L/AM:mbh

Decision 84 10 100 OCT 26 1984

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

ORDER INSTITUTING INVESTIGATION to determine whether competition should be allowed in the provision of telecommunications transmission services within the state.	OII 83-06-01 (Filed June 29, 1983)
And Related Matters.	Application 82-12-21 (Filed December 9, 1982)
	Application 83-01-20 (Filed January 13, 1983)
	Application 83-05-16 (Filed May 6, 1983)
	Application 83-05-26 (Filed May 13, 1983)
	Application 83-05-40 (Filed May 18, 1983)
	Application 83-06-54 (Filed June 24, 1983)
	Application 83-07-21 (Filed July 11, 1983)
	Application 83-08-26 (Filed August 8, 1983)
	Application 83-09-37 (Filed September 19, 1983)
	Application 83-10-09 (Filed October 5, 1983)
	Application 83-11-07 (Filed November 3, 1983)
	Application 83-12-25 (Filed December 15, 1983)

And Related Matters.

Application 84-01-01
(Filed January 3, 1984)

Application 84-01-11
(Filed January 5, 1984)

Application 84-01-33
(Filed January 13, 1984)

Application 84-01-38
(Filed January 18, 1984)

Application 84-01-61
(Filed January 27, 1984)

Case 83-05-05
(Filed May 12, 1983)

(I&S)
Case 83-11-05
(Filed November 22, 1983)

Application 84-02-01
(Filed February 2, 1984)

Application 84-02-13
(Filed February 6, 1984)

Application 84-02-14
(Filed February 6, 1984)

Application 84-02-19
(Filed February 7, 1984)

Application 84-02-38
(Filed February 17, 1984)

Application 84-02-45
(Filed February 22, 1984)

Application 84-02-47
(Filed February 24, 1984)

Application 84-02-59
(Filed February 29, 1984)

Application 84-03-02
(Filed March 1, 1984)

Application 84-03-26
(Filed March 6, 1984)

And Related Matters.	Application 84-03-54 (Filed March 15, 1984)
	Application 84-03-61 (Filed March 19, 1984)
	Application 84-03-43 (Filed March 13, 1984)
	Application 84-03-78 (Filed March 26, 1984)
	Application 84-03-87 (Filed March 28, 1984)
	Application 84-03-88 (Filed March 28, 1984)
	Application 84-04-008 (Filed April 2, 1984)
	Application 84-04-032 (Filed April 5, 1984)
	Application 84-04-046 (Filed April 9, 1984)
	Application 84-04-048 (Filed April 9, 1984)
	Application 84-03-70 (Filed March 21, 1984)
	Application 84-04-082 (Filed April 16, 1984)
	Application 84-04-105 (Filed April 19, 1984)
	Application 84-04-115 (Filed April 23, 1984)
	Application 84-04-118 (Filed April 25, 1984)
	Application 84-04-133 (Filed April 26, 1984)
	Application 84-04-136 (Filed April 27, 1984)

ORDER MODIFYING DECISION 84-06-113
AND GRANTING LIMITED REHEARING

On June 13, 1984, the Commission issued Decision (D.) 84-06-113, which prohibited intraLATA competition and denied a complaint filed by Pacific Bell against several interstate common carriers as being without merit. Six parties filed applications for rehearing of that decision: Pacific Bell (Pacific), AT&T Communications (AT&T-C), MCI Corporation (MCI), GTE Sprint (Sprint), CP National Company (CP National), and Satellite Business Systems, Inc. (SBS). We have considered each and every allegation of error raised in those applications, and have concluded that with the exception of one issue, insufficient grounds for rehearing have been shown. However, our further review has identified several areas which we believe should be clarified or modified, as discussed further below.

Before we begin this discussion, we will address one procedural matter. Sprint's pleading, entitled Proposed Application for Rehearing, was filed along with a motion for clarification of filing date. The motion recites that Sprint submitted its pleading to an administrative law judge (ALJ) after five o'clock on July 16, 1984, the last day for filing applications for rehearing. Sprint argues that 1) the document was submitted on the date set by statute, 2) the Commission has the power to allow an exception to the 5:00 p.m. rule where the relief sought does not conflict with statutory requirements, and 3) the Commission should allow an exception to its own practices where doing so will allow this party to be heard, and will not affect any party's interest adversely.

In support of its arguments, Sprint points out that there is no statutory basis for the requirement that documents

be submitted by 5:00 p.m., and the ALJs have in the past accepted filings of various types of documents after 5:00 p.m. on an informal basis. It goes on to note that other adjudicative bodies, including federal courts, often allow parties to submit documents after 5:00 p.m. on the due date by leaving them with a guard at the front desk. It cites California Mutual Water Companies Association v. Public Utilities Commission, 45 C.2d 152 (1955) for the proposition that the "construction in doubtful cases should be in favor of preserving the right whenever substantial interests are not adversely affected by the claimed delay."

