

Decision 02-12-062 December 19, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Pacific Bell (U 1001 C), a Corporation, for Authority to Categorize Business Inside Wire Repair, Interexchange Carrier Directory Assistance, Operator Assistance Service and Inmate Call Control Service as Category III Services.

Application 98-02-017
(Petition for Modification
Filed June 11, 2001)

In the Matter of the Application of Pacific Bell (U 1001 C), a Corporation, for Authority to Categorize Residential Inside Wire Repair as a Category III Service.

Application 98-04-048
(Petition for Modification
Filed June 11, 2001)

**OPINION ON PETITION FOR MODIFICATION
OF DECISION 99-06-053**

I. Summary

This order denies the Office of Ratepayer Advocates' (ORA) petition to modify Decision (D.) 99-06-053 to recategorize Pacific Bell's (Pacific) Residential Inside Wire Repair (RIWR) WirePro service option from Category III¹ to Category II² and to reset Pacific's RIWR WirePro ceiling rate from \$2.99 to \$1.20.

This order also provisionally caps Pacific's RIWR WirePro service option ceiling rate at its current \$2.99 monthly rate. This provisional cap may be

¹ A Category III classification is designated for fully competitive services.

² A Category II classification is designated for discretionary or partially competitive services.

removed through either the filing an application with supporting pricing data or the implementation of revised pricing rules that may be adopted in the Commission's Rulemaking (R.01-09-001) and Investigation (R.01-09-002) into the New Regulatory Framework (NRF) or other Commission proceeding. Any party seeking to recategorize Pacific's RIWR WirePro service option may seek such request through the application process. We are concerned about whether the competitive pricing policies we have afforded Pacific Bell's Inside Wire Services are appropriate to the level of competition in the Inside Wire Repair market. Therefore, we direct the Telecommunications Division to examine the competitive nature of Residential Inside Wire and Business Inside Wire Repair services, and to report its findings to the Commission. We may upon consideration of the report open a proceeding to re-examine the status of Inside Wire Repair Services and determine what categorization and price would be proper.

II. Background

D.99-06-053, among other matters, reclassified Pacific's Business Inside Wire Repair (BIWR) and RIWR services to Category III from Category II. We found Pacific's BIWR service to be one market with two payment options: WirePro³ and Per-Visit.⁴ A similar market situation, a single market with two payment options, was found to exist for its RIWR service. Included in rate changes authorized by that decision was an increase in Pacific's RIWR WirePro

³ The WirePro option provides for customers to pay a monthly fee for diagnostic and repair of any future simple inside wire-related problems at no additional charge.

⁴ The Per-Visit option provides for customers to pay an hourly charge for the diagnostic and repair of all simple inside wire-related problems.

payment option to \$1.20 from \$.60. Subsequent changes up to the current \$2.99 level were approved via the Commission's Advice Letter process for Category III services.

On July 19, 1999, ORA and The Utility Reform Network (TURN) filed a Joint Rehearing Application seeking a reversal of the Category III classification for Pacific's RIWR service. ORA and TURN alleged that the reclassification violated Pub. Util. Code § 1705⁵ since the Commission failed to find that Pacific's RIWR service is offered in two different markets: WirePro and Per-Visit.

In our decision on ORA and TURN's rehearing application, we denied ORA and TURN's RIWR two-market allegation on the ground that the record does not support a finding that RIWR service is offered in two different markets.⁶ We instead affirmed Pacific's RIWR market to be one market with two payment options. At the same time, we granted a limited rehearing to correct a legal error by including a specific finding to that effect. Accordingly, we deleted and replaced D.99-06-053's Finding of Fact 49 to state that "D.93-05-014 [May 7, 1993] and Pacific Bell's tariff identify RIWR service as one market with two payment options, and we find this to be the relevant RIWR market."⁷ We further clarified D.99-06-053's Conclusion of Law 15 to state that Pacific should be authorized to re-categorize its RIWR service to Category III from Category II because Pacific has demonstrated that it has insignificant market power in the RIWR market.⁸ Neither TURN nor ORA pursued judicial review.

⁵ All statutory references are to the Public Utilities Code, unless otherwise noted.

