

Decision 02-12-003 December 5, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Joint Application of AT&T Communications of California, Inc. (U 5002 C) and WorldCom, Inc. for the Commission to Reexamine the Recurring Costs and Prices of Unbundled Switching in Its First Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050.

Application 01-02-024
(Filed February 21, 2001)

Application of AT&T Communications of California, Inc. (U 5002 C) and WorldCom, Inc. for the Commission to Reexamine the Recurring Costs and Prices of Unbundled Loops in Its First Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050.

Application 01-02-035
(Filed February 28, 2001)

Application of The Telephone Connection Local Services, LLC (U 5522 C) for the Commission to Reexamine the Recurring Costs and Prices of the DS-3 Entrance Facility Without Equipment in Its Second Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050.

Application 02-02-031
(Filed February 28, 2002)

**OPINION IMPOSING SANCTIONS FOR
VIOLATIONS OF COMMISSION EX PARTE RULES**

Application of AT&T Communications of California, Inc. (U 5002 C) and WorldCom, Inc. for the Commission to Reexamine the Recurring Costs and Prices of Unbundled Interoffice Transmission Facilities and Signaling Networks and Call-Related Databases in Its Second Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050.

Application 02-02-032
(Filed February 28, 2002)

Application of Pacific Bell Telephone Company (U 1001 C) for the Commission to Reexamine the Costs and Prices of the Expanded Interconnection Service Cross-Connect Network Element in the Second Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050.

Application 02-02-034
(Filed February 28, 2002)

Application of XO California, Inc. (U 5553 C) for the Commission to Reexamine the Recurring Costs of DS1 and DS3 Unbundled Network Element Loops in Its Second Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050.

Application 02-03-002
(Filed March 1, 2002)

**OPINION IMPOSING SANCTIONS FOR
VIOLATIONS OF COMMISSION EX PARTE RULES**

I. Summary

This decision finds that Pacific Bell Telephone Company (Pacific) and WorldCom, Inc. (WorldCom) violated Commission Rule 7.c prohibiting ex parte communications during the “quiet time” surrounding a ratesetting deliberative

meeting. The Commission assesses a fine of \$22,000 against Pacific and a fine of \$1,000 against WorldCom for these violations.

II. Background

On May 2, 2002, the Commission announced that it would hold a Ratesetting Deliberative Meeting (RDM) on a draft decision in the above-captioned proceeding (the “UNE Reexamination”).¹ Notice of this closed session meeting was provided to the public in advance of the meeting via the Commission’s public meeting agenda. The RDM was held at 10:00 a.m. on May 15, 2002.

Statutory authority for those Commission closed session meetings, known as RDMs, is set forth in Pub. Util. Code § 1701.3(c), which provides, in pertinent part, that:

The commission may establish a period during which no oral or written ex parte communications shall be permitted and may meet in closed session during that period which shall not in any circumstance exceed 14 days.

The Commission’s Rules of Practice and Procedure state in Rule 7.c.4, parts (i) and (ii), that:

In any ratesetting proceeding, the Commission may establish a period during which no oral or written communications on a substantive issue in the proceeding shall be permitted between an interested person and a Commissioner, a Commissioner’s personal advisor, the Chief Administrative Law Judge, any Assistant Chief Administrative Law Judge, or the assigned Administrative Law Judge.

¹ The Draft Decision was initially slated for consideration at the Commission’s April 4, 2002 public meeting agenda. Subsequently, Commissioners Lynch and Peevey issued alternate decisions and the initial draft plus the two alternates were considered at the Commission’s May 16, 2002 meeting.

* * *

(ii) Prohibition of Ex Parte Communications When a Ratesetting Deliberative Meeting is Scheduled:

In all ratesetting proceedings in which a hearing has been held, a proposed decision has been filed and served, and a Ratesetting Deliberative Meeting has been scheduled, there shall be a prohibition on communications as provided in this subsection.

The first day of the prohibition on communications will be the day of the Ratesetting Deliberative Meeting at which the proposed decision is scheduled to be discussed and will continue through the conclusion of the Business Meeting at which a vote on the proposed decision is scheduled.

