

Decision 08-04-044

April 10, 2008

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Pac-West Telecomm, Inc. (U5266C),

Complainant,

vs.

Pacific Centrex Services, Inc.
(U5998C),

Defendant.

Case 07-08-026
(Filed August 24, 2007)

**ORDER GRANTING MOTION FOR STAY OF DECISION
(D.) 08-01-031, DENYING REHEARING, AND ORDERING
DEFENDANT TO ANSWER THE COMPLAINT**

I. INTRODUCTION

In this Order we hereby order a stay of Decision (D.) 08-01-031 and direct Pacific Centrex Services, Inc. (“PCS”) to file an answer to the complaint of Pac-West Telecomm, Inc. (“Pac-West”) within 30 days of the issuance (mailing) date of this Order. In exercise of our equitable discretion, we find that stay is warranted in this particular instance. In an abundance of caution and to ensure there is no question that PCS has been afforded adequate due process and opportunity to be heard on the merits, we issue the stay, pending our resolution of the complaint filed by Pac-West. In doing so we are not ruling on the merits of the application for rehearing of D.08-01-031 filed by PCS, nor are we ruling on the merits of PCS’s motion for stay of that Decision. Rather, we find that given the circumstances of this case and the procedural issue involved, we will stay the Decision at this time, as a matter of equity. Because the decision is stayed and PCS will have an opportunity to be heard on the complaint, we deem the instant application for rehearing as moot, and thus, deny it accordingly.

II. BACKGROUND

PCS is a competitive local exchange carrier (“CLEC”) which operates as a reseller of competitive local exchange services in the service territories of Pacific Bell and GTE California.¹

On August 24, 2007, Pac-West filed a complaint with the Commission alleging that PCS owed Pac-West charges for service Pac-West provides under its California intrastate tariffs.² The complaint requested an order directing PCS to pay \$133,730.06 for termination (completion) services provided up to June 27, 2007, plus any applicable late payment charges.

Pursuant to Rule 4.3 of the Commission’s Rules of Practice and Procedure,³ on September 11, 2007, the Commission’s Docket Office notified PCS of the complaint by sending a copy of the complaint, together with instructions to answer within 30 days.

No answer was filed by PCS. Thus, on October 23, 2007, Pac-West filed a motion for entry of default order against PCS. On February 1, 2008, the Commission issued D.08-01-031 (“Decision”) finding in favor of Pac-West and ordering PCS to pay the requested charges.

On February 29, 2008, PCS filed a motion for stay and accompanying application for rehearing of D.08-01-031. PCS challenges the Decision on the grounds that: (1) PCS was denied adequate due process as a result of ineffective Commission notice; (2) the Commission lacks subject matter jurisdiction over the complaint; and (3) the Decision is not supported by the findings. An opposition to the motion for stay was filed by Pac-West.

¹ See *Re Pacific Centrex, LLC* [D.99-10-006] (1999) 2 Cal.P.U.C.3d 661 [Order granting PCS a certificate of public convenience and necessity].

² Pac-West is a CLEC and interexchange (“IXC”) carrier offering telecommunications services to business and residential subscribers in California. PCS’s customers originate traffic that is delivered to Pac-West for termination (completion) to Pac-West’s customers. Pac-West and PCS do not directly connect their networks. Rather, PCS’s traffic is routed to Pac-West via one of the incumbent local exchange companies with whom both companies interconnect.

³ Cal. Code of Regs., tit. 20, § 4.3. All subsequent references to Rules shall refer to the Commission’s Rules of Practice and Procedure unless otherwise specified.

III. DISCUSSION

Request for Stay of D.08-01-031

Public Utilities Code section 1735 applies regarding a request for stay in connection with an application for rehearing. Section 1735 states:

An application for rehearing shall not excuse any corporation or person from complying with and obeying any order or decision, or any requirement of any order or decision of the commission theretofore made, or operate in any manner to stay or postpone the enforcement thereof, *except in such cases and upon such terms as the commission by order directs.*

(Pub. Util. Code, § 1735 (emphasis added).)

