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Decision 88 02 044

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Pacific Bell (U 1001 C), Complainant, vs. Wang Communications, Inc., Defendant.	Case 86-10-012 (Filed October 3, 1986)
And Related Matters.	Application 87-02-033 (Filed February 13, 1987) Application 87-02-034 (Filed February 13, 1987)

(See Appendix A for appearances.)

I N D E X

INTERIM OPINION

I. Summary

In Decision (D.) 84-06-113 we established a procedure for consideration of requests for authority to offer intraLATA private line high-speed data transmission services on a case-by-case basis. Since that time, we have granted authority for such services to two carriers: Wang Communications, Inc. (WCI) in D.85-12-082 and Bay Area Teleport (BAT) in D.87-02-022. This decision addresses Pacific Bell's (Pacific) contention that WCI has violated several conditions of D.85-12-082, which granted WCI operating authority within portions of LATA 1 and LATA 5, and WCI's requests to expand its authority statewide on both an intraLATA and interLATA basis.

We find that WCI has not violated any portion of D.85-12-082 or the stipulation among Pacific, WCI, and the Commission's Public Staff Division (recently renamed the Division of Ratepayer Advocates (DRA)) which was approved by D.85-12-082. Pacific has not convinced us that the statement in the stipulation that WCI will not "offer voice services" prohibits the transmission of multiplexed voice communications or the marketing of WCI's services to customers with voice applications. Similarly, the agreement that WCI will not multiplex does not prohibit dissemination of information about multiplexing or discussion of the advantages of multiplexing with potential customers.

While WCI also has not violated the stipulation by offering its Direct Access private line connections to interexchange carriers' points of presence, WCI's actions in offering this service without Commission authorization run counter to our expectations stated in D.85-12-082 and ignore our conclusions of shared jurisdiction clearly set forth in D.84-06-113. We conclude that WCI's Direct Access service is subject to this Commission's jurisdiction in addition to that of

the Federal Communications Commission (FCC), and that WCI has violated Public Utilities (PU) Code § 1001 by offering this service in California without prior Commission authorization.

We grant WCI's request in Application (A.) 87-02-034 for authority to provide its private line high-speed data transmission services on an interLATA basis within California, subject to the same holding out restrictions imposed on other interexchange carriers. Since WCI's Direct Access service falls within the scope of this authority, Pacific's request for a cease and desist order against WCI's offering of this service becomes moot.

In A.87-02-033, WCI requests statewide expansion of its existing intraLATA authorization. While a complete record was developed regarding WCI's proposed intraLATA operations, we prefer to delay action in this matter until a reexamination of the efficacy of further intraLATA competition in private line services is completed in Investigation (I.) 87-11-033. It is our intent to establish the scope of allowable intraLATA competition in these services on a generic basis early in 1988. We leave this proceeding open for further consideration of WCI's request after a decision is issued in Phase I of I.87-11-033.

II. Background

In D.84-06-113,[1] this Commission invited providers of private line high-speed data transmission services to file applications if they wish to offer such services on an intraLATA basis, subject to certain limitations set forth in that decision. In response, WCI filed A.85-07-045 and A.87-05-046 in July 1985, in which it requested authority to provide high-speed data transmission services at a data speed of 1.544 megabits per second (MBPS)[2] or higher within portions of LATA 1 and LATA 5.

Pacific protested WCI's initial applications. Hearings were scheduled and prepared testimony was submitted by the parties. In the meantime, Pacific, WCI, and DRA entered into negotiations and reached a stipulated agreement on the issues in WCI's applications. As a result, hearings were not held. In D.85-12-082 we granted WCI the requested authority in accordance with the terms and conditions of the stipulation among WCI, Pacific, and DRA.

In Case (C.) 86-10-012 Pacific now alleges that WCI is violating several conditions of the stipulation. WCI filed an answer to Pacific's complaint on November 10, 1986. A prehearing

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1 D.84-06-113 is one of three decisions in I.83-06-01, our investigation to determine whether competition should be allowed in the provision of telecommunications transmission services within the state, and consolidated dockets. In D.84-01-037 we granted interLATA operating authority to a number of interexchange carriers. D.84-06-113 addressed other issues in the investigation, and D.84-10-100 responded to applications for rehearing of D.84-06-113.

2 Transmission service at 1.544 MBPS is sometimes referred to as "T-1 service." A T-1 circuit can carry a single high-speed data transmission, or alternatively multiple lower-speed data or voice transmissions multiplexed to 1.544 MBPS. As an example, such a circuit can carry 24 voice transmissions simultaneously.

conference in this matter was held before Administrative Law Judge (ALJ) Ford on February 11, 1987.

Shortly after that prehearing conference, WCI filed A.87-02-033 and A.87-02-034. In A.87-02-033, WCI requests a Certificate of Public Convenience and Necessity (CPCN) to provide intraLATA private line high-speed data transmission services at a data speed of 1.544 MBPS or higher within all LATAs in California. In A.87-02-034, WCI requests a CPCN to provide comparable services on an interLATA basis in California. General Telephone Company of California (recently renamed GTE California Incorporated (GTE)) filed a protest to A.87-02-033 on March 20, 1987, and Pacific filed protests to both applications on March 23, 1987.

Pacific also filed a motion to consolidate C.86-10-012, A.87-02-033, and A.87-03-034, and WCI filed a response in which it supported consolidation of these matters for hearing on the condition that the consolidation not delay the complaint case.

A consolidated prehearing conference was held on April 21, 1987, at which time the ALJ consolidated the three matters. Nine days of evidentiary hearings were held on June 1 - 5 and July 27 - 30, 1987 in San Francisco. Pacific presented testimony of witnesses Glenn J. Sullivan, Executive Director, Marketing Regulatory Matters, and Richard L. Scholl, Director, Transport Product Financials. WCI presented testimony of Michael W. Tabb, Vice President and Controller of WCI, and Timothy G. Zerbiec, Vice President of Technology at Vertical Systems, Inc. GTE presented testimony of James N. Thompson, Strategic Business Planning Manager. MCI Telecommunications (MCI) presented testimony of Mary E. Wand, Manager of Regulatory Analysis of MCI's Pacific Division.

Issues regarding C.86-10-012 were briefed by Pacific, WCI, and BAT in concurrent opening briefs due July 10, 1987 and closing briefs due August 3, 1987. Concurrent opening and closing briefs regarding remaining issues in the two applications were due

on September 25 and October 16, 1987, and were filed by WCI, Pacific, GTE, MCI, and BAT.

The Proposed Decision of ALJ Ford was filed and served on all parties on January 19, 1988 pursuant to Rule 77.1 et seq. of the Commission's Rules of Practice and Procedure. Comments were filed on February 8, 1988 by WCI, Pacific, BAT, and the California Association of Long Distance Telephone Companies. Reply Comments were filed on February 16, 1988 by WCI and Pacific.

We have carefully considered these comments and have made several relatively minor changes as a result. We have modified our discussions regarding Commission jurisdiction over intrastate private lines with mixed intrastate and interstate usage and Commission regulation of WCI's Direct Access service, and have clarified that the meaning of BAT's stipulation approved in D.87-02-022 was not an issue in this proceeding. There are also several minor editorial revisions.

III. Pacific Complaint

A. Pacific Complaint and Request for Relief

1. WCI is offering high-speed data transmission services for which WCI either multiplexes and/or encourages multiplexing below 1.544 MBPS, in violation of D.85-12-082, the stipulation, and its tariff.

2. WCI is offering and promoting the use of voice services over its intraLATA high-speed data transmission network, in violation of D.85-12-082, the stipulation, and its tariff.

3. WCI is offering to provide direct connection to interexchange carriers' points of presence without utilizing Pacific's switched network, in violation of the stipulation and its tariff and without

filing the necessary application for interLATA authority with the Commission.

Pacific asserts that, in thus providing unauthorized and unlawful intrastate telephone service, WCI has inflicted and, unless restrained by an order of this Commission, will continue to inflict damage and financial injury on Pacific and its customers. Pacific believes that it is being deprived of revenues it would otherwise have received by WCI's unlawful diversion of those revenues, and that the revenue contribution to other types of telephone service has been and will be reduced, thereby burdening Pacific's customers.

Pacific requests that the Commission grant relief in the following ways:

1. Issue a cease and desist order prohibiting WCI from offering multiplexing below 1.544 MBPS and from holding out the availability of voice transmission services or knowingly engaging in the transport of voice traffic.

2. Issue a cease and desist order prohibiting WCI from direct connection to interexchange carrier facilities, and require that WCI obtain Commission approval and tariff authority for any interLATA transmission in California.

3. Order WCI to retain all records of intrastate voice telephone service to enable the Commission to determine the extent of the unauthorized intrastate message service WCI has provided and the amount of revenues diverted from Pacific.

4. Order WCI to account for all funds collected by it from California customers for the provision of unlawful, unauthorized intrastate voice telephone service.

5. Take such other and further action as the Commission deems proper.

B. Events Leading to D.85-12-082

Because C.86-10-012 now before us centers around interpretation of the stipulation which was entered into by Pacific, WCI, and DRA in A.85-07-045 and A.87-05-046, as well as the negotiations leading to that stipulation, we summarize here the relevant events leading to D.85-12-082 as presented in that decision.

Pacific protested A.85-07-045 and A.85-07-046, arguing first that the applications were inconsistent with D.84-06-113 which, it asserted, provided "for very limited, high-speed data competition within Pacific's LATAS," and second that WCI had failed to seek authority to provide intrastate interLATA authority (given WCI's indication in its application that it would be providing interLATA service in addition to intraLATA service). In its protest, Pacific requested, if the applications were granted, that the Commission among other things require that WCI not offer voice service and not multiplex traffic.

In its response to Pacific's protest, WCI stated that it would not provide voice services nor convert the data stream to voice circuits, and would hand off the data stream to WCI's customers at a speed of 1.544 MPBS or higher. In response to Pacific's position that WCI should either represent that it would not offer intrastate interLATA services or amend its applications to request such authority, WCI stated that it was not presently seeking such authority, but that it would file a separate application for that authority in the near future.

In a Notice of Prehearing Conference, the parties were informed that the assigned Commissioner and the assigned ALJs desired the interested parties to devote serious efforts prior to and at the prehearing conference toward settling the concerns raised in Pacific's protests.

At a prehearing conference on September 24, 1985, Pacific indicated that the question of interLATA authority was no longer an

issue, given WCI's representation that it would file an application for such authority in the near future. Pacific remained concerned that, despite WCI's disclaimers regarding its own intentions, nothing would prevent WCI's customers from multiplexing below the 1.544 MBPS level. In Pacific's view, this situation would be all the more troubling if WCI's customers were major interexchange carriers which would then use their switching and multiplexing capabilities to provide intraLATA voice services. Pacific also noted that there is no definition of the term "high-speed data" in D.84-06-113.

At the conclusion of the prehearing conference, the ALJ directed the parties to proceed with negotiations, but also set hearing dates and dates for the submission of testimony, in the event that the negotiations did not succeed.

The parties made filings in October 1985 reporting on the status of negotiations. The parties had reached agreement, among other things, on the following points:

1. IntraLATA competition would be allowed in the provision of high-speed data transmission services over private line networks.

2. For purposes of WCI's applications, transmission services at a data speed of 1.544 MBPS or higher should be considered high-speed data transmission services.

3. WCI would not multiplex below 1.544 MBPS.

The negotiating parties were unable to reach agreement, among other items, on the following:

1. WCI refused to stipulate to a tariff condition that its private line high-speed data transmission services would not be used for voice communications. WCI believed its agreement not to multiplex below 1.544 MBPS and not to offer voice services was sufficient, and that it would be improper for a public utility to inquire into the content of the transmission it is

carrying. WCI proposed to address Pacific's concerns by adding the following language to its tariffs: "WCI will not offer voice services." Pacific did not find this solution acceptable, since WCI cannot legally offer voice services, and therefore, Pacific alleges, a WCI customer cannot legally use high-speed data lines for voice. Pacific stated that it was not asking the Commission to require WCI to monitor the content of its customers' transmissions, but simply that the Commission restrict the use of WCI's high-speed private line service to permissible transmission, i.e., high-speed data transmission. DRA agreed with WCI that monitoring of customer communications by WCI to prevent voice communication would be undesirable and unworkable.

2. WCI refused to stipulate to a condition that service provided to interexchange carriers originate and terminate through Pacific's facilities. Pacific argued that allowing WCI to directly connect to interexchange carrier facilities, either at the WCI customer's premises or at an interexchange carrier's point of presence, effectively creates a total intraLATA and interLATA switched and nonswitched voice and data bypass network.

Given the inability of the negotiating parties to reach agreement, WCI, Pacific, and DRA submitted prepared testimony. After consultation with the assigned Commissioner, the ALJs determined to make one final effort on the negotiating front. The parties were informed that a tentative ruling would, among other things, adopt WCI's compromise tariff language agreeing not to provide voice service in lieu of requiring monitoring by WCI of its customers, and require that any service by WCI to interexchange carriers originate and terminate through Pacific's facilities. The parties met on the morning of the date set for hearing, and arrived at the stipulation which was presented at the hearing. The consolidated matters were then submitted.

WCI compliance with the following portions of the stipulation (which is Appendix B to D.85-12-082) is at issue in C.86-10-012:

> "I. For purposes of these applications, the transmission services to be offered by WCI at a data speed of 1.544 MBPS or higher shall be considered high-speed data transmission services.
>
> "II. WCI agrees not to multiplex below 1.544 MBPS."
>
> * * *
>
> "VI. . . . This schedule is applicable to non-switched private line high speed data transmission services at a data speed of 1.544 MBPS or higher. Services are furnished to connect two or more points on a flat monthly rate. WCI will not offer voice services.
>
> "Service under this tariff is not available to common carriers providing interLATA telecommunications services."

In adopting the stipulation in D.85-12-082, the Commission discussed in particular WCI's agreement not to make service under this tariff available to interexchange carriers. We stated as follows:

> "This revision, applicable to all [interexchange carriers], [footnote omitted] is intended to address the issue pressed by Pacific and PSD [now DRA] that WCI, if it opts to provide service to [interexchange carriers], be required to originate and terminate that service through Pacific's facilities. These concerns relate principally to the threat of carrier bypass, as previously discussed. Since WCI [has stated] that it is not, by these applications, requesting authority to provide service to [interexchange carriers], the proposed modification should suffice for the moment. Further, PSD has stated that its proposal would bar [interexchange carriers] from connecting with WCI, even for their own

> internal business needs, pursuant to the stipulated 'Applicability' Section of the tariff... Therefore, we think the provision is sufficiently comprehensive, and we will adopt this portion of the stipulation. However, when WCI files its application for interLATA authority, which it has indicated it will do in the near future, we will revisit this issue in order to ensure that Pacific's concerns about bypass are adequately considered." (D.85-12-082, mimeo. pp. 21-22.)

In adopting the stipulation, we recognized that it should not be used as an inflexible precedent for future similar applications, and that accommodations may be necessary to account for high-speed data transmission services which differ from those offered by WCI. We recognized that each situation must be reviewed separately, consistent with the course embarked upon in inviting applications and protests in D.84-06-113.

C. WCI Actions Following D.85-12-082

There is virtually no dispute as to what WCI has said or done in marketing its high-speed data transmission services on an intraLATA basis following the issuance of D.85-12-082. As BAT points out in its opening brief, this case turns almost exclusively on interpretation of the stipulation. Before addressing that issue, we will briefly set forth WCI's actions as developed in the record.

WCI's intraLATA efforts have yielded two customers within California to date. One is Bullock's, with a high-speed system connecting several of its stores in the Los Angeles area. At the time that WCI marketed to Bullock's, Bullock's expected that only multiplexed voice traffic would be sent over WCI's facilities. Bullock's subsequently decided to transport some data via WCI which had been transported at low speed under a Pacific tariff. WCI's second customer, the Daily News, has a requirement for 100 percent nonmultiplexed high-speed facsimile communications between two laser printers at 1.544 MBPS.

In its marketing efforts, WCI uses sales material that explains how multiplexing works and makes clear that customers can integrate voice and data traffic so that it can be carried over WCI's high-speed data lines. WCI's current advertising brochure states that "[d]ata, voice, video or facsimile can be transmitted simultaneously to bring you wide-ranging benefits." Also, a set of slide materials used in California shows the use of multiplexing equipment to integrate voice and low-speed data on a high-speed circuit.

At one point WCI offered to buy multiplexing equipment and provide it at cost to Bullock's, though Bullock's did not accept the offer. WCI has provided price comparisons between Pacific's existing voice and low-speed data services and WCI's high-speed data service.

WCI marketed its service to Bullock's even after WCI identified Bullock's intended traffic as 100 percent voice. WCI's continued position is that it is permitted to offer service under such circumstances.

As to connections to interexchange carriers, WCI offers a Direct Access service, which is a private line high-speed data transmission service offered through an interstate tariff approved by the FCC. WCI provides connections directly to Allnet and MCI points of presence in California through this service.

D. Is WCI Multiplexing below 1.544 MBPS and Offering Voice Services in Violation of the Stipulation and D.85-12-082?

Many of the arguments of Pacific and other parties hinge on the meanings of the following terms as used in the stipulation:

- "High-speed data transmission service"
- "Voice service"
- "To offer voice service"
- "To multiplex"

Since these issues are integrally linked, they are treated together in this decision.

1. Pacific's Position

Pacific argues that the central purpose of the stipulation and D.85-12-082, and the principle intent of the parties, was to limit the area of competition to transmission of high-speed data so as to leave undisturbed the voice and low-speed data markets served by local exchange carriers. Pacific asserts that if the parties or the Commission had a different objective in mind they would not have been so careful and exacting in restraining WCI from engaging in multiplexing, switching, or the offering of voice service.

Pacific argues that the correct meanings of the terms used in the stipulation must come from the Commission's actions and objectives in allowing limited competition, the circumstances surrounding WCI's request, and the parties' negotiations that led to the stipulation. Pacific contends that several related Commission decisions focus their attention on the limited nature of competition to be permitted, paying particular attention to the long term and irreversible harm to local exchange carriers that can result from a decision to approve broad based competition.

Pacific contends that the term "high-speed data transmission service" as used in the stipulation excludes the transmission of voice communications. Pacific's witness Sullivan agreed that the term "high-speed data" refers to both voice and data in some applications such as video teleconferencing, and that Pacific itself makes references to both data and voice applications in its own advertising of high-speed data services. However, Pacific argues that Pacific's own marketing practices cannot be used to establish the meaning of the term "high-speed data transmission service" as used in the stipulation, since Pacific has no restrictions on providing voice service.

Pacific further asserts that the term "voice services" used in the stipulation applies to any transmission of voice communications, not only to transmission of voice communications on voice-grade channels (which operate at 64 kilobits per second if digitized).

Pacific also contends that a promise not to offer an intraLATA service carries with it the clear obligation not to promote or sell the prohibited service. It asserts that Commission actions restricting holding out of intraLATA services in D.84-06-113 and D.84-10-100, and imposing a duty to block in D.86-05-073 (which authorized AT&T Communications of California (AT&TC) to provide its Software Defined Network (SDN) service in California) and D.86-11-079 (an AT&TC rate case decision), as well as the unqualified restrictions on the provision of voice transmission services in Ordering Paragraphs 1 and 2 of D.85-12-082, all support this position.

Pacific asserts that, under the stipulation, WCI must not promote voice service by, for example, advertising, promoting, or encouraging customers to place their voice traffic over WCI's facilities. Pacific states that such promotion of the placement of voice traffic over WCI's facilities is the offering of voice service.

In Pacific's view, the stipulation's restriction on multiplexing was similarly designed to prevent WCI from offering, promoting, or encouraging customers to use its facilities for the transmission of multiplexed voice and low-speed data communications, services which WCI itself is not authorized to provide. Pacific contends that WCI is not permitted to instruct customers on the use of multiplexing equipment, explain the integration of voice and data service, or offer to purchase multiplexing equipment for a customer. Pacific asserts that WCI's actions along these lines result in WCI offering multiplexing below 1.544 MBPS, in violation of the stipulation.

The parties are in agreement that, under the terms of the stipulation, WCI's customers are themselves permitted to multiplex voice and low-speed data traffic and place such traffic over WCI's facilities. However, Pacific argues that since the restrictions in the stipulation apply to WCI, WCI should direct customers with voice and low-speed data needs to the local exchange carrier. Pacific asserts that WCI's obligation is similar to that of interexchange carriers that must refrain from offering intraLATA services even though their facilities may physically permit completion of intraLATA calls, pursuant to D.84-06-113 and D.84-10-100. Pacific cites language in D.84-10-100 regarding discussions which interexchange carriers may have with their customers:

> "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 [Other Common Carrier] 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." (D.84-10-100, mimeo. p. 9.)

Pacific contends that WCI likewise agreed to accept this requirement when it promised not to offer voice service.

Pacific asserts that the parties' negotiations leading to the stipulation do nothing to change the above conclusion. While WCI stated repeatedly during the negotiations leading up to the stipulation that it would not provide voice services, Pacific asserts that what WCI did not say about this promise not to offer

voice service also has great significance. Pacific states that, when it inquired more than once during the negotiations about what WCI meant by its commitment not to offer voice service, WCI replied that its intended service offering was "data communications between computers, such as those used by financial institutions" without mentioning any other services or applications. According to Pacific, WCI indicated that data communications presented a viable market in which WCI could operate. Based upon these representations, Pacific determined that the relevant market for WCI is large business users with data communications requirements. Pacific further asserts that DRA had this same understanding as well, citing DRA testimony submitted in A.85-07-045 and A.85-07-046[3] that defined the "relevant market niche" as "limited to large organizations with computer or data transmission needs."

Pacific asserts that, during the negotiations, WCI concealed from other parties that it would market its services by, for example, inquiring about customers' voice and data communications, explaining to customers how to integrate voice and data by multiplexing, and encouraging the placement of all voice and data communications on WCI's facilities. Pacific states that these would have been startling revelations had WCI stated them, and would have been directly contrary to every other representation made and impression conveyed on the question of voice service.

According to Pacific, the important result caused by WCI's concealment is the meaning formed by the parties. Pacific

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3 The ALJ in this proceeding took official notice of the pleadings, prehearing conference transcripts, and prepared testimony submitted in A.85-07-045 and A.85-07-046. Since evidentiary hearings were not held in those matters, the use in this proceeding of the prepared testimony submitted in those prior proceedings is limited to indications of the positions of the parties at that time, rather than the truthfulness of any of the statements made in the testimony.

states that it clearly understood that WCI would not offer or promote voice service. Pacific contends that WCI is now asking the Commission to ignore the face-to-face negotiations by the parties and uncontested representations made during that time, and rely only on the written statements submitted by the parties. Further, according to Pacific, the documents on which WCI relies do not contradict or change what WCI told the parties during the negotiations; they simply do not address certain issues such as marketing activities.

WCI asserts that Pacific changed its position during the course of this proceeding regarding whether WCI can market its services to customers with certain applications which require multiplexing to reach 1.544 MBPS, and whether WCI can discuss multiplexing with those customers. Because of this controversy regarding Pacific's position, related testimony and discussion in Pacific's opening and reply briefs are presented here in some detail.

In prepared testimony, Pacific witness Sullivan described WCI's allowable market as follows:

> "23. Q. Describe further the intraLATA high speed data application that exists for WCI and other intraLATA high speed providers.
>
> "A. There are several applications which apply to high speed data at 1.544 MBPS and above which exist in the intraLATA market. They include, but are not limited to:
>
> - bulk data transfer (computer to computer)
> - live scan security
> - video teleconferencing
> - LAN to LAN connections

- CAD/CAM applications." (Ex. 5, p. 18.)

In response to cross-examination by WCI's counsel, Sullivan explained that these applications are what he would call "high-speed data services as opposed to voice services or low-speed data services." (Tr. p. 92.)

In Sullivan's prepared testimony, he also set forth Pacific's recommendation that the Commission:

> "Direct WCI in its contact with customers to refrain from offering voice services or multiplexing. If asked about such matters by the customer, WCI must respond that it cannot offer voice services or multiplexing, that intraLATA voice and low speed data services are to be obtained from the Local Exchange Carrier, and no other advice is to be given." (Ex. 5, p. 30.)

In response to cross-examination by WCI's counsel, Sullivan discussed in more detail Pacific's views on the extent to which WCI can discuss multiplexing with its customers. Sullivan testified as follows:

> "MR. JOHNSTON: Q. When you recommend that WCI refrain from offering multiplexing, do you ...mean that WCI would not discuss multiplexing by the customer below T-1, correct?
>
> "A. No. If you mean by discussion advising the customer that WCI does not provide multiplexing, will not be the customer's agent in terms of providing multiplexing, that kind of discussion certainly would be permissible.
>
> "Q. Well, what about explaining how multiple circuits can be multiplexed to make use of WCI's service? Would that be permissible?
>
> "A. Not as a condition of selling WCI's service. I guess the scenario I'm trying to explain is one where WCI aggressively markets its service for high-speed data applications and in their discussions with

customers makes it plain to the customers that WCI is not in the business of offering out multiplexing or any voice service or low-speed data service, that that's what the local exchange carrier does and also, as you said earlier, certainly the fact that customers can do their own multiplexing if that's what they do, there's no prohibition about that.

