

Decision 88 11 026 NOV 9 1988

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of)
Pacific Bell (U-1001-C), a corpora-)
tion, for authority to adopt a)
Provisional Tariff to offer Six)
Basic Service Elements through a)
Market Trial.)

Application 88-07-011
(Filed July 8, 1988)

ORIGINAL

OPINION

Background

By its application, Pacific Bell (Pacific) seeks authority to conduct a two-year market trial of six Basic Service Elements (BSEs) under a provisional tariff. Pacific requests ex parte approval of its proposed Market Trial.

The six BSEs to be introduced by this application represent Pacific's initial introduction of services designed to implement the goals of Open Network Architecture (ONA). The Federal Communications Commission (FCC) developed the ONA concept in its Computer III proceeding.¹ The FCC proposed to allow the Bell Operating Companies (BOCs), including Pacific, to offer enhanced services without creating a separate subsidiary, i.e., without "structural separation." The FCC has allowed that local exchange companies can locate equipment used in providing enhanced services in their telephone company offices and can integrate those

¹ Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), CC Docket 85-229, Phase I, Report and Order, 104 F.C.C. 2d 958 (1986); Memorandum Opinion and Order on Reconsideration, 2 F.C.C. Rcd. 3037 (1987); Order on Further Reconsideration, Released, February 18, 1988; CC Docket 85-229, Phase II, Report and Order, 2 F.C.C. Rcd. 3072 (1987); Memorandum Opinion and Order on Reconsideration, Released February 18, 1988 (appellate review pending).

services into their basic network operations. To avoid the competitive advantage this could give BOCs over other firms, the FCC ordered the BOCs to develop new forms of interconnection to provide competitors with "comparably efficient" arrangements and other safeguards. The ONA framework is a part of several different nonstructural safeguards adopted by the FCC in its Computer Inquiry III rules to allow the BOCs to provide enhanced services without structural separation. These safeguards include rules for allocating costs to regulated and unregulated services (FCC Part 64), network information disclosure requirements, and rules for the handling of Customer Proprietary Network Information (CPNI). The ONA plans are intended to provide a comprehensive scheme for allowing enhanced service competitors to gain access to current and evolving network functions useful for those competitors' services. When approved, the ONA plans provide "permanent" relief from the structural separation requirements of Computer Inquiry II. Comparably Efficient Interconnection (CEI) plans can also be filed as interim measures to allow a BOC to obtain service-by-service approval of relief from structural separation on a demonstration that network functions specific to each service are available on a nondiscriminatory basis. Thus, the FCC ordered that the BOCs develop and file plans to provide ONA.

ONA and CEI are intended to serve two principal goals of the FCC: to promote the development of enhanced services and to provide safeguards against anticompetitive behavior by the BOCs. Through CEI and ONA, one of the FCC's strategies is to require the BOCs to unbundle the bottleneck functions or BSEs, needed by enhanced service competitors into individual building blocks or BSEs, and to provide these BSEs on the same terms and conditions to competitors as well as its affiliated enhanced service operation. This unbundling is intended to assure competitors access to any network function they need while paying only for the functions they need. The legal and regulatory background to the FCC's Computer

Inquiry III and the ONA framework is subject to considerable uncertainty. This Commission has joined with a number of other parties in appealing the action of the FCC in preempting state regulation of enhanced services and prohibiting structural separation rules for the BOCs. This review is currently pending before the United States Ninth Circuit Court of Appeals, and its outcome could have a major impact on the scope of authority of this Commission over intrastate enhanced services policies.

In addition, the CEI and ONA rules of the FCC are yet to be fully defined much less fully implemented, and as a result, are subject to additional uncertainty. Finally, the participation of the BOCs in the provision of enhanced services, whether on a separated or unseparated basis, has been subject to restrictions imposed by the United States District Court for the District of Columbia under the AT&T Consent Decree. These restrictions have been partially lifted by that court (Consent Decree Court) in recent decisions, but the Court retains some jurisdiction over antitrust and other public interest matters pertaining to enhanced services. A description of the six BSEs at issue in this application will be discussed in the section to follow.

Five timely protests under Rule 8.1 et seq. of our Rules of Practice and Procedure were filed by California Bankers Clearing House Association (CBCHA), MCI Telecommunications Corporation (MCI), Telephone Answering Services of California, Inc. (TASC), US Sprint Communications Company and Telenet Communications Corporation (Sprint/Telenet), and Toward Utility Rate Normalization (TURN). In addition, a letter dated August 17, 1988, was received from Telecommunications Association (TCA) supporting the protest of CBCHA. All protestants object to ex parte treatment of this application.

Pacific responded to all of the above protests. On August 16, 1988, Pacific responded to the protests of MCI and CBCHA. On August 22, 1988, Pacific responded to the protests of

Sprint/Telenet, TURN, and TASC. By letter dated August 26, 1988, Pacific objects to the Commission's consideration of TCA's August 17, 1988 letter, characterizing it as a late-filed protest. However, Pacific did respond substantively to the issues raised in TCA's letter.

On September 1, 1988, the Division of Ratepayer Advocates (DRA) filed comments on Pacific's application concurring in ex parte treatment so long as certain conditions were met. Those conditions will be discussed in a later section of this decision.