The Commission's Rules define an ex parte communication as a written or oral communication that concerns any substantive issue in a formal proceeding, takes place between an interested person and a decisionmaker, and does not occur in a public hearing, workshop, or other public setting, or on the record of the proceeding. (Rule 5.e.) A decisionmaker in a ratesetting case such as this one includes Commissioners and the assigned Administrative Law Judge (ALJ). (Rule 5.f.) Prohibitions on ex parte communications extend to Commissioners' advisors when a closed session meeting is scheduled and a corresponding quiet time is invoked. (Rule 7.c.4.)² The rules further define an "interested person" to include a party who has made a formal appearance in a case (Rule 5.h).

On May 15, 2002, the day of the RDM, Pacific, a party in the UNE Reexamination proceeding, sent a letter to all five Commissioners regarding the

² Rule 7.c. 4(i) specifies to whom the prohibitions on ex parte communications applies when a quiet-time is invoked. We interpret Rule 7.c.4.ii as applying to the same list of persons.

substance of the alternate decision of Commissioner Lynch in this proceeding. A copy of the letter was also sent to five of the commissioners' personal advisors and the assigned ALJ. On the same day, an attorney representing WorldCom, Inc. (WorldCom), one of the applicants in this proceeding, left a voicemail message for Tom Long, Commissioner Lynch's personal advisor, also regarding the substance of the draft and alternate decisions in this matter.

III. Responses of Pacific and WorldCom

On May 20, 2002, the Assigned Commissioner and ALJ issued a ruling asking Pacific and WorldCom to explain why they failed to comply with the Commission's ex parte rules.

In response, Pacific stated that on the day of the RDM it had indeed hand-delivered to each Commissioner and telecommunications advisor a letter from Pacific's President Lora Watts responding to a May 13, 2002 letter the Commissioners and advisors had received from AT&T's President David Dorman. Pacific believed it was imperative to respond to the Dorman letter and attempted to do so before the RDM but was unsuccessful. Around noon on May 15, Pacific sent an electronic copy of its letter to the service list for the proceeding. Shortly thereafter, the ALJ responded to Pacific's electronic message, informing Pacific that it had apparently violated Commission rules on ex parte communications. Pacific then physically retrieved the letters from each Commissioner's office.

Pacific asks the Commission to exercise discretion and not impose a sanction, citing other examples of recent rulings regarding apparent ex parte

violations that admonish the parties involve, but do not impose a sanction.³

Pacific contends that a penalty is inappropriate because its actions in response to the AT&T letter were justified as an attempt to “correct misstatements of fact submitted by AT&T at the last minute.” (Pacific response, 5/28/02, p. 4.)

Further, Pacific claims that no party was harmed or prejudiced by Pacific’s actions because the letters were immediately retrieved as soon as Pacific was contacted by the ALJ.

WorldCom responds that it did not willfully or knowingly violate the rule, but that its failure to comply with Rule 7 was, in part, due to lack of familiarity with RDMs. WorldCom is not aware of an RDM ever occurring in a telecommunications matter. Further, WorldCom states that it intended to comply with Commission rules, but that it relied on an incorrect understanding that any ex parte ban or “quiet time” surrounding an RDM did not begin until the commencement of the actual RDM. WorldCom’s attorney left the voicemail message with Commissioner Lynch’s advisor at 9:10 a.m. on the morning in question.

Finally, WorldCom suggests that there has been no actual violation of Rule 7 because this is not a ratesetting proceeding in which a hearing has been held. According to WorldCom, the ex parte communication that did occur was very brief and designed only to call attention to a specific pleading contained in the record of the proceeding. Therefore, this inadvertent violation should not warrant harsh penalties. Rather, WorldCom asks the Commission to remind the

³ Pacific cites a May 3, 2002 ALJ ruling in I.00-11-052 and D.01-08-067 issued in C.00-08-053. Both the ruling and decision discuss apparent violations of Commission ex parte rules but decline to impose a penalty.

parties of the rules pertaining to this case and to warn them that sanctions may be applied for any future violations.

IV. Discussion

A. Pacific and WorldCom Violated Rule 7.c

There is no dispute that on May 15, 2002, two parties to this proceeding engaged in ex parte communications despite the existence of an ex parte ban related to the RDM. Pacific does not deny that its contacts were in violation of Commission rules, although it suggests its actions were somehow warranted because of a perceived need to respond to an AT&T ex parte contact of two days prior. According to Pacific, “it was imperative to respond to Mr. Dorman’s letters, which go way beyond the record in this proceeding and are inaccurate in important respects.” (Pacific response, 5/28/02, p. 3.) From its own explanation, Pacific appears to believe that it should be the judge of when the record needs correcting and that it can, by itself, waive the Commission’s ex parte rules in order to have the last word. This suggestion is, at best, misguided, and at worst, appalling.