"Q. I believe we established yesterday that you are not aware of any instance in which WCI is providing multiplexing for a customer below T-1 for its intraLATA service, are you?

"A. No, I would not say you are providing multiplexing. You are prohibited from that. That's my understanding.

"Q. So when you say offering multiplexing here, I'm having a hard time understanding exactly what you mean when you say WCI should be directed not to offer multiplexing. It's something different than providing multiplexing, isn't it?

"A. Yes, it is. It's an extension of that, however. It's not the physical provisioning of multiplexing but it's rather a salesman saying well, I'll take care of the multiplexing for you. We'll get it for you. We'll have it made available to you. It's part of our deal with you.

"Q. But the salesman wouldn't be prohibited then from saying to the customer we provide the T-1 pipe, you provide the multiplexing. If you have any questions about how that multiplexing is done, I can give you information concerning that. But you have to go buy [your] own multiplexing equipment. Would that be okay?

"A. I think part of that is okay. I think you can say we don't provide multiplexing.

"Q. But you can't discuss their acquisition of their own multiplexing?

"A. I would hope that you would refrain from that and the reason I say that is that it isn't in and of itself the fact that the customer, these sophisticated customers know how to get...multiplexors. It's the issue of the ultimate competition with the voice market. That's what our concern has been from the beginning and we would like WCI's behavior to be that of a provider of the high-speed data service to meet the high-speed data applications of the market and no more.

"Q. Your opinion is that any discussion of the customer's ability to multiplex the signal or multiplex WCI's service is a violation of the stipulation; isn't that true?

"A. Yes, if its intent is to promulgate the sale.

"Q. So then as to whether there was or was not a violation of the stipulation would be sort of a case-by-case customer analysis as to what the salesman's intent was?

"A. I think you have to look at the circumstances and assess whether there was a violation of that intent, yes." (Tr. pp. 159-162.)

Later, Sullivan discussed a hypothetical situation in which video teleconferencing, one of the applications which he had earlier named as being in WCI's allowable market, may require multiplexing to reach 1.544 MBPS. He testified as follows:

"MR. JOHNSTON: Q. Assume there was a way to provide video conferencing or high speed facsimile...that...required multiplexing by the customer below 1.544 MBPS. Would those [be] applications that...WCI could advise its customers could be placed over WCI's service?

"A. Under the conditions that you set on it, I would think not. I think what I tried to testify earlier to was that you were providing a facility [with] 1.544 capability and that unless the customer

application was offered you at that speed, that you really were not dealing with a high-speed data application.

"Q. . . . As I understand your testimony, Mr. Sullivan, WCI could provide service to that customer if...the technology was such that the...customer application would be at 1.544 but if it was lower than 1.544, WCI would have to say I'm sorry, we can't provide that service?

"A. No, I said if the customer hands off to you at 1.544, then I think that meets the stipulation. If the customer himself multiplexes, whatever the application is, up to your offering, then as we've said a number of times, the customer is not prohibited from doing that.

"Q. Even if we know that going in, even if they tell us up front we have an application below 1.544, but we'll multiplex it up, ...WCI in that instance, then could say yes?

"A. . . . I would think that you would refrain from encouraging the customer to do anything other than go to the local exchange company to talk about multiplexing or taking care of demands that were below the 1.544 rate.

"Q. So at least with respect to a service such as video conferencing, whether we could discuss it with the customer would depend on whether they were looking at a 1.544 video conferencing application or a lower video conferencing application?

"A. I think that meets your hypothesis." (Tr. pp. 167-168.)

In its opening brief, Pacific recognizes and does not take issue with WCI's testimony that many of the applications identified by Sullivan as being in WCI's limited data market often require multiplexing to reach 1.544 MBPS. Pacific states that

Sullivan "agreed that for the limited data only market [WCI] accepted there is nothing wrong with [WCI] discussing the advantages of multiplexing," citing Sullivan's testimony on transcript page 161, as quoted above. Pacific concludes that WCI could permissibly demonstrate in its promotional material the use of multiplexing equipment in association with its authorized services by deletion of references to voice and sub-rate (below 1.544 MBPS) data, and that such promotional material would then represent to the public WCI's authorized services in a manner that conforms to the stipulation.

In its reply brief, Pacific again summarizes its position regarding multiplexing and WCI's authorized market as follows:

> "Acting within its authorized market of high speed data services (computer and data transmissions by large business customers) Wang can discuss the multiplexing of such services. Mr. Zerbiec testified that many large customers do multiplex these data services (Tr. 335-38), and Wang can discuss the multiplexing of its authorized services. However, Wang has no basis or reason for explaining the 'integration of voice and data applications', or describing to customers how 'subrate' data (low speed data) can be integrated with Wang's authorized services. In addition, Wang is not permitted to offer the purchase of multiplexing equipment on behalf of its customers. To do so would effectively eliminate the prohibition against multiplexing below 1.544 MBPS." (Pacific Reply Brief, pp. 9-10.)

In Pacific's view a viable market for WCI exists within the limitations it believes were imposed in the stipulation, that is, computer and data transmissions by large business customers. While Zerbiec testified for WCI that a purely non-multiplexed market would be trivial, Pacific asserts that he did not consider whether a market focused on computer and data transmissions (including multiplexed transmissions) would be viable.

While Pacific recognizes that WCI's market under Pacific's interpretation of the stipulation is limited, it argues that the entire purpose of the stipulation was to set a limited market for WCI. It states that the Commission has repeatedly expressed its concern over the harm to universal service that can result from the hasty intervention of competition, and for that reason has chosen to proceed cautiously in this area. It states that customers do exist for WCI in the market it agreed to enter when it signed the stipulation, and that the Commission should not change its attitude on intraLATA competition and allow WCI to proceed with a full scale assault on Pacific's intraLATA voice market.

2. WCI's Position

WCI alleges that the terms of the stipulation were clearly understood by Pacific, DRA, and the Commission at the time WCI's applications were granted in D.85-12-082, and that Pacific's complaint is a transparent attempt to rewrite the terms of the stipulation in a manner that would effectively preclude WCI from competing in the provision of intraLATA private line high-speed data transmission services. WCI submits that all Pacific's objections to WCI's service raised in this proceeding were previously addressed and resolved in D.85-12-082.

WCI denies both that it is offering to multiplex below 1.544 MBPS and that it is offering voice services in its provision of intraLATA private line high-speed data transmission services. In its view, Pacific's complaint on these issues centers on whether WCI under the stipulation is prohibited from discussing admittedly lawful applications for its service with its customers or prospective customers. Under Pacific's interpretation of the stipulation, the legality of WCI's actions would depend not on the characteristics of the service provided by WCI nor the customer's use of that service, but would be determined instead by WCI's representations to the customer concerning uses of the service.

WCI points out that Pacific agrees that WCI is not multiplexing its service below 1.544 MBPS, and further that Pacific does not intend to restrict WCI's customers from multiplexing. According to WCI, Pacific ventures beyond the clear words of the stipulation to a tortured interpretation of the intent of the words, alleging that WCI has violated the intent of the "no multiplexing" provision by simply encouraging customers to multiplex and place low-speed data and voice communications on WCI's high-speed circuits.

WCI points out that the stipulation does not address advertising or marketing practices at all, and does not prohibit WCI from discussing voice applications or multiplexing with customers.

WCI contends that the fundamental flaw in Pacific's arguments is Pacific's deliberate confusion of the transmission service WCI provides with the customer's application for that service. WCI argues that Pacific has struggled throughout this proceeding to mischaracterize voice applications for WCI's service as voice services "offered" by WCI.

In WCI's view, the absurdity of Pacific's position becomes apparent when one considers other applications for WCI's intraLATA service. According to Tabb, one would not call WCI's transmission service a "video teleconferencing service" if the customer had a video teleconferencing application, and it would be ludicrous to call the service a "CAD/CAM service" if that were the customer's application. WCI concludes that it is no less illogical to label WCI's service a "voice service" whenever a customer has a voice application.

As further support for its position, WCI points to Sullivan's characterization of Pacific's competitive High Capacity Digital Service during cross-examination by WCI's counsel:

> "MR. JOHNSTON: Q. In your opinion is Pacific Bell's high capacity digital service a voice service?

"A. No, it is what it is. It is what we advertise it to be. It's a high capacity digital service.

"Q. You don't advertise it to be a voice service?

"A. No. It has the capability of being able to provide a high-speed transmission capability and through multiplexing normal voice communications can be multiplexed up to the levels of high-speed data and transmitted and then brought down again to the voice level so that the intelligence is transmitted on an end-to-end basis.

"Q. So it's not a voice service but there are voice applications for the service, correct?

"A. Yes." (Tr. p. 162, emphasis added.)

WCI concludes that WCI's service, like Pacific's High Capacity Digital Service, cannot be accurately characterized as a "voice service." WCI states that its service is a high capacity digital service for which a customer may have voice applications.

In its reply brief, WCI takes issue with Pacific's allegation that WCI concealed its understanding of the term "voice services" from Pacific and DRA during the negotiations. WCI provides quotes from documents and transcripts in A.85-07-045 and A.85-07-046 which, it asserts, show that the distinction between WCI's service and voice services was addressed during the negotiations on no fewer than six occasions. Representative portions of three of these citations follow:

1. WCI Opposition to Pacific Protest of A.85-07-045 and A.85-07-046

"WCI will not provide voice services. . . . WCI will not convert the data stream to voice circuits. As specified in the application, the data stream will be handed off to WCI's customers at a speed of 1.544 MBPS or higher." (WCI Opposition to Protest of Pacific Bell, pp. 3-4, emphasis added.)

2. Prepared Testimony of WCI Employee Submitted in A.85-07-045 and A.85-07-046

"7. Q. Do you have any comments on Pacific's suggestion that WCI's customers be prohibited from multiplexing up to 1.544 MBPS?

"A. Yes. This is an absurd proposal. WCI has stipulated that we will not multiplex below 1.544 MBPS, which effectively prohibits us from offering voice services. Pacific's suggested prohibition would effectively prohibit us from offering any service at all. Regardless of the nature of the data being transmitted, the customer must multiplex up to a data speed of 1.544 MBPS or higher at the interface for transmission on WCI's facilities. Without multiplexing by the customer, there cannot be high-speed data transmission." (Ex. 8, Att. 5, p. 4, emphasis added.)

3. Prepared Testimony of DRA Submitted in A.85-07-045 and A.85-07-046

"Q. 6. Do WCI's applications fit within the bounds of the Commission's invitation for applications to provide 'high-speed data transmission services over private line networks'?

"A. 6. WCI's applications do fit within the bounds of the Commission's invitation in D.84-06-113 because:

"a) A high-speed digital bit stream will be transmitted (1.544 megabits per second (MBPS) or above). WCI will not transmit at less than 1.544 MBPS.

"b) WCI will not transmit voice at normal voice grade speeds.

"c) WCI will not provide switching or direct connection to the switches." (Ex. 5, p. 4, emphasis added.)

WCI asserts that the only logical interpretation of these representations is that WCI and DRA considered "voice services" as used in the negotiations to refer to provision of voice grade circuits and transmission of voice at normal voice-grade speeds. WCI concludes that if Pacific for whatever reason did not understand WCI's position, WCI should not suffer the consequences.

WCI asserts that the phrase "high-speed data transmission services" as used in the stipulation is synonymous with "high-speed digital transmission services," and that the term "data" does not refer to the customer's application but rather to the digital bit stream of 0s and 1s being transmitted. Tabb cites Pacific's marketing brochure for its own High Capacity Digital Service, which describes voice, data, and video applications and refers to the total service as a high-speed data transmission service, as demonstration that it is common to refer to a high-speed digital transmission service as a high-speed data transmission service.

WCI contends that Pacific seriously misrepresents the position WCI took during the negotiations on customer multiplexing. WCI cites Sullivan's oral testimony in which he stated that Pacific did not understand during the negotiations that WCI intended to market its services to customers with applications below 1.544 MBPS. WCI counters that it had specifically addressed this topic in prepared testimony submitted in A.85-07-045 and A.85-07-046 which stated that customer multiplexing is essential if WCI is to offer any service at all, and concludes that it was made absolutely clear to Pacific prior to the stipulation that WCI fully intended to market its service to customers with applications below 1.544 MBPS.

WCI maintains its position that the market for nonmultiplexed applications is insignificant. Zerbiec testified that, of the five applications identified by Sullivan as within WCI's allowable market, LAN-to-LAN connections always use multiplexing; live scan security, video teleconferencing, and

CAD/CAM applications commonly involve multiplexing; and bulk data transfer often occurs on high-speed networks allowing for multiple applications. WCI contends that Pacific's descriptive literature of its own High Capacity Digital Service further shows the insignificance of the market for nonmultiplexed applications. Pacific's marketing brochure and slide show presume multiplexing below 1.544 MBPS for all applications mentioned, either by Pacific or the customer.

WCI concludes that the Commission should reject the artificial restrictions Pacific seeks to impose on WCI's service, which in WCI's view bear no rational relationship to the marketplace but are intended solely to give Pacific an unfair competitive advantage.

In its reply brief, WCI counters Pacific's position that WCI's obligation not to solicit customers with voice applications is analogous to the obligation of interexchange carriers not to offer intraLATA service. WCI points out that the Commission in D.84-06-113 explicitly prohibited competition in the intraLATA market. On the other hand, the Commission has not prohibited WCI's service from being used for the transmission of multiplexed voice and data communications, and Pacific has conceded that this is a lawful use of WCI's service. Further, the Commission in D.84-06-113 gave explicit directions to the interexchange carriers prohibiting them from holding out the availability of intraLATA service and requiring them to advise inquiring customers only that intraLATA calls may not be lawfully placed over their networks and should be placed over the facilities of the local exchange carriers.

WCI questions rhetorically why Pacific did not state its intent that a similar obligation be imposed upon WCI concerning transmission of multiplexed voice communications during negotiations leading to the stipulation. It answers that Pacific did try to insert language prohibiting customer use for the

transmission of multiplexed voice communications, and that Pacific failed. WCI concludes that Pacific is attempting now to relitigate the issue, reading intentions into the "no voice services" language that never existed at the time of the stipulation.

WCI also contends that Pacific's interpretation of the stipulation has changed through the course of these proceedings. According to WCI, Pacific's position in discovery prior to hearing was that WCI's customers are not allowed to multiplex below 1.544 MBPS pursuant to the stipulation. However, on the first day of hearing, Sullivan testified that it is not Pacific's intention, nor has it ever been, that WCI's customers could not multiplex their own voice communications for transmission over WCI's facilities. During the hearings, according to WCI, Pacific's position was that WCI should not advise customers on multiplexing WCI's service or using it for integrating multiplexed voice and data communications. Now, WCI argues, Pacific's interpretation of the stipulation has changed yet again, with an acknowledgement in its opening brief that WCI can discuss multiplexing with customers that are in what Pacific now calls WCI's "authorized market," that is, "business machine to business machine" connections.

WCI speculates that this change in position could be because Pacific realized belatedly that Sullivan's position on discussing multiplexing was unsupportable. WCI argues that Pacific's new position is equally untenable. It concludes that the strongest argument against Pacific's interpretation of the stipulation provisions on multiplexing and voice services is Pacific's inability after numerous attempts to articulate its position in any coherent fashion.

3. BAT's Position

BAT believes that Pacific has not shown that WCI violated either D.85-12-082 or the stipulation, and that the complaint should be dismissed. In BAT's view, Pacific's claim, reduced to its core, is that WCI did not disclose how it intended to market

its services and that WCI's marketing activities cannot be reconciled with what Pacific intended the stipulation to mean. Thus, Pacific seeks to rewrite the stipulation to impose an ironclad set of restrictions on WCI's marketing activities which would effectively exclude WCI from the competitive market.

BAT argues that nothing WCI has done is forbidden by the stipulation. No amount of alchemy, for example, can transmute marketing discussions about the use of multiplexers in connection with WCI's service into the activity which the stipulation actually forbids, namely, WCI itself multiplexing intraLATA voice or data to 1.544 MBPS. Similarly, no amount of argument can transform transmission service at 1.544 MBPS into activity the stipulation forbids, namely, the provision of voice grade service to customers.

According to BAT, Pacific seeks the imposition upon WCI of undefined restrictions that would prohibit WCI representatives from discussing with customers the uses that the customer could make of WCI's service. Pacific seeks to prevent WCI from educating customers with respect to multiplexing, or "encouraging" customers to multiplex, or, indeed, even from responding to inquiries from customers with respect to uses of WCI circuits that require customer multiplexing. Instead, Pacific would require WCI to refer all such inquiries and discussions to Pacific.

BAT submits that Pacific is fully aware that there is no viable market for a service limited to applications at 1.544 MBPS. After reviewing Pacific's marketing materials for its High Capacity Digital Service, Sullivan conceded that all or virtually all of the services described in those materials require multiplexing, either by Pacific or by the customer.

In BAT's view, Sullivan's attempts to describe and justify the restrictions to be placed on WCI sales representatives produced a set of confusing and sometimes contradictory proposed guidelines. BAT provided four quotes from Sullivan's testimony to illustrate its point:

> "WCI could not inform a potential customer that they could combine multiple voice grade circuits onto one line..." (Tr. pp. 142-143.)
>
> "It's not the physical provisioning of multiplexing but it's rather a salesman saying, 'Well, I'll take care of the multiplexing for you. We'll get it for you. We'll have it made available for you. It's part of our deal with you.'" (Tr. p. 160.)
>
> "You can't discuss their acquisition of their own multiplexing." (Tr. pp. 167-168.)
>
> "[A] representation to a potential customer... regarding economies of scale as a reason to order a high-capacity transport service... would...be prohibited by the stipulation." (Tr. pp. 227-228.)

BAT points out that Sullivan conceded that Pacific's proposed ban on WCI's discussions of multiplexing is not absolute, testifying that intent to promulgate the sale is a factor and that each violation of the stipulation would have to be determined on a case-by-case basis.

BAT concludes that Pacific seeks to hamstring WCI and all other potential competitors in the intraLATA private line high-speed data transmission service market with unrealistic, unworkable, and, ultimately, undecipherable restrictions on marketing activity. In BAT's view, the clear and unambiguous purpose of these restrictions is to eliminate competition in this market. BAT concludes that if the Commission were to adopt Pacific's position, it would render meaningless the portion of D.84-06-113 which invited competition in this market.

Finally, BAT addresses the terminology used in this proceeding. It asserts that the term which the Commission used in D.84-06-113 to describe the market in which it permitted intraLATA competition, "high-speed data transmission service," is something of a misnomer. As Zerbiec stated, "Speed refers to the number of, the amount of information which is transferred per unit [of] time."

According to BAT, it is more accurate to refer to "high-speed data transmission service" as "high-capacity digital service." This term captures the attributes of 1.544 MBPS transmission, namely its large capacity and its ability to accommodate the transmission of multiple applications at the same time through multiple circuits or streams of traffic. BAT points out that Pacific refers to its own 1.544 MBPS service as High-Capacity Digital Service.

4. Discussion

We should emphasize that the issues which we will decide as a result of Pacific's complaint relate only to the scope of WCI activity authorized by the stipulation entered into by WCI, Pacific, and DRA, and approved by the Commission in D.85-12-082. This is not a proper forum for determination of the ideal scope of competition in intraLATA high-speed services on a broader scale, nor for determination of definitions of technical terms used outside the stipulation, nor for modification in any way of the authority granted to WCI in D.85-12-082. The burden of proof is on Pacific Bell to show that WCI has violated the terms of the stipulation, as it was negotiated by the parties and approved by the Commission.

As noted earlier, much of the disagreement during the hearings regarded the meaning of certain technical terms used in the stipulation. We agree with Pacific that interpretation of these terms may come from the Commission's prior actions, the circumstances surrounding WCI's request, and the parties' negotiations that led to the stipulation, as well as from the stipulation itself. However, we wish to offer two caveats. First, contrary to Pacific's position, we do not believe that Commission actions taken subsequent to D.85-12-082 are necessarily indicative of Commission intent in approving the WCI stipulation. It would be improper to automatically assume that the Commission intended at the time the WCI stipulation was approved to apply to WCI all policies adopted at later times for other competitive services.

Second, the fact that Pacific's witness was not himself present at the negotiations leading to the stipulation, but instead "monitored" them through conversations with Pacific's participant, reduces the weight of his testimony regarding WCI's oral representations during the negotiations. Particularly since much of that testimony regarded assertions about what WCI did not say, we find the transcripts and documents created contemporaneously more pursuasive in establishing the intent of WCI during the negotiations.

In interpreting the terms used in the stipulation, a central issue is whether the prohibitions on multiplexing and offering of voice services include holding out restrictions. Pacific argues that restrictions comparable to those adopted in D.84-06-113, D.84-10-100, and D.86-05-073 for interexchange carriers regarding holding out of the usage of their services for the completion of intraLATA communications were implicit in the stipulation and should be applied to WCI.

The stipulation does not explicitly contain any holding out restrictions such as those suggested by Pacific. As Pacific has noted, the stipulation carefully and clearly prohibited WCI from multiplexing, switching, or offering voice service. In light of this, we find significant the absence of any mention of holding out or other marketing restrictions in the stipulation. We also note that D.84-06-113 and subsequent decisions granting interLATA authority in California make explicit the adopted holding out restrictions. The care with which holding out restrictions have been imposed on interexchange carriers makes us question further Pacific's assertions that similar restrictions are implicit in the stipulation with WCI.

We agree with WCI that it is hard to reconcile various Pacific statements regarding the extent of asserted holding out restrictions applying to WCI's discussions of multiplexing with customers. Statements in Pacific's briefs indicate that Pacific's

current position is that WCI may discuss the advantages of multiplexing at least with customers with certain data applications without violating the stipulation's prohibition on multiplexing. Pacific's view of WCI's allowable market also engenders confusion. Pacific states in its closing brief that WCI's authorized market is computer and data transmissions by large business customers. What determines the cut-off point? The size of the customer? The total communications needs of the customer? The speed at which the computer and data transmissions are generated?[4] If the latter, what is the cut-off speed? It appears not to be 1.544 MBPS in Pacific's view, since Pacific has not taken issue with WCI's testimony that at least one of the applications which Pacific cites as being in the allowable market requires multiplexing for transmission at 1.544 MBPS and since Pacific has now agreed that WCI may discuss the advantages of multiplexing with customers with computer and data transmission applications.

From Sullivan's testimony alone, we would infer that Pacific's position is that (a) WCI may market its service to large business customers with computer and data transmissions, (b) if the customer indicates that its applications would require multiplexing in order to reach 1.544 MBPS, WCI should direct the customer to the local exchange company, (c) if the customer asks, WCI may tell it that it may legally multiplex its transmissions in order to use WCI's service, but (d) WCI may not encourage the customer to multiplex or provide information on how to multiplex, and (e) WCI does not have to refuse service to customers which it knows will multiplex their transmissions. A determination of whether WCI

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4 We recognize the terminology problems mentioned by BAT regarding "speed" and "capacity." Since "speed" has been used throughout both I.83-06-01 and this proceeding to connote capacity, we continue such usage in this decision. We hope parties will use more precise terminology in I.87-11-033.

crosses the line between (c) and (d) would be made on a case-by-case basis.

However, Pacific's briefs indicate that WCI may "discuss the advantages of multiplexing" with customers with computer and data transmissions. This appears to contradict the prohibition on encouragement and dissemination of information regarding multiplexing which Sullivan espoused in his testimony, and leaves the record unclear regarding where Pacific would draw the line between allowable and prohibited discussions regarding multiplexing between WCI and its potential customers.

One thing that is clear is that Pacific would have the Commission prohibit WCI marketing activities aimed at encouraging customers to multiplex voice traffic for transmission over WCI's facilities. Pacific claims that such activities themselves constitute the offering of voice service.

Pacific asserts that "voice service" includes any transmission of voice communications at any speed. WCI provided several citations from transcripts and documents in A.85-07-045 and A.85-07-046 which it contends show that WCI and DRA at least understood "voice services" to refer only to transmission of voice communications at normal voice grade speeds. We find this record established contemporaneously more persuasive than assertions by Pacific's witness, who was not present at the negotiations. We conclude that Pacific has not established that the term "voice services," as used in the stipulation, means the transmission of voice communications at any speed.

The citations provided by WCI also show that WCI at least understood that the prohibition on WCI multiplexing in and of itself prevents WCI from offering voice services. We have found no written record that any party disagreed with WCI's interpretation of these terms at the time of the negotiations. Further, there is no language in the stipulation or elsewhere supporting Pacific's position that holding out restrictions are implicit in the

prohibition on the offering of voice services. For these reasons, we conclude that Pacific has not met its burden of proof to establish that WCI has violated the prohibition on the offering of voice service.