We will accept the document as an application for rehearing because, as Sprint points out, no substantial interests would be adversely affected if we do. We hasten to point out, however, that this is frequently not the case, such as in matters where only one application for rehearing is tendered and tendered late, and acceptance or rejection of the application could mean the difference between an applicant being placed at risk of judicial review or not. Parties should therefore file their applications for rehearing in a timely manner, and not count on receiving special consideration such as this to preserve the character of their pleadings.

We make special comment on Sprint's allegation that pleadings have, in the past, been left informally with ALJs after 5:00 p.m. for filing. This, of course, shifts the burden of filing from the party to the ALJ, which is not acceptable. Further, it depends on the fortuitous circumstance of finding an ALJ who is working past 5:00 p.m. on the date in question. This is not possible for those making filings in San Diego, where no ALJs are stationed, and not likely in Los Angeles where there are only four ALJs. It also raises the question of fairness to other parties--if one finds an ALJ working at 5:30 p.m. and

leaves the filing, but another tries at 6:00 p.m. and finds no one, is the first filing timely and the second one not? If a party finds an ALJ with whom to leave the filing after 5:00 p.m. on one occasion but not on another, can the party claim that it relied to its detriment on its previous experience? We think such inequities abound unless a specific time and place are fixed for the filing of documents.

We draw Sprint's attention to Rule 44 which provides, in part, "Unless otherwise directed, all documents shall be received in the Commission's Docket Office at the State Building, 350 McAllister Street, San Francisco, CA, at the State Building, 107 South Broadway, Los Angeles, CA or at the State Building, 1350 Front Street, San Diego, CA," emphasis supplied. These offices are open uniformly from 8:15 a.m. until 5:00 p.m. on all business days. These hours give all parties certainty as to when their filings must be made, and no party has an advantage by virtue of geographical location which another lacks. While we sympathize with the hardships created by mechanical breakdowns, parties should be mindful of the deadlines, particularly those set by statute, and factor such considerations into their schedule, which is a matter uniquely under their control.

We now proceed with our discussion of substantive issues.

Pacific's Complaint. As is clear from its application for rehearing, Pacific remains in disagreement with us over the interpretation of both the applicable law and the facts in this case. We have not been persuaded to change either our result or our basic analysis. However, we do clarify our discussion to eliminate some inconsistencies with the record and with our findings and conclusions. In order to avoid confusion, we will delete the existing discussion on pages 77-81, and

substitute a revised discussion. We modify the necessary findings and conclusions separately.

Pacific finally complains that it was improperly cut off from discovery by the ALJ, both because of a statement the ALJ made at the first prehearing conference on the materiality of the fitness issue; and a subsequent ruling that purportedly, defendants did not have to produce any internal documents concerning their intrastate service.

Pacific's arguments have no merit. The record shows the ALJ's statement was mere opinion and not a ruling; moreover, we agree with the ALJ that fitness questions are usually most relevant in the context of applications, not complaints. Furthermore, Pacific did not seek a ruling from either the assigned Commissioner or the full Commission on the ALJ's ruling. Lastly, the record is clear that Pacific continued discovery subsequent to these events by noticing depositions of certain MCI witnesses who offered affidavits in opposition to Pacific's cease-and-desist motion. Those depositions were postponed indefinitely and never completed. Pacific cannot be heard to argue now that it was denied its full right to discovery.

Prohibition on Competition. MCI, Sprint, and SBS all argue that for numerous reasons the Commission should reverse itself and allow intraLATA competition. We will not do so at this time. We have not become persuaded, in the few months since the decision was issued, that we know substantially more now than we did then about how the uncertainties we identified will resolve themselves. We have expressed our intent to reexamine the situation as we gain experience with interLATA markets in the context of the post-divestiture world. In fact, we are beginning this reexamination, in the context of two legislative-type hearings, in early November. We feel assured

that by this process we can fairly assess the effects of our decision to prohibit intraLATA competition, and adjust it as the public interest requires.

Blocking. Several parties have challenged our blocking requirement as being unlawful, and request that it be eliminated. Pacific has requested that we modify it to require blocking as equal access becomes available for each switching entity within a LATA; and asks that any carrier who does not subscribe to equal access be itself required to block what, under equal access, Pacific would have blocked. Pacific further asks us to monitor this OCC blocking.

We decline at this time to change our blocking requirement in either of the suggested directions. However, our review of the record confirms that one problem area exists--that of distinguishing interjurisdictional calls which originate or terminate over adjunct facilities. If, under equal access, such calls cannot be distinguished from wholly intraLATA calls, Pacific runs the risk of interfering with lawful interLATA or interstate traffic if it blocks the intraLATA portion of these calls.

