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Decision 01-11-069 November 29, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

The Utility Consumers' Action Network, Complainant, vs. Pacific Bell (U 1001 C), Defendant.	Case 98-04-004 (Filed April 6, 1998)
And Related Matters	Case 98-06-003 (Filed June 1, 1998) Case 98-06-027 (Filed June 8, 1998) Case 98-06-049 (Filed June 24, 1998) Investigation 90-02-047 (Filed February 23, 1990)

ORDER DENYING EMERGENCY MOTION FOR STAY OF DECISION 01-09-058

On October 19, 2001, Pacific filed an Emergency Motion for Stay Pending Rehearing and Judicial Review of D.01-09-058, along with a Motion to Shorten Time. Decision (D.) 01-09-058 is a final decision in a complaint proceeding against Pacific Bell (Pacific) regarding its practices for marketing optional services to residential customers. The proceeding consolidated complaints brought by the Utility Consumers' Action Network (UCAN), the

Greenlining Institute and the Latino Issues Forum (Greenlining), and the Telecommunications Union, California Local 103, International Federation of Professional and Technical Engineers, AFL-CIO (TIU).

D.01-09-058 concludes that Pacific Bell violated statutory and decisional law in its failure to adequately disclose information related to Caller ID blocking options and inside wire maintenance plans, and in its sequential marketing of optional services starting with the highest priced package. The decision orders a number of remedial measures, including notification of customers who may have been affected by Pacific Bell's misleading sales strategies, revisions to Pacific Bell's Tariff Rule 12, and internal changes designed to emphasize service over sales or marketing. Among other things, the decision limits Pacific's sales-volume based incentive compensation for service representatives and their immediate supervisors to 5% of the employees' monthly compensation. Finally, the decision imposes $25.55 million in penalties on Pacific.

On September 24, 2001, shortly after the Commission approved D.01-09-058,[1] Pacific filed a complaint in federal district court challenging the decision. (Pacific Bell Telephone Co. v. Richard A. Bilas, et al., C01-03610 (N.D. Cal.).) On October 10, 2001, the district court issued a temporary retraining order (TRO) enjoining the Commission from enforcing the cap on incentive compensation as it relates to employees covered by the NLRA.

On October 25, 2001, the Commission issued an order on its own motion in response to the federal district court's TRO. That order stayed the cap on incentive compensation, without distinguishing between employees covered by the NLRA and their immediate supervisors, until further order of the Commission. (See D.01-10-045, Order Staying Ordering Paragraph 12 of Decision 01-09-058.)

[1] The decision was voted on at the September 20, 2001 Commission meeting, but was not mailed until October 5, 2001.

That order also denied Pacific's Motion to Shorten Time on the Emergency Motion for Stay that was filed on October 19, 2001. On November 5, 2001, the Office of Ratepayers Advocates (ORA) and Greenlining filed oppositions to Pacific's Emergency Motion for Stay of D.01-09-058.

Applications for rehearing of D.01-09-058 were filed by the Communication Workers of America (CWA) on October 26, 2001; Greenlining Institute, Latino Issues Forum and the 31 Individual Complainants (Greenlining) on November 2, 2001; and Pacific Bell on November 5, 2001. CWA asserts that the 5% limit on sales-volume incentive compensation is preempted by federal law. Greenlining contends that the Commission abused its discretion in declining to adjudicate Greenlining's Business and Professions Code claims and in setting the fine too low. Pacific Bell challenges the remedial measures ordered, the conclusions that Pacific Bell violated various laws, and the imposition of penalties. Pacific argues that many of the findings are not supported by the evidence and that the legal conclusions are in error. Pacific also contends that its First Amendment rights are violated by the decision's limitations on Pacific's commercial speech.