Pacific agrees that WCI has not itself multiplexed any customer's transmissions from a lower speed to 1.544 MBPS. In its statements in its briefs that WCI may discuss the advantages of multiplexing with certain customers with computer and data transmissions, Pacific seems to back away from its earlier arguments that such actions violate the stipulation's prohibition on multiplexing. This seeming change in position leaves us with no clear understanding of what actions, short of direct multiplexing, would constitute a violation of the prohibition on multiplexing in Pacific's view. Further, as noted earlier, there is no explicit language in the stipulation or elsewhere imposing holding out restrictions prohibiting the dissemination of information regarding multiplexing. For these reasons, we conclude that Pacific has not met its burden to show that any of WCI's actions have violated the prohibition on multiplexing in the stipulation.

Finally, we address the meaning of "high-speed data transmission services," as used in the stipulation. The stipulation states as follows:

> "For purposes of these applications, the transmission services to be offered by WCI at a data speed of 1.544 MBPS or higher shall be considered high-speed data transmission services."

The circularity of this definition leads us to conclude that the meaning of the term must be derived from other portions of the stipulation. The parties agree that customers themselves may multiplex and transport voice communications using WCI's service. We have also concluded that Pacific has not shown that the stipulation prohibits WCI's marketing of its service to customers with voice applications, nor that it prohibits WCI's discussing multiplexing with its customers. Once again, we must conclude that Pacific has not shown that the "high-speed data transmission

services" agreed to by the parties and approved in D.85-12-082 exclude the carriage of multiplexed voice communications or WCI's marketing of its services to customers with voice applications.

In conclusion, we find that Pacific has not proven that WCI violated the stipulation or D.85-12-082 in these areas. What this record does demonstrate is the importance of reaching a clear written agreement, especially when meanings of technical terms and concepts are not well-established and incontrovertible. Such clarity would presumably reduce later controversy over the initial terms of the agreement. Based on the record before us, we conclude that this portion of Pacific's complaint and the related relief requested by Pacific should be denied.

K. Is WCI's Direct Access Service in Violation of the Stipulation and D.85-12-082?

1. Pacific's Position

While WCI agreed in the stipulation not to make "service under this tariff" available to interexchange carriers, Pacific contends that D.85-12-082 makes clear that WCI was not to offer any direct connection to interexchange carriers that would involve the provision of intrastate telecommunications without first seeking interLATA authority from the Commission.

Pacific takes issue with WCI's and BAT's arguments that a circuit carrying both interstate and intrastate traffic is subject only to the jurisdiction of the FCC. Pacific asserts that the Commission specifically rejected such arguments in D.84-06-113, and later affirmed in D.86-05-073 its position that a private line facility carrying intrastate and interstate traffic remains subject to the reasonable regulation of this Commission.

Pacific argues also that in Louisiana Public Service Commission v. FCC, __ U.S. __, 106 S. Ct. 1890 (1986), the United States Supreme Court firmly held that state regulation of jointly

(interstate and intrastate) used facilities could not be preempted by the FCC.

Pacific recognizes in its opening brief that two recent FCC decisions, Re The Chesapeake and Potomac Telephone Company of Maryland, FCC 87-169, Memorandum Opinion and Order, and GTE Services Administration v. American Telephone and Telegraph Company and The Associated Bell System Companies, DA 87-721, Order (Chief, Common Carrier Bureau), have imposed federal tariffed rates on contaminated circuits. However, Pacific points out that these decisions are still subject to FCC reconsideration and court review, and further that they do not require that the Commission forego all regulation of WCI's facilities.[5]

Pacific provides as examples two types of state regulation which it asserts would not impermissably intrude on legitimate federal concerns: consideration of the intrastate bypass effects of WCI's Direct Access service and the imposition of reasonable holding out rules.

Pacific asserts that every interexchange carrier in California has submitted to Commission regulation of its jurisdictionally mixed use facilities, and none have, to Pacific's knowledge, shown any adverse affect. In Pacific's view, WCI has presented no evidence that its doing so would have any negative impact on its service.

Pacific contends that WCI's Direct Access service is strikingly similar to AT&T's Megacom or SDN service, where a dedicated facility connects a customer's premise with an

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5 Regarding the first of these two cases, the FCC has issued a Memorandum Opinion and Order on Reconsideration, 2 FCC Rcd 3528 (1987); the decision was appealed; the case was settled while on appeal; and the court dismissed as moot the appeal and directed the FCC to vacate its order. The Hecht Company v. FCC, No. 87-1396 (D.C. Cir., 1987).

interexchange carrier's point of presence where switched Message Telephone Service-like calling is completed. Pacific contends that the Direct Access service allows the customer and WCI to avoid the payment of any switched or special (private line type) access charges assessed by the local exchange carrier, and that this results in a loss of non-traffic sensitive cost recovery.

Pacific recognizes that it offers high-speed special access services similar to WCI's Direct Access service from both intrastate and interstate tariffs. Evidence developed during the hearings shows that, while an intrastate tariff is available, Pacific currently provides high-speed special access service only through its interstate tariff. Sullivan testified that this is due primarily to the significant price differential between the intrastate and interstate tariffs. He testified that Pacific itself makes no attempt to ascertain accurately the jurisdictional nature of traffic carried over its special access circuits, essentially leaving the choice of whether the service will be priced out of the intrastate tariff or the interstate tariff up to the customer. Pacific argues, however, that Pacific's own practices are no basis for WCI evading Commission regulation of its Direct Access service.

2. WCI's Position

WCI denies that its Direct Access service violates the stipulation and its intraLATA tariff. In WCI's view, all signatories to the stipulation clearly understood that the stipulation does not in any way address or restrict WCI's provision of such interstate services in California, but only applies to services offered under WCI's CPUC intraLATA tariff.

WCI contends that its Direct Access service is an interstate telecommunications service and as such is subject to the exclusive jurisdiction of the FCC, arguing that state regulation of this service would contravene federal policies favoring competition in the provision of interstate communications services. WCI

provides extensive citations to FCC and federal court decisions to support its position.

WCI asserts that state regulation pursuant to Section 2(b) of the federal Communications Act may be exercised only over those services and facilities which are separable from and do not substantially affect the conduct or development of interstate communications. According to WCI, this principle was enunciated in three federal court cases. (North Carolina Utilities Commission v. FCC, 537 F.2d 787 (4th Cir., 1976), cert. denied, 429 U.S. 1027 (1976); North Carolina Utilities Commission v. FCC, 552 F.2d 1036 (4th Cir., 1976), cert. denied, 434 U.S. 874 (1977); and California v. FCC, 567 F.2d 84 (D.C. Cir., 1977), cert. denied, 434 U.S. 1010 (1978).)

WCI distinguishes the current issue of jurisdiction over WCI's Direct Access service from that in Louisiana PSC. There, the Supreme Court held that Section 2(b) operates to bar FCC preemption of state regulation over depreciation of dual jurisdictional property for intrastate ratemaking purposes. The Court premised its decision on its finding that because the Communications Act itself, in Section 410, establishes a process in the depreciation context to determine what portion of an asset is used to produce or deliver interstate as opposed to intrastate services, "it facilitates the creation or recognition of distinct spheres of regulation," thus allowing the application of different rates and methods of depreciation by both the states and the federal government to dual jurisdictional property. (Id. at 1902) WCI noted that the Court emphasized, however, that its holding left undisturbed those cases in which the FCC asserted jurisdiction where separation of interstate and intrastate usage is not feasible.

WCI also distinguishes its Direct Access service from AT&T's SDN service addressed in D.86-05-073, on similar grounds. It contends that, in contrast to SDN, WCI's Direct Access service

is not a switched service and has no capacity to distinguish or measure intrastate versus interstate calling. According to Tabb, WCI would have to add network switching technology in order to segregate intrastate from interstate use; he further testified that this would be prohibitively expensive for WCI.

WCI argues that such physical reconfiguration of WCI's Direct Access facilities would directly impair WCI's ability to provide interstate services to its customers, which result WCI contends would be clearly at odds with judicial and FCC precedent, citing American Telephone & Telegraph, 56 FCC 2d 14 (1975), aff'd sub nom., California v. FCC, 567 F.2d 84 (D.C. Cir., 1978).

Finally, WCI cites this Commission's own language in D.84-06-113 to support its assertion that the potential for incidental intrastate use of WCI's Direct Access service does not require the assertion of jurisdiction by the State:

> "Intrastate telecommunications traffic carried over facilities as an incidence to lawfully provided interstate services are encompassed within interstate operating authorities and may not be prohibited by this Commission." (D.84-06-113, Conclusion of Law 2, mimeo. p. 101.)

WCI states that nothing in the record contradicts WCI's testimony that the intrastate traffic carried over its Direct Access facilities is incidental to the interstate communications purpose of those facilities.

Finally, WCI states that Pacific now downplays its earlier argument that WCI's Direct Access service is in violation of the stipulation and urges instead that the Commission apply certain unspecified "holding out" restrictions or state access charges to the service. WCI asserts that the adoption of "holding out" restrictions or access charges is not at issue in this proceeding; instead the issue is whether WCI violated the terms of the stipulation.

3. BAT's Position

BAT agrees with WCI's view that the stipulation does not forbid WCI from offering service to interexchange carriers under its federal authority. BAT points out that the stipulation says only, "Service under this tariff is not available to common carriers providing interLATA telecommunications," and contends that this says nothing about service under another tariff not being available for interstate traffic.

BAT contends that Pacific has offered no reply to WCI's reliance on the portion of D.84-06-113 which states that intrastate traffic carried incidental to lawful interstate service is "encompassed within interstate operating authorities and may not be prohibited by this Commission." Further, in BAT's view, there is an element of hypocrisy to Pacific's position since all of its intrastate high-speed special access circuits from customer premises to interexchange carriers' points of presence are provided under Pacific's FCC tariff, with no procedures or practice to determine the predominance of interstate versus intrastate traffic.

4. Discussion

The section of the stipulation regarding availability of WCI's intrastate service to interexchange carriers states that:

> "Service under this tariff is not available to common carriers providing interLATA telecommunications services."

Parties agree that WCI is not offering its Direct Access service through the intrastate tariff authorized as a result of this stipulation. Thus, we conclude that WCI is not violating its tariff, the stipulation, or D.85-12-082 in this respect.

Nevertheless, we find WCI's actions troublesome for other reasons: as discussed below, they run counter to WCI representations made in A.85-07-045 and A.85-07-046, ignore our conclusions of shared jurisdiction clearly set forth in D.84-06-113, and violate PU Code § 1001.

WCI represented in A.85-07-045 and A.85-07-046 that it would file an application requesting interLATA authority before providing connections to interexchange carriers in California. (See WCI Motion for Decision without Hearing and Order Shortening Time to Respond to Motion, November 8, 1985, pp. 7-8.) In approving the stipulation in D.85-12-082, we relied upon this representation as assurance that Pacific's concerns about carrier bypass would be adequately considered in that separate application "in the near future."

Rather than requesting interLATA authority, WCI has instead gone forward with connections to interexchange carriers under the aegis of its interstate authority. WCI's current arguments regarding the exclusivity of FCC jurisdiction run counter to its seeming acquiescence in A.85-07-045 and A.85-07-046 to Commission jurisdiction over such connections. While there is no indication that WCI deliberately misled the Commission regarding its position in late 1985, its actions in commencing its Direct Access service without Commission authorization are particularly disturbing in light of its earlier admission of Commission jurisdiction.

In D.84-06-113, we considered arguments in many respects identical to those now repeated by WCI regarding FCC jurisdiction over facilities with mixed interstate/intrastate usage. We concluded at that time that this Commission maintains a vital role, along with the FCC, in the regulation of interexchange carriers. After discussing many of the same FCC and federal court decisions which WCI has cited, we concluded as follows:

> "Based upon these cases, several parties, notably MCI, Sprint, and [Western Union], argue that this Commission may not regulate their intrastate activities. It is essentially their position that intrastate traffic carried over their facilities as an incidence to lawfully provided interstate services are encompassed within their FCC certificates and that, consequently, this Commission may not bar the

> intrastate traffic which would otherwise fall plainly within our jurisdiction. Their analysis is incomplete and incorrect.
>
> "There remains in the face of the primacy of federal regulation a vital state jurisdiction. The cases only establish the proposition that this jurisdiction must be carefully exercised so as not to intrude on the interstate and foreign telecommunications over which the FCC presides. . . . The full authority to certificate and supervise intrastate telecommunications is...left to the states subject to the proviso that federally regulated services be neither burdened nor discriminated against. In our order, we take full cognizance of the 'practical difficulties' of separating interstate from intrastate traffic and carefully weigh them so as not to 'substantially encroach' upon the development of the integrated national network the courts seek to protect." (D.84-06-113, mimeo. pp. 13-14.)

Since that time, we have consistently opposed efforts by the FCC to preempt state regulatory authority over intrastate private lines which connect to interstate lines.[6] WCI has brought forth no new evidence or argument which would sway us from

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6 California sought review of the FCC's decision in American Telephone and Telegraph Company, Pacific Telephone and Telegraph Company and Southwest Bell Company, Tariff F.C.C. No. 270, 1.544 Mbps channels for connection with interstate communications systems. At the FCC's request, the court declared the case moot and remanded it to the FCC to vacate the order. Pacific Bell v. FCC, No. 85-1599 (D.C. Cir., 1986). We also filed to intervene in the action seeking review of the two Memorandum Opinions and Orders in Chesapeake and Potomac Telephone Company of Maryland, Petition for Declaratory Ruling Regarding Intrasate Private Lines Used in Interstate Communications discussed above. See also our comments and reply comments filed before the FCC in In the Matter of the Petition of New York Telephone Company for Declaratory Ruling with Respect to the Physically Intrastate Private Line and Special Access Channels Utilized for Sales Agents-to-Computer New York State Lottery Communications.

our position, and we conclude in this case that WCI's Direct Access service is subject to the jurisdiction of this Commission in addition to that of the FCC.

WCI argues that it cannot at this time distinguish intrastate and interstate calling over its Direct Access private line facilities and that compliance with a requirement to do so would be prohibitively expensive. This issue of measurement of intrastate and interstate traffic goes to the types of regulation which we find appropriate for such services, but in our view does not bear on the primary issue of jurisdiction. Our regulation of WCI's Direct Access service is addressed in a subsequent section of this opinion, in which we grant WCI interLATA authority in response to A.87-02-034.

In D.84-06-113 and D.84-10-100, we addressed a consolidated complaint filed by Pacific seeking a cease and desist order against the assertedly illegal intrastate operations of a number of interexchange carriers which had begun service within California without intrastate operating authority. Because we had, in the meantime, authorized these parties to provide intrastate interLATA telecommunications services, we found that Pacific's complaint for a cease and desist order, to the extent it was directed at interLATA operations subsequent to D.84-01-037, to be moot. We also concluded that the intrastate traffic carried over the defendants' facilities constituted an incidental use not rendered in violation of any law. As a result, we denied Pacific's complaint.[7]

There are close similarities between that situation and the current one in which WCI has been providing its Direct Access service in California without intrastate authorization. WCI has

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7 We note that Conclusion of Law 2 in D.84-06-113, which WCI quotes, was replaced in D.84-10-100 modifying D.84-06-113.

now, with the filing of A.87-02-034, requested a CPCN to provide interLATA high-speed private line services within California. We today grant WCI's request in this regard, subject to the same holding out restrictions imposed on other interexchange carriers. If WCI submits to our regulation and complies with the restrictions which we impose, its Direct Access service will no longer be contrary to its intrastate authorization. On the expectation that WCI will do this, we find that Pacific's request for a cease and desist order against WCI's Direct Access service in California is moot, consistent with our findings in D.84-06-113 and D.84-10-100.

WCI asserts that any intrastate traffic carried over its Direct Access facilities is incidental to lawful interstate services, and that no party has refuted this claim. No evidence was introduced in this proceeding on the question of whether WCI, in promoting its Direct Access service, took steps to ensure that intrastate usage of this service would indeed be incidental or whether, on the other hand, WCI held itself out as an intrastate carrier. Absent such information, we cannot determine whether the intrastate usage of WCI's Direct Access service has been incidental to lawful interstate use.

Despite the similarities, there is one critical difference between the situation we addressed in D.84-06-113 and the one before us today. Prior to D.84-01-037 and D.84-06-113, we had never clearly asserted jurisdiction over nondominant interexchange carriers. Since the issuance of those decisions, carriers should have been fully cognizant of our conclusions in this regard and our regulatory program including certification procedures and holding out restrictions. Further, D.85-12-082 made clear that we fully expected to examine any service WCI might propose which would connect customers to interexchange carriers, and in that proceeding WCI itself seemingly acquiesced regarding our jurisdiction over such service. We conclude that WCI has violated PU Code § 1001 in undertaking its Direct Access service

without prior Commission authorization and further has in general operated in defiance of this Commission's regulatory program. We note that this conclusion is independent of whether intrastate use of the service has been incidental to lawful interstate use.

Our conclusions regarding the illegality of WCI's operations are tempered by recognition that WCI's interLATA operations to date, consisting to our knowledge only of its high-speed private line Direct Access services, are much more limited than those engaged in by most other interexchange carriers, which typically provide a range of switched services. Because D.84-06-113 addressed our jurisdiction over interexchange carriers in general, without focusing on the extent of our jurisdiction over a carrier with such limited operations, we will impose no sanctions on WCI as a result of its actions in engaging in the unauthorized intrastate operations which Pacific has brought to our attention in this complaint.

Because of our contemporaneous granting of interLATA authority to WCI, we conclude that the portion of Pacific's complaint regarding WCI's Direct Access service should be denied. However, we do not wish in any way to send a signal that other carriers might expect to disregard this Commission's regulatory authority until a complaint is filed against them, at which time they simply file an application for a CPCN to avoid any negative consequences. In Rulemaking 85-08-042, we are addressing, among other issues, how to deal with violations of the PU Code and our regulations when we find that an interexchange carrier has been operating absent Commission authorization. We put potential violators on notice that we will not take such illegal operations lightly.

IV. WCI Application for Statewide InterLATA Authorization

A. WCI Request

In A.87-02-034, WCI requests a CPCN to provide interLATA private line high-speed data transmission services at a data speed of 1.544 MBPS or higher in California. By this application, WCI requests authority to market its high-speed data transmission services between all interLATA points in California.

WCI states that it takes a comprehensive, system solution approach in designing, installing, and maintaining communications facilities to meet its customers' needs and that this includes identification of new applications for high-speed data transmission circuits, thereby expanding the market for transmission services.

As an innovative information transmission company, WCI does not specialize in any single type of transmission technology. WCI states that it utilizes digital terrestrial microwave and digital fiber optic transmission technologies, with the customer's application for WCI's services dictating the type of transmission technology employed.

Because of the custom design for each client, WCI charges for its information transmission services on an individual contract basis. WCI states that by negotiating individual contracts for each customer, WCI can take into account the actual cost of building the proprietary network system for that customer.

If certificated, WCI states that it will file a tariff for intrastate interLATA services with the Commission. Consistent with the procedure specified in D.85-12-082, WCI would submit proposed rates and cost data for each service agreement to the Commission's Evaluation and Compliance Division (recently renamed the Commission Advisory and Compliance Division (CACD)), showing that the proposed rates are above cost, and permitting CACD a reasonable period of time to review the data prior to filing an advice letter requesting tariff approval of the negotiated rates.

WCI states that its proposed services offer the following identifiable benefits to consumers:

- Access to the services of an innovative information transmission company providing private line networks custom-designed to meet the specific customer's needs;
- Development of new applications and an expanded market for high-speed data transmission services;
- Increased availability of high-speed data transmission services; and
- Increased reliability of high-speed data transmission services because of the customer's participation in the establishment and maintenance of quality in circuits dedicated to that customer's use.

WCI states that the Commission has previously determined in D.84-01-037 that the public convenience and necessity require that competition be allowed in the provision of interLATA telecommunications services, and concludes that its application should be granted.

B. Pacific Protest

Pacific protests A.87-02-034. It asserts that WCI has failed to satisfy the requirement of Rule 18(a) of the Commission's Rules of Practice and Procedure, which requires that an applicant give a "full description of the proposed construction or extension, and the manner in which same will be constructed." Pacific states that this has special meaning in WCI's case for two reasons. First, WCI has agreed not to provide intraLATA voice services, and second, WCI now intends, it appears, to offer interLATA and intraLATA services over the same network facilities. Pacific asserts that WCI must demonstrate what reasonable measures it has taken or will take to prevent intraLATA voice services. Pacific states that WCI has failed to do so, and that its application should not be granted until it provides the needed information.

Pacific states that A.87-02-034 does not specify whether WCI intends to hold out the availability of interLATA private line high-speed voice transmission services. Pacific interprets the absence of any statement precluding such holding out to mean that WCI will assert its right to hold out the availability of such service. Pacific also asserts that any Commission authorization should make clear that WCI must file tariffs, and that such tariffs must comply with D.84-06-113 restrictions on the holding out of intraLATA voice telecommunications services.

Pacific is concerned about potential interactions between WCI's interLATA facilities and intraLATA facilities if WCI's applications are both approved. Pacific states that WCI would be allowed to offer and provide interLATA voice services but not intraLATA voice services. Pacific asserts that WCI has the burden of showing that it will separate facilities for its proposed interLATA and intraLATA services so that the two services are not commingled in a way that circumvents what it believes is a prohibition on the holding out of intraLATA voice transmission, and of demonstrating what reasonable steps it will take to instruct customers concerning intraLATA voice services that are reserved solely for local exchange carriers. It is Pacific's position that technical and/or holding out instructions can be implemented that would permit WCI to comply with prior Commission decisions.

C. Should WCI be Granted InterLATA Authority?

No party has unequivocally opposed a grant of authority for the interLATA private line high-speed data transmission services which WCI requests. Pacific recommends several conditions, and GTE states that it agrees with Pacific in this regard. MCI and BAT recommend that A.87-02-024 be granted.

We have granted interLATA operating authority to numerous other applicants, including BAT which has authority granted in D.86-06-027 to provide interLATA private line services similar to that requested by WCI. Consistent with our finding in D.84-01-037

that interLATA competition is in the public interest, we conclude that WCI should be granted its requested operating authority, subject to certain holding out restrictions as discussed below. WCI is expected to comply with the PU Code and with all applicable rules and regulations of this Commission. We will impose the rules adopted in D.84-01-037 regarding the filing of tariffs by interexchange carriers for WCI's interLATA services, rather than those proposed by WCI. Other conditions recommended by Pacific are discussed below.

WCI should be subject to the fee system, as set forth in PU Code §§ 401 et seq., which is used to fund the cost of regulating common carriers and businesses related thereto and public utilities. By Resolution M-4746, we set the fee level for fiscal year 1987-88 for telephone corporations at 0.10 of 1% (0.0010) of revenue subject to the fee. Appropriate tariff rules should be incorporated in WCI's tariff rules for the imposition of this surcharge.

Should Restrictions be Imposed to Prevent Commingling of IntraLATA and InterLATA Traffic?

Pacific recommends that WCI be prohibited from using its interLATA facilities to complete intraLATA voice or low-speed data communications it is not authorized to provide, and that WCI be required to take all reasonable and necessary steps to separate its interLATA traffic from its intraLATA traffic. Pacific recommends further that WCI be required to assist its customers in structuring their networks to direct intraLATA voice and low-speed traffic to the local exchange carrier. Pacific states that these conditions are consistent with the intent of the stipulation, and are needed to prevent WCI from using interLATA authority to avoid and evade restrictions contained in its intraLATA authorization.

WCI asserts that it cannot commingle a customer's intraLATA and interLATA traffic since it provides dedicated, point-to-point private line circuits with no switching. Since its

interLATA service will in every instance involve a private line circuit that crosses a LATA boundary, WCI contends further that the service could not be used for the transmission of intraLATA communications. WCI concludes that, since in its view commingling cannot occur, the holding out restrictions recommended by Pacific are unnecessary and should be rejected.

WCI is correct in its statement that, since it cannot provide switching, it cannot commingle a customer's interLATA and intraLATA traffic. However, WCI seems to overlook the fact that there is no restriction that would prevent a customer from using its own switching equipment to route intraLATA traffic over WCI interLATA facilities. The traffic could then be switched and transmitted, perhaps over another WCI interLATA private line, back into the originating LATA. While such routing might be circuitous, we can envision circumstances in which it might be economically advantageous to the customer. In those cases, WCI interLATA services might be used to bypass a local exchange carrier, thus depriving that carrier of some amount of revenue. This appears to be Pacific's concern.