To our minds, the evidence on this issue is insufficient to be able to evaluate the significance of this interference. While we will not remove the blocking requirement, we will reopen this record for the limited purpose of allowing the parties to provide further evidence and argument on this issue. Specifically, we will expect evidence on what kinds of adjunct facilities and what configurations with the intraLATA network are involved, the magnitude of the problem posed by this situation--i.e., how many and what kinds of customers are primarily involved, what technology is available to allow Pacific to identify these calls, whether Pacific or the OCC is the appropriate company to implement this technology, and

what the economic ramifications of doing so would be to the company involved.

We will continue to monitor the development of Pacific's blocking capabilities. While we do not do so today, we may in the future wish to call for additional input from the parties on blocking issues other than the one discussed above.

Private Line Services. CP National and MCI, in its response to Pacific's application, challenge our determination to impose a limitation on competition in the area of private line services. We do not find their arguments persuasive, nor do we find persuasive the argument of Pacific that the limitation in this area should be further defined. Pacific's proposal has no record support, nor has Pacific presented any other reasons sufficient to justify such a change at this time.

Dominant Carrier Regulation. We are not persuaded by AT&T-C's arguments that it should not be subject to dominant carrier regulation; thus our order on this point stands.

Advice to Customers. MCI and Sprint object to the requirement that their sales representatives must tell a current or prospective customer who is inquiring whether intraLATA calls may be physically completed over their networks, that it is unlawful to place such calls, and he/she should use the local exchange carrier instead. The purpose of this requirement is to ensure that no OCC or reseller is holding itself out as providing intraLATA service. This is not asking the representative to give legal advice, nor need it put the representative in an awkward position. If the customer persists even after the statement has been repeated, the representative can easily end the conversation politely. The requirement will be retained.

Sprint further argues the requirement will impose

unfair burdens on development of its interLATA and interstate marketing efforts, largely because the requirement is not applicable to AT&T-C. However, until equal access is achieved, intraLATA calls cannot be completed through AT&T-C's facilities. It would make no sense to apply the requirement to AT&T-C.

Uniform Rates on a Mileage Basis. Sprint and SBS both object to this requirement. We do not understand Sprint's objection, since it admits that it sets rates this way at the present time. SBS seems not to understand just what the requirement entails. All it means is that a carrier's rate must be uniform for all calls of the same distance--e.g., calls within a 100-mile radius of San Francisco must cost the same as calls within a 100-mile radius of Eureka. The rate does not have to be the same as any other carrier's rate for the same distance. We expect SBS to review this matter again. If it still continues to have problems with this requirement, it may apply to the Commission for an extension of time or an exemption, with its justification fully explained. Therefore,

IT IS ORDERED that D.84-06-113 is modified as follows:

1. The discussion on page 77 to 81, mimeo, is deleted and the following discussion substituted in its place:

"VII. The Pacific Complaint

> Pacific filed Case 83-05-05 seeking a cease and desist order against the intrastate operations of MCI, Sprint and WU. By various amendments, Pacific added a number of defendants and, as a result of these amendments, the defendants to its complaint are by and large the parties whose applications have been consolidated with OII 83-06-01. Pacific also seeks an accounting from the defendants of all revenues accruing from the operations Pacific alleges to be

unlawful.[6] For the reasons set forth below, Pacific's complaint is denied in all respects.

By the various decisions rendered in these matters, we have authorized numerous parties to provide intrastate interLATA telecommunications services. See, e.g., D.84-01-037. Having ratified the provision of such services by the defendants, we find that Pacific's complaint for a cease and desist order, to the extent it is directed at interLATA operations, is moot. However, Pacific's allegation of unlawful provision of intrastate service, as it applies to service rendered prior to that ratification, is still very much alive.

In this decision, we address the issue of intrastate intraLATA services and determine that switched toll services should remain the exclusive domain of Pacific. Pacific's request for a cease and desist order as it may apply against the intraLATA operations of the defendants therefore also remains ripe.

However, under the circumstances of this case there are two key proofs which Pacific, as a complainant, would have had to provide to succeed with its complaint. The first, necessary to refute defendants' affirmative defense, is that the intrastate traffic carried over the defendants' facilities--whether it was inter- or intraLATA--was not incidental to otherwise lawful services; the second is that a cease and desist order which might go beyond a prohibition on the holding

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[6] Several parties have argued that this Commission is not empowered to award damages to Pacific in any event. Pacific does not request damages but an "accounting" of allegedly illicit gains. The jurisdictional issue does not arise under the complaint and we need not reach it.

out of intraLATA service could be crafted without unduly burdening or proscribing otherwise lawful service offerings. Pacific did not provide either.