On November 15, 2001, Pacific filed a Petition for Stay, or in the Alternative, for a Writ of Mandate and/or Review in the First District Court of Appeal in an attempt to have the court stay D.01-09-058. On November 19, 2001, prior to the Commission filing its response, the court issued an order stating that it would be premature for the court to entertain Pacific's stay request because two requests were pending before the Commission.[2] The court deferred Pacific's request for a stay pending action by the Commission and Executive Director. (Pacific Bell Telephone Co. v. Public Utilities Commission, A096828.)

[2] In addition to the motion for stay, Pacific asked the Executive Director for an extension of time to comply with the order. The request for extension of time has been denied.

Public Utilities Code section 1735 states that an application for rehearing shall not excuse any corporation or person from complying with and

obeying any order or decision of the Commission, or operate to stay or postpone the enforcement of any order, "except in such cases and upon such terms as the commission by order directs." Thus, the Commission's authority to stay a decision is discretionary.

The Commission considers a number of factors in determining whether there is good cause to grant a stay pending rehearing of its own decisions. Those factors include whether the moving party will suffer serious or irreparable harm if the stay is not granted and whether the moving party is likely to prevail on the merits. (Pacific Gas and Electric Company (1999) 1999 Cal. PUC Lexis 602; Re Southern California Gas Co. (1990) 39 Cal.P.U.C.2d 14.) In addition, the Commission balances harm to the applicant or the public interest, if the decision is later reversed versus harm to other parties or the public interest if the decision is affirmed. (Re Line Extension Rules of Electric and Gas Utilities (1999) 1999 Cal. PUC Lexis 928; AirTouch Communications v. Pacific Bell (1995) 61 Cal.P.U.C.2d 606.) In addition, the Commission may consider other factors relevant to a particular case.

Pacific Bell contends that a stay should be issued because Pacific's application for rehearing will raise serious issues demonstrating that the decision is unsupported by the evidence and contrary to the First Amendmentment. Pacific alleges the decision's limitations on Pacific's commercial speech violate the First Amendment. Pacific claims that it will have to spend an estimated $14.5 million to comply with the requirements in the opinion such as customer notifications, retraining, revising customer support systems, etc. If any of these requirements were later modified, there would be additional costs. Furthermore, Pacific argues that any such changes would cause confusion to services representatives as well as to customers. Finally, Pacific claims that the loss of First Amendment rights, even for minimal periods of time, constitutes irreparable injury.

Pacific also argues that irreparable harm will be caused by implementation of the incentive compensation caps ordered in the decision. However, the portion of the decision that orders the incentive compensation cap has already been stayed. Therefore, this issue is not relevant to Pacific's current stay request.

ORA and Greenlining assert that Pacific is not likely to prevail on the merits. In addition, ORA and Greenlining contend that Pacific has not shown irreparable harm. They argue that (1) Pacific's claims regarding the costs of compliance are speculative; (2) monetary costs alone are not considered serious or irreparable; and (3) any potential harm to Pacific if the stay is denied is outweighed by harm to the public if the stay is granted.

We do not believe that Pacific has demonstrated good cause for a stay. First, Pacific has not demonstrated a likelihood of success on the merits. Pacific's arguments that the remedial measures ordered by the decision are not supported by the evidence and that the decision violates Pacific's First Amendment rights are not persuasive. The First Amendment does not protect misleading or deceptive speech. Even if protected, commercial speech may be regulated if there is a substantial governmental interest. (Central Hudson Gas & Electric Corp. v. Public Service Commission (1980) 447 U.S. 557, 566.)

We also do not believe that Pacific has demonstrated that it will suffer irreparable harm if the decision is not stayed. The remedies ordered are clearly in public interest. The decision does not prohibit Pacific from marketing its optional services; it is only being required to provide complete information when doing so. Regarding the expenditure of money to comply with the decision, monetary loss alone is not an adequate showing of irreparable harm under the stay standard applied by the Court of Appeal. (North Shuttle Service, Inc. v. Public Utilities Commission (1998) 67 Cal.App.4th 386, 395.) In addition, whatever harm there might be if the decision were found to restrict Pacific's First Amendment rights is

outweighed by harm to the public if Pacific is allowed to continue those marketing practices that decision concluded are misleading and deceptive. Finally, even if the Commission were to reverse any of its conclusions regarding violations or penalties, we see no serious injury to Pacific prior to the date those penalties are due, which is 180 days from the effective date of the order.