We have determined elsewhere in this opinion that WCI is not prohibited from marketing its previously authorized intraLATA high-speed services to customers which would multiplex voice or low-speed data communications for transmission over WCI's intraLATA facilities. However, we decline in a later section of this decision to authorize an expansion of WCI's intraLATA authority to geographic areas other than those covered by D.85-12-082,[8] pending further consideration of the efficacy of further intraLATA competition in this area. In the meantime, WCI should be subject to the same holding out restrictions as other interexchange

8 The extent of authority granted in D.85-12-082 is an issue in C.87-07-024, which has been consolidated with I.87-11-033.

carriers, i.e., it cannot hold out the availability of intraLATA services to customers in areas in which it does not have intraLATA authority, and shall advise its customers in such areas that intraLATA communications should be placed over the facilities of the local exchange carrier. WCI, in answering any customer inquiries as to whether its facilities may physically be used to complete intraLATA calls in areas where it does not have intraLATA authority, shall advise current and potential customers that such calls (1) may not be lawfully placed over its networks and (2) should be placed over the facilities of the local exchange carriers without any further advice being given. WCI may not instruct customers in such areas regarding how to switch intraLATA traffic so that it is carried over WCI's interLATA facilities nor encourage them to do so in other ways.

E. Should WCI's Direct Access Service be Authorized?

Pacific asserts that WCI should be required to make any direct connections to an interexchange carrier through the facilities of the local exchange carrier. In Pacific's view this restriction is consistent with the intent of the stipulation and should be adopted by the Commission in the consolidated applications. WCI steadfastly maintains that such services, i.e., its Direct Access service, are within the exclusive jurisdiction of the FCC and may not be prohibited or restricted by this Commission.

Pacific essentially recommends that we prohibit WCI from engaging in carrier bypass. As BAT and WCI point out, we have already considered the issue of carrier bypass in D.85-06-115 and declined to adopt such a ban. BAT asserts that Pacific has presented absolutely no evidence why such a restriction ought to be imposed on WCI when it is not imposed on any other California-certificated interexchange carrier.

As discussed previously, we firmly assert jurisdiction over WCI's Direct Access service. We have already found that WCI did not violate the stipulation by offering its Direct Access

service in California. Since Pacific has presented no other argument why carrier bypass should be prohibited for WCI, we conclude that WCI's Direct Access service should be authorized consistent with our treatment of other interexchange carriers in this regard.

We turn now to the manner of our regulation of WCI's Direct Access service. Because this service provides bypass of the local exchange carriers' switched network, we view it as basically analogous to special access. As a result, the regulatory treatment of special access services can provide guidance regarding appropriate treatment of Direct Access. At the same time, it is clear that the Direct Access service falls within the nondominant framework adopted in D.84-06-113. The regulatory treatment of Direct Access must be established within this context.

First, since there is no reason to differentiate among WCI's interLATA services in this regard, the holding out restrictions adopted above should be imposed on Direct Access as well as on all other interLATA services offered by WCI.

WCI states that it would have to add network switching technology to its Direct Access lines in order to measure intrastate calling. We note that the local exchange carriers do not at this time measure intrastate usage of their special access services either. The FCC is considering changes in separations treatment of mixed use special access lines in CC Docket 78-72 and CC Docket 80-286, and we filed comments in response to its Memorandum Opinion and Order on Reconsideration and Order Inviting Comments released December 24, 1986, in which we supported allocation based on use where the mixed traffic is measurable by actual or estimated methods.

The issue of measurement of intrastate usage on a mixed use Direct Access line was not well developed in this record. For instance, the option of obtaining such information from the interexchange carrier in instances where the Direct Access line

terminates at an interexchange carrier switch and the interexchange carrier bills the customer on a usage sensitive basis was not discussed.

Given the state of the record on this point and the status quo for special access services, we will not require measurement of intrastate traffic on Direct Access lines with mixed usage at this time. For now, the method by which WCI prices its Direct Access service should be consistent with that currently in place for local exchange carriers' special access services. WCI should file an intrastate tariff for its Direct Access service. We will allow WCI, in consultation with its customers, to determine whether a specific installation should be offered from its intrastate or interstate tariff. Service provided under WCI's intrastate Direct Access tariff will be subject to the fee system provided for in PU Code §§ 401 et seq. We retain the option of revisiting the issues of separability and pricing of intrastate usage of WCI's Direct Access service in the future.

V. WCI Application for Statewide IntraLATA Authorization

A. WCI Request

In A.87-02-033, WCI requests a CPCN to provide intraLATA private line high-speed data transmission services at a data speed of 1.544 MBPS or higher within all LATAs in California. WCI proposes to expand the area within which it will market its high-speed data transmission services, stating that the services offered will be identical to those intraLATA services which WCI is currently authorized to offer by D.85-12-082.

WCI's descriptions of its proposed intraLATA services and the identifiable benefits are identical to the descriptions of its proposed interLATA services contained in A.87-02-034. WCI states that it will provide service pursuant to the terms and conditions set forth in its existing intraLATA tariff on file with the

Commission and will submit proposed rates and cost data for each service agreement pursuant to the procedure specified in D.85-12-082.

In its application, WCI asserts that the Commission has previously determined that the public convenience and necessity require that competition be allowed on an intraLATA basis in the provision of high-speed data transmission services over private line networks. It quotes D.84-06-113 as the basis for its position:

> "We believe that there is some merit in opening up the private lines market to some limited form of competition. We therefore invite applications from persons who are interested in providing high-speed data transmission services over private line networks. In our view, Pacific's (or any other local exchange company's) facilities may not be well suited to the provision of these specialized services and competitors should be allowed to provide them on an intraLATA basis. We intend to encourage the development of these technologies by this order. While we do not completely open the private lines market to full competition, we may in the future reexamine our policy on this issue. For now, however, we will not since we have concerns that the fullest competition will only encourage carrier bypass which, as we discuss elsewhere in this opinion, poses a threat to the switched network." (D.84-06-113, mimeo. p. 67.)

WCI contends further that the Commission determined in D.84-06-113 that entry into the private line high-speed data transmission market would not threaten the switched network because private lines are primarily used to provide service over dedicated non-switched access lines and constitute a minuscule portion of the local exchange carriers' revenues.

In WCI's view, the switched network will not suffer adverse consequences from WCI's provision of its proposed service because WCI will only provide point-to-point private line services

independent of the message telephone network, WCI's system will contain no switches, and WCI will restrict sale of its services to customers requiring high-speed data communications at a data speed of 1.544 MBPS or higher. WCI asserts that its proposed service falls within the niche of permissible intraLATA "high-speed data transmission services" as that term was used in D.84-06-113.

WCI concludes that the Commission's prior determinations in D.84-06-113 and D.85-12-082, the identifiable benefits to consumers, and the lack of adverse consequences to the switched network demonstrate that the public convenience and necessity require approval of WCI's application for a statewide intraLATA CPCN.

B. Pacific Protest

Pacific reiterates many of its reasons for opposing A.87-02-034 in its protest to A.87-02-033. It states that WCI has failed to comply with Rule 18(a), and has not shown how, if at all, it intends to abide by the Commission's prohibition on intraLATA voice competition adopted in D.84-06-113.

Pacific also takes the position that any decision granting WCI statewide intraLATA authority must specify that such authority is subject to the same terms and conditions imposed in D.85-12-082. It believes that, to avoid any misunderstanding, the stipulation approved in D.85-12-082 should be specifically incorporated into any grant of the instant application. However, Pacific requests that the stipulation which should accompany any approval of this application should be conformed to the terms and conditions of a later stipulation approved in D.87-02-022 for a similar service to be provided by BAT. In Pacific's view, the terms and conditions delineated in D.87-02-022, which differ slightly from those in WCI's stipulation, clarify the intent of the terms and conditions contained in D.85-12-082 and correctly reflect the Commission's attitude on the provision of voice services by an intraLATA high-speed data provider. In particular, the stipulation

approved in D.87-02-022 for BAT states, "The services and facilities provided hereunder are for data transmission only and it is not intended that such services and facilities be used for provision or completion of intraLATA voice traffic."

Pacific reiterates its position set forth in its protest to A.87-02-034 that WCI has the burden of showing that it will separate facilities for its interLATA and intraLATA services so that policies against intraLATA competition are not circumvented. Pacific asserts that WCI cannot be permitted to gain intraLATA voice authority that the Commission has intentionally, and for good reason, reserved for local exchange carriers.

C. GTE Protest

GTE states that if the charges which Pacific has levied against WCI in C.86-10-012 are proved, WCI should be disqualified from providing its present service and denied authority for expanding that service statewide. In addition, GTE believes that the Commission should confront the questions raised in C.86-10-012 regarding whether WCI's customer have used or will use WCI's service for voice transmissions in contravention of the spirit, if not the letter, of D.84-06-113, and should also set clear ground rules for the type of intraLATA competition it might allow under the guise of "high-speed data private lines."

GTE also asserts that a grant of WCI's application would not serve the public convenience and necessity. GTE states that it is ready and able to provide the same high-speed data private line transmission service that WCI contemplates to WCI's proposed customers or to anyone else, either out of its standard tariffs or on a special assembly basis. In GTE's view, the only effect of allowing intraLATA competition where a local exchange carrier is able to provide the same service is to deprive the local exchange carrier of some contribution to the cost of providing basic service. It recommends that the requested intraLATA authorization be denied.

D. Should WCI Be Granted Statewide IntraLATA Authority at this Time?

A lengthy record was developed in this proceeding regarding whether the public convenience and necessity require that WCI's intraLATA authorization be expanded statewide.

WCI, supported by BAT and WCI, argues that statewide expansion of its service would result in a host of benefits commonly attributed to marketplace competition. These parties contend that WCI's expansion into the statewide intraLATA market would increase the availability of private line high-speed transmission services and lead to new applications for this efficient mode of transmission. WCI asserts that the local exchange carriers have an economic incentive to use existing copper facilities, that competition in this market would result in the use of improved technology and provision of better service, and that WCI would provide the higher reliability levels needed by customers with specialized data transmission applications.

GTE argues, supported to large extent by Pacific, to the contrary. These local exchange carriers assert that they can offer services technically identical to and with at least as high reliability as WCI's services. In their view, only their lack of pricing flexibility prevents them from duplicating the customer-specific services which WCI offers. Pacific argues that WCI's costs of providing its services will always exceed Pacific's costs due to Pacific's ability to use embedded plant and other economies of scale and scope. Pacific and GTE contend that expansion of WCI's intraLATA authority would only lead to needless duplication of facilities, inefficient use of their systems, stranded investment, uneconomic bypass, and loss of contribution to basic services with a resulting negative impact on universal service. They conclude that WCI's request for statewide intraLATA authorization should be denied.

If the Commission nevertheless grants WCI's request, Pacific and GTE urge that the authorization include the same restrictions which in their view exist in the current stipulation. Pacific reiterates its position that WCI is not permitted to offer, hold out, promote, or advertise in any way intraLATA voice and low-speed data services.

To date, we have entertained requests for authority to offer intraLATA private line high-speed data transmission services on a case-by-case basis. Since D.84-06-113, we have granted authority for such services to only two carriers: WCI and BAT. WCI's authorization granted in D.85-12-082 is limited to portions of LATA 1 and LATA 5; BAT's authorization granted in D.87-02-022 is similarly limited to LATA 1 and LATA 3. Both authorizations were granted as a result of stipulations reached among the parties. GTE asserts in its protest that the Commission should set clear ground rules for intraLATA competition in private line high-speed data transmission services before granting WCI statewide authority.

Much has happened since our conclusion almost four years ago in D.84-06-113 that there might be merit in opening up the intraLATA private lines market to limited competition. Telecommunications markets have expanded rapidly and customer sophistication has increased. Both the local exchange carriers and this Commission have gained experience in assessing the marketplace and impacts of competition.

In particular, the WCI and BAT proceedings and Pacific's complaint have heightened our appreciation of the difficulties inherent in delineating a portion of the intraLATA market as open to competition. We have concluded today that WCI's stipulation does not preclude marketing to customers with voice applications, despite Pacific's and GTE's protestations otherwise. BAT's stipulation approved in D.87-02-022 contains the statement that, "it is not intended that such services and facilities be used for provision or completion of intraLATA voice traffic." While Pacific

asserts that the Commission meant a similar restriction to apply to WCI, we cannot, in looking back, verify that that was our intent.[9] Since neither WCI's stipulation nor D.85-12-082 clearly spelled out such a restriction, we have found in WCI's favor in C.86-10-012.

We note that in D.84-06-113 we concluded, "we would be remiss if we did not provide an opportunity to the developers and providers of [high-speed private line] services to apply for authority to offer such services in California without regard to LATA boundaries." As we have interpreted the WCI stipulation and D.85-12-082, statewide expansion of WCI's intraLATA authorization along with today's grant of interLATA authorization would allow WCI to offer its private line high-speed data transmission services statewide without regard to LATA boundaries. While it would undoubtedly be more efficient (at least from WCI's perspective) if no intraLATA restrictions were maintained on WCI's services, we are hesitant to expand intraLATA private line competition at this time, for reasons developed below.

As discussed in D.87-07-017 issued in I.85-11-013, it may be difficult, even after extensive proceedings, to reach satisfying conclusions about the extent of true competitiveness in a particular market. In that investigation, we are examining whether AT&TC should be granted pricing flexibility in light of competition in the interLATA market. The situation is somewhat reversed in the issue before us, i.e., whether to allow intraLATA competition for a service for which the local exchange carriers have limited pricing flexibility. In either instance, however, the best approach may be to allow enough competition so that the marketplace may show us whether competitive conditions really exist. WCI has succinctly

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9 The meaning of BAT's stipulation was not an issue in this proceeding, having been properly excluded by the ALJ.

observed that competition should be shifted from the hearing room to the marketplace.

While we are sympathetic to WCI's pleas, it has become increasingly apparent in both interLATA and intraLATA markets that pricing flexibility by the dominant carriers is an important complement to competition by nondominant carriers, to help ensure that competition is effective and that societal benefits accrue. We also recognize that the case-by-case approach for consideration of requests for private line high-speed services which has sufficed since D.84-06-113 may have reached the limits of its usefulness.

We believe that, after four years, the time is ripe to revisit the question of intraLATA competition on a generic rather than a case-by-case basis. To this end, we recently initiated a new investigation, I.87-11-033, in which we will both reconsider the efficacy of further intraLATA competition and address local exchange carrier pricing flexibility.

It is our intent in I.87-11-033 to establish the scope of allowable intraLATA competition in private line high-speed data transmission services and certain other services (excluding message toll service and related services) in early 1988. To ensure consistency with actions in that proceeding, we prefer to delay action on WCI's request for statewide intraLATA authority until that time. We leave this proceeding open for further consideration of WCI's request after a decision is issued in Phase I of I.87-11-033. We note that this step is consistent with D.87-11-064, in which we deferred further action on MCI's request for expanded authority to offer its virtual private line network services. Following a Phase I decision in I.87-11-033, it is our expectation to proceed expeditiously with action on both WCI's and MCI's outstanding applications.

Findings of Fact

1. In D.84-06-113, we invited providers of private line high-speed data transmission services to file applications if they wish to offer such services on an intraLATA basis and required persons not authorized to provide intraLATA telecommunications service to refrain from holding out the availability of such services and to advise their subscribers that intraLATA communications should be placed over the facilities of the local exchange carrier.

2. In D.84-06-113, we also concluded that this Commission has broad regulatory authority over the providers of intrastate telecommunications; that this Commission may neither burden nor discriminate against federally authorized telecommunications; and that FCC certification does not preempt this Commission's consideration of applications for the provision of the intrastate services of persons holding federal authority.

3. In D.85-12-082 in A.85-07-045 and A.85-07-046, we granted WCI authority to provide intraLATA private line high-speed data transmission services in portions of LATA 1 and LATA 5, subject to certain conditions set forth in that decision and in a stipulation which had been reached by WCI, Pacific, and DRA.

4. In C.86-10-012, Pacific alleges that WCI is violating several conditions of the stipulation.

5. In A.87-02-033, WCI requests a CPCN to provide intraLATA private line high-speed data transmission services within all LATAs in California.

6. In A.87-02-034, WCI requests a CPCN to provide private line high-speed data transmission services on an interLATA basis in California.

7. At the time that WCI marketed to Bullock's, Bullock's expected that only multiplexed voice traffic would be sent over WCI's facilities, though Bullock's subsequently decided to transport some data via WCI.

8. In its marketing efforts, WCI uses sales material that explains how multiplexing works and makes clear that customers can integrate voice and data traffic so that it can be carried over WCI's high-speed data lines. WCI has provided price comparisons between Pacific's and WCI's services.

9. WCI offers Direct Access service, a private line high-speed data transmission service offered through an interstate tariff, which provides connections directly to interexchange carriers' points of presence in California.

10. Pacific presented testimony that WCI's allowable intraLATA market includes bulk data transfer (computer to computer), live scan security, video teleconferencing, LAN to LAN connections, and CAD/CAM applications.

11. Pacific presented testimony that WCI should give customers no advice regarding intraLATA voice services or multiplexing other than that it cannot offer voice services or multiplexing and that intraLATA voice and low-speed data services are to be obtained from the local exchange carrier.

12. WCI presented testimony that many of the applications identified by Pacific as being in WCI's intraLATA market often require multiplexing to reach 1.544 MBPS.

13. Pacific states in its opening brief that there is nothing wrong with WCI discussing the advantages of multiplexing for the limited data only market.

14. The stipulation does not address advertising or marketing provisions, and does not include any holding out restrictions comparable to those contained in D.84-06-113 regarding the offering of intraLATA services by interexchange carriers.

15. "Speed" refers to the amount of information that is transferred per unit of time. It is more accurate to refer to "high-speed data transmission service" as "high-capacity digital service."

16. Interpretation of technical terms used in the stipulation may come from prior Commission actions, circumstances surrounding WCI's request, and the parties' negotiations that led to the stipulation, as well as from the stipulation itself.

17. Pacific's witness who testified regarding WCI representations during the negotiations was not himself present at the negotiations, but instead monitored them through conversations with Pacific's participant.

18. Pacific's testimony and position in its briefs regarding the extent of the asserted holding out restrictions and WCI's allowable market are unclear, confusing, and in some instances contradictory.

19. Pacific asserts that "voice service" includes any transmission of voice communications at any speed.

20. WCI's citations to transcripts and documents in A.85-07-045 and A.85-07-046 are more persuasive than assertions by Pacific's witness in establishing the meaning both of "voice services" and of the prohibition on the offering of voice services contained in the stipulation.

21. Pacific agrees that WCI has not itself multiplexed any customer's transmissions from a lower speed to 1.544 MBPS, and that customers may themselves multiplex such transmissions legally.

22. WCI and BAT argue that WCI's Direct Access service is within the exclusive jurisdiction of the FCC.

23. WCI asserts that the intrastate traffic carried over its Direct Access facilities is incidental to the interstate communications purpose of those facilities.

24. The stipulation does not prohibit the offering of connections to interexchange carriers through tariffs other than WCI's intraLATA tariff.

25. In D.85-12-082, we made clear that we wished to examine certain issues relating to carrier bypass before granting WCI interLATA authority, and that we expected, based upon WCI's own representations, that WCI would file an application for interLATA authority soon thereafter.

26. WCI has provided its Direct Access services absent Commission authorization, which runs counter to our expectations stated in D.85-12-082 and also ignores our conclusions of shared jurisdiction clearly set forth in D.84-06-113.

27. In D.84-01-037 and D.84-06-113 the Commission clearly asserted jurisdiction over nondominant interexchange carriers.

28. Because we contemporaneously grant WCI authority to offer its Direct Access service on an interLATA basis, Pacific's request for relief in C.86-10-012 related to WCI's actions in offering this service is moot.

29. WCI is a wholly-owned subsidiary of Wang Laboratories, Inc., which provides any funds necessary for WCI's operation.

30. All intrastate services proposed in A.87-02-033 and A.87-02-034 would utilize facilities authorized and constructed under authority of the FCC.

31. In D.84-01-037 the Commission found interLATA competition to be in the public interest.

32. It can be seen with certainty that there is no possibility that the granting of A.87-02-034 may have a significant adverse effect on the environment.

33. There is no reason to treat WCI differently than other interexchange carriers regarding the holding out of the availability of intraLATA services it is not authorized to provide.

34. Public convenience and necessity require the granting of A.87-02-034 in part, to the extent set forth in the Ordering Paragraphs.

35. In D.85-06-115 we considered the issue of carrier bypass and declined to adopt a ban on carrier bypass.

36. There is no reason to treat WCI differently than other interexchange carriers regarding its ability to engage in carrier bypass.

37. WCI's Direct Access service is analogous to special access services in that it provides bypass of the local exchange carriers' switched network.

38. WCI's Direct Access service falls within the nondominant framework adopted in D.84-06-113.

39. It is reasonable at this time for WCI to price its Direct Access service by a method consistent with that in place for special access services.

40. Pacific and GTE oppose WCI's request for a CPCN to provide intraLATA private line high-speed data transmission services within all LATAs in California.

41. In I.87-11-033 we will both reconsider the efficacy of further intraLATA competition and address local exchange carrier pricing flexibility.

42. To ensure consistency with I.87-11-033, it is reasonable to delay action on WCI's request for statewide intraLATA authority until after a Phase I decision has been issued in I.87-11-033.

Conclusions of Law

1. As complainant, Pacific has the burden of proof in C.86-10-012 on those issues for which it seeks affirmative relief.

2. Pacific has not established that WCI has violated the prohibitions in the stipulation and D.85-12-082 regarding multiplexing and the offering of voice services.

3. WCI has not violated the stipulation's provision regarding service to common carriers providing interLATA telecommunications services.

4. WCI's Direct Access service is subject to the jurisdiction of this Commission in addition to that of the FCC.

5. The Commission may impose holding out restrictions such as those adopted in D.84-06-113 on WCI's Direct Access and other interLATA operations.

6. WCI has violated PU Code § 1001 in undertaking its Direct Access service without prior Commission authorization and further has in general operated in defiance of this Commission's regulatory program.

7. Pacific's complaint against WCI and all requested relief should be denied.

8. WCI's application for a CPCN to provide interLATA private line high-speed data transmission services at a data speed of 1.544 MBPS or higher in California should be granted in part to the extent set forth in the Ordering Paragraphs.

9. WCI should be prohibited from holding out the availability of intraLATA services it is not authorized to provide and should be required to advise its customers that intraLATA communications it is not authorized to provide should be placed over the facilities of the local exchange carrier. WCI should be prohibited from instructing customers in areas in which it does have intraLATA authority regarding how to switch intraLATA traffic so that it is carried over WCI's interLATA facilities and from encouraging them to do so in other ways.

10. WCI's Direct Access service should be authorized subject to the same holding out restrictions imposed on other interLATA services WCI may offer. WCI should file an intrastate tariff for its Direct Access service and should determine in consultation with its customers whether a specific installation should be offered from its intrastate or interstate tariff.

11. Because of the public interest in effective interLATA competition, this order should be effective today.

Only the amount paid to the State for operative rights may be used in rate fixing. The State may grant any number of rights and may cancel or modify the monopoly feature of these rights at any time.

INTERIM ORDER

IT IS ORDERED that:

1. Case 86-10-012 filed by Pacific Bell (Pacific) against Wang Communications, Inc. (WCI) is denied.

2. A certificate of public convenience and necessity (CPCN) is granted to WCI to provide interLATA private line high-speed data transmission services at a data speed of 1.544 megabits per second or higher in California to the limited extent of providing the requested service on an interLATA basis. The authority granted is conditioned on WCI's agreement to establish rates and charges for its high-speed data transmission service above its cost of providing such service. The authority granted is further subject to the conditions that WCI refrain from holding out to the public the provision of any intraLATA services it is not authorized to provide, that WCI advise its subscribers that intraLATA communications which WCI is not authorized to provide should be placed over the facilities of the local exchange carriers, and that WCI not instruct customers in areas in which it does not have intraLATA authority regarding how to switch intraLATA traffic so that it is carried over WCI's interLATA facilities nor encourage them to do so in other ways.

3. To the extent that Application (A.) 87-02-034 requested authorization to provide intraLATA telecommunications services, the application is denied.

4. WCI is authorized to file with this Commission, five days after the effective date of this order, tariff schedules for the provision of interLATA service. If WCI has an effective FCC-approved tariff, it may file a notice adopting such FCC tariff with a copy of the FCC tariff included in the filing. Such adoption notice shall specifically exclude the provision of intraLATA services which WCI is not authorized to provide. If WCI has no effective FCC tariffs, or wishes to file tariffs applicable only to California intrastate interLATA service, it is authorized to do so, including rates, rules, regulations, and other provisions necessary to offer service to the public. Such filing shall be made in accordance with General Order (G.O.) 96-A, excluding Sections IV, V, and VI, and shall be effective not less than one day after filing.

5. The requirements of G.O. 96-A relative to the effectiveness of tariffs after filing are waived in order that changes in FCC tariffs may become effective on the same date for California interLATA service if WCI adopts FCC tariffs on an intrastate basis.

6. WCI is subject to the user fee as a percentage of gross intrastate revenue under Public Utilities Code Sections 401, et seq.

7. The corporate identification number assigned to WCI is U-5098-C, which should be included in the caption of all original filings with this Commission and in the titles of other pleadings filed in existing cases.

8. Within 30 days after this order is effective, WCI shall file a written acceptance of the certificate granted in this proceeding.

9. The certificate granted and the authority to render service under the rates, charges, and rules authorized will expire if not exercised within 12 months after the effective date of this order.