The first question to be answered in analyzing the incidental use issue is whether the defendants were unlawfully transporting unauthorized intrastate traffic. Secondly, we must address whether the defendants were holding themselves out to provide such services. We answer both of these questions in the negative.

In this case, facilities were designed and constructed pursuant to federally-tariffed and -certificated operations. Defendants' tariffs specifically state that no intrastate service is offered. Contrary to Pacific's claims, the defendants were under no obligation to configure, design or construct their facilities in such a manner as to permit the precise and efficacious blocking of unauthorized traffic. We note that, as early as 1978, AT&T protested MCI's application for interstate authority alleging that MCI could provide intrastate service pursuant to the latter's tariff filing <u>but never raised the issue of blocking</u>; its protest was dismissed upon MCI's inclusion of a tariff provision excluding intrastate services. <u>MCI Telecommunications</u>, <u>supra</u>, 70 FCC 2d at 667. Thus we find no prior legal duty was ever imposed upon the defendants to configure their respective networks so as to permit blocking. To create such a duty at this late date would impose potentially severe and onerous burdens upon the defendants, burdens created in large part by Pacific's and AT&T's collective and individual failure to more timely raise the issue. And, as the record clearly indicates, the difficulty of blocking is a product of the inferior interconnections presently provided by Pacific to defendants. This situation will be changed with the advent of equal access and we impose a blocking requirement as a result.

As to Pacific's allegation that the defendants have held themselves out as intrastate carriers, we have reviewed Pacific's showing and conclude that holding out has not been established.

The promotional materials that Pacific cites to the contrary are apparently from national advertising programs, not tailored to any particular jurisdiction. The advertising does list cities that may be reached by a subscriber, but when such materials are distributed on a national basis, the information is more reasonably interpreted as promoting interstate calling, since a subscriber in one state is advised of the various places that may be reached over the network. Defendants allege that they have never used an intrastate city pair as the basis for a comparison of their rates with the Bell system rates. Thus we agree that they have never actively promoted their service as an intrastate service.

Pacific's reported conversations with defendants' sales personnel are ultimately no more persuasive. Although it is true that defendants did not discourage the intrastate use of their network, they were under no obligation to do so.

In sum, Pacific is incorrect when it states that "every intrastate call placed over the lines of MCI and Sprint has been in violation of law, even where such calls may be alleged to have been 'incidental' to interstate service." Defendants have put their facilities into place pursuant to FCC regulations. No legal duty to configure those facilities in such a way as to permit blocking was ever imposed on defendants. The present difficulty of blocking is a product of the inferior connections presently provided to defendants by Pacific. Finally, the record does not establish to our satisfaction that defendants have promoted the intrastate use of their facilities. In these specific circumstances, we conclude the defendants' intrastate traffic complained of

here constitutes an incidental use not rendered in violation of any law.

At worst, their status is like Sony as a seller of video recorders that may be used to infringe copyrights.[7] They provide the facilities for a legitimate business purpose, and are not responsible for such other uses that may be made by customers.

This point was made recently by the United States Supreme Court in Sony Corp. v. Universal City Studios, Inc., __ US __, 78 L.Ed 2d 574 (1984) involving the question whether the sale of home videotape recorders constitutes contributory infringement of television program copyrights. In that case the Court held:

> "Accordingly, the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses." 78 L.Ed 2d at 592.

Applying that principle to the specific case, the Court stated:

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7 We say "at worst" because in the Sony analogy the customer may be actively violating the law, even if Sony isn't (although Sony was found to have advertised an infringing use). But in the telephone case the customer placing the call is not violating any law. Furthermore, there is no suggestion that defendants have not paid to Pacific the appropriate access charges for carrying such traffic, while the essence of the Sony case is the unpaid royalties. Where the conduct complained of is lawful, it would be a deprivation of due process to impose a penalty.

"The question is thus whether the Betamax is capable of commercially significant noninfringing uses. In order to resolve that question we need not explore all the different potential uses of the machine and decide whether or not they would constitute infringement. Rather, we need only consider whether on the basis of facts as found by the district court a significant number of them would be non-infringing." Id.

The Court found that at least one potential use plainly satisfied this standard.

While the Sony case is not directly applicable to this one, it provides an apt analogy. In this case there is no doubt that defendant's facilities are "capable of" "noninfringing" uses. We also think the record fully supports our finding that defendants are not contributorily responsible for any "infringing" use.

We do not mean to suggest that defendants' conduct has been exemplary. Clearly they could have done more to discourage intrastate use of their facilities. Just as clearly they could have done more to encourage intrastate use of their facilities. But we do not find that their conduct has been unscrupulous, or that they have breached any obligation imposed by law. The complaint has no merit.

