of false and misleading statements in its motion for stay. We have considered complainants' arguments. We conclude that some statements in Pacific's motion constitute a type of advocacy that is neither helpful nor desirable in practice before the Commission. But the statements in question do not clearly rise to the level of a Rule 1 violation. We will, therefore, deny complainants motion for sanctions.

VII. CONCLUSION

For the foregoing reasons we are granting limited rehearing of D.98-12-023 in order to modify certain holdings consistent with the discussion in this decision, and to correct certain additional minor errors. Aside from the specific modifications, any provisions in D.98-12-023 which are inconsistent with today's decision are overruled. No further discussion of Pacific's arguments is required. We find that no good cause exists to grant rehearing of D.98-12-023 as modified herein.

THEREFORE IT IS ORDERED that:

1. Limited rehearing of D.98-12-023 is granted in order to make certain modifications to the decision.

2. The paragraph beginning with "As discussed..." on page 5 of D.98-12-023 is deleted.

3. Question 2 on page 5 of D.98-12-023 is modified to read:

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

4. The discussion on pages 11-12 of D.98-12-023 beginning with "Further," and ending with "...before us." is deleted.

5. The discussion on page 15 of D.98-12-023 beginning on the third line with "In light of..." and ending with the second to last sentence of that paragraph which ends in "technically feasible." is deleted.

6. The last paragraph on page 18 of D.98-12-023 which continues onto page 19 is deleted.

7. The second and third sentences of the second full paragraph on page 19 of D.98-12-023 are deleted and replaced with the following:

> Pacific cannot rely on these tariff provisions to refuse IAC's request since Pacific's tariffs fail to comply with the Settlement and are therefore not valid as they pertain to MPOE relocation requests. Moreover, tariffs must by construed against the utility, and, as with all laws, construed in a manner to be legally valid. Therefore, Pacific's tariffs cannot be interpreted to allow Pacific to unreasonably discriminate against customers.

8. The last paragraph of the discussion in section 9 on page 21 of D.98-12-023 is deleted and replaced with the following:

These sections frequently have been applied in complaint cases. The Commission has held that section 762 "allows aggrieved parties to complain about utility conduct which may comply with all existing laws and regulations but nonetheless may be unreasonable." (H.B. Ranches, Inc. v. Southern California Edison Co. (1983) 11 Cal.P.U.C.2d 400, 406.) Although this procedure is often used for environmental complaints these sections are by no means limited to environmental issues. For instance, in Evans v. Cal-Am Water Co. (1979) 1 Cal.P.U.C.2d 587, the Commission relied on section 761 to require Cal-Am to include a certain area within its service territory.

Pacific's behavior at issue here clearly falls within the scope of our section 761 and section 762 authority. Based on the record in this proceeding we conclude that Pacific's "service", refusing IAC's request which would benefit a competitor, is "unjust" and "unreasonable." Our view is supported by California Supreme Court holdings that competitive considerations are an important element of the public interest. (See Northern California Power Agency v. Public Utilities Com. (1971) 5 Cal.3d 370, 377.) We may therefore "by order" require that the reconfiguration service be performed pursuant to sections 761 and 762.

In light of the foregoing discussion, we emphasize that our order requiring Pacific to perform the requested rearrangement is independently based on our affirmative authority under these Code sections.

9. The following section 12 A is inserted on page 23 of D.98-12-023 before section 13:

12 A. Changes from the Proposed Decision

Pursuant to Public Utilities Code section 1701.2 the Commission must provide a statement explaining changes from a proposed decision. In this case our Decision substantially revises the Proposed Decision

and reverses its conclusions. After review of the record and Complainants' appeal, we have a fundamentally different view of the Complainants' allegations and the relevant law from that of the Administrative Law Judge. We note that our reasoning is explained in the body of this decision.

We have made the following changes to the Proposed Decision (POD) (all references are to the Commission Decision):

- The conclusion that a violation of law must be demonstrated for Complainants to prevail has been deleted. (See section 9.)
- The conclusion that section 761 and 762 should not apply has been changed. (See section 9.)
- We are not ordering a separate proceeding regarding Demarcation Points be opened, but rather we are ordering that a ruling be issued in the Local Competition proceeding.
- The characterization of the discrimination claim and the issues before the Commission has been changed. (See sections 4 and 6.)
- While our decision agrees with the POD that the Settlement itself did not require MPOE relocations at pre-1993 facilities, the discussions resolving Complainants' claims on this basis have been deleted. (See section 7.)
- The discussion holding that Pacific has satisfied the Settlement Agreement has been deleted. (See section 6.)
- The discussion implying that section 851 approval would be required for the transfer have been deleted. (See section 8.)
- The discussion relying on Pacific's tariffs to support Pacific's failure to honor IAC's request has been deleted. (See section 8.)

- POD sections 10, "Tariff Requirements", and 11, "Access Agreement, Duty to Bargain" have been deleted as no longer germane to the analysis of the Complaint. (See also section 12.)
- The Findings of Fact, Conclusions of Law and Ordering Paragraphs have been modified consistent with the changes to the POD.

10. The second full sentence on page 24 of D.98-12-023 beginning with "We also direct..." is deleted and replaced with "We will hold workshops to determine the value of post-NRF facilities that will convert to INC upon reconfiguration of the MPOEs on IAC's affected properties."

11. Finding of Fact 12 in D.98-12-023 is deleted.

12. Finding of Fact 14 is added to D.98-12-023 which reads as follows:

> Pacific has not offered any reasonable or non-discriminatory explanation for its refusal to honor IAC's reconfiguration request.

13. Conclusion of Law 1 in D.98-12-023 is deleted.

14. Conclusion of Law 16 in D.98-12-023 is deleted and replaced with:

> Because D.92-01-023 authorized transfer of network cable of the sort involved in the IAC reconfigurations, no additional § 851 authorization is required for the transfer of cable at issue in this complaint.

15. Conclusion of Law 22 is added to D.98-12-023 which reads as follows:

> In refusing the request of a customer to reconfigure its MPOE, which would benefit a competitor, without a reasonable explanation for the refusal, Pacific has acted unjustly and unreasonably.

16. Conclusion of Law 23 is added to D.98-12-023, which reads as follows:

Pursuant to Public Utilities Codes sections 761 and 762 the Commission is justified in ordering Pacific to perform the reconfigurations IAC requests.

17. Ordering Paragraph 3 of D.98-12-023 is deleted.

18. Rehearing of D.98-12-023, as modified herein, is denied.

19. The ALJ in the Local Competition docket (R.95-04-043; I.95-04-044) shall issue a ruling opening the issues of the standards for MPOE relocation, and appropriate compensation for transferred cable, for consideration in that docket. (See D.92-01-023, App. A, § IV. D(3).) All interested parties will have an opportunity to participate in that consideration.

20. Pacific's request for oral argument is denied.

21. OpTel (California) Telecom, Inc.'s Petition to Intervene in C.98-02-020 is denied.

22. Pacific Bell's July 1, 1999 Motion for Stay is denied.

23. Complainants' July 16, 1999 Motion for Sanctions is denied.

24. This proceeding is closed.

This order is effective today.

Dated August 5, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
JOEL Z. HYATT
CARL W. WOOD
Commissioners