10. A.87-02-034 is granted in part and denied in part as set forth above.

This order is effective today.
Dated FEB 24 1988, at San Francisco, California.

STANLEY W. HULETT
President
DONALD VIAL
JOHN B. OHANIAN
Commissioners

Commissioner Frederick R. Duda, being necessarily absent, did not participate.

Commissioner G. Mitchell Wilk, being necessarily absent, did not participate.

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

Victor Weisser, Executive Director

APPENDIX A

List of Appearances

Complainant in C.86-10-012 and Protestant in A.87-02-033 and A.87-02-034: Marlin A. Ard and David P. Discher, Attorneys at Law, for Pacific Bell.

Defendant in C.86-10-012 and Applicant in A.87-02-034 and A.87-02-033: Hamel & Park, by John W. Pettit, Robert P. Fletcher, Attorneys at Law (Washington, D.C.), and Kilpatrick, Johnston & Adler by Robert G. Johnston, Attorney at Law (Nevada), for Wang Communications.

Interested Parties in C.86-10-012 and Protestant in A.87-02-033: Richard E. Potter, Attorney at Law, for General Telephone Company of California.

Interested Parties: James L. Lewis, Attorney at Law (Massachusetts), and Messrs. Morrison & Foerster, by Theodore O. Senger, Attorney at Law, for MCI Telecommunications, Corp.; Armour, St. John, Wilcox, Goodin & Scholtz, by Thomas J. MacBride, Jr., Attorney at Law, for California Association of Long Distance Companies; Peter A. Casciato, P.C., Attorney at Law, for Cable & Wireless Communications, Inc.; Nancy Bromley, for GTC-GTE; E. Nicholas Selby, Attorney at Law, for Bay Area Teleport; Michael A. Morris, Attorney at Law, for California Cable Television Association; Mary Lynn Ganthier, for Ganthier & Hallett, and Ranger Telecommunications, Inc.; and Randolph W. Deutsch, Attorney at Law, for AT&T Communications.

Division of Ratepayer Advocates: Kevin P. Coughlan.

(END OF APPENDIX A)

ALJ/CLF/vdl

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Pacific Bell (U 1001 C), Complainant, vs. Wang Communications, Inc., Defendant.	Case 86-10-012 (Filed October 3, 1986)
And Related Matters.	Application 87-02-033 (Filed February 13, 1987) Application 87-02-034 (Filed February 13, 1987)

(See Appendix A for appearances.)

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INTERIM OPINION

I. Summary

In Decision (D.) 84-06-113 we established a procedure for consideration of requests for authority to offer intraLATA private line high-speed data transmission services on a case-by-case basis. Since that time, we have granted authority for such services to two carriers: Wang Communications, Inc. (WCI) in D.85-12-082 and Bay Area Teleport (BAT) in D.87-02-022. This decision addresses Pacific Bell's (Pacific) contention that WCI has violated several conditions of D.85-12-082, which granted WCI operating authority within portions of LATA 1 and LATA 5, and WCI's requests to expand its authority statewide on both an intraLATA and interLATA basis.

We find that WCI has not violated any portion of D.85-12-082 or the stipulation among Pacific, WCI, and the Commission's Public Staff Division (recently renamed the Division of Ratepayer Advocates (DRA)) which was approved by D.85-12-082. Pacific has not convinced us that the statement in the stipulation that WCI will not "offer voice services" prohibits the transmission of multiplexed voice communications or the marketing of WCI's services to customers with voice applications. Similarly, the agreement that WCI will not multiplex does not prohibit dissemination of information about multiplexing or discussion of the advantages of multiplexing with potential customers.

While WCI also has not violated the stipulation by offering its Direct Access private line connections to interexchange carriers' points of presence, WCI's actions in offering this service without Commission authorization run counter to our expectations stated in D.85-12-082 and ignore our conclusions of shared jurisdiction clearly set forth in D.84-06-113. We conclude that WCI's Direct Access service is subject to this Commission's jurisdiction in addition to that of

the Federal Communications Commission (FCC), and that WCI has violated Public Utilities (PU) Code § 1001 by offering this service in California without prior Commission authorization.

We grant WCI's request in Application (A.) 87-02-034 for authority to provide its private line high-speed data transmission services on an interLATA basis within California, subject to the same holding out restrictions imposed on other interexchange carriers. Since WCI's Direct Access service falls within the scope of this authority, Pacific's request for a cease and desist order against WCI's offering of this service becomes moot.

In A.87-02-033, WCI requests statewide expansion of its existing intraLATA authorization. While a complete record was developed regarding WCI's proposed intraLATA operations, we prefer to delay action in this matter until a reexamination of the efficacy of further intraLATA competition in private line services is completed in Investigation (I.) 87-11-033. It is our intent to establish the scope of allowable intraLATA competition in these services on a generic basis early in 1988. We leave this proceeding open for further consideration of WCI's request after a decision is issued in Phase I of I.87-11-033.

II. Background

In D.84-06-113,[1] this Commission invited providers of private line high-speed data transmission services to file applications if they wish to offer such services on an intraLATA basis, subject to certain limitations set forth in that decision. In response, WCI filed A.85-07-045 and A.87-05-046 in July 1985, in which it requested authority to provide high-speed data transmission services at a data speed of 1.544 megabits per second (MBPS)[2] or higher within portions of LATA 1 and LATA 5.

Pacific protested WCI's initial applications. Hearings were scheduled and prepared testimony was submitted by the parties. In the meantime, Pacific, WCI, and DRA entered into negotiations and reached a stipulated agreement on the issues in WCI's applications. As a result, hearings were not held. In D.85-12-082 we granted WCI the requested authority in accordance with the terms and conditions of the stipulation among WCI, Pacific, and DRA.

In Case (C.) 86-10-012 Pacific now alleges that WCI is violating several conditions of the stipulation. WCI filed an answer to Pacific's complaint on November 10, 1986. A prehearing

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1 D.84-06-113 is one of three decisions in I.83-06-01, our investigation to determine whether competition should be allowed in the provision of telecommunications transmission services within the state, and consolidated dockets. In D.84-01-037 we granted interLATA operating authority to a number of interexchange carriers. D.84-06-113 addressed other issues in the investigation, and D.84-10-100 responded to applications for rehearing of D.84-06-113.

2 Transmission service at 1.544 MBPS is sometimes referred to as "T-1 service." A T-1 circuit can carry a single high-speed data transmission, or alternatively multiple lower-speed data or voice transmissions multiplexed to 1.544 MBPS. As an example, such a circuit can carry 24 voice transmissions simultaneously.

conference in this matter was held before Administrative Law Judge (ALJ) Ford on February 11, 1987.

Shortly after that prehearing conference, WCI filed A.87-02-033 and A.87-02-034. In A.87-02-033, WCI requests a Certificate of Public Convenience and Necessity (CPCN) to provide intraLATA private line high-speed data transmission services at a data speed of 1.544 MBPS or higher within all LATAs in California. In A.87-02-034, WCI requests a CPCN to provide comparable services on an interLATA basis in California. General Telephone Company of California (recently renamed GTE California Incorporated (GTE)) filed a protest to A.87-02-033 on March 20, 1987, and Pacific filed protests to both applications on March 23, 1987.

Pacific also filed a motion to consolidate C.86-10-012, A.87-02-033, and A.87-03-034, and WCI filed a response in which it supported consolidation of these matters for hearing on the condition that the consolidation not delay the complaint case.

A consolidated prehearing conference was held on April 21, 1987, at which time the ALJ consolidated the three matters. Nine days of evidentiary hearings were held on June 1 - 5 and July 27 - 30, 1987 in San Francisco. Pacific presented testimony of witnesses Glenn J. Sullivan, Executive Director, Marketing Regulatory Matters, and Richard L. Scholl, Director, Transport Product Financials. WCI presented testimony of Michael W. Tabb, Vice President and Controller of WCI, and Timothy G. Zerbiec, Vice President of Technology at Vertical Systems, Inc. GTE presented testimony of James N. Thompson, Strategic Business Planning Manager. MCI Telecommunications (MCI) presented testimony of Mary E. Wand, Manager of Regulatory Analysis of MCI's Pacific Division.

Issues regarding C.86-10-012 were briefed by Pacific, WCI, and BAT in concurrent opening briefs due July 10, 1987 and closing briefs due August 3, 1987. Concurrent opening and closing briefs regarding remaining issues in the two applications were due

on September 25 and October 16, 1987, and were filed by WCI, Pacific, GTE, MCI, and BAT. This matter is now ready for decision.

III. Pacific Complaint

A. Pacific Complaint and Request for Relief

Pacific makes the following allegations in its complaint:

1. WCI is offering high-speed data transmission services for which WCI either multiplexes and/or encourages multiplexing below 1.544 MBPS, in violation of D.85-12-082, the stipulation, and its tariff.

2. WCI is offering and promoting the use of voice services over its intraLATA high-speed data transmission network, in violation of D.85-12-082, the stipulation, and its tariff.

3. WCI is offering to provide direct connection to interexchange carriers' points of presence without utilizing Pacific's switched network, in violation of the stipulation and its tariff and without filing the necessary application for interLATA authority with the Commission.

Pacific asserts that, in thus providing unauthorized and unlawful intrastate telephone service, WCI has inflicted and, unless restrained by an order of this Commission, will continue to inflict damage and financial injury on Pacific and its customers. Pacific believes that it is being deprived of revenues it would otherwise have received by WCI's unlawful diversion of those revenues, and that the revenue contribution to other types of telephone service has been and will be reduced, thereby burdening Pacific's customers.

Pacific requests that the Commission grant relief in the following ways:

1. Issue a cease and desist order prohibiting WCI from offering multiplexing below 1.544 MBPS and from holding out the availability of voice transmission services or knowingly engaging in the transport of voice traffic.

2. Issue a cease and desist order prohibiting WCI from direct connection to interexchange carrier facilities, and require that WCI obtain Commission approval and tariff authority for any interLATA transmission in California.

3. Order WCI to retain all records of intrastate voice telephone service to enable the Commission to determine the extent of the unauthorized intrastate message service WCI has provided and the amount of revenues diverted from Pacific.

4. Order WCI to account for all funds collected by it from California customers for the provision of unlawful, unauthorized intrastate voice telephone service.

5. Take such other and further action as the Commission deems proper.

B. Events Leading to D.85-12-082

Because C.86-10-012 now before us centers around interpretation of the stipulation which was entered into by Pacific, WCI, and DRA in A.85-07-045 and A.87-05-046, as well as the negotiations leading to that stipulation, we summarize here the relevant events leading to D.85-12-082 as presented in that decision.

Pacific protested A.85-07-045 and A.86-07-046, arguing first that the applications were inconsistent with D.84-06-113 which, it asserted, provided "for very limited, high-speed data competition within Pacific's LATAS," and second that WCI had failed to seek authority to provide intrastate interLATA authority (given WCI's indication in its application that it would be providing interLATA service in addition to intraLATA service). In its

protest, Pacific requested, if the applications were granted, that the Commission among other things require that WCI not offer voice service and not multiplex traffic.

In its response to Pacific's protest, WCI stated that it would not provide voice services nor convert the data stream to voice circuits, and would hand off the data stream to WCI's customers at a speed of 1.544 MPBS or higher. In response to Pacific's position that WCI should either represent that it would not offer intrastate interLATA services or amend its applications to request such authority, WCI stated that it was not presently seeking such authority, but that it would file a separate application for that authority in the near future.

In a Notice of Prehearing Conference, the parties were informed that the assigned Commissioner and the assigned ALJs desired the interested parties to devote serious efforts prior to and at the prehearing conference toward settling the concerns raised in Pacific's protests.

At a prehearing conference on September 24, 1985, Pacific indicated that the question of interLATA authority was no longer an issue, given WCI's representation that it would file an application for such authority in the near future. Pacific remained concerned that, despite WCI's disclaimers regarding its own intentions, nothing would prevent WCI's customers from multiplexing below the 1.544 MBPS level. In Pacific's view, this situation would be all the more troubling if WCI's customers were major interexchange carriers which would then use their switching and multiplexing capabilities to provide intraLATA voice services. Pacific also noted that there is no definition of the term "high-speed data" in D.84-06-113.

At the conclusion of the prehearing conference, the ALJ directed the parties to proceed with negotiations, but also set hearing dates and dates for the submission of testimony, in the event that the negotiations did not succeed.

The parties made filings in October 1985 reporting on the status of negotiations. The parties had reached agreement, among other things, on the following points:

1. IntraLATA competition would be allowed in the provision of high-speed data transmission services over private line networks.

2. For purposes of WCI's applications, transmission services at a data speed of 1.544 MBPS or higher should be considered high-speed data transmission services.

3. WCI would not multiplex below 1.544 MBPS.

The negotiating parties were unable to reach agreement, among other items, on the following:

1. WCI refused to stipulate to a tariff condition that its private line high-speed data transmission services would not be used for voice communications. WCI believed its agreement not to multiplex below 1.544 MBPS and not to offer voice services was sufficient, and that it would be improper for a public utility to inquire into the content of the transmission it is carrying. WCI proposed to address Pacific's concerns by adding the following language to its tariffs: "WCI will not offer voice services." Pacific did not find this solution acceptable, since WCI cannot legally offer voice services, and therefore, Pacific alleges, a WCI customer cannot legally use high-speed data lines for voice. Pacific stated that it was not asking the Commission to require WCI to monitor the content of its customers' transmissions, but simply that the Commission restrict the use of WCI's high-speed private line service to permissible transmission, i.e., high-speed data transmission. DRA agreed with WCI that monitoring of customer communications by WCI to prevent voice communication would be undesirable and unworkable.

2. WCI refused to stipulate to a condition that service provided to interexchange carriers originate and terminate through Pacific's facilities. Pacific argued that allowing WCI to directly connect to interexchange carrier facilities, either at the WCI customer's premises or at an interexchange carrier's point of presence, effectively creates a total intraLATA and interLATA switched and nonswitched voice and data bypass network.

Given the inability of the negotiating parties to reach agreement, WCI, Pacific, and DRA submitted prepared testimony. After consultation with the assigned Commissioner, the ALJs determined to make one final effort on the negotiating front. The parties were informed that a tentative ruling would, among other things, adopt WCI's compromise tariff language agreeing not to provide voice service in lieu of requiring monitoring by WCI of its customers, and require that any service by WCI to interexchange carriers originate and terminate through Pacific's facilities. The parties met on the morning of the date set for hearing, and arrived at the stipulation which was presented at the hearing. The consolidated matters were then submitted.

WCI compliance with the following portions of the stipulation (which is Appendix B to D.85-12-082) is at issue in C.86-10-012:

"I. For purposes of these applications, the transmission services to be offered by WCI at a data speed of 1.544 MBPS or higher shall be considered high-speed data transmission services.

"II. WCI agrees not to multiplex below 1.544 MBPS."

* * *

"VI. . . . This schedule is applicable to non-switched private line high speed data transmission services at a data speed of 1.544 MBPS or higher. Services are

> furnished to connect two or more points on a flat monthly rate. WCI will not offer voice services.
>
> "Service under this tariff is not available to common carriers providing interLATA telecommunications services."

In adopting the stipulation in D.85-12-082, the Commission discussed in particular WCI's agreement not to make service under this tariff available to interexchange carriers. We stated as follows:

> "This revision, applicable to all [interexchange carriers], [footnote omitted] is intended to address the issue pressed by Pacific and PSD [now DRA] that WCI, if it opts to provide service to [interexchange carriers], be required to originate and terminate that service through Pacific's facilities. These concerns relate principally to the threat of carrier bypass, as previously discussed. Since WCI [has stated] that it is not, by these applications, requesting authority to provide service to [interexchange carriers], the proposed modification should suffice for the moment. Further, PSD has stated that its proposal would bar [interexchange carriers] from connecting with WCI, even for their own internal business needs, pursuant to the stipulated 'Applicability' Section of the tariff... Therefore, we think the provision is sufficiently comprehensive, and we will adopt this portion of the stipulation. However, when WCI files its application for interLATA authority, which it has indicated it will do in the near future, we will revisit this issue in order to ensure that Pacific's concerns about bypass are adequately considered." (D.85-12-082, mimeo. pp. 21-22.)

In adopting the stipulation, we recognized that it should not be used as an inflexible precedent for future similar applications, and that accommodations may be necessary to account for high-speed data transmission services which differ from those offered by WCI. We recognized that each situation must be reviewed

separately, consistent with the course embarked upon in inviting applications and protests in D.84-06-113.

C. WCI Actions Following D.85-12-082

There is virtually no dispute as to what WCI has said or done in marketing its high-speed data transmission services on an intraLATA basis following the issuance of D.85-12-082. As BAT points out in its opening brief, this case turns almost exclusively on interpretation of the stipulation. Before addressing that issue, we will briefly set forth WCI's actions as developed in the record.

WCI's intraLATA efforts have yielded two customers within California to date. One is Bullock's, with a high-speed system connecting several of its stores in the Los Angeles area. At the time that WCI marketed to Bullock's, Bullock's expected that only multiplexed voice traffic would be sent over WCI's facilities. Bullock's subsequently decided to transport some data via WCI which had been transported at low speed under a Pacific tariff. WCI's second customer, the Daily News, has a requirement for 100 percent nonmultiplexed high-speed facsimile communications between two laser printers at 1.544 MBPS.

In its marketing efforts, WCI uses sales material that explains how multiplexing works and makes clear that customers can integrate voice and data traffic so that it can be carried over WCI's high-speed data lines. WCI's current advertising brochure states that "[d]ata, voice, video or facsimile can be transmitted simultaneously to bring you wide-ranging benefits." Also, a set of slide materials used in California shows the use of multiplexing equipment to integrate voice and low-speed data on a high-speed circuit.

At one point WCI offered to buy multiplexing equipment and provide it at cost to Bullock's, though Bullock's did not accept the offer. WCI has provided price comparisons between

Pacific's existing voice and low-speed data services and WCI's high-speed data service.

WCI marketed its service to Bullock's even after WCI identified Bullock's intended traffic as 100 percent voice. WCI's continued position is that it is permitted to offer service under such circumstances.

As to connections to interexchange carriers, WCI offers a Direct Access service, which is a private line high-speed data transmission service offered through an interstate tariff approved by the FCC. WCI provides connections directly to Allnet and MCI points of presence in California through this service.

D. Is WCI Multiplexing below 1.544 MBPS and Offering Voice Services in Violation of the Stipulation and D.85-12-082?

Many of the arguments of Pacific and other parties hinge on the meanings of the following terms as used in the stipulation:

- "High-speed data transmission service"
- "Voice service"
- "To offer voice service"
- "To multiplex"

Since these issues are integrally linked, they are treated together in this decision.

1. Pacific's Position

Pacific argues that the central purpose of the stipulation and D.85-12-082, and the principle intent of the parties, was to limit the area of competition to transmission of high-speed data so as to leave undisturbed the voice and low-speed data markets served by local exchange carriers. Pacific asserts that if the parties or the Commission had a different objective in mind they would not have been so careful and exacting in restraining WCI from engaging in multiplexing, switching, or the offering of voice service.

Pacific argues that the correct meanings of the terms used in the stipulation must come from the Commission's actions and objectives in allowing limited competition, the circumstances surrounding WCI's request, and the parties' negotiations that led to the stipulation. Pacific contends that several related Commission decisions focus their attention on the limited nature of competition to be permitted, paying particular attention to the long term and irreversible harm to local exchange carriers that can result from a decision to approve broad based competition.

Pacific contends that the term "high-speed data transmission service" as used in the stipulation excludes the transmission of voice communications. Pacific's witness Sullivan agreed that the term "high-speed data" refers to both voice and data in some applications such as video teleconferencing, and that Pacific itself makes references to both data and voice applications in its own advertising of high-speed data services. However, Pacific argues that Pacific's own marketing practices cannot be used to establish the meaning of the term "high-speed data transmission service" as used in the stipulation, since Pacific has no restrictions on providing voice service.

Pacific further asserts that the term "voice services" used in the stipulation applies to any transmission of voice communications, not only to transmission of voice communications on voice-grade channels (which operate at 64 kilobits per second if digitized).

Pacific also contends that a promise not to offer an intraLATA service carries with it the clear obligation not to promote or sell the prohibited service. It asserts that Commission actions restricting holding out of intraLATA services in D.84-06-113 and D.84-10-100, and imposing a duty to block in D.86-05-073 (which authorized AT&T Communications of California (AT&TC) to provide its Software Defined Network (SDN) service in California) and D.86-11-079 (an AT&TC rate case decision), as well

as the unqualified restrictions on the provision of voice transmission services in Ordering Paragraphs 1 and 2 of D.85-12-082, all support this position.

Pacific asserts that, under the stipulation, WCI must not promote voice service by, for example, advertising, promoting, or encouraging customers to place their voice traffic over WCI's facilities. Pacific states that such promotion of the placement of voice traffic over WCI's facilities is the offering of voice service.

In Pacific's view, the stipulation's restriction on multiplexing was similarly designed to prevent WCI from offering, promoting, or encouraging customers to use its facilities for the transmission of multiplexed voice and low-speed data communications, services which WCI itself is not authorized to provide. Pacific contends that WCI is not permitted to instruct customers on the use of multiplexing equipment, explain the integration of voice and data service, or offer to purchase multiplexing equipment for a customer. Pacific asserts that WCI's actions along these lines result in WCI offering multiplexing below 1.544 MBPS, in violation of the stipulation.

The parties are in agreement that, under the terms of the stipulation, WCI's customers are themselves permitted to multiplex voice and low-speed data traffic and place such traffic over WCI's facilities. However, Pacific argues that since the restrictions in the stipulation apply to WCI, WCI should direct customers with voice and low-speed data needs to the local exchange carrier. Pacific asserts that WCI's obligation is similar to that of interexchange carriers that must refrain from offering intraLATA services even though their facilities may physically permit completion of intraLATA calls, pursuant to D.84-06-113 and D.84-10-100. Pacific cites language in D.84-10-100 regarding discussions which interexchange carriers may have with their customers:

> "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 [Other Common Carrier] 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." (D.84-10-100, mimeo. p. 9.)

Pacific contends that WCI likewise agreed to accept this requirement when it promised not to offer voice service.

Pacific asserts that the parties' negotiations leading to the stipulation do nothing to change the above conclusion. While WCI stated repeatedly during the negotiations leading up to the stipulation that it would not provide voice services, Pacific asserts that what WCI did not say about this promise not to offer voice service also has great significance. Pacific states that, when it inquired more than once during the negotiations about what WCI meant by its commitment not to offer voice service, WCI replied that its intended service offering was "data communications between computers, such as those used by financial institutions" without mentioning any other services or applications. According to Pacific, WCI indicated that data communications presented a viable market in which WCI could operate. Based upon these representations, Pacific determined that the relevant market for WCI is large business users with data communications requirements. Pacific further asserts that DRA had this same understanding as well, citing DRA testimony submitted in A.85-07-045 and

A.85-07-046[3] that defined the "relevant market niche" as "limited to large organizations with computer or data transmission needs."

Pacific asserts that, during the negotiations, WCI concealed from other parties that it would market its services by, for example, inquiring about customers' voice and data communications, explaining to customers how to integrate voice and data by multiplexing, and encouraging the placement of all voice and data communications on WCI's facilities. Pacific states that these would have been startling revelations had WCI stated them, and would have been directly contrary to every other representation made and impression conveyed on the question of voice service.

According to Pacific, the important result caused by WCI's concealment is the meaning formed by the parties. Pacific states that it clearly understood that WCI would not offer or promote voice service. Pacific contends that WCI is now asking the Commission to ignore the face-to-face negotiations by the parties and uncontested representations made during that time, and rely only on the written statements submitted by the parties. Further, according to Pacific, the documents on which WCI relies do not contradict or change what WCI told the parties during the negotiations; they simply do not address certain issues such as marketing activities.

WCI asserts that Pacific changed its position during the course of this proceeding regarding whether WCI can market its services to customers with certain applications which require

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3 The ALJ in this proceeding took official notice of the pleadings, prehearing conference transcripts, and prepared testimony submitted in A.85-07-045 and A.85-07-046. Since evidentiary hearings were not held in those matters, the use in this proceeding of the prepared testimony submitted in those prior proceedings is limited to indications of the positions of the parties at that time, rather than the truthfulness of any of the statements made in the testimony.

multiplexing to reach 1.544 MBPS, and whether WCI can discuss multiplexing with those customers. Because of this controversy regarding Pacific's position, related testimony and discussion in Pacific's opening and reply briefs are presented here in some detail.

In prepared testimony, Pacific witness Sullivan described WCI's allowable market as follows:

> "23. Q. Describe further the intraLATA high speed data application that exists for WCI and other intraLATA high speed providers.
>
> "A. There are several applications which apply to high speed data at 1.544 MBPS and above which exist in the intraLATA market. They include, but are not limited to:
>
> - bulk data transfer (computer to computer)
> - live scan security
> - video teleconferencing
> - LAN to LAN connections
> - CAD/CAM applications." (Ex. 5, p. 18.)

