BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Communications Workers of America, Local 9415, Kathleen Kinchius, President, Complainant, vs. Pacific Bell, (U 1001 C), Defendant.	Case 92-04-007 (Filed April 3, 1992)

ADMINISTRATIVE LAW JUDGE'S RULING DIRECTING PARTIES TO MEET AND CONFER

This ruling directs the parties to meet and confer, and after that to be prepared to attend a prehearing conference (PHC), for the purpose of discussing issues raised in the parties' comments filed in response to the Administrative Law Judge's Ruling Proposing Dismissal (ALJ Ruling) issued in this docket on September 17, 2002. Opening comments on this ruling were filed by the complainant, Communications Workers of America, Local 9415 (CWA), on October 1, 2002. Reply comments were filed by defendant, Pacific Bell Telephone Company (Pacific), on October 16, 2002.

Background

As noted in the ALJ Ruling, this case was filed more than 10 years ago. After extensive motion practice, hearings on the four principal issues the parties agreed to submit for decision were held on June 10 and 11, 1993. The ALJ Ruling noted that since much of this hearing time had been devoted to the adequacy of

the training Pacific was giving its operators and service representatives on Commission monitoring rules, and to the adequacy of the forms Pacific was using in connection with monitoring, the record could be so stale that a decision on these issues might no longer be justified.

The ALJ Ruling also noted that another issue at the 1993 hearings was Pacific's proposed use of a recorded announcement to inform customers that their calls might be monitored for quality assurance purposes. The ruling inquired whether any decision was necessary on this issue, since "it is common knowledge that the use of such announcements has become ubiquitous since the hearing in this case was held, while the use of a periodic beep tone to warn of monitoring has all but disappeared." (ALJ Ruling, p. 2.)

CWA's Position

In its October 1 comments, CWA strongly argues that it is entitled to a decision on the existing record, and that in any event, the record on three principal issues is not stale.

As a general matter, CWA complains that the ALJ Ruling unfairly places the burden on it as complainant to demonstrate that the existing record is still valid:

> "The approach suggested in the [ALJ Ruling] is the reverse of that which it should be. In an adjudicatory proceeding, the deciding official makes a determination based on the record. In the event that the decision proves, in any respect, to be impracticable because of a change in circumstances, any affected party can raise that issue in a post-hearing proceeding. The [ALJ Ruling] improperly seeks to reverse this process by adopting a presumption of invalidity and requiring the Complainant, which has already met its burden of establishing a record, to assume the additional burden of proving the record's continued validity." (CWA Comments, p. 4.)

In addition to this general objection, CWA argues that the record clearly remains valid on the issues of remote monitoring, the checklists used by Pacific for monitoring, and the training Pacific gives its operators and service representatives on monitoring. On the first of these issues, CWA states:

> "Complaint has alleged, and believes that it has demonstrated, that … remote monitoring violate[s] the Commission's prohibition against monitoring from a location that is not at or near the station of the monitored employee, and the prohibition against monitoring in such a way as to conceal background sounds that notify the participants that the call is being monitored. This practice still exists. In fact, because of the pendency of this matter before the Commission, the parties have refrained from negotiations that would have changed Defendant's practices in this regard." (*Id.* at 6.)

CWA also contends that the record concerning Pacific's checklists remains pertinent. On this question, CWA states:

> "Complainant has maintained that Defendant used monitors other than the supervisor of the monitored employee to conduct supervisory monitoring. As a result, the monitor would impermissibly transmit the content of the monitored conversation to the supervisor. Although the Commission required the creation of a check list form that would prevent the transmission of detailed information about call content, Defendant instead uses forms that call for narrative descriptions of the calls and for much more detail than required for Defendant's purposes. Complainant maintains that this practice has remained unchanged." (*Id.*)

CWA concludes by noting that the record also remains timely on the issue of training, because the 1993 hearing established that Pacific's training "fails to provide adequate information on restrictions applicable to monitoring." CWA asserts that Pacific's training on these issues remains inadequate. (*Id.*)

Pacific's Position

In its October 16 reply comments, Pacific agrees that this case should be dismissed due to the staleness of the record, but differs somewhat from CWA on the question of what issues were litigated in 1993.

First, Pacific disagrees with CWA's assertion that based on the pendency of this case, the union has refrained from negotiating over remote monitoring conducted at business offices. In fact, Pacific states, CWA raised this issue during bargaining in 1995, 1998 and 2001. Pacific concludes that "the subject of remote monitoring is best left to the collective bargaining process." (Pacific Reply Comments, p. 2.)

