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Decision 99-09-032 September 2, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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

ORDER DENYING REHEARING OF DECISION 99-05-013

I. SUMMARY

This decision denies the applications for rehearing of Decision (D.) 99-05-013 (Decision) filed by AT&T Communications of California (AT&T) and Cellular Carriers Association of California (CCAC). That Decision ordered telecommunications carriers to remit to the California High Cost Fund B (CHCF-B) and California Teleconnect Fund (CTF) interest earned on CHCF-B and CTF surcharge revenues collected prior to the issuance of D.98-01-023. The Decision also defined "earned interest" to include imputed interest on surcharge revenues used as working capital, where the carrier in effect made an interest-free loan to itself. Applicants challenged the definition of earned interest, as well as the Commission's authority to order the carriers to remit interest earned prior to the effective date of D.98-01-023. GTE California Incorporated (GTEC) filed comments supporting both applications. The Commission's Office of Ratepayer

Advocates (ORA) and The Utility Reform Network (TURN) both filed responses opposing the applications. We have reviewed the allegations of legal error in the applications for rehearing and conclude that rehearing is not warranted.

II. DISCUSSION

Most of the applicants' arguments stem from the Decision's definition of earned interest, which includes imputed interest on surcharge revenues used as working capital, where the carrier in effect made an interest-free loan to itself. AT&T argues that the Commission's clarification of the term "earned interest" violates Public Utilities Code[1] section 1708 by significantly changing the impact of the Decision after all opportunities for the parties to be heard on this issue have expired. According to AT&T, "it is not reasonable to assume that interested parties could have been put on notice...that this interpretation of imputed interest was under consideration in this proceeding." (AT&T's Application for Rehearing, p. 4.) As AT&T notes, that part of the definition of "earned interest" did not appear in the draft decision. CCAC similarly argues that adopting the expanded definition of "earned interest" in the Decision constitutes an abuse of discretion, as the Commission had received no written argument, conducted no hearing, and rendered no Findings of Fact of Conclusions of Law on the issue.

Applicants' arguments are without merit. We clearly stated in D.98-01-023 as well as D.98-04-068 that we never intended carriers to benefit in any significant fashion from surcharge revenues that accrued prior to D.98-01-023. Both D.96-10-066 and D.97-01-020 make clear that surcharge revenues are not to be used for any purpose other than simply returning them to the CHCF-B and CTF funds. The Commission never authorized carriers to use the surcharge revenues as working capital and carriers did not have a reasonable expectation that they would profit from the CHCF-B and CTF surcharge revenues they were ordered to collect. The purpose of requiring carriers to remit interest earned prior to D.98-01-023 is

[1] Unless otherwise stated, all statutory references are to the Public Utilities Code.

to prevent them from reaping a windfall at the ratepayers' expense due to the delay in implementing the CHCF-B and CTF trusts. Carriers had adequate notice that they would be required to return to the ratepayers any benefit gained from using surcharge revenues they had collected from customers, as expressed in D.98-01-023 and D.98-04-068. It does not matter whether a carrier benefitted by keeping interest payments that belong to ratepayers or by using surcharge revenues as working capital as a means of cutting its financing costs. The rationale for requiring remittance of earned interest, as reflected in the Decision's Findings of Fact and Conclusions of Law, applies equally to surcharge revenues used as working capital. It would be wasteful and against the interest of the ratepayers to have yet another round of comments and argument on this matter.

Moreover, the ALJ ruling of May 13, 1998 requested comments on various issues including whether telecommunications carriers should be allowed to use a "standard" interest rate to determine the amount of interest to be remitted by the carrier in lieu of the actual amount of interest earned by the carrier. Thus, carriers were aware that the Commission was considering the possibility of imputing interest on the surcharge revenues, whether interest was actually earned or not. A review of the record shows that most carriers chose not to comment on this option, instead focussing only on the situation where a carrier actually accrued interest on the surcharge revenues. However, some parties did address the issue of imputed interest in their comments. For example, Los Angeles Cellular Telephone Company supported the idea of imputing a standard interest rate, noting that many carriers co-mingled their collections, utilizing them to meet ongoing expenses, and/or depositing them into various accounts along with monies from other sources. (Los Angeles Cellular Telephone Company's Comments, filed 6/1/98, p. 9.) TURN also stated that the Commission should impute a "standard" interest rate if a carrier is unable to provide an accounting for the funds and state precisely how much interest it earned. (Reply Comments of TURN, filed June 16, 1998, p. 3.) As such, carriers had adequate notice that we would look into requiring

carriers to return to the ratepayers the time value of the money collected and held by the carriers prior to D.98-01-023, whether that interest was actually earned or imputed.

As the Commission did receive comments on the issue of imputed interest, the Decision is not arbitrary or capricious as CCAC claims. The Decision provides sufficient rationale for requiring the carriers to remit interest, whether imputed or actually earned. Moreover, the Decision's definition of "earned interest" should come as no surprise to CCAC, as the Commission clarified the definition of "earned interest" in response to a request by CALTEL/CCAC. Applicant's challenges to the definition of earned interest to include imputed interest on surcharge revenues used as working capital are without merit and do not warrant rehearing of this Decision.