⁶ D.99-09-036, at p. 4 (1999).

⁷ *Id.* at p. 16 (1999).

⁸ *Id.*

III. Petition

On June 11, 2001, nearly 2 years after its application for rehearing on the same issues was denied, ORA filed a Petition for Modification (petition) of D.99-06-053 to recategorize Pacific's RIWR WirePro service option back to Category II from Category III and to reset the ceiling rate for that service option to \$1.20, adjusted downward from \$2.99. The petition appeared on the Commission's Daily Calendar of June 13, 2001. On July 11, 2001, Pacific, Verizon California, Inc. (Verizon), and TURN filed responses to ORA's petition. While TURN supports ORA's petition, Pacific and Verizon oppose it. The petition of ORA and responses of Verizon and TURN identified three issues for consideration: the timeliness of ORA's petition, the change in categorization, and the change in the ceiling rate. We first address the timeliness of the ORA's petition.

IV. Timeliness of Petition

Rule 47(d) of the Commission's Rules of Practice and Procedure (Rules) allows petitions to be filed within one year of the effective date of the decision proposed to be modified. If more than one year has elapsed, the petition must also explain why the petition could not have been filed within one year of the effective date of the decision.

Pacific contends that ORA's petition should be summarily denied because it is procedurally improper and substantively invalid. Pacific explains that ORA is seeking a complete reversal of prior Commission findings, on which ORA has

argued and lost following an evidentiary hearing,⁹ in its comments to a proposed decision,¹⁰ and again on rehearing.¹¹

Verizon also believes that ORA's petition should be summarily denied. Verizon contends ORA has not justified why the petition could not have been filed within one year of the effective date of the decision; that ORA merely reargues positions that the Commission previously considered and rejected; and that ORA provides no evidence to suggest that conditions have changed.

In this instance, ORA's petition is filed two years after D.99-06-053 was issued. ORA explains that it could not have filed its petition within a one-year time period because the series of pricing events that resulted in a 400% rate increase in the WirePro service option, which compelled ORA to file its petition, occurred between July 1999 and March 2001. This series of pricing events started with an increase from \$.60 to \$1.20 in July 1999, continued with an additional \$.79 increase to \$1.99 on June 2, 2000, and culminated with an additional \$1.00 increase to \$2.99 on March 1, 2001. The first increase, a 100% increase in the rate, was authorized through the application process to bring the service rate above cost pursuant to D.99-06-053 and the latter two increases were authorized through the advice letter process.

TURN concurs with ORA that the petition could not have been filed within a year after the effective date of the decision. In its support for ORA,

⁹ Consolidated Application (A.) 98-02-017, dated February 9, 1998 and A.98-04-048, dated April 21, 1998.

¹⁰ ORA's concurrent brief filed in consolidated A.98-02-017 and A.98-04-048 on September 14, 1998, which resulted in D.99-06-053 (1999).

¹¹ ORA and TURN's joint rehearing application of D.99-06-053 filed July 9, 1999, which resulted in D.99-09-036 (1999).

TURN explains that the extended time period for filing a petition is reasonable, given the two-plus years of price increases.

Contrary to the arguments of Pacific and Verizon, ORA has substantiated that the events causing it to file this petition occurred over nearly a two year time period, making it impractical for ORA to have filed its petition within a one-year time period. We concur with ORA and TURN and find that ORA's petition is timely filed.

For a petition to meet filing requirements, Rule 47(b) specifies that the petition concisely state the justification for the requested relief and that it provide specific wording to facilitate compliance with all requested modifications to a decision. Any factual allegations must be supported with specific citations to the record in the proceeding or to matters that may be officially noticed. Allegations of new or changed facts must be supported by an appropriate declaration.

Even though ORA is in compliance with Rule 47(b), with Pacific and Verizon contend that ORA's petition should be summarily dismissed. One primary reason, as both Pacific and Verizon assert, is that ORA employs the same arguments it has previously presented and lost in evidentiary hearings; in its comments to the proposed decision; and again, upon rehearing. We decline to dismiss the petition before considering the gravity of the basis under which ORA petitions for a change in the categorization and ceiling rate of Pacific's RIWR WirePro service option.

