

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of the Joint Application of SBC Communications Inc. ("SBC") and AT&T Corp. ("AT&T") for Authorization to Transfer Control of AT&T Communications of California (U-5002), TCG Los Angeles, Inc. (U-5462), TCG San Diego (U-5389), and TCG San Francisco (U-5454) to SBC, Which Will Occur Indirectly as a Result of AT&T's Merger With a Wholly-Owned Subsidiary of SBC, Tau Merger Sub Corporation.

Application 05-02-027  
(Filed February 28, 2005)

**ADMINISTRATIVE LAW JUDGE'S RULING  
DENYING OFFICE OF RATEPAYER ADVOCATES'  
MOTION FOR OFFICIAL NOTICE OF JACOT DEPOSITION  
TESTIMONY IN COMMISSION INVESTIGATION 02-06-003**

This ruling denies the motion filed on August 16, 2005, by the Office of Ratepayer Advocates (ORA) to take official notice of excerpts from the deposition of Mr. James Jacot, the Cingular Vice President of Network Engineering, in this Commission's Investigation 02-06-003. ORA had initially offered the transcript for impeachment purposes at the end of the testimony of SBC witness Christopher Rice (and offered to cross-examine Mr. Rice so as to allow him an opportunity to explain the transcript assertions - HT at 1525-26). After Applicants objected and the Assigned Administrative Law Judge (ALJ) took the matter under submission, ORA returned with its Motion for Official Notice of the transcript. Specifically, ORA requests official notice of pages 4, 6-8,

and 10 of the Jacot deposition dated September 9, 2002<sup>1</sup> (as to Mr. Jacot's background with SBC and position as Regional V.P., Cingular Network Operations) and pages 368-69 of his deposition dated March 5, 2003, (as to Cingular handset testing in Austin). Copies of the referenced pages were attached to the "Supporting Declaration of Counsel," provided along with the ORA Motion. ORA seeks official notice, arguing that these documents are relevant to clarify or correct the testimony of SBC witness Rice regarding the proximity and use of Cingular and SBC's testing facility in Austin, Texas. (HT 1424-26). Mr. Rice testified that, at least to his knowledge, Cingular was not doing handset testing at its Austin facility.

ORA had previously offered part of this transcript as an impeachment exhibit at the end of the testimony of SBC witness Christopher Rice. ORA sought the opportunity to cross-examine Mr. Rice to allow him the opportunity to explain the Jacot transcript assertions. RT at 1525-26.

Applicants filed a response in opposition to the motion on August 18, 2005, arguing that it is improper to use Mr. Jacot's deposition in an unrelated proceeding to "impeach" the sworn, live testimony of Christopher Rice. Applicants claim that the deposition excerpts are not appropriate for the impeachment of a testifying witness nor are they admissible under California law. Applicants argue that in any event, because Mr. Jacot's deposition does not

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<sup>1</sup> The title sheet of the September 9, 2002 deposition attached to ORA's motion bears the designation "Confidential." In an email message dated August 26, 2005 from ORA counsel to the ALJ, however, the ORA counsel indicates that Cingular has waived confidentiality on the Jacot deposition transcript pp. 1-12. Accordingly, based on the representation of ORA counsel, the referenced transcript pages for which ORA seeks official notice are deemed not be subject to confidentiality restrictions.

speak to what Cingular currently does, it does not contradict or impeach Mr. Rice's testimony.

Mr. Jacot testified that, *in March 2003*, Cingular tested handsets it received from vendors in Cingular's laboratory in Austin, Texas. Mr. Rice did not testify during the hearing about what Cingular was doing in early 2003, but that, to his knowledge, Cingular does not *currently* test handsets in Austin. HT at 1426.

Applicants argue that, in any event, the deposition testimony of a third party would not be admissible to impeach the testimony of a testifying witness. *See* Civ. Proc. Code § 2025.620 ("Any party may use a deposition for the purpose of contradicting or impeaching *the testimony of the deponent as a witness . . .*" (emphasis added)).<sup>2</sup>

Applicants also argue that Mr. Jacot's deposition is not subject to official notice under any of the provisions of Evidence Code § 452 because his deposition testimony is not an official act of the "legislative, executive and judicial departments," a court record, or a fact or proposition that is "not reasonably subject to dispute." Evid. Code. § 452 (c), (d), (h).