The Commission is denying Pacific's motion without prejudice. We see no reason to stay the remedial measures that Pacific is required to complete within 90 days from the effective date of the order. However, the Commission may reconsider whether to stay its order, or portions of it, pending disposition of the applications for rehearing, if circumstances warrant.

Along with the Emergency Motion for Stay, Pacific filed a Motion to File Declaration of Michelle Gomez Under Seal. Pacific asserts that the declaration contains confidential, proprietary and competitively sensitive information regarding Pacific's staffing, customers service practice, costs and training programs. ORA opposes Pacific's motion on the basis that Pacific has not carried its burden of justifying its claims of confidentiality. At the time ORA filed its response, ORA did not have a copy of the declaration itself. ORA has since been provided with a copy.

After reviewing the document, we have decided to grant Pacific's motion on the assumption that the document has been provided to all parties under a nondisclosure agreement. If it later appears that this is not the case, or that there is not good cause for confidentiality, we may reconsider this issue.

Therefore **IT IS ORDERED** that:

1. Pacific Bell's Emergency Motion for Stay Pending Rehearing and Judicial Review of D.01-09-058 is denied without prejudice.

2. Pacific Bell's Motion to File Declaration of Michelle Gomez Under Seal is granted.

This order is effective today.

Dated November 29, 2001 at San Francisco, California.

LORETTA M. LYNCH
President
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners

I will file a concurrence.

/s/ GEOFFREY F. BROWN
Commissioner

I will file a dissent

/s/ HENRY M. DUQUE
Commissioner

/s/ RICHARD A. BILAS
Commissioner

Commissioners Henry M. Duque and Richard A. Bilas dissenting:

Unlike the majority decision, we find that grounds for a stay have been shown by Pacific. Pacific has demonstrated irreparable injury as well as a likelihood of success on the merits.

Pacific has established that it will suffer irreparable harm if the underlying decision is not stayed. Where financial details are provided, a monetary loss may constitute irreparable harm for purposes of imposing a stay. North Shuttle Service, Inc. v. Public Utilities Com. (1998) 67 Cal.App.4th 386, 396. Pacific estimates that it will spend $14.5 million to comply with the requirements in the underlying decision, such as customer notifications, retraining and revising customer support systems. If any of the requirements are later modified on rehearing, there will be other costs.[1] This is in addition to the $25.55 million in penalties that Pacific was ordered to pay to the General Fund.

We also believe that Pacific has demonstrated a likelihood of success on the merits. Among other legal errors, the underlying decision violates the constitutional rights of Pacific and is not supported by the findings. These legal errors are set forth in detail in our dissent to the underlying decision and will not be repeated in full here.

In brief, Pacific was fined without the notice required by the Due Process Clause. The majority acknowledges the absence of "existing statutory or decisional standards" governing Pacific's practices. D.01-09-058, p. 1. Pacific, in effect, was denied prior notice of the specific standards to which it would be held and fined.

The standard in Public Utilities Code § 2896 is merely a general directive to provide consumers with sufficient information to allow them to make informed choices among telecommunications services and providers. The statute does not set out any specific script or presentation sequence that must be followed by utility sales personnel.

[1] It would be difficult for Pacific to recoup its costs from ratepayers. It is also unclear from a policy perspective if the costs should even be borne by ratepayers.

Nor is there any requirement in Public Utilities Code § 451 that Pacific Bell, or any telecommunications corporation, explain to a customer in each transaction, each product, optional service, package of services, or promotion that the carrier has in its tariffs.