V. Categorization

ORA petitions to recategorize Pacific's RIWR WirePro service option on the grounds that the current Category III classification conflicts with the Commission's New Regulatory Framework (NRF) Decision (D.89-10-031, dated October 12, 1989). ORA takes this position on the basis that "Pacific clearly

retains significant, if not exclusive, market power for its RIWR WirePro Plan service”¹² option.

The NRF Decision established a Category III classification for only those services of a Local Exchange Carrier (LEC) having or expecting to have insignificant market power in providing the service in each market it intends to serve. Concurrently, a Category II classification was established only for those services that are discretionary or partially competitive and for which the LEC retains significant, though perhaps a declining, market power. Hence, if ORA’s significant market power contention is correct, then by definition, the RIWR WirePro service option must be reclassified.

ORA acknowledges that the pivotal issue in determining the appropriate classification is the relevant market, so that an accurate analysis of market power can be undertaken. ORA contends that the RIWR WirePro service option is a distinctly separate market from the RIWR Per-Visit service option. ORA, acknowledging that its position conflicts with prior Commission Decisions, contends that we erroneously concluded in Pacific’s re-categorization application and in the joint rehearing application filed by ORA and TURN that Pacific’s RIWR service consists of one market with two payment options. In support of its separate market position, ORA presents arguments that we considered and rejected in both Pacific’s re-categorization application and in the rehearing application. The only new evidence which ORA offers to support its position that the markets are separate is related to the recent pricing activity which has

¹² ORA’s June 11, 2001 petition, at p. 10.

taken place under the RIWR WirePro service option since D.99-06-053 was issued on June 10, 1999. This is discussed in more detail in the Section VI. Ceiling Rate.

TURN contends that ORA's position is valid because Pacific has substantially increased its RIWR WirePro service rate, while keeping its RIWR Per-Visit service rate constant. This has occurred subsequent to recategorizing the entire RIWR service from Category II to Category III. TURN further alleges that this disparity in rate changes between the RIWR service options demonstrates that "Pacific surely enjoys significant market power in the residential inside wire repair insurance market, if not also in the one-time service call market."¹³ TURN concludes that this price discrepancy has resulted in unfair exploitation of the market power mechanism, particularly in the case of the RIWR WirePro service option.

We agree with ORA that the definition of the relevant market is crucial to an accurate analysis of market power. Our D.99-06-053 affirmation that Pacific's RIWR services is one market with two payment options was based on expert testimony substantiating that payment options do not transform a single service into two different services. We further affirmed in D.99-06-053 that regardless of which payment option is selected by customers, these payment options are designed to solve the same problem: "faulty" residential inside wire.¹⁴ To arrive at these affirmations, we relied on the record in D.99-06-053,¹⁵ D.93-05-014,¹⁶ and Pacific's October 6, 1997 inside wire repair Tariff No. 8.3 attached to its

¹³ TURN's July 11, 2001 response to ORA's petition, at p. 2.

¹⁴ D.99-09-036 at pages 5-6, order granting limited rehearing of D.99-06-053.

¹⁵ Pacific's application to recategorize RIWR to Category III from Category II.

application for Category III status. We used a similar analysis for the BIWR market, which has been challenged and is not an issue in ORA's petition before us now.

The burden of proof arising from the evidence presented in a petition rests with its petitioner. Other than petitioner ORA's identification of rate changes under the RIWR WirePro service option, there is no change in the substantive evidence. Furthermore, ORA's previously presented arguments (as cited herein) fail to convince us that Pacific's WirePro service option is being offered to customers in a market that is distinctly separate from that of the RIWR Per-Visit service option. Moreover, we're also not convinced, and therefore cannot affirm, that Pacific would retain significant, let alone exclusive, market power.

Regarding the new evidence presented by petitioner ORA, we observe that the WirePro rate was priced below cost prior to 1999. An increase in price above cost level, in itself, does not constitute an elevation of this service option to a realm above and beyond competitive levels. ORA merely establishes that the price of the RIWR WirePro service option increases while the price of Pacific's RIWR Per-Visit option remains constant. Notably missing are facts on the market power impact, if any, that these price changes have on the competitive behavior and market conditions of the RIWR market. It should be noted here that these price increases were subject to protest and Commission scrutiny, and this matter is further addressed in the following Ceiling Rate discussion.