Finally, the record establishes that, for a great deal of the intraLATA toll market, Pacific's service and rates are superior to those of the defendants. Pacific would itself do much to discourage the diversion of intraLATA traffic by disseminating these facts. Moreover, it is in the business interests of the defendants to do the same in order to prevent the dissatisfaction of their subscribers should the latter use the defendants' facilities for intraLATA calls only to later discover

Pacific's rate advantage. We are willing to rely upon the parties in this case to exercise good faith business judgment and fair business practices in comlying with our order.[7a] We thus decline to issue a cease and desist order to effect compliance.

In light of the above discussion, we see no point in issuing an order for an accounting as requested by Pacific. Its proofs are not compelling and an accounting serves no independent purpose in the context of Pacific's complaint. It will be denied.

[7a] Our additional requirement placed upon the intrastate interLATA carriers to refer intraLATA callers to the local exchange company provides an additional step to the ones voluntarily undertaken to date."

2. New Finding 26A is added to read:

"The record is insufficient on the relationship between requiring Pacific to block intraLATA calls after equal access is achieved and interjurisdictional calls made using adjunct facilities."

3. Finding 29 is modified to read:

"The record does not establish that the defendants in C.83-05-05 have held themselves out as providing unauthorized intrastate services."

4. Finding 31 is modified to read:

"National advertising campaign materials promote interstate calling, even though such materials incidentally advise subscribers of

destinations that are in their own state."

5. Finding 31A is added to read:

"Neither MCI, Sprint, nor WU has been shown to have advertised an intrastate city pair as the basis for a comparison of their rates with the Bell System rates."

6. Conclusion of Law 2 is modified to read:

"The facts developed on this record demonstrate that MCI, Sprint, and WU have provided intrastate telecommunications service as incidental to their lawfully authorized interstate service."

7. New Conclusion of Law 8A is added to read:

"Limited rehearing should be held to obtain further evidence and argument on the issue of our blocking requirement as it relates to interjurisdictional calls made using adjunct facilities."

IT IS FURTHER ORDERED that rehearing of Decision 84-06-113 is granted limited to receiving further evidence and argument on the issue of our blocking requirement as it relates to interjurisdictional calls made using adjunct facilities, as more fully discussed above.

Rehearing is to be held before such Commissioner or Administrative Law Judge at such time and place as shall hereafter be designated.

The Executive Director is directed to cause notice of the rehearing to be mailed at least ten (10) days prior to such hearing.

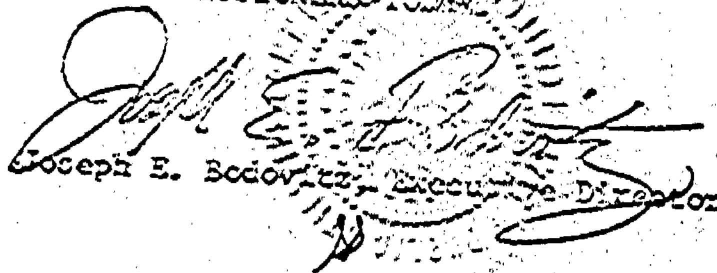
IT IS FURTHER ORDERED that except as granted and provided herein, rehearing of D.84-06-113 is hereby denied.

This order is effective today.

Dated OCT 26 1984, at San Francisco, California.

VICTOR CALVO
PRISCILLA C. GREW
DONALD VIAL
WILLIAM T. BAGLEY
Commissioners

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY.



Joseph E. Bodovitz, Executive Director

EX-6A: To replace 2d full ¶ on p. 8. Rehearing alternative.

OK 4-0

We decline at this time to change our blocking requirement in either of the suggested directions. However, our review of the record confirms that one problem area exists--that of distinguishing interjurisdictional calls which originate or terminate over adjunct facilities. If, under equal access, such calls cannot be distinguished from wholly intraLATA calls, Pacific runs the risk of interfering with lawful interLATA or interstate traffic if it blocks the intraLATA portion of these calls.

To our minds, the evidence on this issue is insufficient to be able to evaluate the significance of this interference. While we will not remove the blocking requirement, we will reopen this record for the limited purpose of allowing the parties to provide further evidence and argument on this issue. Specifically, we will expect evidence on what kinds of adjunct facilities and what configurations with the intraLATA network are involved, the magnitude of the problem posed by this situation--i.e., how many and what kinds of customers are primarily involved, what technology is available to allow Pacific to identify these calls, whether Pacific or the OCC is the appropriate company to implement this technology, and what the economic ramifications of doing so would be to the company involved.

→ adds language (Ann Meeks)

Conclusion of Law 8 (p. 17) is modified to read:

"Blocking should not be required prior to equal access, but limited rehearing should be held to obtain further evidence and argument on the issue of our blocking requirement as it relates

to interjurisdictional calls made using adjunct facilities."

