

# **Bond Case Briefs**

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## **PUBLIC UTILITIES - CALIFORNIA**

### **BullsEye Telecom, Inc. v. California Public Utilities Commission**

**Court of Appeal, First District, Division 5, California - July 6, 2021 - Cal.Rptr.3d - 66 Cal.App.5th 301 - 2021 WL 2801926 - 21 Cal. Daily Op. Serv. 6845**

Local carriers filed petitions for writ review of decisions by Public Utilities Commission (PUC), first, finding that local carriers discriminated against long-distance carrier with respect to rates charged for switched access services and, second, denying local carriers' request for rehearing but modifying earlier decision.

Petitions were consolidated and writ of review was issued.

The Court of Appeal held that:

- PUC was not required to conduct new evidentiary hearing when granting request for rehearing;
- PUC's determination that switched access was monopoly bottleneck service was not novel;
- PUC's determination that switched access was monopoly bottleneck service allowed it to revisit prior holdings that disparity in rates was justified;
- PUC did not shift burden of proving unlawful discrimination to local carriers;
- Any deviations from scoping memorandum did not prejudice local carriers; and
- Statutes prohibiting discriminatory reparations and refunds of rates on file with PUC did not preclude PUC from ordering refund as reparation for rate discrimination.

When granting request for rehearing, statute governing orders of modification did not require Public Utilities Commission (PUC) to follow procedural aspects of regular hearings, including new evidentiary hearing, before modifying and superseding its prior decision that local carriers set discriminatory rates against long-distance carrier; statutes governing proceedings before PUC did not define "rehearing" as equivalent to regular hearing, but, rather, only specified that evidentiary proceedings were required in certain situations, such as on rehearing in expedited complaint procedure for small claims, and local carriers did not demonstrate they were denied opportunity to present evidence in original evidentiary proceeding or that new factual developments required new evidentiary hearing.

Determination by Public Utilities Commission (PUC) that switched access was monopoly bottleneck service, supporting PUC's conclusion that local carriers imposed discriminatory rates against long-distance carrier, did not constitute novel determination, and, thus, did not violate PUC procedural rules prohibiting retroactive applications of novel regulatory determinations, where PUC had previously recognized, in context of incumbent local exchange carriers prior to adoption of Telecommunications Act of 1996, that switched access was monopoly bottleneck service, and given that PUC's pre-Act determination turned on nature of services, PUC was not required to state expressly that same analysis would apply to post-Act competitive local carriers before applying that analysis in case at hand.

Determination by Public Utilities Commission (PUC) that switched access service constituted monopoly bottleneck service allowed PUC, on rehearing of long-distance carrier's claims that local carriers engaged in rate discrimination, to revisit and reject its prior determinations that long-distance carrier was not willing and able to accept terms and conditions of local carriers' lower-rate contracts with its competitors and that rational basis supported rate difference; PUC's determination on rehearing, finding that carrier was willing and able to accept terms and conditions of competitors' contracts and that no rational basis supported rate difference, indicated PUC did not intend reasoning for its prior findings to the contrary to extend to monopoly bottleneck services.

In finding that local carriers failed to submit evidence of any rational basis for discriminating against long-distance carrier with respect to rates for local exchange services, Public Utility Commission (PUC) did not impermissibly shift burden of proving unlawful discrimination to local carriers rather than long-distance carrier, where long-distance carrier had already established that there was no difference in the cost of providing services, such that PUC properly required local carriers to offer other justification for rate differential.

By deviating from scoping memorandum, which gave local carriers reason to believe long-distance carrier's discrimination claim would fail if long-distance carrier were not willing and able to accept all terms of lower-rate agreements offered to its competitors, Public Utilities Commission (PUC), which held that long-distance carrier's willingness and ability to accept terms related to switched access services were sufficient, did not prejudice local carriers, where PUC considered all issues described in scoping memorandum and acknowledged that while long-distance carrier was only willing and able to meet terms related to switched access services, such willingness and ability were legally sufficient in context of monopoly bottleneck service.

Holding by Public Utilities Commission (PUC) that costs of service did not constitute rational basis for differential rates set by local carriers for long-distance carrier versus competitors, and that certain other factors were irrelevant to rational-basis analysis, was not contrary to scoping memorandum, even though scoping memorandum gave local carriers reason to believe long-distance carrier's discrimination claim would fail if there were non-cost-related considerations that supported different treatment, where PUC considered all issues described in scoping memorandum, which did not specify any particular factors that would be considered in rational-basis analysis.

Holding of Public Utilities Commission (PUC) that factors other than cost of services were irrelevant to analysis of whether rational basis existed for local carriers' setting of higher rates for switched access services with respect to long-distance carrier versus its competitors, in contrast with scoping memorandum that listed non-cost factors as possible rational bases for different rates, did not prejudice local carriers, where local carriers did not identify any evidence they would have presented had they been aware PUC would conclude factors listed in memorandum did not constitute rational bases in light of record, and memorandum did not discourage or prevent local carriers, which did not assert different costs of service supported different rates, from presenting any such evidence.

Statutes prohibiting public utilities from refunding any portion of rates on file with Public Utilities Commission (PUC) and prohibiting discriminatory reparations for discriminatory rates did not preclude PUC from ordering refund to long-distance carrier as reparation for local carriers' discriminatory offering and provision of off-tariff discounts to certain of long-distance carrier's competitors; local carriers did not establish that other long-distance customers with similar claims did not have opportunity to file complaint with PUC, as would render reparations discriminatory, refund statute did not prohibit all awards permitted by reparations statute, and refund statute allowed "just and reasonable" refunds as reparations for rate discrimination when justified by special circumstances.