With regard to the new evidence, RIWR WirePro rate changes, we observe that the WirePro rate had been priced below cost for a number of years. An

¹⁶ RE: accounting for station connections and related ratemaking effects and the economic consequences of customer-owned premise wiring.

increase in price above cost, in itself, does not necessarily mean that the market for RIWR is not competitive. ORA merely established that the price of the WirePro service option increases while the price of Pacific's Per-Visit option remains constant.

We remain unconvinced that Pacific's RIWR WirePro service option is a distinctly separate market from that of its RIWR Per-Visit service option. Accordingly, we stand similarly unconvinced that competition has failed in the RIWR market, or that there exists a compelling need to recategorize Pacific's RIWR WirePro service option back to Category II from its current designation as a Category III type of service.

VI. Ceiling Rate

ORA previously acknowledged that Pacific's then existing \$.60 RIWR WirePro service rate had been priced below cost. Additionally, ORA acknowledges the Commission's approval of a \$1.20 ceiling rate which takes into consideration that, while the RIWR WirePro service was priced below cost, the ceiling rate is by necessity adjusted to a level higher than that of cost. Accordingly, ORA does not object to the \$1.20 ceiling rate.

ORA does, however, assert that Pacific's current rate, which resulted from rate increases subsequent to D.99-06-053, violates Section 451 in that the rate can be demonstrated to be unjust and unreasonable. ORA contends that Pacific used its authority from D.99-06-053 to raise its RIWR WirePro service rate to a level in excess of its costs for that service and in excess of the actual California Consumer Price Inflation (CCPI) rate of 6.1% during the same time period. ORA further contends that "the ceiling rates Pacific now seems to be aiming for are those

charged by other subsidiaries of SBC Communications, Inc., Pacific's parent company."¹⁷ This contention is based on ORA's computer search which found that a \$3.95 rate is being charged by SBC affiliates in Arkansas, Kansas, Missouri, Texas, and Oklahoma.¹⁸

ORA asserts that the current ceiling rate no longer bears any relation to Pacific's cost and therefore substantially exceeds all objective gauges for measuring inflation.

ORA is petitioning the Commission to reinstate Pacific's \$1.20 ceiling rate "Unless and until Pacific proves that its costs necessitate an increase"¹⁹ through the Commission's application process.²⁰ Pacific counters that its price increases, were submitted to the Commission through the Advice Letter process in conformance with the Commission's advice letter procedures for Category III services.

The ensuing advice letters from Pacific were devised to seek a ceiling-rate adjustment to a level greater than five percent, such a request becoming vulnerable to protests although none was made. Since, absent any protest, a five percent or greater increase in the ceiling rate becomes effective upon 30-day advance notice and becomes permanent on the thirtieth day after filing, Pacific's current rate can be deemed appropriate. Any protest to these advice letters would have precluded the rate changes from becoming permanent until the protest was withdrawn or resolved by Commission action. Absent the withdrawal or resolution of a protest, the ceiling rate would have reverted back

¹⁷ Petition at p. 7.

¹⁸ Paragraph 5 of ORA's Declaration attached to its petition.

¹⁹ Petition at p. 8.

²⁰ Petition at p. 13.

to its previously authorized level. This protest procedure is set forth on page four of D.99-06-053.

Pacific's first advice letter²¹ requesting a 65% increase in the ceiling rate to \$1.99 from \$1.20 appeared in the Commission's Daily Calendar of June 2, 2000 and its second advice letter²² requesting a 50% increase in the ceiling rate to \$2.99 from \$1.99 appeared in the Commissions Daily Calendar of February 2, 2001. ORA and TURN both had the opportunity to protest these advice letters and, for whatever reason, neither did so. Absent protests, these advice letters underwent Commission scrutiny prior to being approved by the Commission.

No one disputes that Pacific's RIWR WirePro rate is above cost level, and this has been the case since D.98-06-053 became effective in 1998. ORA's assertion that Pacific's current RIWR WirePro service rate is unjust and unreasonable lacks merit, particularly because ORA fails to provide in its petition any factual data for market activity and collaborative adjustment of cost that would support its argument that Pacific's rate is above a competitive level.