P. 18 insert IT IS FURTHER ORDERED that rehearing of Decision 84-06-113 is granted limited to further evidence and argument on the issue of our blocking requirement as it relates to interjurisdictional calls made using adjunct facilities, as more fully discussed above.

Rehearing is to be held before such Commissioner or Administrative Law Judge at such time and place as shall hereafter be designated.

The Executive Director is directed to cause notice of the rehearing to be mailed at least ten (10) days prior to such hearing.

Ex-6A: to replace 2d full ¶ on p. 8.
"Do-nothing-now" alternative.

We decline at this time to change our blocking requirement in either of the suggested directions. However, our review of the record confirms that one problem area exists--that of distinguishing interjurisdictional calls which originate or terminate over adjunct facilities.

The present record is unclear as to the magnitude of the problem. However, we are not convinced by the parties' arguments that we should rescind our blocking requirement or that we should reopen the record on this issue at the present time. We will continue to monitor the situation. If, as the future unfolds, it is developing into a significant problem, we will deal with it accordingly.

that by this process we can fairly assess the effects of our decision to prohibit intraLATA competition, and adjust it as the public interest requires.

Blocking. Several parties have challenged our blocking requirement as being unlawful, and request that it be eliminated. Pacific has requested that we modify it to require blocking as equal access becomes available for each switching entity within a LATA; and asks that any carrier who does not subscribe to equal access be itself required to block what, under equal access, Pacific would have blocked. Pacific further asks us to monitor this OCC blocking.

We decline at this time to change our blocking requirement in either of the suggested directions. However, we are concerned that the evidence is not wholly persuasive that even upon equal access, it will be possible to distinguish between intra- and interLATA calls with a high degree of accuracy. We will, therefore, require Pacific to demonstrate to our satisfaction, prior to actually implementing the blocking requirement, that the technology it intends to use is capable of making this distinction. Otherwise, we run the serious risk of the kind and degree of interference with the interstate telecommunications network which might well put our regulatory scheme in jeopardy.

Private Line Services. CP National and MCI, in its response to Pacific's application, challenge our determination to impose a limitation on competition in the area of private line services. We do not find their arguments persuasive, nor do we find persuasive the argument of Pacific that the limitation in this area should be further defined. Pacific's proposal has no record support, nor has Pacific presented any other reasons sufficient to justify such a change at this time.

Dominant Carrier Regulation. We are not persuaded by AT&T-C's arguments that it should not be subject to dominant carrier regulation; thus our order on this point stands.

Advice to Customers. MCI and Sprint object to the requirement that their sales representatives must tell a current or prospective customer who is inquiring whether intraLATA calls may be physically completed over their networks, that it is unlawful to place such calls, and he/she should use the local exchange carrier instead. The purpose of this requirement is to ensure that no OCC or reseller is holding itself out as providing intraLATA service. This is not asking the representative to give legal advice, nor need it put the representative in an awkward position. If the customer persists even after the statement has been repeated, the representative can easily end the conversation politely. The requirement will be retained.

Sprint further argues the requirement will impose unfair burdens on development of its interLATA and interstate marketing efforts, largely because the requirement is not applicable to AT&T-C. However, until equal access is achieved, intraLATA calls cannot be completed through AT&T-C's facilities. It would make no sense to apply the requirement to AT&T-C.

Uniform Rates on a Mileage Basis. Sprint and SBS both object to this requirement. We do not understand Sprint's objection, since it admits that it sets rates this way at the present time. SBS seems not to understand just what the requirement entails. All it means is that a carrier's rate must be uniform for all calls of the same distance--e.g., calls within a 100-mile radius of San Francisco must cost the same as calls within a 100-mile radius of Eureka. The rate does not have to be the same as any other carrier's rate for the same

distance. We expect SBS to review this matter again. If it still continues to have problems with this requirement, it may apply to the Commission for an extension of time or an exemption, with its justification fully explained. Therefore,

IT IS ORDERED that D.84-06-113 is modified as follows:

1. The first paragraph on page 72, mimeo, is modified to read:

> "We note that the record before us establishes that the technological progress that has blurred the interstate-intrastate dividing line may soon offer us the ability to separate interstate from intrastate and interLATA from intraLATA traffic. Upon the implementation of equal access commencing in the fall of 1984, Pacific will assertedly have the capability of distinguishing intraLATA calls from interLATA or interstate calls. AT&T has not opposed the implementation of blocking even before equal access because Pacific can presently block intraLATA calls placed over AT&T's facilities. As equal access is implemented and the OCCs are in the same relationship to Pacific as is the current case with respect to AT&T, we will order Pacific to block any intraLATA call placed over an OCC's facilities."