Tariff Rule 12 likewise does not impose any obligation on Pacific to quote applicable rates and charges separately unless the customer designates an optional service packages. Tariff Rule 12 provides that "[t]he quotation of applicable rates and charges shall be stated separately for each *optional service* designated by the customer." (Emphasis added.). There is no statute, rule or directive which even addresses the sequence of offering optional services. Lastly, Pacific Bell is no longer under an obligation to disclose that landlords and not tenants are responsible for inside wire repair.

Additionally, Pacific is correct that the underlying decision is not supported by the findings. The majority's reliance on the purported similarities with the 1986 complaint case as a basis for the penalties is misplaced. The 1986 complaint case involved the bundling of local service with optional services, not the sequence of offering optional services such as call forwarding and call waiting. There is no allegation here that Pacific is selling local service as part of its packages for optional services. Indeed, there is no record evidence that Pacific violated the 1986 complaint case prohibition against mixing offerings of local service with optional services.

For all the above reasons, we dissent.

/s/ HENRY M. DUQUE	/s/ RICHARD A. BILAS
Henry M. Duque Commissioner	Richard A. Bilas Commissioner

November 29, 2001
San Francisco, California

Commissioner Geoffrey F. Brown, Concurring:

I have voted to deny Pacific Bell's request for a stay pending re-hearing and judicial review. I am writing my concurrence to respond to the claim made by Pacific Bell that the marketing restrictions set for the Final Order 9 (re: Tariff 12) violate its First Amendment rights to free commercial speech. (See pp. 8-11 Emergency Motion of Pacific Bell Telephone). Pacific Bell's (hereinafter Pacific) rationale in seeking emergency and immediate relief is that because the restrictions violate its free speech rights, such restrictions "per se" cause irreparable harm (Motion at p. 13-14). My review of constitutional authorities leads me to conclude that its claim is unsupportable, and that the Commission had a valid basis to impose requirements on Pacific's sales practices.

Pacific specifically points to two orders in the decision which it finds objectionable:

1. The requirement that it cease offering additional services when the customer indicates he or she wants no further sales information.

2. The requirement that sales personnel disclose the lowest price option as well as the highest price options.

The first of these – that Pacific respects the right of the customer to say "no" is a restriction on the manner of speech rather than on its content. It is very much in the tradition of common carrier courtesy rules. See Harpes, James, and Gray The Law of Torts, 2 Edition (1986) 89.3, pp 616-620. Under our rules and precedents that recognize the near-monopoly power that this utility has in its dealings with customers, Pacific cannot be allowed to badger the customer. Pacific's response is that the customer can always hang up. Aside from the inducement to courseness and incivility inherent in this adversarial solution, it also fails to address the needs of customers who have other business to discuss with the

utility's representative. The widespread public use of call-blocking, unlisted telephone numbers, and caller identification systems affords eloquent testimony for the proposition that the public seeks respite from insistent and disingenuous telemarketing techniques. Where, as here, the telemarketing representative has a virtual monopoly on the information the consumer needs to make an informed choice, one wonders why Pacific seeks our blessing for its programmatic deception through omission or relevant data. As the Supreme Court said in Consolidated Edison and Public Service Commission 447 U.S 530, at 536 (1979). "A restriction that regulates time, place, or manner of speech may be imposed so long as it is reasonable." I believe this restriction is more than reasonable. [1]

The second requirement that sales representatives describe the lowest priced option in advertising services is designed to provide customers with information for a better-informed choice.

