BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation into the Operations and Practices of Qwest Communications Corporation, et al. Concerning Compliance with Statutes, Commission Decisions, and Other Requirements Applicable to the Utility's Installation of Facilities in California for Providing Telecommunications Service.	Investigation 00-03-001 (Filed March 2, 2000)

JOINT ASSIGNED COMMISSIONER'S AND ADMINISTRATIVE LAW JUDGE'S RULING CONCERNING JOINT MOTION BY THE CONSUMER PROTECTION AND SAFETY DIVISION AND THE SALINAN NATION REGARDING "JURSIDICTIONAL" ISSUES

This Joint Ruling by the Assigned Commissioner and the assigned Administrative Law Judge (ALJ) is issued in response to a joint motion filed on September 19, 2003 by the Consumer Protection and Safety Division (CPSD) and the Salinan Nation, an intervenor in this proceeding, seeking a ruling by the full Commission on what the moving parties characterize as threshold jurisdictional issues.

Summary

The joint motion arises out of the discussion at a prehearing conference (PHC) held on August 5, 2003 that the ALJ convened to discuss ideas for settling this proceeding. CPSD and the Salinan Nation argue that because the ALJ stated at the PHC that he believed he could not rule on the "jurisdictional" issues

briefed by respondents and the Consumer Services Division[1] in June 2001—*i.e.*, the question of which of three certificates of public convenience and necessity (CPCNs) held by Qwest Communications International, Inc. (Qwest Inc.) applied to the construction work at issue—CPSD cannot determine what is an appropriate settlement position, nor can it determine the scope of the investigation it should undertake to arrive at a settlement position. Thus, the moving parties assert, the failure to rule on this issue is "obstructing this proceeding," and the full Commission should decide the allegedly jurisdictional issues so that "the factual evidence can be evaluated and the matter brought to hearing or to the settlement table as expeditiously as possible." (Joint Motion, pp. 4-5.) The opening brief that CSD filed on June 15, 2001, and the reply brief that it filed on June 29, 2001, are attached to the Joint Motion.

On October 6, 2003, Qwest Communications Corporation (QCC), a subsidiary of Qwest Inc., filed a response to the Joint Motion. In its response, QCC reiterates the arguments set forth in its briefs of June 15 and June 29, 2001 (which are attached to its response) and states that it does not oppose a decision by the full Commission on the Joint Motion. QCC continues, however, that in its opinion the issue to be decided is "whether Qwest's . . . CPCN [granted in D.93-10-018] authorized Qwest to act as a facilities-based carrier without the conditions in the . . . CPCN [granted in D.97-09-110] that CPSD alleges Qwest violated. Indeed, a ruling on the issue will clear Qwest of any misconduct and end this investigation." (Response, p. 6.)

[1] The Consumer Services Division (CSD) was the predecessor of CPSD.

For the reasons set forth below, we conclude that based on the current record, it is not possible to rule on the issues as framed by the briefs submitted by CPSD and QCC in June 2001. As indicated below, we believe that more briefing and factual development of these issues will be necessary to resolve them.

First, it is not possible to determine whether, as CPSD asserts, Qwest's attorneys conceded at a December 21, 1999 meeting with Commission staff that all of the relevant construction work took place pursuant to the CPCN granted in Decision (D.) 97-09-110. The authority granted in that decision was subject to a Mitigated Negative Declaration (MND) requiring the applicant to "conduct appropriate data research for known cultural resources in the proposed project area, and avoid such resources in designing and constructing the project." (D.97-09-110, Appendix D, p. 10.)[2] QCC maintains that at the December 21 meeting, its attorneys merely told Commission staff that Qwest Inc. had adequate authority to construct under one or more of the CPCNs it held.

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[2] This MND, which QCC acknowledges it did not comply with prior to the December 16, 1999 Stop Work Order, also required that "should cultural resources be encountered during construction, all earthmoving activity which would adversely impact such resources shall be halted or altered until the petitioner retains the service of a qualified archaeologist who will do the appropriate examination and analysis." (*Id.*)

As a condition of having the Stop Work Order lifted, Qwest Inc. agreed to abide by a special set of Cultural Resource Protocols in connection with all construction work done by itself or on its behalf in California. Qwest Inc. has asserted that these Cultural Resource Protocols impose requirements that go well beyond those set forth in the MND adopted in D.97-09-110. No party has suggested that Qwest Inc. or any of its affiliates has failed to abide by the Cultural Resource Protocols since they were entered into.