2. A new paragraph is inserted on page 72, mimeo, between the existing first and second paragraphs, to read:

> "We will, however, require Pacific, prior to implementing any blocking, to demonstrate that the technology it intends to employ does in fact have the capacity to distinguish intra- and interLATA calls with a high degree of accuracy."

3. The discussion on page 77 to 81, mimeo, is deleted and the following discussion substituted in its place:

"VII. The Pacific Complaint

Pacific filed Case 83-05-05 seeking a cease and desist order against the intrastate operations of MCI, Sprint and WU. By various amendments, Pacific added a number of defendants and, as a result of these amendments, the defendants to its complaint are by and large the parties whose applications have been consolidated with OII 83-06-01. Pacific also seeks an accounting from the defendants of all revenues accruing from the operations Pacific alleges to be unlawful.[6] For the reasons set forth below, Pacific's complaint is denied in all respects.

By the various decisions rendered in these matters, we have authorized numerous parties to provide intrastate interLATA telecommunications services. See, e.g., D.84-01-037. Having ratified the provision of such services by the defendants, we find that Pacific's complaint for a cease and desist order, to the extent it is directed at interLATA operations, is moot. However, Pacific's allegation of unlawful provision of intrastate service, as it applies to service rendered prior to that ratification, is still very much alive.

In this decision, we address the issue of intrastate intraLATA services and determine that switched toll services should remain the exclusive domain of Pacific. Pacific's request for a cease and desist order as it may apply against the intraLATA

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6 Several parties have argued that this Commission is not empowered to award damages to Pacific in any event. Pacific does not request damages but an "accounting" of allegedly illicit gains. The jurisdictional issue does not arise under the complaint and we need not reach it.

operations of the defendants therefore also remains ripe.

However, under the circumstances of this case there are two key proofs which Pacific, as a complainant, would have had to provide to succeed with its complaint. The first, necessary to refute defendants' affirmative defense, is that the intrastate traffic carried over the defendants' facilities--whether it was inter- or intraLATA--was not incidental to otherwise lawful services; the second is that a cease and desist order which might go beyond a prohibition on the holding out of intraLATA service could be crafted without unduly burdening or proscribing otherwise lawful service offerings. Pacific did not provide either.

The First question to be answered in analyzing the incidental use issue is whether the defendants were unlawfully transporting unauthorized intrastate traffic. Secondly, we must address whether the defendants were holding themselves out to provide such services. We answer both of these questions in the negative.

In this case, facilities were designed and constructed pursuant to federally-tariffed and -certificated operations. Defendants' tariffs specifically state that no intrastate service is offered. Contrary to Pacific's claims, the defendants were under no obligation to configure, design or construct their facilities in such a manner as to permit the precise and efficacious blocking of unauthorized traffic. We note that, as early as 1978, AT&T protested MCI's application for interstate authority alleging that MCI could provide intrastate service pursuant to the latter's tariff filing <u>but never raised the issue of blocking</u>; its protest was dismissed upon MCI's inclusion of a tariff provision excluding intrastate services. <u>MCI Telecommunications</u>, <u>supra</u>, 70 FCC 2d at 667. Thus we find no prior legal duty was ever imposed upon the defendants to configure their respective networks so as to permit blocking. To create

such a duty at this late date would impose potentially severe and onerous burdens upon the defendants, burdens created in large part by Pacific's and AT&T's collective and individual failure to more timely raise the issue. And, as the record clearly indicates, the difficulty of blocking is a product of the inferior interconnections presently provided by Pacific to defendants. This situation will assertedly be changed with the advent of equal access and we impose a blocking requirement as a result.

As to Pacific's allegation that the defendants have held themselves out as intrastate carriers, we have reviewed Pacific's showing and conclude that holding out has not been established.

The promotional materials that Pacific cites to the contrary are apparently from national advertising programs, not tailored to any particular jurisdiction. The advertising does list cities that may be reached by a subscriber, but when such materials are distributed on a national basis, the information is more reasonably interpreted as promoting interstate calling, since a subscriber in one state is advised of the various places that may be reached over the network. Defendants allege that they have never used an intrastate city pair as the basis for a comparison of their rates with the Bell system rates. Thus we agree that they have never actively promoted their service as an intrastate service.

Pacific's reported conversations with defendants' sales personnel are ultimately no more persuasive. Although it is true that defendants did not discourage the intrastate use of their network, they were under no obligation to do so.

In sum, Pacific is incorrect when it states that "every intrastate call placed over the lines of MCI and Sprint has been in violation of law, even where such calls may

be alleged to have been 'incidental' to interstate service." Defendants have put their facilities into place pursuant to FCC regulations. No legal duty to configure those facilities in such a way as to permit blocking was ever imposed on defendants. The present difficulty of blocking is a product of the inferior connections presently provided to defendants by Pacific. Finally, the record does not establish to our satisfaction that defendants have promoted the intrastate use of their facilities. In these specific circumstances, we conclude the defendants' intrastate traffic complained of here constitutes an incidental use not rendered in violation of any law.