Under section 1735, our authority to grant a stay is discretionary.⁴ In exercising that discretion, we normally consider the following factors: (1) whether the moving party will suffer serious or irreparable harm if the stay is not granted; (2) whether the moving party is likely to prevail on the merits of the application for rehearing; (3) a balance of the harm to the moving party (or the public interest) if the stay is not granted and the decision is later reversed, against the harm to the other parties (or the public interest) if the stay is granted and the decision is later affirmed; and (4) other factors relevant to the particular case.⁵

PCS's motion does not explicitly address arguments related to the first three factors. However, we believe its due process allegation is a unique "other factor" relevant to this case which merits preliminary and independent consideration. PCS

⁴ See *Order Instituting Investigation Into The Proposal of Sound Energy Solutions to Construct And Operate A Liquified Natural Gas Terminal At The Port Of Long Beach* ("SES OIF") [D.04-07-040] (2004) ___ Cal.P.U.C.3d ___, 2004 Cal. PUC LEXIS 352, *2.

⁵ *SES OII*, *supra*, 2004 Cal. PUC LEXIS 352, at *2 citing to *Pacific Gas and Electric Company* [D.99-09-035] (1999) 2 Cal.P.U.C.2d 329, 1999 Cal. PUC LEXIS 602; *Re Southern California Edison Company* [D.90-12-101] (1990) 39 Cal.P.U.C.2d 14, 1990 Cal. PUC LEXIS 1316; *Re Line Extension Rules of Electric and Gas Utilities* [D.99-09-034] (1999) 2 Cal.P.U.C.2d 227, 1999 Cal. PUC LEXIS 601; and *Airtouch Communications v. Pacific Bell* [D.95-09-122] (1995) 61 Cal.P.U.C.2d 606, 1995 Cal. PUC LEXIS 774.

contends that ineffective Commission service of the complaint deprived it of notice and the opportunity to be heard, contrary to Rule 4.3 and Public Utilities Code section 1757(a)(6).⁶ According to PCS, the Commission's notice was not sent to an authorized agent for receipt of service. As a result, PCS claims its management had no actual notice of the matter and so no answer was filed. PCS requests the Commission stay the Decision so PCS can be afforded its due process right to respond to the complaint. (PCS Motion, pp. 1-4, Rhg. App., pp. 6-7.)

Rule 4.3 provides in pertinent part:

When a complaint or amendment is accepted for filing...the Docket Office Shall serve on each defendant (a) a copy of the complaint or amendment and (b) instructions to answer...indicating (1) the date when the defendant's answer shall be filed and served....

(Cal Code of Regs., tit. 20, § 4.3.)⁷

Section 1757 applies to Court review of a Commission decision in any complaint or enforcement proceeding. Section 1757 (a) states that such review shall not extend further than to determine, among other things, whether:

(6) The order or decision of the Commission violates any right of the petitioner under the Constitution of the United States or the California Constitution.

(Pub. Util. Code, § 1757, subd. (a)(6).)

PCS alleges here, that the Decision deprives PCS of its procedural due process rights under the Fourteenth Amendment of the United States Constitution (the "Due Process Clause"). The United States Supreme Court has held:

⁶ All subsequent section references refer to the Public Utilities Code unless otherwise specified.

⁷ See also section 1704 stating in pertinent part: "Upon the filing of a complaint, the commission shall cause a copy thereof to be served upon the corporation or person complained of." (Pub. Util. Code, § 1704.)

The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement. (citation omitted) There must be due notice and opportunity to be heard, the procedure must be consistent with the essentials of a fair trial, and the Commission must act upon evidence and not arbitrarily. (citation omitted)⁸

The California Supreme Court has further stated:

Due process as to the commission's initial action is provided by the requirement of adequate notice to a party affected and an opportunity to be heard before a valid order can be made. (*People v. Western Airlines, Inc.* 42 Cal.2d 621, 632 citing to *Southern Pac. Co. v. Public Utilities Commission* (1953) 41 Cal.2d 354, 365.)

PCS establishes at least a reasonable doubt regarding whether it received adequate notice of Pac-West's complaint. The record shows that the Commission's Docket Office directed notice to Mr. Kyle Spielbuehler. In addition, the record contains a certified mail receipt, indicating that PCS did receive the notice two days after it was sent.

However, PCS claims Mr. Spielbuehler is a repair technician at PCS, not an officer, manager, or designated agent to receive service.⁹ PCS claims it does not know how Mr. Spielbuehler came to be identified as an official contact for PCS, but it was certainly in error. (PCS Motion, p. 1, Declaration of Kenny Birstein, para. 14, Rhg. App., pp. 5-7.) PCS claims management first became aware of the complaint on February 6, 2008, when Mr. Kenny Birstein, a sales manager, received a letter from Pac-West informing the company of the Commission's Decision.¹⁰ (PCS Motion, Declaration of

⁸ *Railroad Commission of California v. Pacific Gas & Electric Company* (1937) 302 U.S. 388, 393-394.