Pacific’s explanation is noticeably lacking in any discussion of whether it knew the Commission’s ex parte rules and whether it understood that delivering its letter on the day of the RDM was a violation of the quiet time. This lack of an explanation leads to the conclusion that Pacific knowingly and willfully violated the Commission’s rules. We find this extremely troubling.

In contrast, WorldCom explains that it thought its actions were not a violation. WorldCom describes its inexperience with the RDM process, its misimpression of the quiet time starting point, and its belief that Rule 7.c did not apply to ratesetting cases without a hearing. Unfortunately, we cannot allow inexperience with the rules and a lack of understanding to justify a violation. If

WorldCom was unfamiliar with an RDM or when the quiet time began, it should have at least made some effort to determine whether its actions were appropriate before making the ex parte communication. Similarly, we cannot ignore the violation simply because WorldCom assumed that the rules only applied if a hearing had been held. If WorldCom had read the rules thoroughly or inquired, it would have discovered that per Rule 6.6 and Rule 7.e, the ex parte prohibitions of Rule 7.c, including a quiet time if an RDM is scheduled, apply in all ratesetting cases where there has been no final determination that hearings are not needed. In the June 14, 2002 Scoping Memo, the Assigned Commissioner and ALJ specifically left open the question of whether hearings were required and ruled that ex parte Rules 7.c and 7.1 applied to this case.⁴ Given that the RDM concerned a decision that was interim in nature, and the proceeding quite clearly would remain open to set final rates for Pacific, the Commission had not made a final determination on the need for hearings.

Therefore, we find that both Pacific and WorldCom violated Commission Rule 7.c prohibiting ex parte communications beginning on the day of an RDM through the Commission meeting at which the item is scheduled to be considered. Because Pacific's letter was delivered to five Commissioners, five telecommunications advisors, and the ALJ, Pacific violated Rule 7.c with eleven separate offenses. WorldCom violated the rule with one offense.

⁴ See "Assigned Commissioner and Administrative Law Judge's Ruling Denying Motion to Abey Cost Re-Examination and Setting Scope for Unbundled Network Element Cost Re-Examination Proceeding," 6/14/01, Ruling Paragraph 10, p. 30.

B. Level of Penalty

Given these violations, we must determine whether to apply sanctions to Pacific and WorldCom. Pacific claims that no party was harmed or prejudiced by Pacific's or WorldCom's communications, that its communication was intended to correct the record, and that it immediately retrieved the communication after contacted by the ALJ. WorldCom suggests that if it is found to have violated Commission rules, a reminder of the rules regarding RDMS and a warning that sanctions will apply for future violations is appropriate.

We do not agree with Pacific that there is no harm from these violations. While neither party achieved all of its positions in the decision that ultimately issued, there was harm to the regulatory process from parties as sophisticated as Pacific and WorldCom either ignoring the rules entirely or not bothering to ascertain what rules would apply in an unfamiliar situation. Pacific's and Worldcom's lax approach to adhering to Commission rules has dealt a blow to the public's and the parties' overall confidence in the fairness of Commission processes. As we have already noted above, we vehemently disagree with Pacific's suggestion that its ex parte communications were justified in order to "correct the record." If we were to forgive Pacific's transgressions here based on this excuse, we would be inviting countless other parties to similarly bend or break Commission ex parte rules. The fact that Pacific retrieved its letter after it was told to do so is also irrelevant. Notably absent from Pacific's filing is any statement of regret for not following the rules or explanation whether Pacific realized that its ex parte letters violated Commission rules. We cannot help but wonder whether Pacific would have retrieved the

letters if it had not been asked to do so by the ALJ. Even so, if you move your car after parking illegally, you still must pay the ticket.

Neither do we agree with WorldCom's suggestion that the Commission should simply provide a reminder of the rules and a warning that sanctions will apply to future violations. The Commission should not have to provide reminders to the parties that they need to follow the rules. As we have already stated, confusion over the rules does not justify a violation.

