

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion to Assess and Revise the New Regulatory Framework for Pacific Bell and Verizon California Incorporated.

Rulemaking 01-09-001
(Filed September 6, 2001)

Order Instituting Investigation on the Commission's Own Motion to Assess and Revise the New Regulatory Framework for Pacific Bell and Verizon California Incorporated.

Investigation 01-09-002
(Filed September 6, 2001)

**ADMINISTRATIVE LAW JUDGE'S RULING
DENYING ORA'S MOTION TO STRIKE PORTIONS
OF PACIFIC BELL'S SUPPLEMENTAL REBUTTAL TESTIMONY**

This ruling denies the Office of Ratepayer Advocates' (ORA's) motion to strike portions of Pacific Bell's (Pacific's) supplemental rebuttal testimony.

Background

In Phase 1 of this proceeding, the Commission will consider, among other things, proposed ratemaking adjustments. As set forth in the ruling issued by the assigned Commissioner on December 27, 2001, any party that proposes a ratemaking adjustment has the burden of demonstrating that its proposal has a clear and direct connection to ORA's audit, is legal (e.g., does not constitute an impermissible form of retroactive ratemaking), and is consistent with the New Regulatory Framework (NRF).

On January 22, 2002, ORA submitted the written testimony of Danilo E. Sanchez. Sanchez recommends, among other things, that Verizon's rates be reduced by \$112 million over a three-year period. Sanchez asserts that his proposed ratemaking adjustment has a clear and direct connection to ORA's audit, does not constitute retroactive ratemaking, and is consistent with NRF.

On February 20, 2002, Pacific deposed Mr. Sanchez. During the course of the deposition, Pacific asked several questions pertaining to retroactive ratemaking. On February 22, 2002, Pacific submitted the Supplemental Rebuttal Testimony of Dr. Robert G. Harris that purports to contain testimony based on the Sanchez deposition. On February 26, 2002, ORA filed a motion to strike portions of (1) the Supplemental Rebuttal Testimony of Dr. Harris, and (2) the Sanchez deposition. Pacific opposes ORA's motion.

ORA's Assertion that Pacific's Supplemental Rebuttal Testimony Relies on Statements in the Deposition that Should Be Stricken from the Record.

ORA moves to strike Answer 5 of Pacific's supplemental rebuttal testimony wherein Dr. Harris asserts that Mr. Sanchez's testimony "proves conclusively that Mr. Sanchez does not understand the concept of retroactive ratemaking, much less offer support for his claim that ORA's recommendation would not constitute retroactive ratemaking." Support for Answer 5 is contained in Answer 6 wherein Dr. Harris asserts that Mr. Sanchez admits that "if ORA's proposed ratemaking is retroactive, it would be improper." In support of the latter assertion, Dr. Harris cites page 8 of the Sanchez deposition transcript.

ORA asserts that page 8 of the deposition deals with a hypothetical question about retroactive ratemaking that Pacific posed to Mr. Sanchez.¹ ORA states that both it and The Utility Reform Network objected to the question during the deposition on the grounds that it called for a legal opinion on retroactive ratemaking. ORA states that because Sanchez is not an attorney, it cannot be assumed that he is competent to provide an analysis of retroactive ratemaking. ORA argues that because Dr. Harris's Answers 5 and 6 rely on an improper question, both Answers should be stricken, as should the improper question and related answer on page 8, lines 1-13 of the deposition.

Pacific responds that admissions contained in depositions are admissible evidence. Pacific argues that ORA cannot have it both ways – that Sanchez is competent to assert in his direct testimony that ORA's proposed ratemaking adjustment is not retroactive ratemaking, while also asserting during the deposition that Sanchez is not competent to provide an analysis of retroactive ratemaking. Pacific contends that ORA's contradictory positions regarding the competence of their witness undermine ORA's case.