At worst, their status is like Sony as a seller of video recorders that may be used to infringe copyrights.[7] They provide the facilities for a legitimate business purpose, and are not responsible for such other uses that may be made by customers.

This point was made recently by the United States Supreme Court in Sony Corp. v. Universal City Studios, Inc., __ US __, 78 L.Ed 2d 574 (1984) involving the question whether the sale of home videotape recorders constitutes contributory infringement of

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[7] We say "at worst" because in the Sony analogy the customer may be actively violating the law, even if Sony isn't (although Sony was found to have advertised an infringing use). But in the telephone case the customer placing the call is not violating any law. Furthermore, there is no suggestion that defendants have not paid to Pacific the appropriate access charges for carrying such traffic, while the essence of the Sony case is the unpaid royalties. Where the conduct complained of is lawful, it would be a deprivation of due process to impose a penalty.

the Court held:

> "Accordingly, the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses." 78 L.Ed 2d at 592.

Applying that principle to the specific case, the Court stated:

> "The question is thus whether the Betamax is capable of commercially significant noninfringing uses. In order to resolve that question we need not explore all the different potential uses of the machine and decide whether or not they would constitute infringement. Rather, we need only consider whether on the basis of facts as found by the district court a significant number of them would be non-infringing." Id.

The Court found that at least one potential use plainly satisfied this standard.

While the Sony case is not directly applicable to this one, it provides an apt analogy. In this case there is no doubt that defendant's facilities are "capable of" "noninfringing" uses; such uses predominate. We also think the record fully supports our finding that defendants are not contributorily responsible for any "infringing" use.

We do not mean to suggest that defendants' conduct has been exemplary. Clearly they could have done more to discourage intrastate use of their facilities. Just as clearly they could have done more to encourage intrastate use of their facilities. But we do not find that their conduct has been unscrupulous, or that

they have breached any obligation imposed by law. The complaint has no merit.

Finally, the record establishes that, for a great deal of the intraLATA toll market, Pacific's service and rates are superior to those of the defendants. Pacific would itself do much to discourage the diversion of intraLATA traffic by disseminating these facts. Moreover, it is in the business interests of the defendants to do the same in order to prevent the dissatisfaction of their subscribers should the latter use the defendants' facilities for intraLATA calls only to later discover Pacific's rate advantage. We are willing to rely upon the parties in this case to exercise good faith business judgment and fair business practices in comlying with our order.[7a] We thus decline to issue a cease and desist order to effect compliance.

In light of the above discussion, we see no point in issuing an order for an accounting as requested by Pacific. Its proofs are not compelling and an accounting serves no independent purpose in the context of Pacific's complaint. It will be denied.

[7a] Our additional requirements placed upon the intrastate interLATA carriers to refer intraLATA callers to the local exchange company provides additional steps to the ones voluntarily undertaken to date."

4. Finding 26 is modified to read:

"Upon the offering of interconnections under the mandated equal access, all interexchange carriers would assertedly be provided the immediate means to block intraLATA traffic without affecting their other services."

5. Finding 29 is modified to read:

"The record does not establish that the defendants in C.83-05-05 have held themselves out as providing unauthorized intrastate services."

6. Finding 31 is modified to read:

"National advertising campaign materials promote interstate calling, even though such materials incidentally advise subscribers of destinations that are in their own state."

7. Finding 31A is added to read:

"Neither MCI, Sprint, nor WU has been shown to have advertised an intrastate city pair as the basis for a comparison of their rates with the Bell System rates."

8. Conclusion of Law 2 is modified to read:

"MCI, Sprint, and WU have provided intrastate telecommunications service as incidental to their lawfully authorized interstate service."

9. Conclusion of Law 8 is modified to read:

"Blocking should not be required prior to equal access, and with the advent of equal access, not until Pacific has demonstrated on the record that its facilities and technology distinguish between intra- and interLATA traffic with a high degree of accuracy."

10. Ordering Paragraph 2 is modified to read:

"Pacific Bell (Pacific), after demonstrating on the record its ability to distinguish intra- and interLATA traffic, shall block unauthorized intraLATA traffic carried over

or through the facilities of any
interexchange carrier upon full
implementation of equal access within a
LATA."

omit ~~IT IS FURTHER ORDERED that rehearing of D.84-06-113, as modified above, is hereby denied.~~

This order is effective today.

Dated OCT 26 1984, at San Francisco, California.

VICTOR CALVO
PRISCILLA C. GREW
DONALD VIAL
WILLIAM T. BAGLEY
Commissioners