It is also not possible to rule, as QCC has asked us to do, that the construction at issue was within the scope of the authority originally issued to QCC's predecessor, Southern Pacific Telecommunications Company (SP Telco), in D.93-10-018. That 1993 decision expressly stated in Conclusion of Law (COL) No. 12 that "no facilities are to be constructed." In its papers here, QCC has not demonstrated how the advice letter process that was used in 1994 to convert SP Telco's CPCN into authority to operate as a facilities-based reseller of interLATA services carried with it any authority to construct facilities.

In view of the significant gaps in and need for more development of the record, the joint motion must be denied. It is also clear that because of this situation, it would not be appropriate to refer the joint motion to the full Commission.

The June 2001 Briefs

The issues that were briefed in 2001, and on which the Joint Motion seeks a decision, were briefed pursuant to a ruling issued by the ALJ on April 17, 2001. In that ruling, the ALJ acceded to the parties' suggestion that the threshold issue in the case was to determine which of three CPCNs held by Qwest Inc. governed the trenching work at issue, which took place in San Jose and San Luis Obispo. The ALJ's ruling gave the following description of the issue of which CPCN should be deemed to govern the Qwest companies' construction work:

> "According to QCC, it is one of three subsidiaries of [Qwest Inc.] that hold CPCNs from this Commission. The other two are LCI International Telecom Corp. (LCI) and USLD Communications (USLD). LCI and USLD, both of which Qwest Inc. acquired in 1998, are subject to pre-construction conditions imposed by a Commission-adopted negative declaration. QCC, which was originally known as Southern Pacific Telecommunications Company, obtained its CPCN in 1993 [in D.93-10-018] and is

> apparently not subject to such conditions. According to QCC's March 15[, 2001] status report, all of the construction at issue in this case took place under QCC's certificate, and was conducted by the construction organization that QCC had in place prior to the 1998 transfer of control of USLD and LCI to Qwest Inc. Since no pre-construction conditions were applicable to QCC, and since Decision (D.) 98-06-001 (the decision approving transfer of control of LCI and USLD to Qwest Inc.) apparently did not subject QCC to the same conditions as LCI and USLD, QCC intends to argue that no violation of any Commission decision, order or rule occurred as a result of its activities." (April 17, 2001 ALJ Ruling, p. 2; footnote omitted.)

In the brief it submitted on June 15, 2001, CSD contended that the CPCN granted in D.93-10-018 was clearly not applicable to the trenching work at issue because, *inter alia*, Qwest attorneys had conceded at the December 21, 1999 meeting that the work in question had taken place under the CPCN granted to LCI in D.97-09-110. In its June 15, 2001 brief, CSD describes the December 21 meeting (which took place shortly after staff served the Stop Work Order on QCC) as follows:

> "On December 21, 1999, Qwest attorneys Paula Amanda, Jose Guzman and Mary Wand met with Peter V. Allen, then an attorney for the Commission, concerning the matter at hand. At that meeting, one of the questions Qwest was to answer was the identification of the CPCN under which the activities were proceeding. Qwest represented at that meeting that 'for all of its construction in California, Qwest was using the CPCN originally issued to LCI by the Commission in D.97-09-110.' (See Declaration of Peter V. Allen, Attachment A hereto.)" (CSD Opening Brief, p. 3; footnote omitted.)

This brief description of what was said at the December 21 meeting is contradicted by a declaration from one of QCC's attorneys, Mary Wand, that is attached to QCC's June 29, 2001 reply brief. In her declaration, Ms. Wand states that "it appears that Mr. Allen misunderstood the representations we made to

him." (¶ 3.) She continues that although Mr. Allen was told that Qwest Inc. had authority to construct under all three of the CPCNs that it held (*i.e.,* those originally granted in D.93-10-018, D.97-04-011 and D.97-09-110) "we never represented to [Mr. Allen] that Qwest relied upon the authority granted by the LCI CPCN, as opposed to one of its two other CPCNs, to perform its California construction." (*Id.*) Ms. Wand recalls the discussion at the December 21 meeting as follows:

> "I did not make any representation to Mr. Allen at the December 21 meeting as to which of these CPCNs Qwest actually used to perform its California construction. Rather, the discussion was merely that Qwest had authority to construct telecommunications facilities under each of the three CPCNs. I was aware at the time of the meeting that QCC had commenced construction in California prior to its acquisition of LCI, specifically because I had prepared Advice Letter No. 2 requesting that the CPCN issued to Southern Pacific Telecommunications [in D.93-10-018] be expanded to include facilities-based authority in accordance with the procedures adopted by the Commission in D.91-10-041, Conclusion of Law 7, and in effect at the time Advice Letter No. 2 was filed. Therefore I would not have told Mr. Allen that all construction was performed using the LCI CPCN." (Wand Declaration, ¶ 5.)

