

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking on the)
Commission's Own Motion to Establish) R.00-02-004
Consumer Rights and Consumer Protection Rules) (Filed February 3, 2000)
Applicable to All Telecommunications Utilities)
_____)

**OPPOSITION OF THE UTILITY REFORM NETWORK, NATIONAL
CONSUMER LAW CENTER, UTILITY CONSUMERS ACTION NETWORK,
CONSUMERS UNION, AND AARP TO THE DRAFT DECISION OF ASSIGNED
COMMISSIONER KENNEDY AND THE MOTIONS FOR STAY OF D.04-05-057**

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**OPPOSITION OF TURN, NCLC, UCAN, CU AND AARP
TO THE DRAFT DECISION OF ASSIGNED COMMISSIONER KENNEDY
AND THE MOTIONS FOR STAY OF D.04-05-057**

I. INTRODUCTION

The Utility Reform Network, National Consumer Law Center, the Utility Consumers' Action Network, Consumers Union, and AARP¹ (hereinafter referred to collectively as "Consumer Groups") provide this response to the Draft Decision of Commissioner Kennedy (issued January 5, 2005), and the motions for stay filed January 6, 2005.

Consumer Groups oppose each and every aspect of the collective actions proposed in the Assigned Commissioner's Ruling of January 5, the Draft Decision attached thereto, and the requests for stay filed subsequently. This flurry of rulings and filings is nothing more than a transparent attempt to take advantage of changes in the Commission's membership to reverse a recent Commission decision and must be rejected. Instead, the Commission should 1) take no action at its January 13, 2005 meeting due to the failure to issue the draft decision in a timely fashion and the absence of any justification for reducing the normal comment period, and 2) at a subsequent meeting deny the requested stay and any other requested action that would undermine implementation of the Bill of Rights adopted in D.04-05-057 and upheld in D.04-10-013.

The Draft Decision and the ensuing motions are merely a resuscitation of rhetoric-laden arguments that have been previously rejected by this Commission. The exaggerated tone of these pleadings cannot be ignored. The arguments describe a parade of horrors that will descend upon both the wireline and wireless carriers: these rules will be single-handedly responsible for a) ending telecommunications competition in California (to the extent any such

¹ NCLC, UCAN, CU and AARP have each authorized TURN to submit these comments on their behalf.

competition currently exists), b) stopping research and development and innovation in the industry, c) driving several carriers into bankruptcy or, at a minimum, forcing them to pull out of the lucrative California market, and d) ruining the California economy. All of this because this Commission's earlier decision requires carriers to give consumers thirty days instead of fifteen to return or cancel service, to put the outstanding balance of a customer's bill on a disconnection notice, and to highlight important terms such as price, term of service and early termination fee on a written contract.

These identical arguments have failed before, and the carriers have not presented any additional information that might warrant a different outcome. The only change since the issuance of D.04-10-013 is in the makeup of the Commission, and that alone is not a valid reason for beginning the process of dismantling the Bill of Rights. Any sense of due process is turned on its head when a public agency attempts to push through such an outcome in order to take advantage of the inevitable 2-1 vote thereby reversing the consumer protections adopted and upheld a few months earlier by a 3-2 vote. California deserves better from its decision-makers.

II. PROCEDURAL BACKGROUND

The Commission issued D.04-05-057 (adopting the Bill of Rights), D.04-08-056 (rejecting the initial industry requests for a stay) and D.04-10-013 (rejecting the legal challenges raised by the industry) over the course of six months. In each case, the decision was approved by a 3-2 vote, with the same three Commissioners voting in support of the Bill of Rights, and the same two Commissioners dissenting. Two of the Commissioners voting with the majority in each of those decisions left the agency at the end of 2004; the two dissenters remain.

The agenda for the Commission's first meeting of 2005, issued January 3, 2005, provided the first indication that Commissioner Kennedy intended to sponsor a decision modifying D.04-05-057 to stay the effective date of that decision. The proposed decision itself was not provided to the parties until late on January 5, when it was e-mailed as an attachment to an Assigned Commissioner's ruling of the same date.