ORA filed a third-round reply to Applicants response on August 25, 2005. ORA explains that its proposed procedural remedy is different than using the deposition for impeachment under the Code of Civil Procedure.<sup>3</sup> ORA argues

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<sup>2</sup> SBC argues that because Cingular, the company by which Mr. Jacot was employed, is not a party to this proceeding, his deposition is not admissible for any purpose as the deposition of a party pursuant to section 2025.620(b) of the Code of Civil Procedure.

<sup>3</sup> ORA cited C.C.P. § 2025.620 not for its application to impeachment situations, but for the proposition that deposition testimony enjoys the same dignity as any official proceeding and thus is admissible under Evidence Code § 452(c) as an "official act of the ... executive ... department ... of any state." ORA notes that C.C.P. § 2025.620(a)

*Footnote continued on next page*

that a request for official notice does not rely on the C.C.P. in the first instance,<sup>4</sup> but rather goes to those things that are “not reasonably subject to dispute” and which may aid the development of a complete record.

ORA argues that the transcript would be admissible under Evidence Code § 452(h), relating to “facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.”<sup>5</sup>

As to Applicants’ substantive or relevance objections, ORA observes that Mr. Rice initially indicated that no Cingular work was done in the Austin facility, and then conceded that Cingular work was done in the same building, but in a different part of that building. HT at 1425.<sup>6</sup> Mr. Rice then testified without limitation as to time that the engineers at the Austin lab “don’t do handset testing either.” HT at 1426. ORA argues that Mr. Jacot’s assertion that Cingular

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allows “any party” to “use a deposition ... for any other purpose permitted by the Evidence Code.”

<sup>4</sup> Even were the Commission to consider the deposition strictly as impeachment, ORA would argue that SBC and Cingular are so intertwined as to constitute a single party for purposes of C.C.P. § 2025.620. See Hearing Exhibits 65, 68 (joint financial statements of SBC/Cingular), 101C (SBC study of Cingular market share, Cingular referred to as “SBC” wireless).

<sup>5</sup> ORA’s counsel provided, in support of its motion, a declaration attesting to the accuracy of the transcript, and has the entire original deposition transcript offers to provide this to any party questioning its accuracy.

<sup>6</sup> Mr. Rice also offered a distinction between work done by SBC before and after a “joint venture.” HT at 1425. The reference is apparently to the joint venture between SBC and Bell South that created Cingular in 2000. See D.04-09-062, Slip Op. at p. 5. Thus, ORA believes that the work previously done by SBC was presumably transitioned over to Cingular at or about that time.

did in fact do handset testing in Austin (and may still do) at least places Mr. Rice's statement in context. More importantly, however, SBC has maintained throughout this proceeding that it is entirely separate and apart from Cingular Wireless. The close proximity of Cingular and SBC facilities, as well as Mr. Jacot's own past history of work for both entities (see deposition pages 4-10) are just two more data points that refute this assertion. ORA submits that the Commission should take official notice of the deposition excerpts in order to have a full record on the Cingular/SBC relationship.

### **Discussion**

In arguing for official notice of the Jacot deposition, ORA focuses on the criterion that the factual statements made in the Jacot deposition are not dispute (even though inferences and implications drawn there from are disputed). Yet, the Jacot deposition does not meet other criteria of § 452, namely, the deposition does not constitute an official act of the "legislative, executive and judicial departments," a court record, or a fact or proposition that is "not reasonably subject to dispute." Evid. Code. § 452 (c), (d), (h). Moreover, as noted by SBC, the deposition testimony of a third party would not be admissible to impeach the testimony of Mr. Rice as a testifying witness. In any event, the testimony of Mr. Rice is sufficiently clear on this issue without the necessity of taking official notice of the Jacot deposition.

**IT IS RULED** that the motion of the Office of Ratepayer Advocates to take official notice of excerpts from the deposition of Mr. James Jacot is hereby denied.

Dated August 29, 2005, at San Francisco, California.

/s/ THOMAS R. PULSIFER

A.05-02-027 TRP/eap

Thomas R. Pulsifer  
Administrative Law Judge



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TTY 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.