⁹ We also note that the certified receipt indicates that someone other than Mr. Spielbuehler signed for the service, leaving it uncertain whether Mr. Spielbuehler in fact received the notice, even if he was a correct agent for service.

¹⁰ PCS states the letter from Pac-West was dated February 4, 2008, and not addressed to any specific individual. (Declaration of Kenny Birstein, para. 4.) It is not clear why the letter was directed to Mr. Birstein.

Kenny Birstein, para. 4.) PCS also questions why no one from the Commission attempted to call PCS after it failed to file an answer, to tell them they should do so. (PCS Motion, p. 4.)

At the outset we wish to clarify that the Commission's due process obligation is satisfied upon properly sending the notice and instructions to answer. There is no legal duty to subsequently contact a defendant who has failed to respond.

It is routine Commission practice to telephone a defendant company prior to sending notice of a complaint, in order to verify a proper agent for service. The Commission's Docket Office confirms that such a call was made in this instance. Mr. Spielbuehler reportedly took the call, identified himself as a manager, and indicated the documents could be directed to him. We are also aware that our records from another recent complaint proceeding similarly indicate that Mr. Spielbuehler was the designated recipient of the Commission's notice and instructions to answer.¹¹ Evidentiary hearings in that proceeding were later cancelled and the matter was settled, suggesting there was no problem with using Mr. Spielbuehler as the agent for service in that instance.

Nevertheless, on balance and equitable grounds, we find certain considerations weigh toward giving PCS the benefit of the doubt in this instance. We find that here, if only as a matter of equity, it is preferable to afford PCS an opportunity to respond to the merits of Pac-West's complaint. We see no apparent harm to Pac-West of delaying payment of the \$133,730.06. Conversely, it would be unjust to deny PCS an opportunity to respond if it is correct that the assessed charges are in error.

In addition, we are aware that as a matter of course, PCS appears to designate its President (Devin Semler) or Vice President (Joshua Ploude) as the proper agents for service, not Mr. Spielbuehler. Even if Mr. Spielbuehler agreed that service could be directed to him, there is some basis to suggest he may have misunderstood the

¹¹ See C.07-09-009 involving Black's Irrigation Systems, Inc. v. PCS. Instructions to answer dated September 24, 2007, directed to Mr. Kyle Spielbuehler, Manager.

nature of the Commission's telephone communication. To that end, PCS argues it is a small company, relatively unsophisticated in Commission practice and procedures. (PCS Rhg. App., p. 7.) Finally, according to Mr. Birstein, upon receipt of the February letter from Pac-West, he immediately notified PCS's President, who indicated he had not heard of a complaint by Pac-West. As a result, PCS immediately contacted Pac-West regarding the alleged charges, and obtained counsel to inquire how to proceed before the Commission. (PCS Motion, Declaration of Kenny Birstein, para. 4-13.) We are inclined to view such actions as demonstrating some good faith effort to take appropriate action regarding this matter, albeit quite late.

For these reasons, we find it reasonable to exercise our equitable discretion to grant a stay of D.08-01-031. The circumstances of this case regarding notice and procedural due process convince us to treat this as a compelling "other factor" to reach that conclusion. Because there is reasonable basis to grant a stay independent of any other factor we might otherwise consider, further review is unnecessary here. Accordingly, we direct PCS to file its answer on the merits of Pac-West's complaint within 30 days of the issuance (mailing) of this Order. We also expect PCS will properly educate its employees regarding the handling of any inquires regarding the service of process and the proper handling of notices and documents received by the company.

Finally, we expect both PCS and Pac-West to cooperate in providing any testimony, documents and evidence that may be requested to resolve the complaint. Upon resolution of the complaint, we will issue another order and dispose of the stay at the time, and/or vacate the Decision, as appropriate.

IV. CONCLUSION

For the reasons stated above, the motion for stay of D.08-01-031 is granted. The accompanying application for rehearing is denied, as moot. PCS is ordered to file its answer to Pac-West's complaint within 30 days of the issuance (mailing) of this Order.

THEREFORE, IT IS ORDERED that:

1. The motion for stay of D.08-01-031 is granted.

2. PCS shall file its answer to Pac-West's complaint within 30 days of the issuance (mailing) of this Order.
3. The application for rehearing of D.08-01-031 is hereby denied, as moot.
4. This proceeding, Case (C.) 07-08-026, remains open.

This order is effective today.

Dated April 10, 2008, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
TIMOTHY ALAN SIMON
Commissioners