Pursuant to Public Utilities Code Section 311 and Rule 77.2, under most circumstances the Commission must issue a draft decision at least 30 days before the Commission meeting at which it will be first considered, and provide parties a twenty-day comment period. The Assigned Commissioner's Ruling of January 5 invokes the exception set forth in Rule 77.7(f)(9):

In the following circumstances, the Commission may reduce or waive the period for public review and comment under this rule regarding draft decisions . . . (9) for a decision where the Commission determines, on the motion of a party or on its own motion, that public necessity requires reduction or waiver of the 30-day period for public review and comment. For purposes of this subsection, "public necessity" refers to circumstances in which the public interest in the Commission adopting a decision before expiration of the 30-day review and comment period clearly outweighs the public interest in having the full 30-day period for review and comment. "Public necessity" includes, without limitation, circumstances where failure to adopt a decision before expiration of the 30-day review and comment period would place the Commission or a Commission regulatee in violation of applicable law, or where such failure would cause **significant harm to public health or welfare**. When acting pursuant to this subsection, the Commission will provide such reduced period for public review and comment as is consistent with the public necessity requiring reduction or waiver.²

The "public necessity" cited in the January 5 ruling is as follows:

Customers and carriers alike would be harmed if the normal comment period ensues; because of the great complexity of the required steps, carriers continue not to be able to meet our implementation schedule for D.04-05-057. That process involves

² Rule 77.7(f)(9) [emphasis added].

testing, for example, billing information systems, which may fail and consequently damage customers.

On that basis, the Assigned Commissioner's Ruling established January 11, 2005, as the date for comments on the draft decision, giving parties only four business days.

In an electronic ruling issued after 5:00 p.m. on Friday January 7, 2005, Commissioner Kennedy expanded the scope of the comments due January 11, 2005, to include responses to four additional pleadings filed by parties to the proceeding:

- Motion of the Wireline Group for Stay Pending Modification
- Motion of Cingular Wireless, LLC, et al. for a Stay of Decision 04-05-057 and for Shortened Answer Period and Expedited Ruling
- The Wireline Groups' Petition for Modification of Decision 04-05-057 Adopting Rules Governing Telecommunications Consumer Protection
- Petition of Cingular Wireless, LLC for Modification of 04-05-057

The e-mailed "ruling" of the evening of January 7, 2005 provided parties a response period of less than three business days from the date the motions and petitions were filed (and only two business days from the date of the "ruling"). The Commission's Rules of Practice and Procedure would normally provide fifteen days to respond to the Motions for Stay and thirty days to respond to the Petitions for Modification. A subsequent (and more formal) ruling, issued just before the close of business on January 10, 2005, modified the January 7 e-mail to "clarify" that responses to the petitions for modification are not due January 11, but everything else is. This procedural whiplash has distracted parties and wasted the time of those drafting comments.

III. THE ASSIGNED COMMISSIONER RULING FAILS TO DEMONSTRATE ANY “PUBLIC NECESSITY” THAT MIGHT WARRANT A REDUCED COMMENT PERIOD UNDER RULE 77.7(f).

The Commission cannot legally act on this matter at its January 13, 2005 meeting. There is nothing in the Assigned Commissioner’s Ruling of January 5, nor in the draft decision attached thereto, that would constitute any “public necessity” as defined in Rule 77.7(f)(9). Even if the Commission concocts some “public necessity” in an attempt to justify a January 13, 2005 vote, it will not “clearly outweigh[] the public interest in having the full 30-day period for review and comment” as required under the Commission’s rule. Therefore the reduction in the comment period to a period far less than required by Section 311 is inconsistent with the Commission’s own Rules of Practice and Procedure and, as a consequence, an abuse of discretion and a failure to proceed in the manner required by law. Public Utilities Code Section 1757.1.