In response to cross-examination by WCI's counsel, Sullivan explained that these applications are what he would call "high-speed data services as opposed to voice services or low-speed data services." (Tr. p. 92.)

In Sullivan's prepared testimony, he also set forth Pacific's recommendation that the Commission:

> "Direct WCI in its contact with customers to refrain from offering voice services or multiplexing. If asked about such matters by the customer, WCI must respond that it cannot offer voice services or multiplexing, that intraLATA voice and low speed data services are to be obtained from the Local Exchange Carrier,

and no other advice is to be given." (Ex. 5, p. 30.)

In response to cross-examination by WCI's counsel, Sullivan discussed in more detail Pacific's views on the extent to which WCI can discuss multiplexing with its customers. Sullivan testified as follows:

"MR. JOHNSTON: Q. When you recommend that WCI refrain from offering multiplexing, do you ...mean that WCI would not discuss multiplexing by the customer below T-1, correct?

"A. No. If you mean by discussion advising the customer that WCI does not provide multiplexing, will not be the customer's agent in terms of providing multiplexing, that kind of discussion certainly would be permissible.

"Q. Well, what about explaining how multiple circuits can be multiplexed to make use of WCI's service? Would that be permissible?

"A. Not as a condition of selling WCI's service. I guess the scenario I'm trying to explain is one where WCI aggressively markets its service for high-speed data applications and in their discussions with customers makes it plain to the customers that WCI is not in the business of offering out multiplexing or any voice service or low-speed data service, that that's what the local exchange carrier does and also, as you said earlier, certainly the fact that customers can do their own multiplexing if that's what they do, there's no prohibition about that.

"Q. I believe we established yesterday that you are not aware of any instance in which WCI is providing multiplexing for a customer below T-1 for its intraLATA service, are you?

"A. No, I would not say you are providing multiplexing. You are prohibited from that. That's my understanding.

"Q. So when you say offering multiplexing here, I'm having a hard time understanding exactly what you mean when you say WCI should be directed not to offer multiplexing. It's something different than providing multiplexing, isn't it?

"A. Yes, it is. It's an extension of that, however. It's not the physical provisioning of multiplexing but it's rather a salesman saying well, I'll take care of the multiplexing for you. We'll get it for you. We'll have it made available to you. It's part of our deal with you.

"Q. But the salesman wouldn't be prohibited then from saying to the customer we provide the T-1 pipe, you provide the multiplexing. If you have any questions about how that multiplexing is done, I can give you information concerning that. But you have to go buy [your] own multiplexing equipment. Would that be okay?

"A. I think part of that is okay. I think you can say we don't provide multiplexing.

"Q. But you can't discuss their acquisition of their own multiplexing?

"A. I would hope that you would refrain from that and the reason I say that is that it isn't in and of itself the fact that the customer, these sophisticated customers know how to get...multiplexors. It's the issue of the ultimate competition with the voice market. That's what our concern has been from the beginning and we would like WCI's behavior to be that of a provider of the high-speed data service to meet the high-speed data applications of the market and no more.

"Q. Your opinion is that any discussion of the customer's ability to multiplex the signal or multiplex WCI's service is a violation of the stipulation; isn't that true?

"A. Yes, if its intent is to promulgate the sale.

"Q. So then as to whether there was or was not a violation of the stipulation would be sort of a case-by-case customer analysis as to what the salesman's intent was?

"A. I think you have to look at the circumstances and assess whether there was a violation of that intent, yes." (Tr. pp. 159-162.)

Later, Sullivan discussed a hypothetical situation in which video teleconferencing, one of the applications which he had earlier named as being in WCI's allowable market, may require multiplexing to reach 1.544 MBPS. He testified as follows:

"MR. JOHNSTON: Q. Assume there was a way to provide video conferencing or high speed facsimile...that...required multiplexing by the customer below 1.544 MBPS. Would those [be] applications that...WCI could advise its customers could be placed over WCI's service?

"A. Under the conditions that you set on it, I would think not. I think what I tried to testify earlier to was that you were providing a facility [with] 1.544 capability and that unless the customer application was offered you at that speed, that you really were not dealing with a high-speed data application.

"Q. . . . As I understand your testimony, Mr. Sullivan, WCI could provide service to that customer if...the technology was such that the...customer application would be at 1.544 but if it was lower than 1.544, WCI would have to say I'm sorry, we can't provide that service?

"A. No, I said if the customer hands off to you at 1.544, then I think that meets the stipulation. If the customer himself multiplexes, whatever the application is, up to your offering, then as we've said a

number of times, the customer is not prohibited from doing that.

"Q. Even if we know that going in, even if they tell us up front we have an application below 1.544, but we'll multiplex it up, ...WCI in that instance, then could say yes?

"A. . . . I would think that you would refrain from encouraging the customer to do anything other than go to the local exchange company to talk about multiplexing or taking care of demands that were below the 1.544 rate.

"Q. So at least with respect to a service such as video conferencing, whether we could discuss it with the customer would depend on whether they were looking at a 1.544 video conferencing application or a lower video conferencing application?

"A. I think that meets your hypothesis." (Tr. pp. 167-168.)

In its opening brief, Pacific recognizes and does not take issue with WCI's testimony that many of the applications identified by Sullivan as being in WCI's limited data market often require multiplexing to reach 1.544 MBPS. Pacific states that Sullivan "agreed that for the limited data only market [WCI] accepted there is nothing wrong with [WCI] discussing the advantages of multiplexing," citing Sullivan's testimony on transcript page 161, as quoted above. Pacific concludes that WCI could permissibly demonstrate in its promotional material the use of multiplexing equipment in association with its authorized services by deletion of references to voice and sub-rate (below 1.544 MBPS) data, and that such promotional material would then represent to the public WCI's authorized services in a manner that conforms to the stipulation.

In its reply brief, Pacific again summarizes its position regarding multiplexing and WCI's authorized market as follows:

> "Acting within its authorized market of high speed data services (computer and data transmissions by large business customers) Wang can discuss the multiplexing of such services. Mr. Zerbiec testified that many large customers do multiplex these data services (Tr. 335-38), and Wang can discuss the multiplexing of its authorized services. However, Wang has no basis or reason for explaining the 'integration of voice and data applications', or describing to customers how 'subrate' data (low speed data) can be integrated with Wang's authorized services. In addition, Wang is not permitted to offer the purchase of multiplexing equipment on behalf of its customers. To do so would effectively eliminate the prohibition against multiplexing below 1.544 MBPS." (Pacific Reply Brief, pp. 9-10.)

In Pacific's view a viable market for WCI exists within the limitations it believes were imposed in the stipulation, that is, computer and data transmissions by large business customers. While Zerbiec testified for WCI that a purely non-multiplexed market would be trivial, Pacific asserts that he did not consider whether a market focused on computer and data transmissions (including multiplexed transmissions) would be viable.

While Pacific recognizes that WCI's market under Pacific's interpretation of the stipulation is limited, it argues that the entire purpose of the stipulation was to set a limited market for WCI. It states that the Commission has repeatedly expressed its concern over the harm to universal service that can result from the hasty intervention of competition, and for that reason has chosen to proceed cautiously in this area. It states that customers do exist for WCI in the market it agreed to enter when it signed the stipulation, and that the Commission should not change its attitude on intraLATA competition and allow WCI to proceed with a full scale assault on Pacific's intraLATA voice market.

2. WCI's Position

WCI alleges that the terms of the stipulation were clearly understood by Pacific, DRA, and the Commission at the time WCI's applications were granted in D.85-12-082, and that Pacific's complaint is a transparent attempt to rewrite the terms of the stipulation in a manner that would effectively preclude WCI from competing in the provision of intraLATA private line high-speed data transmission services. WCI submits that all Pacific's objections to WCI's service raised in this proceeding were previously addressed and resolved in D.85-12-082.

WCI denies both that it is offering to multiplex below 1.544 MBPS and that it is offering voice services in its provision of intraLATA private line high-speed data transmission services. In its view, Pacific's complaint on these issues centers on whether WCI under the stipulation is prohibited from discussing admittedly lawful applications for its service with its customers or prospective customers. Under Pacific's interpretation of the stipulation, the legality of WCI's actions would depend not on the characteristics of the service provided by WCI nor the customer's use of that service, but would be determined instead by WCI's representations to the customer concerning uses of the service.

WCI points out that Pacific agrees that WCI is not multiplexing its service below 1.544 MBPS, and further that Pacific does not intend to restrict WCI's customers from multiplexing. According to WCI, Pacific ventures beyond the clear words of the stipulation to a tortured interpretation of the intent of the words, alleging that WCI has violated the intent of the "no multiplexing" provision by simply encouraging customers to multiplex and place low-speed data and voice communications on WCI's high-speed circuits.

WCI points out that the stipulation does not address advertising or marketing practices at all, and does not prohibit

WCI from discussing voice applications or multiplexing with customers.

WCI contends that the fundamental flaw in Pacific's arguments is Pacific's deliberate confusion of the transmission service WCI provides with the customer's application for that service. WCI argues that Pacific has struggled throughout this proceeding to mischaracterize voice applications for WCI's service as voice services "offered" by WCI.

In WCI's view, the absurdity of Pacific's position becomes apparent when one considers other applications for WCI's intraLATA service. According to Tabb, one would not call WCI's transmission service a "video teleconferencing service" if the customer had a video teleconferencing application, and it would be ludicrous to call the service a "CAD/CAM service" if that were the customer's application. WCI concludes that it is no less illogical to label WCI's service a "voice service" whenever a customer has a voice application.

As further support for its position, WCI points to Sullivan's characterization of Pacific's competitive High Capacity Digital Service during cross-examination by WCI's counsel:

> "MR. JOHNSTON: Q. In your opinion is Pacific Bell's high capacity digital service a voice service?
>
> "A. No, it is what it is. It is what we advertise it to be. It's a high capacity digital service.
>
> "Q. You don't advertise it to be a voice service?
>
> "A. No. It has the capability of being able to provide a high-speed transmission capability and through multiplexing normal voice communications can be multiplexed up to the levels of high-speed data and transmitted and then brought down again to the voice level so that the intelligence is transmitted on an end-to-end basis.

"Q. So it's not a voice service but there are voice applications for the service, correct?

"A. Yes." (Tr. p. 162, emphasis added.)

WCI concludes that WCI's service, like Pacific's High Capacity Digital Service, cannot be accurately characterized as a "voice service." WCI states that its service is a high capacity digital service for which a customer may have voice applications.

In its reply brief, WCI takes issue with Pacific's allegation that WCI concealed its understanding of the term "voice services" from Pacific and DRA during the negotiations. WCI provides quotes from documents and transcripts in A.85-07-045 and A.85-07-046 which, it asserts, show that the distinction between WCI's service and voice services was addressed during the negotiations on no fewer than six occasions. Representative portions of three of these citations follow:

1. WCI Opposition to Pacific Protest of A.85-07-045 and A.85-07-046

"WCI will not provide voice services. . . . WCI will not convert the data stream to voice circuits. As specified in the application, the data stream will be handed off to WCI's customers at a speed of 1.544 MBPS or higher." (WCI Opposition to Protest of Pacific Bell, pp. 3-4, emphasis added.)

2. Prepared Testimony of WCI Employee Submitted in A.85-07-045 and A.87-05-046

"7. Q. Do you have any comments on Pacific's suggestion that WCI's customers be prohibited from multiplexing up to 1.544 MBPS?

"A. Yes. This is an absurd proposal. WCI has stipulated that we will not multiplex below 1.544 MBPS, which effectively prohibits us from offering voice services. Pacific's suggested prohibition would effectively prohibit us from offering any service at all. Regardless of the nature of the data being transmitted, the customer must multiplex up to a data speed of

1.544 MBPS or higher at the interface for transmission on WCI's facilities. Without multiplexing by the customer, there cannot be high-speed data transmission." (Ex. 8, Att. 5, p. 4, emphasis added.)

3. Prepared Testimony of DRA Submitted in A.85-07-045 and A.85-07-046

"Q. 6. Do WCI's applications fit within the bounds of the Commission's invitation for applications to provide 'high-speed data transmission services over private line networks'?

"A. 6. WCI's applications do fit within the bounds of the Commission's invitation in D.84-06-113 because:

"a) A high-speed digital bit stream will be transmitted (1.544 megabits per second (MBPS) or above). WCI will not transmit at less than 1.544 MBPS.

"b) WCI will not transmit voice at normal voice grade speeds.

"c) WCI will not provide switching or direct connection to the switches." (Ex. 5, p. 4, emphasis added.)

WCI asserts that the only logical interpretation of these representations is that WCI and DRA considered "voice services" as used in the negotiations to refer to provision of voice grade circuits and transmission of voice at normal voice-grade speeds. WCI concludes that if Pacific for whatever reason did not understand WCI's position, WCI should not suffer the consequences.

WCI asserts that the phrase "high-speed data transmission services" as used in the stipulation is synonymous with "high-speed digital transmission services," and that the term "data" does not refer to the customer's application but rather to the digital bit stream of 0s and 1s being transmitted. Tabb cites Pacific's marketing brochure for its own High Capacity Digital Service, which

describes voice, data, and video applications and refers to the total service as a high-speed data transmission service, as demonstration that it is common to refer to a high-speed digital transmission service as a high-speed data transmission service.

WCI contends that Pacific seriously misrepresents the position WCI took during the negotiations on customer multiplexing. WCI cites Sullivan's oral testimony in which he stated that Pacific did not understand during the negotiations that WCI intended to market its services to customers with applications below 1.544 MBPS. WCI counters that it had specifically addressed this topic in prepared testimony submitted in A.85-07-045 and A.85-07-046 which stated that customer multiplexing is essential if WCI is to offer any service at all, and concludes that it was made absolutely clear to Pacific prior to the stipulation that WCI fully intended to market its service to customers with applications below 1.544 MBPS.

WCI maintains its position that the market for nonmultiplexed applications is insignificant. Zerbiec testified that, of the five applications identified by Sullivan as within WCI's allowable market, LAN-to-LAN connections always use multiplexing; live scan security, video teleconferencing, and CAD/CAM applications commonly involve multiplexing; and bulk data transfer often occurs on high-speed networks allowing for multiple applications. WCI contends that Pacific's descriptive literature of its own High Capacity Digital Service further shows the insignificance of the market for nonmultiplexed applications. Pacific's marketing brochure and slide show presume multiplexing below 1.544 MBPS for all applications mentioned, either by Pacific or the customer.

WCI concludes that the Commission should reject the artificial restrictions Pacific seeks to impose on WCI's service, which in WCI's view bear no rational relationship to the

marketplace but are intended solely to give Pacific an unfair competitive advantage.

In its reply brief, WCI counters Pacific's position that WCI's obligation not to solicit customers with voice applications is analogous to the obligation of interexchange carriers not to offer intraLATA service. WCI points out that the Commission in D.84-06-113 explicitly prohibited competition in the intraLATA market. On the other hand, the Commission has not prohibited WCI's service from being used for the transmission of multiplexed voice and data communications, and Pacific has conceded that this is a lawful use of WCI's service. Further, the Commission in D.84-06-113 gave explicit directions to the interexchange carriers prohibiting them from holding out the availability of intraLATA service and requiring them to advise inquiring customers only that intraLATA calls may not be lawfully placed over their networks and should be placed over the facilities of the local exchange carriers.

WCI questions rhetorically why Pacific did not state its intent that a similar obligation be imposed upon WCI concerning transmission of multiplexed voice communications during negotiations leading to the stipulation. It answers that Pacific did try to insert language prohibiting customer use for the transmission of multiplexed voice communications, and that Pacific failed. WCI concludes that Pacific is attempting now to relitigate the issue, reading intentions into the "no voice services" language that never existed at the time of the stipulation.

WCI also contends that Pacific's interpretation of the stipulation has changed through the course of these proceedings. According to WCI, Pacific's position in discovery prior to hearing was that WCI's customers are not allowed to multiplex below 1.544 MBPS pursuant to the stipulation. However, on the first day of hearing, Sullivan testified that it is not Pacific's intention, nor has it ever been, that WCI's customers could not multiplex their

own voice communications for transmission over WCI's facilities. During the hearings, according to WCI, Pacific's position was that WCI should not advise customers on multiplexing WCI's service or using it for integrating multiplexed voice and data communications. Now, WCI argues, Pacific's interpretation of the stipulation has changed yet again, with an acknowledgement in its opening brief that WCI can discuss multiplexing with customers that are in what Pacific now calls WCI's "authorized market," that is, "business machine to business machine" connections.

WCI speculates that this change in position could be because Pacific realized belatedly that Sullivan's position on discussing multiplexing was unsupportable. WCI argues that Pacific's new position is equally untenable. It concludes that the strongest argument against Pacific's interpretation of the stipulation provisions on multiplexing and voice services is Pacific's inability after numerous attempts to articulate its position in any coherent fashion.

3. BAT's Position

BAT believes that Pacific has not shown that WCI violated either D.85-12-082 or the stipulation, and that the complaint should be dismissed. In BAT's view, Pacific's claim, reduced to its core, is that WCI did not disclose how it intended to market its services and that WCI's marketing activities cannot be reconciled with what Pacific intended the stipulation to mean. Thus, Pacific seeks to rewrite the stipulation to impose an ironclad set of restrictions on WCI's marketing activities which would effectively exclude WCI from the competitive market.

BAT argues that nothing WCI has done is forbidden by the stipulation. No amount of alchemy, for example, can transmute marketing discussions about the use of multiplexers in connection with WCI's service into the activity which the stipulation actually forbids, namely, WCI itself multiplexing intraLATA voice or data to 1.544 MBPS. Similarly, no amount of argument can transform

transmission service at 1.544 MBPS into activity the stipulation forbids, namely, the provision of voice grade service to customers.

According to BAT, Pacific seeks the imposition upon WCI of undefined restrictions that would prohibit WCI representatives from discussing with customers the uses that the customer could make of WCI's service. Pacific seeks to prevent WCI from educating customers with respect to multiplexing, or "encouraging" customers to multiplex, or, indeed, even from responding to inquiries from customers with respect to uses of WCI circuits that require customer multiplexing. Instead, Pacific would require WCI to refer all such inquiries and discussions to Pacific.

BAT submits that Pacific is fully aware that there is no viable market for a service limited to applications at 1.544 MBPS. After reviewing Pacific's marketing materials for its High Capacity Digital Service, Sullivan conceded that all or virtually all of the services described in those materials require multiplexing, either by Pacific or by the customer.

In BAT's view, Sullivan's attempts to describe and justify the restrictions to be placed on WCI sales representatives produced a set of confusing and sometimes contradictory proposed guidelines. BAT provided four quotes from Sullivan's testimony to illustrate its point:

> "WCI could not inform a potential customer that they could combine multiple voice grade circuits onto one line..." (Tr. pp. 142-143.)
>
> "It's not the physical provisioning of multiplexing but it's rather a salesman saying, 'Well, I'll take care of the multiplexing for you. We'll get it for you. We'll have it made available for you. It's part of our deal with you.'" (Tr. p. 160.)
>
> "You can't discuss their acquisition of their own multiplexing." (Tr. pp. 167-168.)

> "[A] representation to a potential customer... regarding economies of scale as a reason to order a high-capacity transport service... would...be prohibited by the stipulation." (Tr. pp. 227-228.)

BAT points out that Sullivan conceded that Pacific's proposed ban on WCI's discussions of multiplexing is not absolute, testifying that intent to promulgate the sale is a factor and that each violation of the stipulation would have to be determined on a case-by-case basis.

BAT concludes that Pacific seeks to hamstring WCI and all other potential competitors in the intraLATA private line high-speed data transmission service market with unrealistic, unworkable, and, ultimately, undecipherable restrictions on marketing activity. In BAT's view, the clear and unambiguous purpose of these restrictions is to eliminate competition in this market. BAT concludes that if the Commission were to adopt Pacific's position, it would render meaningless the portion of D.84-06-113 which invited competition in this market.

Finally, BAT addresses the terminology used in this proceeding. It asserts that the term which the Commission used in D.84-06-113 to describe the market in which it permitted intraLATA competition, "high-speed data transmission service," is something of a misnomer. As Zerbiec stated, "Speed refers to the number of, the amount of information which is transferred per unit [of] time." According to BAT, it is more accurate to refer to "high-speed data transmission service" as "high-capacity digital service." This term captures the attributes of 1.544 MBPS transmission, namely its large capacity and its ability to accommodate the transmission of multiple applications at the same time through multiple circuits or streams of traffic. BAT points out that Pacific refers to its own 1.544 MBPS service as High-Capacity Digital Service.

4. Discussion

We should emphasize that the issues which we will decide as a result of Pacific's complaint relate only to the scope of WCI activity authorized by the stipulation entered into by WCI, Pacific, and DRA, and approved by the Commission in D.85-12-082. This is not a proper forum for determination of the ideal scope of competition in intraLATA high-speed services on a broader scale, nor for determination of definitions of technical terms used outside the stipulation, nor for modification in any way of the authority granted to WCI in D.85-12-082. The burden of proof is on Pacific Bell to show that WCI has violated the terms of the stipulation, as it was negotiated by the parties and approved by the Commission.

As noted earlier, much of the disagreement during the hearings regarded the meaning of certain technical terms used in the stipulation. We agree with Pacific that interpretation of these terms may come from the Commission's prior actions, the circumstances surrounding WCI's request, and the parties' negotiations that led to the stipulation, as well as from the stipulation itself. However, we wish to offer two caveats. First, contrary to Pacific's position, we do not believe that Commission actions taken subsequent to D.85-12-082 are necessarily indicative of Commission intent in approving the WCI stipulation. It would be improper to automatically assume that the Commission intended at the time the WCI stipulation was approved to apply to WCI all policies adopted at later times for other competitive services. Second, the fact that Pacific's witness was not himself present at the negotiations leading to the stipulation, but instead "monitored" them through conversations with Pacific's participant, reduces the weight of his testimony regarding WCI's oral representations during the negotiations. Particularly since much of that testimony regarded assertions about what WCI did not say, we find the transcripts and documents created contemporaneously

more pursuasive in establishing the intent of WCI during the negotiations.

In interpreting the terms used in the stipulation, a central issue is whether the prohibitions on multiplexing and offering of voice services include holding out restrictions. Pacific argues that restrictions comparable to those adopted in D.84-06-113, D.84-10-100, and D.86-05-073 for interexchange carriers regarding holding out of the usage of their services for the completion of intraLATA communications were implicit in the stipulation and should be applied to WCI.

The stipulation does not explicitly contain any holding out restrictions such as those suggested by Pacific. As Pacific has noted, the stipulation carefully and clearly prohibited WCI from multiplexing, switching, or offering voice service. In light of this, we find significant the absence of any mention of holding out or other marketing restrictions in the stipulation. We also note that D.84-06-113 and subsequent decisions granting interLATA authority in California make explicit the adopted holding out restrictions. The care with which holding out restrictions have been imposed on interexchange carriers makes us question further Pacific's assertions that similar restrictions are implicit in the stipulation with WCI.

We agree with WCI that it is hard to reconcile various Pacific statements regarding the extent of the asserted holding out restrictions regarding discussion of multiplexing with customers. Statements in Pacific's briefs indicate that Pacific's current position is that WCI may discuss the advantages of multiplexing at least with customers with certain data applications without violating the stipulation's prohibition on multiplexing. Pacific's view of WCI's allowable market also engenders confusion. Pacific states in its closing brief that WCI's authorized market is computer and data transmissions by large business customers. What determines the cut-off point? The size of the customer? The total

communications needs of the customer? The speed at which the computer and data transmissions are generated?[4] If the latter, what is the cut-off speed? It appears not to be 1.544 MBPS in Pacific's view, since Pacific has not taken issue with WCI's testimony that at least one of the applications which Pacific cites as being in the allowable market requires multiplexing for transmission at 1.544 MBPS and since Pacific has now agreed that WCI may discuss the advantages of multiplexing with customers with computer and data transmission applications.

From Sullivan's testimony alone, we would infer that Pacific's position is that (a) WCI may market its service to large business customers with computer and data transmissions, (b) if the customer indicates that its applications would require multiplexing in order to reach 1.544 MBPS, WCI should direct the customer to the local exchange company, (c) if the customer asks, WCI may tell it that it may legally multiplex its transmissions in order to use WCI's service, but (d) WCI may not encourage the customer to multiplex or provide information on how to multiplex, and (e) WCI does not have to refuse service to customers which it knows will multiplex their transmissions. A determination of whether WCI crosses the line between (c) and (d) would be determined on a case-by-case basis.

However, Pacific's briefs indicate that WCI may "discuss the advantages of multiplexing" with customers with computer and data transmissions. This appears to contradict the prohibition on encouragement and dissemination of information regarding multiplexing which Sullivan espoused in his testimony, and leaves

4 We recognize the terminology problems mentioned by BAT regarding "speed" and "capacity." Since "speed" has been used throughout both I.83-06-01 and this proceeding to connote capacity, we continue such usage in this decision. We hope parties will use more precise terminology in I.87-11-033.

leaves the record unclear regarding where Pacific would draw the line between allowable and prohibited discussions regarding multiplexing between WCI and its potential customers.