Therefore, we will assess a fine against Pacific and WorldCom for violating Rule 7.c. According to Pub. Util. Code Section 2107, the Commission can assess a fine of not less than \$500, nor more than \$20,000 for each offense. In D.98-12-075, the Commission set forth principles to apply to the imposition of fines, namely the severity of the offense and the conduct of the utility. The Commission also considers the financial resources of the utility, the degree of harm to the public interest, and precedent.

In terms of severity of the offense, the Commission typically evaluates an offense based on the degree of economic or physical harm, or the unlawful benefits gained by the utility. (*See* D.98-12-075, *mimeo.*, at 36.) The Commission has also held that violations which do not involve harm to consumers, but instead harm the integrity of the regulatory process by "disregarding a statutory or Commission directive, regardless of the effects on the public, will be accorded a high level of severity." (*Id.*) Based on this guidance, we consider Pacific's and WorldCom's violations severe because they disregarded the Commission's *ex parte* rules.

With regard to conduct of the utility, we find no evidence that Pacific or WorldCom made any advance efforts to ensure compliance with the *ex parte* rules for ratesetting cases and thereby prevent the violation. We also conclude

that Pacific's conduct was deliberate rather than inadvertent because of its statements that the ex parte letter was required to correct the record. Therefore, we are persuaded to apply a larger fine to Pacific because of this deliberate conduct in sending a letter to several decisionmakers on the day of an RDM. Both parties did, however, disclose the ex parte communication by filing ex parte notices. Thus, neither Pacific nor WorldCom attempted to hide their respective communications. We find that the severity of the violations is mitigated by the fact that the violations were self-disclosed and that this was the first time that either party had violated ex parte rules for an RDM. We are also persuaded to mitigate the fine based on Pacific's retrieval of its letters.

Pacific is certainly a large corporation with adequate financial resources to pay a fine. The same might have been said of WorldCom at the time the violation occurred in May 2002, but with the company's recent bankruptcy filing, its resources and ability to pay a fine are uncertain. Even with WorldCom's current financial distress, a fine between \$500 and \$20,000 will not be out of line with the resources of either company.

With regard to precedent, Pacific maintains that the Commission should not impose a fine here because it did not fine parties for two other apparent violations of ex parte rules.⁵ Pacific's alleged precedents can be

⁵ Pacific cites a May 3, 2002 ALJ ruling in Investigation 00-11-052 (In Re Investigation of Qwest Communications Corporation and LCI International Telecommunications Corporation) that discusses apparent ex parte violations and reminds parties that ex parte violations may be grounds for sanctions. Pacific also cites D.01-08-067 (C.00-08-053/The Office of Ratepayer Advocates v. Pacific Bell Telephone Company) that discusses contacts between the Office of Ratepayer Advocates and a decisionmaker. (See D.01-08-067, *mimeo.*, at 10.) Pacific's second example of a precedent is not convincing because the order did not find an ex parte violation.

distinguished from the current violations. Although the Commission has merely admonished parties for other apparent ex parte violations, we find that a breach of rules for closed session meetings warrants a penalty because the violation occurred during the Commission's critical decision-making phase and after the parties had many months of experience with the ratesetting rules applicable to this case. Furthermore, Section 1701.3.c quite clearly prohibits communications when closed session deliberations in ratesetting cases are underway. The Commission has zero tolerance for violations of quiet time surrounding its closed session meetings. Therefore, we will impose a fine for these violations.

Based on the totality of the circumstances, we will impose a fine slightly larger than the minimum because this was a first offense for both parties involved. The penalty is intended to send a signal to the parties that the Commission will enforce violations of its ex parte rules. Both Pacific and WorldCom have damaged the public interest by destroying faith in the Commission's process. Their actions have suggested that the Commission's rules are superfluous. To counteract this damage we will impose a fine, but not a large one.

Given all of the above factors, we will impose a fine on Pacific of \$2,000 per offense and a fine on WorldCom of \$1,000 for its offense. We impose a larger fine on Pacific because of our conclusion that its conduct was deliberate rather than inadvertent. Pacific shall pay a fine of \$2,000 for each of its eleven violations, or a total fine of \$22,000, and WorldCom shall pay \$1,000.

V. Comments Draft Decision

The Commission mailed the draft decision of the ALJ in this matter to the parties in accordance with Section 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed by Pacific and AT&T

Communications of California (AT&T), and reply comments were filed by AT&T.