Carriers should have been implementing these rules since May of last year. The deadline for implementation of the majority of the rules, December 6, 2004, has passed. The Executive Director has granted carriers’ requests for more time with a blanket extension until April 2005. Where is the “significant harm to public health or welfare” that is prevented or avoided by addressing this matter January 13 rather than at the Commission meeting on February 10, 2005? What “public necessity” is accomplished by reducing the response time so drastically, to the clear disadvantage of parties that wish to see the Bill of Rights implemented in full?

According to the Draft Decision, “there is a significant risk of consumer harm[] if major changes are made to billing systems without adequate time for testing.”³ The basis for this supposed “significant risk of consumer harm” is the “volume and nature of the extension requests . . . related to billing and computer systems.” The “volume and nature” of the carriers’ claims cannot be determinative of whether or not there is a “significant risk of consumer harm” – and certainly do not justify the expedited comment period. Furthermore, the nature of the claims is essentially the same as those presented in the original stay requests filed after the Commission issued D.04-05-057. But in D.04-08-056, the Commission essentially determined that even if those claims proved accurate, the carriers had failed to justify a stay. At this juncture the approach set forth in the Draft Decision and Assigned Commissioner Rulings does nothing more than affirm the sense that a decision has already been made, and the shortened comment and response periods underscore how little importance will be assigned to these pleadings. The rest of the Commission should firmly and unequivocally reject this approach.

IV. THE ASSIGNED COMMISSIONER INAPPROPRIATELY SHORTENED TIME FOR THE RESPONSES TO THE STAY MOTIONS.

Consumer Groups object to the expedited schedule adopted by the Assigned Commissioner in her e-mailed “ruling” of January 7, 2005. With only five business days to respond to her Draft Decision and even less time to respond to the motions for stay filed by the carriers, Consumer Groups cannot properly scrutinize the record, much less prepare responses that would fully assist informed decision-making by this Commission on January 13.

³ Draft Decision, p. 4. Without further explanation, Finding of Fact 6 expands this determination to include potential disruption to the “provisioning” of telephone service. Curiously, nearly identical language appears in the January 3, 2005 letter of Executive Director Steve Larson granting a broad extension of the compliance dates for a number of the rules. While it seems obvious to Consumers, it may bear repeating – such a statement in a letter from a Commission employee is of no evidentiary value and certainly does not, on its own, establish that a sufficient showing on the risk of consumer harm has been made.

Even if an expedited schedule were justified for comments on the Draft Decision, the Assigned Commissioner offered no explanation other than “administrative efficiency” for the ruling expediting responses on the newly-filed stay motions and petitions. There is something fundamentally wrong with a process that begins with a Draft Decision granting a stay, followed by requests for a stay, and then a drastically reduced opportunity for parties to comment on the merits of both the granting and the after-the-fact request for relief. It may well create the appearance of “efficiency” but comes at a cost to due process that is too high.

This approach must also be rejected because the greater “administrative efficiency” would be gained by NOT expediting the responses to the stay motions and petitions. Thanks to the Assigned Commissioner’s Ruling and Draft Decision, the Commission already had a request for stay pending for a vote at the January 13 meeting before the carriers’ motions were filed. If adopted, the Draft Decision would stay D.04-05-057, rendering the carriers’ Motions for Stay moot. If the matter is held or the Draft Decision rejected at the January 13 meeting, perhaps then the Commission may wish to entertain a shortened time schedule for these other pleadings.

“Administrative efficiency” is rendered meaningless if such “efficiency” is achieved without regard for the resulting hardship on interested parties and the less than useful record produced under such time pressure, and particularly when there is so little gained for the efficient administration of the Commission as it goes about performing the public’s business.