According to Pacific, "the second issue that CWA claims is ripe for decision is Pacific's alleged failure to adopt a checklist form that prohibits non-supervisors from monitoring employees." However, Pacific continues, the issue of allowing non-management employees to engage in supervisory monitoring was resolved in Pacific's favor in the May 11, 1993 ALJ ruling granting partial summary judgment. (*Id.*)

On the general issue of checklists, Pacific asserts that the record is stale:

> [M]uch of the [1993] hearing centered on checklist forms and monitoring training that were in effect ten years ago or more. Although SBC Pacific still uses a checklist form, the checklist form has changed due to changes in law and Commission decisions. Most notably, Rule 12 has changed and other decisions have required new disclosures. Retroactive application of existing legal requirements (if indeed this is what CWA proposes on page 7 of its comments) to ten-year old conduct violates SBC's due process rights." (*Id.* at 2-3.)

Pacific also asserts that the record is stale on the issue of training. "The rules have changed," Pacific states, and so "consequently, training has necessarily

also changed in the intervening years. The CPUC should not issue a decision that would penalize SBC Pacific for not complying with rules that were not in effect ten years ago[,] and should dismiss the case without prejudice." (*Id.* at 3.)

Although Pacific argues that the record on checklists and training is stale, it sees no reason why the Commission should not address the propriety of a recorded announcement that would inform business callers that their calls may be monitored for quality control purposes. On this issue, Pacific states:

> "It has become the industry standard, and every other telecommunications company of which SBC Pacific is aware uses an announcement and monitors their employees for quality control and training. The decision dismissing this case should include a specific statement that SBC Pacific may monitor or record business conversations and inform customers with the often heard 'your call may be monitored or recorded for quality control purposes.'" (*Id.* at 3-4.)

Discussion

Based on the comments submitted by CWA and Pacific, I have concluded that it would not be appropriate either to issue a proposed decision (PD) based on the 1993 hearing record, or to dismiss this case without prejudice, without first obtaining further input from the parties. As indicated below, a meet-and-confer session followed by a PHC appears to be the best vehicle for doing this.

The reason further input is necessary is that, to a considerable extent, the comments of CWA and Pacific talk past each other. For example, while Pacific argues that the record on monitoring training and checklists is stale because both its checklists and training have changed since 1993, Pacific has not provided any specifics about the nature of these changes. The 1993 hearing record contains extensive testimony by both Pacific and CWA witnesses on the training that operators and service representatives were then receiving on the Commission's

monitoring rules. (Transcript (Tr.) 28-31; 131-38; 166-68; 193-95; 219-228.) There was also considerable testimony regarding the specific forms that Pacific was then using in connection with monitoring, including the GA-381, the Quality Assurance Monitoring Form, the Customer Focus Detail Record and the Individual Performance Summary. (Tr. 135-38; 197-203.) By saying only that its monitoring training and checklists have "changed" since 1993, Pacific has not given the Commission an adequate basis for determining which portions, if any, of the 1993 hearing record on these issues are now moot.[1]

CWA's comments, on the other hand, do not acknowledge the pitfalls inherent in issuing a decision about forms and training that may no longer be in use (even though the delay that has brought about this situation is not CWA's fault). Despite the lack of specifics in Pacific's comments, it seems likely that both the checklists and training Pacific gives its employees on monitoring have changed since 1993, at least to some degree. If this is indeed the case, then issuing a decision based solely on the existing record could amount to giving an advisory opinion, something the Commission has traditionally avoided. *See*, Decision (D.) 00-06-076, *mimeo.* at 6, n.2; D.98-03-038, 78 PUC2d 725, 727 (to conserve resources, the Commission does not issue advisory opinions except where "extraordinary circumstances" justify it); *Carlin Communications, Inc. v. Pacific Bell*, D.87-12-017, 26 CPUC2d 125, 130 (exception to rule against advisory

[1] Another issue that was extensively litigated in the 1993 hearings was the propriety of Pacific's use of "tone rooms" (*i.e.*, separate, sound-proof rooms in business offices) to conduct "supervisory" monitoring, *i.e.*, monitoring for the purpose of evaluating the performance of an individual service representative or operator. (Tr. 18-19; 60-64; 125-26.) We do not know from the parties' comments the extent to which Pacific may still be using tone rooms for this purpose.

opinions was appropriate where there was widespread public interest in tariff interpretation issue and expression of Commission's views would assist the courts in resolving related litigation).[2]

These factors have led me to conclude that the best way of determining which portions of the 1993 record are moot, and which are still pertinent, is to give the parties an opportunity to meet and confer, and then, after they have submitted a report on their discussions, to hold a PHC (if necessary) to consider

---

[2] Decision (D.) 98-12-097, 84 CPUC2d 636 (1998), is an example of a case in which the policy against advisory opinions was applied in circumstances not dissimilar to those here. In D.98-12-097, the Commission declined to grant rehearing of D.95-07-046, which had adopted a tariff with a load-specific, flexible rate design for noncore gas customers who engaged in partial bypass of the transportation system of Southern California Gas Company (SoCalGas). D.95-07-046 expressly noted that the new tariff (which eventually became known as a Residual Load Service, or RLS, tariff) was being adopted for an "experimental period," and that the issue of whether it should be retained would be considered in SoCalGas's next Biennial Cost Allocation Proceeding (BCAP). Despite the interim nature of the new tariff, the parties seeking rehearing of D.95-07-046 alleged that its rate design was unlawfully discriminatory, and that the Commission had failed to consider its potential anticompetitive effects.