One thing that is clear is that Pacific would have the Commission prohibit WCI marketing activities aimed at encouraging customers to multiplex voice traffic for transmission over WCI's facilities. Pacific claims that such activities themselves constitute the offering of voice service.

Pacific asserts that "voice service" includes any transmission of voice communications at any speed. WCI provided several citations from transcripts and documents in A.85-07-045 and A.85-07-046 which it contends show that WCI and DRA at least understood "voice services" to refer only to transmission of voice communications at normal voice grade speeds. We find this record established contemporaneously more persuasive than assertions by Pacific's witness, who was not present at the negotiations. We conclude that Pacific has not established that the term "voice services," as used in the stipulation, means the transmission of voice communications at any speed.

The citations provided by WCI also show that WCI at least understood that the prohibition on WCI multiplexing in and of itself prevents WCI from offering voice services. We have found no written record that any party disagreed with WCI's interpretation of these terms at the time of the negotiations. Further, there is no language in the stipulation or elsewhere supporting Pacific's position that holding out restrictions are implicit in the prohibition on the offering of voice services. For these reasons, we conclude that Pacific has not met its burden of proof to establish that WCI has violated the prohibition on the offering of voice service.

Pacific agrees that WCI has not itself multiplexed any customer's transmissions from a lower speed to 1.544 MBPS. In its statements in its briefs that WCI may discuss the advantages of

multiplexing with certain customers with computer and data transmissions, Pacific seems to back away from its earlier arguments that such actions violate the stipulation's prohibition on multiplexing. This seeming change in position leaves us with no clear understanding of what actions, short of direct multiplexing, would constitute a violation of the prohibition on multiplexing in Pacific's view. Further, as noted earlier, there is no explicit language in the stipulation or elsewhere imposing holding out restrictions prohibiting the dissemination of information regarding multiplexing. For these reasons, we conclude that Pacific has not met its burden to show that any of WCI's actions have violated the prohibition on multiplexing in the stipulation.

Finally, we address the meaning of "high-speed data transmission services," as used in the stipulation. The stipulation states as follows:

> "For purposes of these applications, the transmission services to be offered by WCI at a data speed of 1.544 MBPS or higher shall be considered high-speed data transmission services."

The circularity of this definition leads us to conclude that the meaning of the term must be derived from other portions of the stipulation. The parties agree that customers themselves may multiplex and transport voice communications using WCI's service. We have also concluded that Pacific has not shown that the stipulation prohibits WCI's marketing of its service to customers with voice applications, nor that it prohibits WCI's discussing multiplexing with its customers. Once again, we must conclude that Pacific has not shown that the "high-speed data transmission services" agreed to by the parties and approved in D.85-12-082 exclude the carriage of multiplexed voice communications or WCI's marketing of its services to customers with voice applications.

In conclusion, we find that Pacific has not proven that WCI violated the stipulation or D.85-12-082 in these areas.

What this record does demonstrate is the importance of reaching a clear written agreement, especially when meanings of technical terms and concepts are not well-established and incontrovertible. Such clarity would presumably reduce later controversy over the initial terms of the agreement. Based on the record before us, we conclude that this portion of Pacific's complaint and the related relief requested by Pacific should be denied.

E. Is WCI's Direct Access Service in Violation of the Stipulation and D.85-12-082?

1. Pacific's Position

While WCI agreed in the stipulation not to make "service under this tariff" available to interexchange carriers, Pacific contends that D.85-12-082 makes clear that WCI was not to offer any direct connection to interexchange carriers that would involve the provision of intrastate telecommunications without first seeking interLATA authority from the Commission.

Pacific takes issue with WCI's and BAT's arguments that a circuit carrying both interstate and intrastate traffic is subject only to the jurisdiction of the FCC. Pacific asserts that the Commission specifically rejected such arguments in D.84-06-113, and later affirmed in D.86-05-073 its position that a private line facility carrying intrastate and interstate traffic remains subject to the reasonable regulation of this Commission.

Pacific argues also that in Louisiana Public Service Commission v. FCC, __ U.S. __, 106 S. Ct. 1890 (1986) (Louisiana PSC), the United States Supreme Court firmly held that state regulation of jointly (interstate and intrastate) used facilities could not be preempted by the FCC.

Pacific recognizes that two recent FCC decisions, Re The Chesapeake and Potomac Telephone Company of Maryland, FCC 87-169, Memorandum Opinion and Order, and GTE Services Administration v. American Telephone and Telegraph Company and The Associated Bell

System Companies, DA 87-721, Order (Chief, Common Carrier Bureau), have imposed federal tariffed rates on contaminated circuits. However, Pacific points out that these decisions are still subject to FCC reconsideration and court review, and further that they do not require that the Commission forego all regulation of WCI's facilities.

Pacific provides as examples two types of state regulation which it asserts would not impermissably intrude on legitimate federal concerns: consideration of the intrastate bypass effects of WCI's Direct Access service and the imposition of reasonable holding out rules.

Pacific asserts that every interexchange carrier in California has submitted to Commission regulation of its jurisdictionally mixed use facilities, and none have, to Pacific's knowledge, shown any adverse affect. In Pacific's view, WCI has presented no evidence that its doing so would have any negative impact on its service.

Pacific contends that WCI's Direct Access service is strikingly similar to AT&T's Megacom or SDN service, where a dedicated facility connects a customer's premise with an interexchange carrier's point of presence where switched Message Telephone Service-like calling is completed. Pacific contends that the Direct Access service allows the customer and WCI to avoid the payment of any switched or special (private line type) access charges assessed by the local exchange carrier, and that this results in a loss of non-traffic sensitive cost recovery.

Pacific recognizes that it offers high-speed special access services similar to WCI's Direct Access service from both intrastate and interstate tariffs. Evidence developed during the hearings shows that, while an intrastate tariff is available, Pacific currently provides high-speed special access service only through its interstate tariff. Sullivan testified that this is due primarily to the significant price differential between the

intrastate and interstate tariffs. He testified that Pacific itself makes no attempt to ascertain accurately the jurisdictional nature of traffic carried over its special access circuits, essentially leaving the choice of whether the service will be priced out of the intrastate tariff or the interstate tariff up to the customer. Pacific argues, however, that Pacific's own practices are no basis for WCI evading Commission regulation of its Direct Access service.

2. WCI's Position

WCI denies that its Direct Access service violates the stipulation and its intraLATA tariff. In WCI's view, all signatories to the stipulation clearly understood that the stipulation does not in any way address or restrict WCI's provision of such interstate services in California, but only applies to services offered under WCI's CPUC intraLATA tariff.

WCI contends that its Direct Access service is an interstate telecommunications service and as such is subject to the exclusive jurisdiction of the FCC, arguing that state regulation of this service would contravene federal policies favoring competition in the provision of interstate communications services. WCI provides extensive citations to FCC and federal court decisions to support its position.

WCI asserts that state regulation pursuant to Section 2(b) of the federal Communications Act may be exercised only over those services and facilities which are separable from and do not substantially affect the conduct or development of interstate communications. According to WCI, this principle was enunciated in three federal court cases. (North Carolina Utilities Commission v. FCC, 537 F.2d 787 (4th Cir., 1976), cert. denied, 429 U.S. 1027 (1976); North Carolina Utilities Commission v. FCC, 552 F.2d 1036 (4th Cir., 1976), cert. denied, 434 U.S. 874 (1977); and California v. FCC, 567 F.2d 84 (D.C. Cir., 1977), cert. denied, 434 U.S. 1010 (1978).)

WCI distinguishes the current issue of jurisdiction over WCI's Direct Access service from that in Louisiana PSC. There, the Supreme Court held that Section 2(b) operates to bar FCC preemption of state regulation over depreciation of dual jurisdictional property for intrastate ratemaking purposes. The Court premised its decision on its finding that because the Communications Act itself, in Section 410, establishes a process in the depreciation context to determine what portion of an asset is used to produce or deliver interstate as opposed to intrastate services, "it facilitates the creation or recognition of distinct spheres of regulation," thus allowing the application of different rates and methods of depreciation by both the states and the federal government to dual jurisdictional property. (Id. at 1902) WCI noted that the Court emphasized, however, that its holding left undisturbed those cases in which the FCC asserted jurisdiction where separation of interstate and intrastate usage is not feasible.

WCI also distinguishes its Direct Access service from AT&T's SDN service addressed in D.86-05-073, on similar grounds. It contends that, in contrast to SDN, WCI's Direct Access service is not a switched service and has no capacity to distinguish or measure intrastate versus interstate calling. According to Tabb, WCI would have to add network switching technology in order to segregate intrastate from interstate use; he further testified that this would be prohibitively expensive for WCI.

WCI argues that such physical reconfiguration of WCI's Direct Access facilities would directly impair WCI's ability to provide interstate services to its customers, which result WCI contends would be clearly at odds with judicial and FCC precedent, citing American Telephone & Telegraph, 56 FCC 2d 14 (1975), aff'd sub nom., California v. FCC, 567 F.2d 84 (D.C. Cir., 1978).

Finally, WCI cites this Commission's own language in D.84-06-113 to support its assertion that the potential for

incidental intrastate use of WCI's Direct Access service does not require the assertion of jurisdiction by the State:

> "Intrastate telecommunications traffic carried over facilities as an incidence to lawfully provided interstate services are encompassed within interstate operating authorities and may not be prohibited by this Commission." (D.84-06-113, Conclusion of Law 2, mimeo. p. 101.)

WCI states that nothing in the record contradicts WCI's testimony that the intrastate traffic carried over its Direct Access facilities is incidental to the interstate communications purpose of those facilities.

Finally, WCI states that Pacific now downplays its earlier argument that WCI's Direct Access service is in violation of the stipulation and urges instead that the Commission apply certain unspecified "holding out" restrictions or state access charges to the service. WCI asserts that the adoption of "holding out" restrictions or access charges is not at issue in this proceeding; instead the issue is whether WCI violated the terms of the stipulation.

3. BAT's Position

BAT agrees with WCI's view that the stipulation does not forbid WCI from offering service to interexchange carriers under its federal authority. BAT points out that the stipulation says only, "Service under this tariff is not available to common carriers providing interLATA telecommunications," and contends that this says nothing about service under another tariff not being available for interstate traffic.

BAT contends that Pacific has offered no reply to WCI's reliance on the portion of D.84-06-113 which states that intrastate traffic carried incidental to lawful interstate service is "encompassed within interstate operating authorities and may not be prohibited by this Commission." Further, in BAT's view, there is an element of hypocrisy to Pacific's position since all of its

intrastate high-speed special access circuits from customer premises to interexchange carriers' points of presence are provided under Pacific's FCC tariff, with no procedures or practice to determine the predominance of interstate versus intrastate traffic.

4. Discussion

The section of the stipulation regarding availability of WCI's intrastate service to interexchange carriers states that:

> "Service under this tariff is not available to common carriers providing interLATA telecommunications services."

Parties agree that WCI is not offering its Direct Access service through the intrastate tariff authorized as a result of this stipulation. Thus, we conclude that WCI is not violating its tariff, the stipulation, or D.85-12-082 in this respect.

Nevertheless, we find WCI's actions troublesome for other reasons: as discussed below, they run counter to WCI representations made in A.85-07-045 and A.85-07-046, ignore our conclusions of shared jurisdiction clearly set forth in D.84-06-113, and violate PU Code § 1001.

WCI represented in A.85-07-045 and A.85-07-046 that it would file an application requesting interLATA authority before providing connections to interexchange carriers in California. (See WCI Motion for Decision without Hearing and Order Shortening Time to Respond to Motion, November 8, 1985, pp. 7-8.) In approving the stipulation in D.85-12-082, we relied upon this representation as assurance that Pacific's concerns about carrier bypass would be adequately considered in that separate application "in the near future."

Rather than requesting interLATA authority, WCI has instead gone forward with connections to interexchange carriers under the aegis of its interstate authority. WCI's current arguments regarding the exclusivity of FCC jurisdiction run counter to its seeming acquiescence in A.85-07-045 and A.85-07-046 to

Commission jurisdiction over such connections. While there is no indication that WCI deliberately misled the Commission regarding its position in late 1985, its actions in commencing its Direct Access service without Commission authorization are particularly disturbing in light of its earlier admission of Commission jurisdiction.

In D.84-06-113, we considered arguments in many respects identical to those now repeated by WCI regarding FCC jurisdiction over facilities with mixed interstate/intrastate usage. We concluded at that time that this Commission maintains a vital role, along with the FCC, in the regulation of interexchange carriers. After discussing many of the same FCC and federal court decisions which WCI has cited, we concluded as follows:

> "Based upon these cases, several parties, notably MCI, Sprint, and [Western Union], argue that this Commission may not regulate their intrastate activities. It is essentially their position that intrastate traffic carried over their facilities as an incidence to lawfully provided interstate services are encompassed within their FCC certificates and that, consequently, this Commission may not bar the intrastate traffic which would otherwise fall plainly within our jurisdiction. Their analysis is incomplete and incorrect.
>
> "There remains in the face of the primacy of federal regulation a vital state jurisdiction. The cases only establish the proposition that this jurisdiction must be carefully exercised so as not to intrude on the interstate and foreign telecommunications over which the FCC presides. . . . The full authority to certificate and supervise intrastate telecommunications is...left to the states subject to the proviso that federally regulated services be neither burdened nor discriminated against. In our order, we take full cognizance of the 'practical difficulties' of separating interstate from intrastate traffic and carefully weigh them so as not to 'substantially encroach' upon the development

> of the integrated national network the courts seek to protect." (D.84-06-113, mimeo. pp. 13-14.)

WCI has brought forth no new evidence or argument which would sway us from these conclusions reached in D.84-06-113. Consistent with that decision, we conclude in this case that WCI's Direct Access service is subject to the jurisdiction of this Commission in addition to that of the FCC.

We agree with WCI that, unlike AT&T's SDN service, WCI cannot now distinguish intrastate and interstate calling over its Direct Access private line facilities. We do not take issue at this time with WCI's position that a requirement that it reconfigure its system to allow identification of intrastate traffic would impair interstate service. Therefore, we do not assert jurisdiction over pricing of any portion of WCI's Direct Access service. Nevertheless, this does not in any way preclude us from exerting jurisdiction in other ways which do not interfere with FCC regulations.

In D.84-06-113 we reaffirmed our earlier decision in D.84-01-037 to prohibit interexchange carriers from holding out the availability of intraLATA service they are not authorized to provide, stating as follows:

> "Such a prohibition hardly intrudes upon the FCC's authority to permit the applicants to provide interstate service over common facilities." (D.84-06-113, mimeo. p. 72a.)

We similarly find in this instance that we may impose such holding out restrictions on WCI's Direct Access or other interLATA operations. In a subsequent section of this opinion, we do so.

In D.84-06-113 and D.84-10-100, we addressed a consolidated complaint filed by Pacific seeking a cease and desist order against the assertedly illegal intrastate operations of a number of interexchange carriers which had begun service within

California without intrastate operating authority. Because we had, in the meantime, authorized these parties to provide intrastate interLATA telecommunications services, we found that Pacific's complaint for a cease and desist order, to the extent it was directed at interLATA operations subsequent to D.84-01-037, to be moot. We also concluded that the intrastate traffic carried over the defendants' facilities constituted an incidental use not rendered in violation of any law. As a result, we denied Pacific's complaint.[5]

There are close similarities between that situation and the current one in which WCI has been providing its Direct Access service in California without intrastate authorization. WCI has now, with the filing of A.87-02-034, requested a CPCN to provide interLATA high-speed private line services within California. We today grant WCI's request in this regard, subject to the same holding out restrictions imposed on other interexchange carriers. If WCI submits to our regulation and complies with the restrictions which we impose, its Direct Access service will no longer be contrary to its intrastate authorization. On the expectation that WCI will do this, we find that Pacific's request for a cease and desist order against WCI's Direct Access service in California is moot, consistent with our findings in D.84-06-113 and D.84-10-100.

WCI asserts that any intrastate traffic carried over its Direct Access facilities is incidental to lawful interstate services, and that no party has refuted this claim. No evidence was introduced in this proceeding on the question of whether WCI, in promoting its Direct Access service, took steps to ensure that intrastate usage of this service would indeed be incidental or whether, on the other hand, WCI held itself out as an intrastate

5 We note that Conclusion of Law 2 in D.84-06-113, which WCI quotes, was replaced in D.84-10-100 modifying D.84-06-113.

carrier. Absent such information, we cannot determine whether the intrastate usage of WCI's Direct Access service has been incidental to lawful interstate use.

Despite the similarities, there is one critical difference between the situation we addressed in D.84-06-113 and the one before us today. Prior to D.84-01-037 and D.84-06-113, we had never clearly asserted jurisdiction over nondominant interexchange carriers. Since the issuance of those decisions, carriers should have been fully cognizant of our conclusions in this regard and our regulatory program including certification procedures and holding out restrictions. Further, D.85-12-082 made clear that we fully expected to examine any service WCI might propose which would connect customers to interexchange carriers, and in that proceeding WCI itself seemingly acquiesced regarding our jurisdiction over such service. We conclude that WCI has violated PU Code § 1001 in undertaking its Direct Access service without prior Commission authorization and further has in general operated in defiance of this Commission's regulatory program. We note that this conclusion is independent of whether intrastate use of the service has been incidental to lawful interstate use.

Our conclusions regarding the illegality of WCI's operations are tempered by recognition that WCI's interLATA operations to date, consisting to our knowledge only of its high-speed private line Direct Access services, are much more limited than those engaged in by most other interexchange carriers, which typically provide a range of switched services. Because D.84-06-113 addressed our jurisdiction over interexchange carriers in general, without focusing on the extent of our jurisdiction over a carrier with such limited operations, we will impose no sanctions on WCI as a result of its actions in engaging in the unauthorized intrastate operations which Pacific has brought to our attention in this complaint.

Because of our contemporaneous granting of interLATA authority to WCI, we conclude that the portion of Pacific's complaint regarding WCI's Direct Access service should be denied. However, we do not wish in any way to send a signal that other carriers might expect to disregard this Commission's regulatory authority until a complaint is filed against them, at which time they simply file an application for a CPCN to avoid any negative consequences. In Rulemaking 85-08-042, we are addressing, among other issues, how to deal with violations of the PU Code and our regulations when we find that an interexchange carrier has been operating absent Commission authorization. We put potential violators on notice that we will not take such illegal operations lightly.

IV. WCI Application for Statewide InterLATA Authorization

A. WCI Request

In A.87-02-034, WCI requests a CPCN to provide interLATA private line high-speed data transmission services at a data speed of 1.544 MBPS or higher in California. By this application, WCI requests authority to market its high-speed data transmission services between all interLATA points in California.

WCI states that it takes a comprehensive, system solution approach in designing, installing, and maintaining communications facilities to meet its customers' needs and that this includes identification of new applications for high-speed data transmission circuits, thereby expanding the market for transmission services.

As an innovative information transmission company, WCI does not specialize in any single type of transmission technology. WCI states that it utilizes digital terrestrial microwave and digital fiber optic transmission technologies, with the customer's application for WCI's services dictating the type of transmission technology employed.

Because of the custom design for each client, WCI charges for its information transmission services on an individual contract basis. WCI states that by negotiating individual contracts for each customer, WCI can take into account the actual cost of building the proprietary network system for that customer.

If certificated, WCI states that it will file a tariff for intrastate interLATA services with the Commission. Consistent with the procedure specified in D.85-12-082, WCI would submit proposed rates and cost data for each service agreement to the Commission's Evaluation and Compliance Division (recently renamed the Commission Advisory and Compliance Division (CACD)), showing that the proposed rates are above cost, and permitting CACD a reasonable period of time to review the data prior to filing an advice letter requesting tariff approval of the negotiated rates.

WCI states that its proposed services offer the following identifiable benefits to consumers:

- Access to the services of an innovative information transmission company providing private line networks custom-designed to meet the specific customer's needs;
- Development of new applications and an expanded market for high-speed data transmission services;
- Increased availability of high-speed data transmission services; and
- Increased reliability of high-speed data transmission services because of the customer's participation in the establishment and maintenance of quality in circuits dedicated to that customer's use.

WCI states that the Commission has previously determined in D.84-01-037 that the public convenience and necessity require that competition be allowed in the provision of interLATA telecommunications services, and concludes that its application should be granted.

B. Pacific Protest

Pacific protests A.87-02-034. It asserts that WCI has failed to satisfy the requirement of Rule 18(a) of the Commission's Rules of Practice and Procedure, which requires that an applicant give a "full description of the proposed construction or extension, and the manner in which same will be constructed." Pacific states that this has special meaning in WCI's case for two reasons. First, WCI has agreed not to provide intraLATA voice services, and second, WCI now intends, it appears, to offer interLATA and intraLATA services over the same network facilities. Pacific asserts that WCI must demonstrate what reasonable measures it has taken or will take to prevent intraLATA voice services. Pacific states that WCI has failed to do so, and that its application should not be granted until it provides the needed information.

Pacific states that A.87-02-034 does not specify whether WCI intends to hold out the availability of interLATA private line high-speed voice transmission services. Pacific interprets the absence of any statement precluding such holding out to mean that WCI will assert its right to hold out the availability of such service. Pacific also asserts that any Commission authorization should make clear that WCI must file tariffs, and that such tariffs must comply with D.84-06-113 restrictions on the holding out of intraLATA voice telecommunications services.

Pacific is concerned about potential interactions between WCI's interLATA facilities and intraLATA facilities if WCI's applications are both approved. Pacific states that WCI would be allowed to offer and provide interLATA voice services but not intraLATA voice services. Pacific asserts that WCI has the burden of showing that it will separate facilities for its proposed interLATA and intraLATA services so that the two services are not commingled in a way that circumvents what it believes is a prohibition on the holding out of intraLATA voice transmission, and of demonstrating what reasonable steps it will take to instruct

customers concerning intraLATA voice services that are reserved solely for local exchange carriers. It is Pacific's position that technical and/or holding out instructions can be implemented that would permit WCI to comply with prior Commission decisions.

C. Should WCI be Granted InterLATA Authority?

No party has unequivocally opposed a grant of authority for the interLATA private line high-speed data transmission services which WCI requests. Pacific recommends several conditions, and GTE states that it agrees with Pacific in this regard. MCI and BAT recommend that A.87-02-024 be granted.

We have granted interLATA operating authority to numerous other applicants, including BAT which has authority granted in D.86-06-027 to provide interLATA private line services similar to that requested by WCI. Consistent with our finding in D.84-01-037 that interLATA competition is in the public interest, we conclude that WCI should be granted its requested operating authority, subject to certain holding out restrictions as discussed below. WCI is expected to comply with the PU Code and with all applicable rules and regulations of this Commission. We will impose the rules adopted in D.84-01-037 regarding the filing of tariffs by interexchange carriers for WCI's interLATA services, rather than those proposed by WCI. Other conditions recommended by Pacific are discussed below.

WCI should be subject to the fee system, as set forth in PU Code §§ 401 et seq., which is used to fund the cost of regulating common carriers and businesses related thereto and public utilities. By Resolution M-4746, we set the fee level for fiscal year 1987-88 for telephone corporations at 0.10 of 1% (0.0010) of revenue subject to the fee. Appropriate tariff rules should be incorporated in WCI's tariff rules for the imposition of this surcharge.

D. Should Restrictions be Imposed to Prevent Commingling of IntraLATA and InterLATA Traffic?

Pacific recommends that WCI be prohibited from using its interLATA facilities to complete intraLATA voice or low-speed data communications it is not authorized to provide, and that WCI be required to take all reasonable and necessary steps to separate its interLATA traffic from its intraLATA traffic. Pacific recommends further that WCI be required to assist its customers in structuring their networks to direct intraLATA voice and low-speed traffic to the local exchange carrier. Pacific states that these conditions are consistent with the intent of the stipulation, and are needed to prevent WCI from using interLATA authority to avoid and evade restrictions contained in its intraLATA authorization.

WCI asserts that it cannot commingle a customer's intraLATA and interLATA traffic since it provides dedicated, point-to-point private line circuits with no switching. Since its interLATA service will in every instance involve a private line circuit that crosses a LATA boundary, WCI contends further that the service could not be used for the transmission of intraLATA communications. WCI concludes that, since in its view commingling cannot occur, the holding out restrictions recommended by Pacific are unnecessary and should be rejected.

WCI is correct in its statement that, since it cannot provide switching, it cannot commingle a customer's interLATA and intraLATA traffic. However, WCI seems to overlook the fact that there is no restriction that would prevent a customer from using its own switching equipment to route intraLATA traffic over WCI interLATA facilities. The traffic could then be switched and transmitted, perhaps over another WCI interLATA private line, back into the originating LATA. While such routing might be circuitous, we can envision circumstances in which it might be economically advantageous to the customer. In those cases, WCI interLATA services might be used to bypass a local exchange carrier, thus

depriving that carrier of some amount of revenue. This appears to be Pacific's concern.