V. THE MOTIONS FOR STAY MUST BE DENIED

There are currently three pending requests for stay of D.04-05-057. The carriers’ Motions, and even Commissioner Kennedy’s Draft Decision, are premised upon essentially the same arguments made by the carriers last year when they requested a stay of D.04-05-057 pending the result of the Applications for Rehearing. The Commission firmly and unequivocally

rejected that request in D.04-08-056. For purposes of evaluating the present request for a stay, the only material change has been to the lineup of the Commission. Consumer Groups continue to oppose any attempts to further delay the process and deprive consumers of the benefits of these rules.

The stay requests rejected in D.04-08-056 described anticipated implementation problems. Like a self-fulfilling prophecy the motions for stay filed immediately after the Commission lineup had changed point to delays in implementation and the many requests for extension of time the carriers have sought under Rule 48(b).

However, far from justifying a stay, the implementation delays and requests for more time indicate that the extension process is proceeding as designed and in a manner consistent with the basis for denying the stay in D.04-08-056. The Commission anticipated that implementation of the rules may not be smooth or uniform among all the carriers, so D.04-05-057 contains a clear and simple process for carriers to request more time. The Executive Director has been analyzing and reviewing the requests and has granted several, including several blanket exemptions as a result of backlog from the Commission staff. Leaving that process in place eliminates any need for a stay, just as the Commission determined in D.04-08-056. The fact that some carriers are having problems with the implementation of some of the rules, just as they predicted in their stay motions filed six months ago, is not an adequate basis for staying implementation of the entire set of rules for all carriers, particularly when the extension process is available and working.

The carriers' motions and the Draft Decision also overstate the impact of the extension requests. First of all, not all carriers are having trouble with implementation; over 193 carriers

(many of which have a significant number of residential or small business customers) have filed verified letters of compliance with the rules.

Furthermore, of those carriers requesting extensions, most of the requests have been relatively narrow, asking for extensions of only a few selected requirements for a matter of months. Indeed, most carriers have only asked for extensions of approximately 6 or 7 subparts of the rules, out of a total of 75. For example, according to the wireline carriers' own Exhibit A to their Motion for Stay, AT&T asked for more time to comply with only six subparts, MCI only asked for an extension on two and Sprint set the record with a request for more time to comply with fourteen of the subparts of the Rules. Even the wireless carriers don't seem to be having major problems with implementation only requesting more time to comply with between two (Edge Wireless) and thirteen (T-Mobile) subparts. Time Warner, on the other hand, has certified that it is in compliance with all but one subpart.⁴ In addition while Sprint seems to be facing the biggest hurdle to complying in a reasonable time frame (having asked for 13-18 months extension), most carriers asked for six months from December of 2004 on average. The reality is a far cry from the "sky is falling" scenario set forth in the stay motions and the Draft Decision.

The carriers also seem to suggest a stay is warranted because uneven implementation progress among competitors is causing "competitive harm." Wireline Stay at 7-8. As much as both the wireless and wireline carriers like to emphasize the purportedly competitive nature of telecommunications, the Consumer Groups find it ironic that these carriers don't see the opportunity to distinguish themselves through efficient and meaningful implementation of the consumer-friendly rules while their competitors flail with implementation and waste time

⁴ Motion of Time Warner Telecom of California L.P. for Waiver of a Certain Provision of G.O. 168, p. 4.

litigating.⁵ Consider the wireless carrier experience with number portability: Even though they fought the rules and requirements to the bitter end once it was inevitable, the carriers embraced the ability to port numbers as a marketing tool. From a consumer's perspective the fact that one carrier can't seem to find a way to implement the rules efficiently and neatly, but others can, would perhaps be a factor in choosing a carrier. If a carrier can market its stronger emphasis on customer service as a result of these rules, then both the consumer and carrier have benefited.

The wireline carriers go so far as to suggest that the "competitive harm" suffered by carriers as a result of the implementation problems with the Bill of Rights is a violation of the "telecommunications policies" found in Public Utilities Code Section 709. Far from a violation of Section 709, the Rules go directly to support Section 709(h), which states:

To encourage fair treatment of consumers through provision of sufficient information for making informed choices, establishment of reasonable service quality standards, and establishment of processes for equitable resolution of billing and service problems.