Pacific contends the draft decision contains two errors. First, Pacific maintains the fine is not warranted because the violation did not harm anyone or anything. Second, Pacific finds the decision disturbing because the Commission is selectively enforcing its own rules by fining Pacific for this violation while taking no action on unreported ex parte contacts during the course of this proceeding. Specifically, on this last point, Pacific describes a discussion during the Commission's public vote on May 16, 2002 regarding the draft order and alternate orders on interim UNE pricing wherein the Commissioners alluded to an agreement by AT&T, WorldCom and Z-Tel – three CLC's that are parties to this proceeding—not to oppose Pacific's 7 271 Application in exchange for the Commission voting in favor of the Lynch Alternate that became D.02-05-042. Pacific contends that this "agreement" is not reflected in any ex parte filings from those meetings, even though the Commissioners specifically requested that the CLC's amend their ex parte filings to reflect this agreement.

AT&T supports the draft order as written. In response to Pacific's comments, AT&T disputes Pacific's allegations but does not comment on them directly because it believes they are not pertinent to the violations discussed in the draft order.

We make no changes to the draft order in response to Pacific's comments. First, on the subject of harm, the decision already describes the harm to the regulatory process and potential for prejudice to parties from ex parte violations of this type and we will not condone them by acquiescing on penalties in this circumstance. Second, Pacific has reminded us that other potential ex parte violations may have occurred during the course of this proceeding by pointing

out that ex parte filings may not have been adequate in disclosing certain “agreements.” Pacific accuses us of selectively enforcing our rules. We do not mean for this to be the case, and with the reminder that Pacific has provided, we will pursue this issue as we find appropriate. Nevertheless, Pacific’s finger-pointing at other parties, even if these accusations ultimately withstand scrutiny, does not convince us to ignore the violations found in this order.

VI. Assignment of Proceeding

Carl Wood is the Assigned Commissioner and Dorothy Duda is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. On May 15, 2002, the Commission held a ratesetting deliberative meeting to discuss a draft decision and two alternate decisions in this proceeding.
2. On May 15, 2002, Pacific sent a letter to eleven decision-makers regarding the substance of one of the alternate decisions under deliberation at the RDM.
3. On May 15, 2002, an attorney for WorldCom left a voicemail message for a Commissioner’s personal advisor regarding the substance of the draft and alternate decisions.
4. According to Rule 6.6 and Rule 7.e, the ex parte prohibitions of Rule 7.c, including a quiet time if an RDM is scheduled, apply in all ratesetting cases where there has been no final determination on the need for hearings.
5. A June 14, 2001 scoping ruling in this proceeding stated that the need for hearings would be decided at a later date and ruled that ex parte Rules 7.c and 7.1 applied to this proceeding.
6. Pacific and WorldCom engaged in ex parte communications during the ex parte “quiet time” surrounding the RDM.

7. Pacific physically retrieved the letters it had sent after it was asked to do so by the ALJ.

Conclusions of Law

1. Pacific's and WorldCom's ex parte communications on May 15, 2002 violated Commission Rule 7.c that establishes a ban on ex parte communications regarding proposed decisions in ratesetting matters from the day of an RDM through the business meeting at which the item is considered.

2. Pacific's and WorldCom's violations harmed the integrity of the regulatory process.

3. Pacific should pay a larger fine per offense because of the deliberate nature of its conduct.

4. The severity of these violations is mitigated by the fact that the violations were self-disclosed, this was the first instance of a violation by these parties of ex parte rules regarding an RDM, and Pacific retrieved its letters.

5. Violations of ex parte rules for closed session meetings warrant a penalty because the violation occurred during the Commission's critical decision-making phase and after the parties had many months of experience with the applicable ratesetting ex parte rules.

6. Pacific and WorldCom should be fined \$22,000 and \$1,000 respectively for their violations of Commission Rule 7.c.

7. Pacific and WorldCom have adequate financial resources to pay the fine assessed in this order.

O R D E R

IT IS ORDERED that:

1. Pacific Bell Telephone Company shall pay a fine of \$22,000 to the Commission, for deposit in the General Fund of the State of California, within 180 days of the effective date of this order.

2. WorldCom, Inc. shall pay a fine of \$1,000 to the Commission, for deposit in the General Fund of the State of California, within 180 days of the effective date of this order.

This order is effective today.

Dated December 5, 2002 San Francisco, California.

HENRY M. DUQUE
CARL W. WOOD
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners

President Loretta M. Lynch, being necessarily absent,
did not participate.