AT&T and CCAC next argue that the Decision violates section 1705, as the Commission adopted its definition of "earned interest" without separately stating Findings of Fact. AT&T argues there are no findings which support the assumption that carriers would experience a windfall if they were not compelled to impute interest. AT&T claims the Decision contains no "authority or source" to support its definition of earned interest. According to AT&T, whether carriers have actually benefitted from using the surcharge revenues as working capital is a material issue and requires development in findings of fact. CCAC argues that the Decision provides no rational basis for judicial review.

Applicants' arguments are without merit. As TURN points out in its response, no further findings of fact are required because there is no material difference between placing the surcharge revenues in an interest-bearing account, on the one hand, and using the surcharge revenues as working capital, on the other hand. The findings and rationale of the Decision apply equally in both situations. Moreover, whether carriers *actually* benefitted from using surcharge revenues as working capital is immaterial to the policy question of whether carriers who did benefit from using surcharge revenues as working capital should be required to

remit that interest back to the ratepayers. Nor is it relevant to the legal question regarding the Commission's authority to issue such an order. We find no need for additional Findings of Fact on this matter. The Decision's findings provide adequate support for the definition of "earned interest".

AT&T's final argument is that the Decision constitutes an unconstitutional taking of property without due process of law. According to AT&T, the Commission is ordering AT&T to take several million dollars of shareholder monies and make a contribution to the CHCF-B. AT&T argues that since this is done without appropriate findings of fact or conclusions of law, the Decision is in violation of AT&T's constitutional right not to have property taken without due process of law. For the reasons explained above, the notion that parties were not afforded due process in this case is unfounded. As such, AT&T's taking argument necessarily fails. Moreover, AT&T's argument is based on the incorrect assumption that the money being returned to the CHCF-B and CTF funds belongs to its shareholders. As explained in the Decision, the surcharge revenues, along with the time value associated with holding those revenues, belong to the ratepayers, not the carriers. (See D.99-05-013, pp. 8-11.)

CCAC makes several additional arguments challenging the Commission's authority to require carriers to remit any interest earned to the funds. CCAC argues that the Decision is in violation of section 728. According to CCAC, section 728 requires that when the Commission acts in a legislative capacity to impose obligations on utilities subject to its jurisdiction, it must do so on a prospective basis only. As ORA points out in its response, this issue was fully briefed by the parties in the proceeding and is addressed in the Decision. As stated in the Decision, section 728 applies only to "rates or classifications," and 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 section 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 was never part

of any price that utilities charged for products or services. Therefore, the Commission may require carriers to remit this interest without triggering, let alone violating, section 728.

Moreover, as noted in the Decision, 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 effect if such actions do not constitute "general ratemaking." In Southern California Edison Co. v. Public Utilities Com., for example, 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.) CCAC's attempt to broaden the effect of section 728 as a prohibition against the retroactive effect of any legislative order is accordingly without merit.

CCAC also argues that the Commission may not require the payment of interest under the constructive trust theory. CCAC asserts in its application that the Decision erred in its use of a constructive trust since the Commission cannot exercise equitable powers in a quasi-legislative proceeding. CCAC made the same argument in its comments on the ALJ's draft decision, citing Consumer's Lobby Against Monopolies v. Public Utilities Commission (1979) 25 Cal.3d 891 (CLAM). The Commission rejected CCAC's argument, correctly noting that the CLAM decision does not stand for the proposition that the Commission lacks all equitable powers in quasi-legislative proceedings. CCAC has offered no new arguments in its application for rehearing which would demonstrate legal error in the Commission's use of a constructive trust in this case.

Finally, CCAC argues that while the Commission may modify prior orders pursuant to section 1708, the modification may only govern conduct occurring after its effective date. This argument was also considered and rejected in the Decision. As noted in the Decision, section 1708[2] provides the Commission

[2] 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

with broad authority to rescind, alter, or amend any prior order or decision after providing parties with notice and an opportunity to be heard. CCAC and the other parties in this proceeding have 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. Since the procedural requirements of section 1708 have been met, the Commission may use its authority under section 1708 to require carriers to remit any interest they earned on pre-D.98-01-023 surcharge revenues. The Commission also responded to CCAC's assertion that City of Los Angeles v. Public Utilities Commission (1975) 15 Cal.3d 680 prevents the Commission from retroactively modifying a prior Commission order. The Commission correctly noted that City of Los Angeles did not prohibit Commission decisions modified pursuant to section 1708 from having any retroactive effect. Nor did the Court state in City of Los Angeles that there are any additional prohibitions against retroactive ratemaking in proceedings under section 1708 than there are in Commission proceedings generally. Again, CCAC offers no new arguments in its application for rehearing which would warrant a grant of rehearing. CCAC's arguments fail to demonstrate that the Commission misapplied the law in the Decision.

III. CONCLUSION

Applicants have failed to offer any authority or compelling argument demonstrating the Commission committed legal error in requiring the carriers to remit any interest earned on the surcharge revenues. Nor have the applicants demonstrated legal error in the Commission's definition of "earned interest" to include interest imputed on surcharge revenues used as working capital. As such, rehearing should be denied.

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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."

IT IS ORDERED that:

1. AT&T Communications of California's Application for Rehearing of Decision 99-05-013 is denied.

2. Cellular Carriers Association of California's Application for Rehearing of Decision 99-05-013 is denied.

This order is effective today.

Dated September 2, 1999, at San Francisco, California.

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