Further, the California Legislature also set clear policy through the Telecommunications Customer Service Act of 1993 (Public Utilities Code Sections 2896 and 2897), which set several general requirements applicable to "all providers of telecommunications services in California" that these Rules effectuate. The California Legislature and this Commission recognize that telecommunications policy include strong consumer protections and as a result it is California consumers that will suffer harm even if only a temporary stay is granted.

It is also ironic that the carriers use the paternalistic argument that uneven or rushed implementation will harm consumers through confusion or problems with bills. Every subpart of these rules was designed to address potential consumer harm; the longer these rules take to

⁵ Consumer Groups note that the real competitive harm may come from the frenzy of mergers in the wireless industry. Far from justifying a stay of the Rules (Draft Decision at A-2), these mergers erode any competitive pressure or incentive to voluntarily implement strong customer service policies and consumer protections.

implement the more at risk consumers are. The Commission recognized as much in D.04-08-056, when it rejected the notion that a stay would not harm consumers:

We also consider the harm that may result if a stay of the Decision is granted. The Carriers allege that there will be no great harm to the parties or the public if a stay is granted because it will simply preserve the status quo, and consumers are already largely protected under other state and federal laws. However, this argument ignores the fact that, although the Carriers' position is that the status quo should be preserved, the Decision finds that consumers are not adequately protected in the absence of the G.O. *See* Decision, F.F. 2. The most compelling reason for not staying the Decision is that inadequate consumer protection will persist until the G.O. is implemented. Moreover, as consumer groups note, it has already been a long wait for consumers to gain these protections, since this proceeding was opened in 2000.⁶

Even with this clear message sent by the Commission less than six months ago, the carriers and Commissioner Kennedy try this argument again hoping for a different result. But for the same reasons stated in D.04-08-056, these arguments must fail.

Finally, the Draft Decision cites pending litigation in federal and state court challenging the Rules as justification for a proposed stay. The Commission is creating opportunities for future mischief if it even suggests in a formal decision that the agency sees the filing of litigation challenging one of its decisions as an automatic basis, even in part, for granting a stay of the implementation of that decision. Any party that might have its interests advanced by delaying implementation of an adverse CPUC decision will now have added incentive to pursue a court challenge of that decision. The Commission will be hard-pressed to explain why it voluntarily stayed implementation of the Bill of Rights due to such litigation, but doesn't believe that such action is warranted when judicial challenge is pursued in other cases.

It is most curious that none of the plaintiffs in state or federal court asked for a stay of these rules before their respective judges. If the carriers' horror stories of implementation are to

⁶ D.04-08-056, p. 6.

be believed, one would expect that the first thing the carriers would have done in their court challenge to the Bill of Rights is seek a temporary injunction from the hearing officer. The absence of such a request would seem to indicate an inability to make the requisite showing in court or an inordinate amount of confidence that, with time, the Commission would eventually “bail them out” and issue its own stay.

VI. CONCLUSION

The Commission must not adopt the Draft Decision issued January 5, 2005, that would grant a stay of D.04-05-057, nor grant the after-the-fact motions filed the next day seeking such relief. It cannot act on January 13, 2005, without violating Public Utilities Code Section 311 and its own rules implementing that statute. And whether it acts January 13 or at some later date, it should never approve the Draft Decision or grant the motions. Facing the same arguments after D.04-05-057 was first issued, the Commission denied the stay request and instead determined to allow the extension process adopted in the decision to run its course. The experience since then demonstrates that the extension process is generally working as intended. Thus there is less of a

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basis for granting a stay today than there was in August 2004, when the Commission issued D.04-08-056. Granting the stay under such circumstances will only demonstrate a resolve to promote political expediency over compliance with due process, and will invite unnecessary judicial challenge that the Commission could, and should, avoid.

Dated: January 11, 2005

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