In the 1997 SoCalGas BCAP proceeding, the Commission decided to retain the RLS tariff, but not without addressing some of the same issues raised in the applications for rehearing of D.95-07-046. In view of these circumstances, and the fact that no service had been taken under the interim RLS tariff, the Commission concluded that the applications for rehearing of D.95-07-046 were moot, and that deciding them would amount to giving an advisory opinion:

> "[T]o have any hearing about a tariff that is no longer in place, and especially one that had not been used, would be pointless. To do so would also result in the issuance of an opinion that would be akin to an advisory opinion. The Commission has a long-standing policy against issuing such opinions, since they result in an inefficient use of Commission decision-making resources." (84 CPUC2d at 638.)

See also, D.97-09-058, 75 CPUC2d 624, 625-26 (1997).

any remaining differences. After the PHC has been held, the parties will be advised whether it seems feasible to issue a PD based on all or part of the 1993 record, or whether the entire record is so stale that a dismissal without prejudice is appropriate.

To assist the parties in their meet-and-confer sessions, the discussion above includes citations to those portions of the 1993 hearing transcript that focused on the training and forms then used in connection with monitoring. Although the Commission would not expect either the training or forms in use today to be identical to those used in 1993, an issue the parties should address in their meet-and-confer sessions is whether a particular form or training practice litigated in 1993 is sufficiently similar to one in use today so that relying on the 1993 record as to the related form or practice would be justified.

In deciding at their meet-and-confer sessions whether all or part of the 1993 hearing record continues to be pertinent, the parties should also keep in mind the restatement of major issues they agreed to submit for decision after the ALJ's partial summary judgment ruling of May 11, 1993.[3] Those four major issues were as follows:

1. Whether "remote" monitoring from rooms or locations separate from the work area impermissibly deprives customers and employees of notice that their calls are being monitored;

2. Whether the training and forms used by Pacific for monitoring encourages persons doing monitoring to take down an impermissibly full amount of the monitored conversations, in violation of previous Commission rulings;

[3] This list is a paraphrase of the four issues set forth in a joint letter to the undersigned from counsel for CWA and counsel for Pacific dated May 11, 1993.

3. Whether Pacific's training of its employees on monitoring principles is sufficient to give the employees notice that some of their calls might be monitored, and otherwise to comply with Commission training requirements; and

4. Whether Pacific's proposed use of a taped announcement to notify customers that some of their calls might be monitored would be sufficient under General Order (G.O.) 107-B to allow Pacific to make verbatim notes of the monitored conversations and to relay these notes to the monitored employees and their supervisors.[4]

The parties should hold their meet-and-confer sessions to consider the matters set forth above no later than December 31, 2002, and should submit a joint report (or, if they cannot agree on one, separate reports) concerning the outcome of their discussions no later than January 17, 2003. After this report has been evaluated, the undersigned will either schedule a PHC or issue a ruling advising the parties how he intends to proceed.

In accordance with the discussion set forth above, **IT IS RULED** that:

1. The parties shall hold one or more meet-and-confer sessions prior to January 1, 2003 for the purpose of determining which portions of the 1993 hearing record, if any, remain pertinent to the monitoring of operators and service representatives as conducted by Pacific Bell today.

[4] Although CWA's and Pacific's comments indicate that they differ as to whether a ruling is still necessary on the fourth issue, the comments do not indicate any disagreement as to the first three. However, we agree with Pacific that one of the issues CWA claims is unresolved – the propriety of allowing non-management personnel to conduct supervisory monitoring – was in fact resolved in Pacific's favor in the partial summary judgment ruling of May 11, 1993.

2. In such meet-and-confer sessions, the parties should consider whether the 1993 hearing record is sufficient to answer some or all of the four questions that they agreed to submit for resolution following the ALJ ruling granting partial summary judgment issued in this case on April 11, 1993.

3. In order for a portion of the 1993 hearing record that concerns monitoring training or forms to remain pertinent, it need not deal with training or forms identical to those in use today, but must bear a sufficiently close relation to training or forms in use today so that basing a decision on the portion of the 1993 record at issue would not amount to giving an advisory opinion.

4. The parties shall file and serve a joint report concerning their discussions and any agreements reached at the meet-and-confer sessions no later than January 17, 2003. In the event they are unable to agree on the contents of a joint report, they shall file and serve separate reports on these matters.

Dated November 27, 2002, at San Francisco, California.

/s/ A. KIRK MCKENZIE
A. Kirk McKenzie
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Directing Parties to Meet and Confer on all parties of record in this proceeding or their attorneys of record.

Dated November 27, 2002, at San Francisco, California.

/s/ FANNIE SID
Fannie Sid

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.