ORA's motion to strike is denied. Pacific's question at issue on page 8 of the deposition is proper, since it is reasonably germane to Sanchez's testimony that ORA's recommendation does not constitute retroactive ratemaking. Accordingly, there is no merit to ORA's argument that Dr. Harris's Answers 5 and 6 should be stricken because they rely on an improper question.

¹ In the question at issue, Pacific asks: "Okay, and if [ORA's proposed ratemaking adjustment] were hypothetically found to be retroactive ratemaking, would you agree it would be improper, hypothetically?"

ORA's Assertion that Pacific's Supplemental Rebuttal Testimony Relies on Facts Not in Evidence

ORA moves to strike Answer 5 of Dr. Harris's supplemental rebuttal testimony on the grounds that it relies on facts not in evidence. In Answer 5, Dr. Harris asserts that the Sanchez deposition “proves conclusively that Mr. Sanchez does not understand the concept of retroactive ratemaking, much less offer support for his claim that ORA’s recommendation would not constitute retroactive ratemaking.” ORA states that because Pacific never asked Mr. Sanchez during the deposition about his understanding of retroactive ratemaking, there is no basis for Dr. Harris's statement in Answer 5.

Pacific responds that Answer 5 is based on Mr. Sanchez's responses to questions during the deposition regarding retroactive ratemaking. Pacific also argues that it is unreasonable for Pacific to have to ask ORA's witness whether the witness understands the subject matter of his testimony.

ORA's motion to strike is denied. Answer 5 is a conclusionary statement that is clearly related to the Sanchez deposition. The validity of the statement is, at least in part, a factual issue that should be decided after the parties have had an opportunity to develop the record through evidentiary hearings and present arguments in post-hearing briefs that reflect the evidentiary record.

ORA's Assertion that Pacific's Supplemental Rebuttal Testimony Mischaracterizes the Statements Made by ORA's Witness

ORA moves to strike the following portions of Dr. Harris's supplemental rebuttal testimony on the grounds that Dr. Harris mischaracterizes statements made by Mr. Sanchez during the deposition:

"Mr. Sanchez agrees that the effect of the ORA recommendation 'is to have the company pay back money that it had previously made,' which would constitute retroactive ratemaking." (Supplemental Rebuttal Testimony, Answer 6, 4th paragraph, quoting the Sanchez deposition.)

"Mr. Sanchez admits that the effective purpose of the ORA recommendation is retroactive ratemaking, 'to correct for what had taken place during the audit as an incentive for the company to comply with the rules.'" (Supplemental Rebuttal Testimony, Answer 6, 5th paragraph, quoting the Sanchez deposition.)

"Mr. Sanchez has effectively admitted that ORA's recommended ratemaking adjustment would constitute retroactive ratemaking. Given that retroactive ratemaking is contrary to the ACR's criteria and Commission policy, ORA's recommendation should be rejected by the Commission." (Supplemental Rebuttal Testimony, Answer 7.)

Pacific responds that the Sanchez deposition provides a sound basis for the conclusions reached by Dr. Harris in his supplemental rebuttal testimony.

ORA's motion to strike is denied. The meaning of Mr. Sanchez's statements during the deposition is a factual issue that should be decided after the parties have had an opportunity to develop the record via evidentiary hearings and to present arguments in their post-hearing briefs that reflect the evidentiary record.

Therefore, **IT IS RULED** that the motion filed by the Office of Ratepayer Advocates to strike portions of the Supplemental Rebuttal Testimony of Dr. Robert G. Harris on Behalf of Pacific Bell is denied.

Dated March 14, 2002, at San Francisco, California.

/s/ TIMOTHY KENNEY

Timothy Kenney
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail, to the parties to which an electronic mail address has been provided, this day served a true copy of the original attached Administrative Law Judge’s Ruling Denying ORA's Motion to Strike Portions of Pacific Bell's Supplemental Rebuttal Testimony on all parties of record in this proceeding or their attorneys of record.

Dated March 14, 2002, at San Francisco, California.

/s/ TERESITA C. GALLARDO
Teresita C. Gallardo

N O T I C E

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