Pacific employed cost data based on a study which took place prior to D.98-06-053 in 1998 in order to substantiate the reasonableness of its initial rate increase to \$1.20 from \$.60. As is explained on page 65 of D.99-06-053, we limited the level of that initial rate increase to balance our market and cost analysis with a concern for potential shocks to customers adversely affected by abrupt pricing changes.

Pacific's reliance on a 1997 cost study along with the Commission's intent to mitigate any potential for rate shocks are facts supporting a ceiling rate at a

²¹ Advice Letter No. 21207, filed on May 31, 2000.

level higher than that of the adopted rate of \$1.20. Even ORA acknowledges that the ceiling rate is, of necessity, above cost level.

Notwithstanding Pacific's ability to provide its RIWR WirePro service option above cost level, the parties still abandoned their opportunity to take advantage of the Advice letter process in order to protest those rate changes which they allege are unjust and unreasonable.

Although ORA compares the 150% change in Pacific's RIWR WirePro rate (\$1.20 to \$2.99) that occurred since D.99-06-053 was issued with the 6.1% change in the CCPI that occurred within the same time period, ORA provides no collaborative facts to substantiate that an inflation rate has been or should be used as a benchmark for increasing the price for a utility service. The facts in the proceeding show the opposite. An inflation rate has no bearing whatsoever on the RIWR WirePro rate. For example, prior to the authorization of a \$1.20 RIWR WirePro rate by D.99-06-053, the rate remained at a constant level of \$.60 with no adjustments to correct the below-cost pricing or annual rates of inflation that incurred from 1992 to 1998.

ORA provided printouts from the internet showing a \$3.95 RIWR WirePro rate currently being charged in several of Pacific's affiliated territories to demonstrate that SBC Pacific intends to set its RIWR WirePro rate at the same level as other states. ORA provided no other evidence of Pacific seeking this rate level for its California service territory. It is not our policy to set rates based on the levels for comparable services in other states. As stated in D.99-09-036, our decision on ORA and TURN's application for rehearing of D.99-06-053, any

²² Advice Letter No. 21593, filed on January 30, 2001.

increase in Pacific's RIWR rates should be based on California markets and the California regulatory treatment of RIWR. We propose no change to this position.

While Pacific's RIWR WirePro rate is above cost, ORA has not demonstrated that Pacific's \$2.99 RIWR WirePro rate is in violation of Section 451. We decline to reset Pacific's RIWR WirePro rate back to \$1.20 at this time.

Any further increase in the price for Pacific's RIWR WirePro service option would appear to be excessive and predatory without the benefit of an updated cost study. We will provisionally cap the ceiling rate of this service option to ensure that any subsequent increase in this rate complies with Section 451. This provisional cap may be removed upon either the filing of an application with supporting pricing data or upon implementing revised NRF pricing rules that may be addressed in the Commission's rulemaking and investigation into revising the NRF or other Commission proceeding.

Any party may seek to change the categorization of Pacific's WirePro service option by filing an application with substantive information demonstrating that Pacific WirePro service option is a distinctly separate market from Pacific's per-visit service option and that Pacific has significant market power in that market.

VII. Comments

The draft decision of the Administrative Law Judge in this matter was mailed to the parties in accordance with Section 311(g)(1) of the Public Utilities Code and Rule 77.7 of the Commission's Rules of Practice and Procedure.

Rule 77.3 of the Commission's rules of Practice and Procedure specifically requires Section 311 comments to focus on factual, legal, or technical errors in the proposed decision. In the process of citing such errors, the parties are required

to make specific reference to the record. Comments that merely reargue positions taken in briefs are accorded no weight and should not be filed. Rule 77.4 further requires that comments which contain recommendations for specific changes to the proposed decision also include findings of fact and conclusions of law that are believed to support those changes.

Comments were timely filed by ORA and Pacific. No changes were made to the draft decision Assignment of Proceeding.