Pacific, on the other hand, sees itself as no different from any other marketer:

> "… Pacific's service representative offers optional services to customers, often [sic] the most complete package of services first. This is no different than [sic] a computer company promoting its top-of-the-line fully loaded computer before offering last year's (or last month's) model." (Motion, p.8)

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[1] Pacific cites Edenfield v. Fame 507 U.S. 761 at 776 (1993) for the proposition that the customer's ability to terminate a call makes unnecessary restriction on Public not to continue a sales pitch. But Edenfield differs significantly from the present case in that Edenfield involved a flat ban by the State of Florida on accountants soliciting clients. The court did not feel the State's argument that the ban was necessary to protect privacy justified such a comprehensive ban. Here, we allow Pacific to solicit but we require only the customer's aquiescence, attempting to prevent aggressive sales techniques. In other situations where the client is vulnerable, the court has upheld limited bans on solicitation. See Ohralik v. Ohio State Bar Association 436 U.S. 447 (1978)

Pacific then cites Central Hudson v Public Service Commission 441 U.S. 557, at 562 (1979). " Even when advertising communicates only a version of the relevant facts, the First Amendment pressures some accurate information is better than none at all." However, the Court has also recognized that incomplete information can mislead and confuse, and that as an appropriate antidote the state may require additional information be made available to the consumers. See Bates v State Bar of Arizona 433 U.S. 350, at 375 (1976).

The Commission has found after exhaustive inquiry that sequential marketing techniques leave customers in the dark about the existence of lower priced plans, options or services. A deliberate policy of offering only high-priced options can cause a purchaser to think there is only one price for a particular feature (such as "Wire Pro"). When talking to the customer, Pacific's sale representative has command of the information the customer will learn of less expensive features only if he is lucky enough to ask the right questions. Unlike the computer customer in the store, the product line is not displayed before him. Moreover, given Pacific's near monopoly situation (unlike the computer store) no competitor normally beckons for the customer's business. Therefore, it is appropriate for the Commission to correct the imbalance. As Justice Blackburn wrote in Bates, supra (at 375):

> "If the naivete of the public will cause advertising by attorneys [substitute "Pacific"] to be misleading, then it is the bar's [substitute, regulatory agency] to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective."

In evaluating Pacific's free speech claims, it is important to distinguish between the law regarding political speech and commercial speech. Of political speech, courts are highly protective; they will strike down prior restraints and prophylactic rules that are regulatory in nature. Riley v. National Federation

of the Blind 487 U.S. 781, 798 (1988). Compelled disclosures imposed on political statements alter the content and "the First Amendment mandates that we presume the speakers, not the government, know best what they want to say and how they say it." Id at 803. Although commercial speech is subject to First Amendment protection, it does not enjoy the same level of judicial deference as does political speech. Central Hudson, supra at 563, fn.5. Therefore, speech made in the course of commercial transactions that is misleading or deceptive can be banned. Central Hudson, supra at 562-563. Where, on the other hand, commercial speech is not misleading, the state carries the burden of demonstrating that (1) the prohibition serves a substantial state interest and (2) the governmental interest is not susceptible to a more limited restrictions. Central Hudson, supra at 564. In the various cases cited by Pacific, Central Hudson, Edenfield, Virginia Pharmacy, the court struck down prohibitions on advertising because the state could not demonstrate a substantial state interest, nor could it show that some less extreme alternative could not have been fashioned to accomplish what the prohibitions were designed to prevent. One such alternative that courts have found to be acceptable is a disclosure requirement. In our decision, we have found that Pacific's sales practice is misleading. However, unlike Central Hudson, Edenfield and Bates, we have not imposed a ban. Instead, we require sales personnel to make disclosures intended to prevent the utility from misleading customers. Pacific's sale personnel can still market the highest-priced products, but they must inform customers of lower-cost alternatives (Accord: Andrew's Mortuary v. FTA 726, F2d 993 (1001) [FTA required funeral houses to provide itemized price list to customers]).

Pacific is correct in its assertion that it did not make false representations in selling its services (Motion, p.8). Still, its statements were misleading because the customer was told but a portion of the truth. Despite what Pacific may argue, it does not in this instance have a constitutional right to

withhold accurate information. Zouderer v. Office of Disciplinary Counsel 471 U.S. 626, at 652 (fn.14).

/s/ GEOFFREY F. BROWN

GEOFFREY F. BROWN
Commissioner

San Francisco, California
November 29, 2001