Ms. Wand's assertions about the authority that QCC held pursuant to the CPCN issued in D.93-10-018 are consistent with statements about the scope of that CPCN contained in the declaration of Jack Shives, Assistant Vice President of Rights of Way and Real Estate for QCC, which was attached to Qwest's June 15, 2001 brief. In his declaration, Mr. Shives states that "QCC, formerly known as Southern Pacific Telecommunications Company (SP), obtained a [CPCN] from the [Commission] in 1993, and became a facilities-based provider in 1994." (Shives Declaration, ¶ 2.) He also states that "from 1994 through the

present[,] Qwest has performed construction in California pursuant to the SP CPCN." (*Id.* at ¶ 3.)

Although Qwest has provided the May 23, 1994 advice letter by which the CPCN granted to SP Telco in D.93-10-018 was converted into authority to act as a facilities-based reseller of interLATA services (*see* Tab A to QCC's June 29, 2001 reply brief), this advice letter does not indicate on its face that the enlarged authority being sought included any authority to construct facilities. The advice letter merely states that "Southern Pacific Telecommunications Company . . . hereby submits the attached financial statements to demonstrate that it meets the standard financial requirements to become a facilities based reseller of intrastate, interLATA interexchange facilities." It also quotes COL No. 7 of D.91-10-041 as stating that "any certificated switchless reseller who desires to own, control, operate, or manage telephone lines, and to offer the expanded services of a facilities-based reseller should file an advice letter demonstrating that it meets the standard financial requirement." The question of authority to construct facilities is not addressed in the advice letter, which according to QCC became effective by operation of law on July 2, 1994.

Discussion

Before addressing the merits of the arguments offered by CPSD and Qwest, a few words need to be said in response to their characterization of the issues here as "jurisdictional." There can be no doubt that in this case, the Commission has plenary authority to interpret the law and to state the policy governing its issuance of CPCNs. This includes authority to construe the requirements of and to determine the interrelationships of the three California CPCNs held by Qwest Inc. In short, the Commission has ample jurisdiction to determine all of the issues presented by this case.

However, based on the differing recollections of the December 21, 1999 meeting with Commission staff and the other gaps in proof described above, we do not think it is possible to determine on the existing record whether, as CPSD asserts, the trenching work at issue should be deemed to have taken place under the authority granted in D.97-09-110 (which is subject to the requirements of the MND concerning "known cultural resources"), or whether the work should be deemed to have taken place under the authority originally granted in D.93-10-018, which is not subject to such requirements.[3]

We reach this conclusion for several reasons. First, even if any admissions made by Qwest's attorneys at the December 21 meeting could be considered determinative of the issue before us, the declarations of Mr. Allen and Ms. Wand essentially talk past each other. Not only do they disagree on the key question of whether Qwest's attorneys specified at the meeting the authority under which Qwest was constructing, but neither declaration is accompanied by any notes or other form of corroboration. Under these circumstances, it would be difficult to determine with any certainty what was said at the December 21, 1999 meeting without having both Mr. Allen and Ms. Wand available for cross-examination.

However, as the record now stands, it is also not possible to rule, as QCC requests, that as a result of the May 23, 1994 advice letter, "QCC (then Southern Pacific Telecom. Co.) became a facilities-based carrier, with the right to own,

[3] It is undisputed that in D.98-06-001, the "merger" decision whereby control of LCI and USLD was transferred to Qwest Inc., the requirements of the MND set forth in D.97-09-110 were not explicitly made applicable either to USLD (which received its CPCN in D.97-04-011) or to QCC (which operated under the CPCN originally granted in D.93-10-018).

operate *and build* communications lines." (QCC's June 29, 2001 Reply Brief, p. 3; emphasis added.)

Mr. Shives states in his declaration that construction was carried out in California for five years under the CPCN originally issued to SP Telco after that CPCN was converted into facilities-based resale authority in 1994. (Shives Declaration, ¶ 3.) However, the fact remains that QCC has offered no proof that in the period before 1999, the Commission considered facilities-based resale authority obtained through the advice letter conversion process to be sufficient to authorize construction.