Henry Duque is the Assigned Commissioner and Michael Galvin is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. The pivotal issue in determining the appropriate classification for an NRF service is in defining the relevant market so that an accurate analysis of market power can be undertaken.
2. The NRF Decision (D.89-10-031) established a Category III classification for only those services of an LEC having or expected to have insignificant market power in providing the service in each market it intends to serve.
3. Pacific's RIWR service has been found to consists of one market with two payment options: WirePro and Per-Visit.
4. We affirmed in D.99-09-036 that regardless of which payment option is selected by customers, these payment options are designed to solve the same service problem, faulty residential inside wire.
5. Our D.99-09-036 affirmation that Pacific's RIWR services is one market with two payment options is based on expert testimony substantiating that payment options do not transform a single service into two different services.
6. Increases in the RIWR service rate are based on California markets and the California regulatory treatment of RIWR.

7. The price level of the initial RIWR WirePro service rate approved in D.99-06-053 was limited to a range within which we were able to balance our market and cost analysis with a concern for potential shocks, which could be experienced by customers due to the effect of sharp pricing changes.

8. Pacific's RIWR WirePro rate was increased from \$.60 to \$1.20, pursuant to D.99-06-053.

9. Prior to the approval of a \$1.20 RIWR ceiling rate for the RIWR WirePro service, the rate had remained at a constant level since 1992 with no ceiling-rate adjustments to correct below-cost-level pricing or annual rates of inflation.

10. The Commission's approval of a \$1.20 RIWR WirePro service rate was made with the recognition that that service was priced below cost and that the ceiling rate is necessarily higher than cost.

11. Pacific's RIWR WirePro rate has increased 150% to \$2.99 from \$1.20 since being classified as a Category III service.

12. Requests for review of RIWR WirePro service rate changes that occurred subsequent to the issuance of D.99-06-053 were submitted to the Commission for review through the Advice Letter process in conformance with the procedural guidelines set forth in D.99-06-053.

13. Parties failed to file any protests to the Advice Letters within which Pacific sought an increase in its RIWR WirePro service rate.

14. Pacific's BIWR and RIWR services were recategorized to Category III from Category II, pursuant to D.99-06-053 on June 10, 1999 and affirmed by D.99-09-036 on September 2, 1999.

15. The joint rehearing application of ORA and TURN seeking a reversal of Pacific Bell's RIWR WirePro Category III designation and single market designation with two payment options was denied.

16. We affirmed in our denial of the rehearing application that Pacific's RIWR market is one market with two payment options.

17. Rule 47(d) permits the filing of a petition on a decision issued more than one year ago if in said petition it is explained why that petition could not have been filed within one year of the effective date of the decision.

18. ORA could not have filed its petition within one year because the pricing events prompting it to file the petition occurred over a two-and-a-half year time period.

19. The petition provides no facts on the impact, if any, that the RIWR WirePro price service rate changes have on the competitive behavior and market conditions of the RIWR market.

Conclusions of Law

1. ORA's Petition for Modification of D.99-06-053 should be denied.
2. Pacific's RIWR WirePro service option rate should be provisionally capped.
3. The application process should be used for seeking a change in the categorization of Pacific's WirePro service option.

O R D E R

IT IS ORDERED that:

1. The June 11, 2001 Petition for Modification of Decision 99-06-053 filed by the Commission's Office of Ratepayer Advocates is denied.
2. Pacific Bell's (Pacific) Residential Inside Wire Repair (RIWR) WirePro service option rate is provisionally capped. This provisional cap may be removed via either the application process or implementation of revised New

Regulatory Framework pricing rules that may be addressed in other Commission proceedings.

3. Any party seeking a change in the categorization of Pacific's service RIWR service option rate shall file an application with substantive information demonstrating that Pacific's WirePro service option is a distinctly separate market from Pacific's per-visit service option and that Pacific has significant market power in that market.

4. The Telecommunications Division is directed to examine the competitive nature of Residential and Business Inside Wire Repair services, and to report its findings to the Commission simultaneously with the Commission's 2003 report to the Legislature on the status of competition in California.

5. Application (A.) 98-02-017 and A.98-04-048 are closed.

This order is effective today.

Dated December 19, 2002, at San Francisco, California.

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

I dissent.

I reserve the right to file a dissent.

/s/ LORETTA M. LYNCH
President