We have determined elsewhere in this opinion that WCI is not prohibited from marketing its previously authorized intraLATA high-speed services to customers which would multiplex voice or low-speed data communications for transmission over WCI's intraLATA facilities. However, we decline in a later section of this decision to authorize an expansion of WCI's intraLATA authority to geographic areas other than those covered by D.85-12-082,[6] pending further consideration of the efficacy of further intraLATA competition in this area. In the meantime, WCI should be subject to the same holding out restrictions as other interexchange carriers, i.e., it cannot hold out the availability of intraLATA services to customers in areas in which it does not have intraLATA authority, and shall advise its customers in such areas that intraLATA communications should be placed over the facilities of the local exchange carrier. WCI, in answering any customer inquiries as to whether its facilities may physically be used to complete intraLATA calls in areas where it does not have intraLATA authority, shall advise current and potential customers that such calls (1) may not be lawfully placed over its networks and (2) should be placed over the facilities of the local exchange carriers without any further advice being given. WCI may not instruct customers in such areas regarding how to switch intraLATA traffic so that it is carried over WCI's interLATA facilities nor encourage them to do so in other ways.

E. Should WCI's Direct Access Service be Authorized?

Pacific asserts that WCI should be required to make any direct connections to an interexchange carrier through the

6 See D.87-11-029 for a clarification of the extent of authority granted in D.85-12-082.

facilities of the local exchange carrier. In Pacific's view this restriction is consistent with the intent of the stipulation and should be adopted by the Commission in the consolidated applications. WCI steadfastly maintains that such services, i.e., its Direct Access service, are within the exclusive jurisdiction of the FCC and may not be prohibited or restricted by this Commission.

Pacific essentially recommends that we prohibit WCI from engaging in carrier bypass. As BAT and WCI point out, we have already considered the issue of carrier bypass in D.85-06-115 and declined to adopt such a ban. BAT asserts that Pacific has presented absolutely no evidence why such a restriction ought to be imposed on WCI when it is not imposed on any other California-certificated interexchange carrier.

We agree with BAT in this matter. We have found that WCI did not violate the stipulation by its Direct Access service. Further, we do not challenge FCC jurisdiction over pricing and most other aspects of this service. However, as discussed previously, we firmly assert our jurisdiction to the extent it can be exercised without interfering with that of the FCC. We conclude that WCI's Direct Access service should be authorized subject to the same holding out restrictions imposed on other interLATA services WCI may offer as a result of today's grant of interLATA authorization.

V. WCI Application for Statewide IntraLATA Authorization

A. WCI Request

In A.87-02-033, WCI requests a CPCN to provide intraLATA private line high-speed data transmission services at a data speed of 1.544 MBPS or higher within all LATAs in California. WCI proposes to expand the area within which it will market its high-speed data transmission services, stating that the services offered will be identical to those intraLATA services which WCI is currently authorized to offer by D.85-12-082.

WCI's descriptions of its proposed intraLATA services and the identifiable benefits are identical to the descriptions of its proposed interLATA services contained in A.87-02-034. WCI states that it will provide service pursuant to the terms and conditions set forth in its existing intraLATA tariff on file with the Commission and will submit proposed rates and cost data for each service agreement pursuant to the procedure specified in D.85-12-082.

In its application, WCI asserts that the Commission has previously determined that the public convenience and necessity require that competition be allowed on an intraLATA basis in the provision of high-speed data transmission services over private line networks. It quotes D.84-06-113 as the basis for its position:

> "We believe that there is some merit in opening up the private lines market to some limited form of competition. We therefore invite applications from persons who are interested in providing high-speed data transmission services over private line networks. In our view, Pacific's (or any other local exchange company's) facilities may not be well suited to the provision of these specialized services and competitors should be allowed to provide them on an intraLATA basis. We intend to encourage the development of these technologies by this order. While we do not completely open the private lines market to full competition, we may in the future reexamine our policy on this issue. For now, however, we will not since we have concerns that the fullest competition will only encourage carrier bypass which, as we discuss elsewhere in this opinion, poses a threat to the switched network." (D.84-06-113, mimeo. p. 67.)

WCI contends further that the Commission determined in D.84-06-113 that entry into the private line high-speed data transmission market would not threaten the switched network because private lines are primarily used to provide service over dedicated

non-switched access lines and constitute a minuscule portion of the local exchange carriers' revenues.

In WCI's view, the switched network will not suffer adverse consequences from WCI's provision of its proposed service because WCI will only provide point-to-point private line services independent of the message telephone network, WCI's system will contain no switches, and WCI will restrict sale of its services to customers requiring high-speed data communications at a data speed of 1.544 MBPS or higher. WCI asserts that its proposed service falls within the niche of permissible intraLATA "high-speed data transmission services" as that term was used in D.84-06-113.

WCI concludes that the Commission's prior determinations in D.84-06-113 and D.85-12-082, the identifiable benefits to consumers, and the lack of adverse consequences to the switched network demonstrate that the public convenience and necessity require approval of WCI's application for a statewide intraLATA CPCN.

B. Pacific Protest

Pacific reiterates many of its reasons for opposing A.87-02-034 in its protest to A.87-02-033. It states that WCI has failed to comply with Rule 18(a), and has not shown how, if at all, it intends to abide by the Commission's prohibition on intraLATA voice competition adopted in D.84-06-113.

Pacific also takes the position that any decision granting WCI statewide intraLATA authority must specify that such authority is subject to the same terms and conditions imposed in D.85-12-082. It believes that, to avoid any misunderstanding, the stipulation approved in D.85-12-082 should be specifically incorporated into any grant of the instant application. However, Pacific requests that the stipulation which should accompany any approval of this application should be conformed to the terms and conditions of a later stipulation approved in D.87-02-022 for a similar service to be provided by BAT. In Pacific's view, the

terms and conditions delineated in D.87-02-022, which differ slightly from those in WCI's stipulation, clarify the intent of the terms and conditions contained in D.85-12-082 and correctly reflect the Commission's attitude on the provision of voice services by an intraLATA high-speed data provider. In particular, the stipulation approved in D.87-02-022 for BAT states, "The services and facilities provided hereunder are for data transmission only and it is not intended that such services and facilities be used for provision or completion of intraLATA voice traffic."

Pacific reiterates its position set forth in its protest to A.87-02-034 that WCI has the burden of showing that it will separate facilities for its interLATA and intraLATA services so that policies against intraLATA competition are not circumvented. Pacific asserts that WCI cannot be permitted to gain intraLATA voice authority that the Commission has intentionally, and for good reason, reserved for local exchange carriers.

C. GTE Protest

GTE states that if the charges which Pacific has levied against WCI in C.86-10-012 are proved, WCI should be disqualified from providing its present service and denied authority for expanding that service statewide. In addition, GTE believes that the Commission should confront the questions raised in C.86-10-012 regarding whether WCI's customer have used or will use WCI's service for voice transmissions in contravention of the spirit, if not the letter, of D.84-06-113, and should also set clear ground rules for the type of intraLATA competition it might allow under the guise of "high-speed data private lines."

GTE also asserts that a grant of WCI's application would not serve the public convenience and necessity. GTE states that it is ready and able to provide the same high-speed data private line transmission service that WCI contemplates to WCI's proposed customers or to anyone else, either out of its standard tariffs or on a special assembly basis. In GTE's view, the only effect of

allowing intraLATA competition where a local exchange carrier is able to provide the same service is to deprive the local exchange carrier of some contribution to the cost of providing basic service. It recommends that the requested intraLATA authorization be denied.

D. Should WCI Be Granted Statewide IntraLATA Authority at this Time?

A lengthy record was developed in this proceeding regarding whether the public convenience and necessity require that WCI's intraLATA authorization be expanded statewide.

WCI, supported by BAT and WCI, argues that statewide expansion of its service would result in a host of benefits commonly attributed to marketplace competition. These parties contend that WCI's expansion into the statewide intraLATA market would increase the availability of private line high-speed transmission services and lead to new applications for this efficient mode of transmission. WCI asserts that the local exchange carriers have an economic incentive to use existing copper facilities, that competition in this market would result in the use of improved technology and provision of better service, and that WCI would provide the higher reliability levels needed by customers with specialized data transmission applications.

GTE argues, supported to large extent by Pacific, to the contrary. These local exchange carriers assert that they can offer services technically identical to and with at least as high reliability as WCI's services. In their view, only their lack of pricing flexibility prevents them from duplicating the customer-specific services which WCI offers. Pacific argues that WCI's costs of providing its services will always exceed Pacific's costs due to Pacific's ability to use embedded plant and other economies of scale and scope. Pacific and GTE contend that expansion of WCI's intraLATA authority would only lead to needless duplication of facilities, inefficient use of their systems, stranded

investment, uneconomic bypass, and loss of contribution to basic services with a resulting negative impact on universal service. They conclude that WCI's request for statewide intraLATA authorization should be denied.

If the Commission nevertheless grants WCI's request, Pacific and GTE urge that the authorization include the same restrictions which in their view exist in the current stipulation. Pacific reiterates its position that WCI is not permitted to offer, hold out, promote, or advertise in any way intraLATA voice and low-speed data services.

To date, we have entertained requests for authority to offer intraLATA private line high-speed data transmission services on a case-by-case basis. Since D.84-06-113, we have granted authority for such services to only two carriers: WCI and BAT. WCI's authorization granted in D.85-12-082 is limited to portions of LATA 1 and LATA 5; BAT's authorization granted in D.87-02-022 is similarly limited to LATA 1 and LATA 3. Both authorizations were granted as a result of stipulations reached among the parties. GTE asserts in its protest that the Commission should set clear ground rules for intraLATA competition in private line high-speed data transmission services before granting WCI statewide authority.

Much has happened since our conclusion almost four years ago in D.84-06-113 that there might be merit in opening up the intraLATA private lines market to limited competition. Telecommunications markets have expanded rapidly and customer sophistication has increased. Both the local exchange carriers and this Commission have gained experience in assessing the marketplace and impacts of competition.

In particular, the WCI and BAT proceedings and Pacific's complaint have heightened our appreciation of the difficulties inherent in delineating a portion of the intraLATA market as open to competition. We have concluded today that WCI's stipulation does not preclude marketing to customers with voice applications,

despite Pacific's and GTE's protestations otherwise. BAT's stipulation appears more restrictive, with the statement that, "it is not intended that such services and facilities be used for provision or completion of intraLATA voice traffic." While Pacific asserts that the Commission meant this same restriction to apply to WCI, we cannot, in looking back, verify that that was our intent. Since neither WCI's stipulation nor D.85-12-082 clearly spelled out such a restriction, we have found in WCI's favor in C.86-10-012.

We note that in D.84-06-113 we concluded, "we would be remiss if we did not provide an opportunity to the developers and providers of [high-speed private line] services to apply for authority to offer such services in California without regard to LATA boundaries." As we have interpreted the WCI stipulation and D.85-12-082, statewide expansion of WCI's intraLATA authorization along with today's grant of interLATA authorization would allow WCI to offer its private line high-speed data transmission services statewide without regard to LATA boundaries. While it would undoubtedly be more efficient (at least from WCI's perspective) if no intraLATA restrictions were maintained on WCI's services, we are hesitant to expand intraLATA private line competition at this time, for reasons developed below.

As discussed in D.87-07-017 issued in I.85-11-013, it may be difficult, even after extensive proceedings, to reach satisfying conclusions about the extent of true competitiveness in a particular market. In that investigation, we are examining whether AT&TC should be granted pricing flexibility in light of competition in the interLATA market. The situation is somewhat reversed in the issue before us, i.e., whether to allow intraLATA competition for a service for which the local exchange carriers have limited pricing flexibility. In either instance, however, the best approach may be to allow enough competition so that the marketplace may show us whether competitive conditions really exist. WCI has succinctly

observed that competition should be shifted from the hearing room to the marketplace.

While we are sympathetic to WCI's pleas, it has become increasingly apparent in both interLATA and intraLATA markets that pricing flexibility by the dominant carriers is an important complement to competition by nondominant carriers, to help ensure that competition is effective and that societal benefits accrue. We also recognize that the case-by-case approach for consideration of requests for private line high-speed services which has sufficed since D.84-06-113 may have reached the limits of its usefulness.

We believe that, after four years, the time is ripe to revisit the question of intraLATA competition on a generic rather than a case-by-case basis. To this end, we recently initiated a new investigation, I.87-11-033, in which we will both reconsider the efficacy of further intraLATA competition and address local exchange carrier pricing flexibility.

It is our intent in I.87-11-033 to establish the scope of allowable intraLATA competition in private line high-speed data transmission services and certain other services (excluding message toll service and related services) in early 1988. To ensure consistency with actions in that proceeding, we prefer to delay action on WCI's request for statewide intraLATA authority until that time. We leave this proceeding open for further consideration of WCI's request after a decision is issued in Phase I of I.87-11-033. We note that this step is consistent with D.87-11-064, in which we deferred further action on MCI's request for expanded authority to offer its virtual private line network services. Following a Phase I decision in I.87-11-033, it is our expectation to proceed expeditiously with action on both WCI's and MCI's outstanding applications.

Findings of Fact

1. In D.84-06-113, we invited providers of private line high-speed data transmission services to file applications if they

wish to offer such services on an intraLATA basis and required persons not authorized to provide intraLATA telecommunications service to refrain from holding out the availability of such services and to advise their subscribers that intraLATA communications should be placed over the facilities of the local exchange carrier.

2. In D.84-06-113, we also concluded that this Commission has broad regulatory authority over the providers of intrastate telecommunications; that this Commission may neither burden nor discriminate against federally authorized telecommunications; and that FCC certification does not preempt this Commission's consideration of applications for the provision of the intrastate services of persons holding federal authority.

3. In D.85-12-082 in A.85-07-045 and A.85-07-046, we granted WCI authority to provide intraLATA private line high-speed data transmission services in portions of LATA 1 and LATA 5, subject to certain conditions set forth in that decision and in a stipulation which had been reached by WCI, Pacific, and DRA.

4. In C.86-10-012, Pacific alleges that WCI is violating several conditions of the stipulation.

5. In A.87-02-033, WCI requests a CPCN to provide intraLATA private line high-speed data transmission services within all LATAs in California.

6. In A.87-02-034, WCI requests a CPCN to provide private line high-speed data transmission services on an interLATA basis in California.

7. At the time that WCI marketed to Bullock's, Bullock's expected that only multiplexed voice traffic would be sent over WCI's facilities, though Bullock's subsequently decided to transport some data via WCI.

8. In its marketing efforts, WCI uses sales material that explains how multiplexing works and makes clear that customers can integrate voice and data traffic so that it can be carried over

WCI's high-speed data lines. WCI has provided price comparisons between Pacific's and WCI's services.

9. WCI offers Direct Access service, a private line high-speed data transmission service offered through an interstate tariff, which provides connections directly to interexchange carriers' points of presence in California.

10. Pacific presented testimony that WCI's allowable intraLATA market includes bulk data transfer (computer to computer), live scan security, video teleconferencing, LAN to LAN connections, and CAD/CAM applications.

11. Pacific presented testimony that WCI should give customers no advice regarding intraLATA voice services or multiplexing other than that it cannot offer voice services or multiplexing and that intraLATA voice and low-speed data services are to be obtained from the local exchange carrier.

12. WCI presented testimony that many of the applications identified by Pacific as being in WCI's intraLATA market often require multiplexing to reach 1.544 MBPS.

13. Pacific states in its opening brief that there is nothing wrong with WCI discussing the advantages of multiplexing for the limited data only market.

14. The stipulation does not address advertising or marketing provisions, and does not include any holding out restrictions comparable to those contained in D.84-06-113 regarding the offering of intraLATA services by interexchange carriers.

15. "Speed" refers to the amount of information that is transferred per unit of time. It is more accurate to refer to "high-speed data transmission service" as "high-capacity digital service."

16. Interpretation of technical terms used in the stipulation may come from prior Commission actions, circumstances surrounding WCI's request, and the parties' negotiations that led to the stipulation, as well as from the stipulation itself.

17. Pacific's witness who testified regarding WCI representations during the negotiations was not himself present at the negotiations, but instead monitored them through conversations with Pacific's participant.

18. Pacific's testimony and position in its briefs regarding the extent of the asserted holding out restrictions and WCI's allowable market are unclear, confusing, and in some instances contradictory.

19. Pacific asserts that "voice service" includes any transmission of voice communications at any speed.

20. WCI's citations to transcripts and documents in A.85-07-045 and A.85-07-046 are more persuasive than assertions by Pacific's witness in establishing the meaning both of "voice services" and of the prohibition on the offering of voice services contained in the stipulation.

21. Pacific agrees that WCI has not itself multiplexed any customer's transmissions from a lower speed to 1.544 MBPS, and that customers may themselves multiplex such transmissions legally.

22. WCI and BAT argue that WCI's Direct Access service is within the exclusive jurisdiction of the FCC.

23. WCI asserts that the intrastate traffic carried over its Direct Access facilities is incidental to the interstate communications purpose of those facilities.

24. The stipulation does not prohibit the offering of connections to interexchange carriers through tariffs other than WCI's intraLATA tariff.

25. In D.85-12-082, we made clear that we wished to examine certain issues relating to carrier bypass before granting WCI interLATA authority, and that we expected, based upon WCI's own representations, that WCI would file an application for interLATA authority soon thereafter.

26. WCI has provided its Direct Access services absent Commission authorization, which runs counter to our expectations

stated in D.85-12-082 and also ignores our conclusions of shared jurisdiction clearly set forth in D.84-06-113.

27. WCI cannot distinguish intrastate and interstate calling over its Direct Access private line facilities.

28. In D.84-01-037 and D.84-06-113 the Commission clearly asserted jurisdiction over nondominant interexchange carriers.

29. Because we contemporaneously grant WCI authority to offer its Direct Access service on an interLATA basis, Pacific's request for relief in C.86-10-012 related to WCI's actions in offering this service is moot.

30. WCI is a wholly-owned subsidiary of Wang Laboratories, Inc., which provides any funds necessary for WCI's operation.

31. All intrastate services proposed in A.87-02-033 and A.87-02-034 would utilize facilities authorized and constructed under authority of the FCC.

32. In D.84-01-037 the Commission found interLATA competition to be in the public interest.

33. It can be seen with certainty that there is no possibility that the granting of A.87-02-034 may have a significant adverse effect on the environment.

34. There is no reason to treat WCI differently than other interexchange carriers regarding the holding out of the availability of intraLATA services it is not authorized to provide.

35. Public convenience and necessity require the granting of A.87-02-034 in part, to the extent set forth in the Ordering Paragraphs.

36. In D.85-06-115 we considered the issue of carrier bypass and declined to adopt a ban on carrier bypass.

37. There is no reason to treat WCI differently than other interexchange carriers regarding its ability to engage in carrier bypass.

38. Pacific and GTE oppose WCI's request for a CPCN to provide intraLATA private line high-speed data transmission services within all LATAs in California.

39. In I.87-11-033 we will both reconsider the efficacy of further intraLATA competition and address local exchange carrier pricing flexibility.

40. To ensure consistency with I.87-11-033, it is reasonable to delay action on WCI's request for statewide intraLATA authority until after a Phase I decision has been issued in I.87-11-033.

Conclusions of Law

1. As complainant, Pacific has the burden of proof in C.86-10-012 on those issues for which it seeks affirmative relief.

2. Pacific has not established that WCI has violated the prohibitions in the stipulation and D.85-12-082 regarding multiplexing and the offering of voice services.

3. WCI has not violated the stipulation's provision regarding service to common carriers providing interLATA telecommunications services.

4. WCI's Direct Access service is subject to the jurisdiction of this Commission in addition to that of the FCC.

5. The Commission may impose holding out restrictions such as those adopted in D.84-06-113 on WCI's Direct Access or other interLATA operations without intruding upon FCC authority.

6. WCI has violated PU Code § 1001 in undertaking its Direct Access service without prior Commission authorization and further has in general operated in defiance of this Commission's regulatory program.

7. Pacific's complaint against WCI and all requested relief should be denied.

8. WCI's application for a CPCN to provide interLATA private line high-speed data transmission services at a data speed of 1.544

MBPS or higher in California should be granted in part to the extent set forth in the Ordering Paragraphs.

9. WCI should be prohibited from holding out the availability of intraLATA services it is not authorized to provide and should be required to advise its customers that intraLATA communications it is not authorized to provide should be placed over the facilities of the local exchange carrier. WCI should be prohibited from instructing customers in areas in which it does have intraLATA authority regarding how to switch intraLATA traffic so that it is carried over WCI's interLATA facilities and from encouraging them to do so in other ways.

10. WCI's Direct Access should be authorized subject to the same holding out restrictions imposed on other interLATA services WCI may offer.

11. Because of the public interest in effective interLATA competition, this order should be effective today.

Only the amount paid to the State for operative rights may be used in rate fixing. The State may grant any number of rights and may cancel or modify the monopoly feature of these rights at any time.

INTERIM ORDER

IT IS ORDERED that:

1. Case 86-10-012 filed by Pacific Bell (Pacific) against Wang Communications, Inc. (WCI) is denied.

2. A certificate of public convenience and necessity (CPCN) is granted to WCI to provide interLATA private line high-speed data transmission services at a data speed of 1.544 megabits per second or higher in California to the limited extent of providing the requested service on an interLATA basis. The authority granted is conditioned on WCI's agreement to establish rates and charges for its high-speed data transmission service above its cost of

providing such service. The authority granted is further subject to the conditions that WCI refrain from holding out to the public the provision of any intraLATA services it is not authorized to provide, that WCI advise its subscribers that intraLATA communications which WCI is not authorized to provide should be placed over the facilities of the local exchange carriers, and that WCI not instruct customers in areas in which it does not have intraLATA authority regarding how to switch intraLATA traffic so that it is carried over WCI's interLATA facilities nor encourage them to do so in other ways.

3. To the extent that Application (A.) 87-02-034 requested authorization to provide intraLATA telecommunications services, the application is denied.

4. WCI is authorized to file with this Commission, five days after the effective date of this order, tariff schedules for the provision of interLATA service. If WCI has an effective FCC-approved tariff, it may file a notice adopting such FCC tariff with a copy of the FCC tariff included in the filing. Such adoption notice shall specifically exclude the provision of intraLATA services which WCI is not authorized to provide. If WCI has no effective FCC tariffs, or wishes to file tariffs applicable only to California intrastate interLATA service, it is authorized to do so, including rates, rules, regulations, and other provisions necessary to offer service to the public. Such filing shall be made in accordance with General Order (G.O.) 96-A, excluding Sections IV, V, and VI, and shall be effective not less than one day after filing.

5. The requirements of G.O. 96-A relative to the effectiveness of tariffs after filing are waived in order that changes in FCC tariffs may become effective on the same date for California interLATA service if WCI adopts FCC tariffs on an intrastate basis.

APPENDIX A

List of Appearances

Complainant in C.86-10-012 and Protestant in A.87-02-033 and A.87-02-034: Marlin A. Ard and David P. Discher, Attorneys at Law, for Pacific Bell.

Defendant in C.86-10-012 and Applicant in A.87-02-034 and A.87-02-033: Hamel & Park, by John W. Pettit, Robert P. Fletcher, Attorneys at Law (Washington, D.C.), and Kilpatrick, Johnston & Adler by Robert G. Johnston, Attorney at Law (Nevada), for Wang Communications.

Interested Parties in C.86-10-012 and Protestant in A.87-02-033: Richard E. Potter, Attorney at Law, for General Telephone Company of California.

Interested Parties: James L. Lewis, Attorney at Law (Massachusetts), and Messrs. Morrison & Foerster, by Theodore O. Senger, Attorney at Law, for MCI Telecommunications, Corp.; Armour, St. John, Wilcox, Goodin & Scholtz, by Thomas J. MacBride, Jr., Attorney at Law, for California Association of Long Distance Companies; Peter A. Casciato, P.C., Attorney at Law, for Cable & Wireless Communications, Inc.; Nancy Bromley, for GTC-GTE; E. Nicholas Selby, Attorney at Law, for Bay Area Teleport; Michael A. Morris, Attorney at Law, for California Cable Television Association; Mary Lynn Ganthier, for Ganthier & Hallett, and Ranger Telecommunications, Inc.; and Randolph W. Deutsch, Attorney at Law, for AT&T Communications.

Division of Ratepayer Advocates: Kevin P. Coughlan.

(END OF APPENDIX A)

6. WCI is subject to the user fee as a percentage of gross intrastate revenue under Public Utilities Code Sections 401, et seq.

7. The corporate identification number assigned to WCI is U-5098-C, which should be included in the caption of all original filings with this Commission and in the titles of other pleadings filed in existing cases.

8. Within 30 days after this order is effective, WCI shall file a written acceptance of the certificate granted in this proceeding.

9. The certificate granted and the authority to render service under the rates, charges, and rules authorized will expire if not exercised within 12 months after the effective date of this order.

10. A.87-02-034 is granted in part and denied in part as set forth above.

This order is effective today.

Dated FEB 24 1988, at San Francisco, California.