Such proof will be important in this case, because the amount of construction activity carried out by telecommunications companies increased significantly after the Commission decided in 1995 to authorize local exchange competition. (D.95-07-054, 60 CPUC2d 611). Recognizing that facilities-based local exchange competition was likely to require much more construction than was necessary for facilities-based interexchange competition (which required mainly a switch), Rule 4.C.(2) of the rules adopted in D.95-07-054 required competitive local carriers to "comply with CEQA as specified in Rule 17.1 of the Commission's Rules of Practice and Procedure." (60 CPUC2d at 643.) The first MND issued in response to this rule was included as Appendix D to D.95-12-057. (63 CPUC2d 763, 785-821.)[4]

[4] In its October 6, 2003 reply to the Joint Motion, QCC attempts to finesse the issue of its construction authority by relying on a statement in D.02-08-063 that "facilities-based *carriers* are those that *plan to construct* their own facilities rather than use the facilities of other telephone companies." (*Mimeo.* at 10; emphasis added.) While this may be true, it begs the question of what authority SP Telco obtained in 1994 when it became, through the advice letter conversion process, a facilities-based *reseller* of intrastate, interLATA interexchange facilities.

In the absence of proof that prior to 1999, the Commission considered the advice letter conversion process used by SP Telco in 1994 to include authority to construct facilities,[5] it is not possible to rule that QCC had authority under the

[5] The only "evidence" QCC has offered along these lines is an argument that, based on language in D.98-06-001 about the construction of Qwest Inc.'s fiber optic network, the Commission was aware in 1998 that construction was occurring in California under the CPCN originally granted in D.93-10-018. (June 29, 2001 Reply Brief, pp. 3-4.)

To the extent this supposed awareness is meant to suggest that the Commission is somehow estopped from challenging QCC's authority to construct under the converted CPCN, the suggestion is not well taken. As Professor Pierce has noted, the law frowns on arguments that government agencies are estopped from taking enforcement action on the basis of advice given by their agents:

> "Under the present legal regime, in which it is virtually impossible to obtain estoppel against the government, agencies maximize the free advice they make available, and citizens can and do routinely [rely on advice by agency representatives]. In every context, involving both regulation and government benefits, citizens rationally rely on free advice from government employees even though they know that advice is sometimes wrong. Society derives enormous benefits from the free availability of imperfect advice. If the [U.S. Supreme Court] changed the legal regime to permit estoppel, agencies would reduce the availability of free advice, citizens would no longer have the option of relying on free but imperfect government advice, and society would suffer a large net loss as a result." (II Pierce, ADMINISTRATIVE LAW TREATISE (4th ed.), § 13.1, p. 865.)

See also, *Microcomputer Technology Institute v. Riley*, 139 F.3d 1044, 1052 (5th Cir. 1998) (U.S. Department of Education not estopped from demanding reimbursement of expenses awarded under Pell Grants to students who were inmates in state prisons and had no expenses, and rejecting claim that the Department had tacitly approved appellee's practice of charging for prisoner expenses).

Although estoppel would not be a viable defense in this proceeding, we note that in the *Pacific Fiber Link* case, D.02-08-063, the Commission has recently held that good-faith reliance on advice given by Commission staff can be taken into account as a factor mitigating otherwise-applicable penalties. (*Mimeo.* at 18-19, 22-24.)

CPCN originally granted in D.93-10-018 to engage in the kind of construction that led to the December 1999 Stop Work order.

For all of the reasons set forth above, **IT IS RULED** that the September 19, 2003 Joint Motion of Consumer Protection and Safety Division and the Salinan Nation for a ruling by the Commission regarding the issues briefed by the parties in June 2001 is denied.

Dated December 30, 2003, at San Francisco, California.

/s/ LORETTA M. LYNCH
Loretta M. Lynch
Assigned Commissioner

/s/ STEVE KOTZ for
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 Joint Assigned Commissioner's and Administrative Law Judge's Ruling Concerning Joint Motion by the Consumer Protection and Safety Division and the Salinan Nation Regarding "Jursidictional" Issues on all parties of record in this proceeding or their attorneys of record.

Dated December 30, 2003, at San Francisco, California.

/s/ FANNIE SID
Fannie Sid

N O T I C E

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