Description of the Proposed Market
Trial Introducing Six BSEs

Under Pacific's proposal, the six BSEs, described in detail below, will be offered to enhanced service providers (ESPs) who, in turn, will use the BSEs in the provision of their own service offerings to end users.

The BSEs can be differentiated by the type of access associated with them. The first four BSEs discussed below are associated with end user access to a Pacific central office. The ESP must take an order from its end user and place that order with Pacific. Pacific proposes that the ESP be responsible for all ordering including disconnects, for customer education and for the payment of all BSE charges.² (Pacific's application p. 7.)

The last two BSEs (Nos. 5 and 6) are associated with ESP access. According to Pacific, both require that a series 3002 data channel be provided between the ESP and the central office serving the ESP. Pacific contends an ESP (or the end user) must also order a multiline hunt group arrangement available through Pacific's existing exchange tariffs for the last BSE, the Forwarded Call

² Currently, the same functions performed by these four BSEs are directly available to end users through existing Pacific tariffs, i.e., COMMSTAR offerings.

Information--Multiple Users, to function. The ESP must be preselected by the end user. The six BSEs are summarized here:

1. Call Forwarding Busy Line

The service allows the ESP to have its customers' (the end users) incoming calls redirected to the ESP's number when its customers' telephones are busy.

2. Call Forwarding Don't Answer

This service allows the ESP to redirect its customers' incoming calls after a specific number of rings to the ESP's number.

3. Call Forwarding Busy Line/Don't Answer

This is a combination of Services 1 and 2 above. Calls are forwarded to the ESP's number when either the busy or don't answer condition is encountered.

4. Message Waiting Indicator

This service allows the ESP's customers to receive an audible stutter dial tone on their lines. The stutter dial tone indicates to the customer that messages are waiting with the ESP. The customer then calls the ESP for the messages.

5. Activate Message Waiting Indicator

The service permits the ESP to activate and deactivate the stutter dial tones on each of its customer's lines. Once the customer gets its messages from the ESP, the ESP sends Pacific a signal to turn off the stutter dial tone on the customer's line until the next time messages are stored for that customer.

6. Forwarded Call Information-Multiple Users

This service passes information about the call forwarded to the ESP. It provides delivery of the calling number, the called number, the reason the ESP received the call, and identifies the multiline hunt.

group assigned to the end user's line. The BSE also allows the ESP to turn on the stutter dial tone.

Pacific contends that its proposed Market Trial conforms with the guidelines set out in the Technology Test and Market Trial Guidelines adopted by this Commission in Resolution T-11083, dated December 3, 1986. Pacific selected 30 central offices in four LATAs to participate in its Market Trial. The LATAs are Los Angeles, Sacramento, San Diego, and San Francisco. Pacific chose these locations based on facility capacity, anticipated demand, and to maintain contiguous geographical areas with each of the Market Trial LATAs (Pacific Application p. 5).

Pacific proposes to use four different price points (one for each LATA) for the length of the Market Trial in order to evaluate assumptions made in forecasting market demand for these services. Pacific states that the trial prices combine differently the nonrecurring charges and monthly rates to recover the costs of providing the six BSEs. At or before the conclusion of the Market Trial, Pacific intends to compile the market intelligence it gains in order to set prices for the permanent BSE tariffs to be filed by Advice Letter. Pacific believes its proposal meets the intent of the Commission's Market Trial definition: "[t]he trialing of a service that provides potential customer benefit in a limited marketplace to determine (1) end user willingness to pay and (2) actual demand vs. expected demand." (Resolution T-11083, p. 4.)

Pacific requests to offer these six BSEs through a two-year provisional tariff. Pacific intends to submit interim tracking results to the Commission Advisory and Compliance Division (CACD) every six months starting nine months after the trial's effective date until the conclusion of the trial, in compliance with our Market Trial guidelines. Pacific states it will notify the Commission, in writing, if it intends to modify or cancel the

trial. Pacific claims that any ESPs participating in the trial will be given "adequate" written notice before the trial is modified or canceled. (Pacific's Application p. 6.)

**Issues Raised By Protestants
And Pacific's Responses**

All the protestants object to ex parte treatment of this application, instead requesting outright denial of the application or hearings on certain issues. Since several protestants raised the same concerns, we will summarize their positions by topic rather than by party. Pacific's responses to the protestants' arguments will also be summarized by topic. In addition to these topics, we will address in our discussion protestants' concerns not rebutted by Pacific.

**Is the market trial premature given the
status of Pacific's ONA plan at the FCC?**

Sprint/Telenet, MCI, CBCHA, and TURN all argue that it is premature for this Commission to consider this application because Pacific's ONA plan has not yet received FCC approval. Protestants expect that the FCC will require some modifications of, or reject in its entirety, Pacific's ONA plan given the "intense criticism" levelled at it. (MCI Protest, p. 4.) The protestants argue that since Pacific must comply with guidelines ultimately adopted by the FCC, the provisional tariff requested here could be inappropriate if changes to Pacific's ONA plan are ordered. The protestants urge that the Commission refrain from acting on Pacific's application until the FCC issues a final decision in its proceeding on Pacific's ONA plan.

Similarly, protestants express concern that a "piecemeal" approach to ONA issues and BSE provision will allow Pacific to avoid effective regulatory review and prevent this Commission from educating itself regarding broader policy issues involved with these services. CBCHA acknowledges that it does not have a tremendous interest in these specific BSEs, but is terribly

concerned that future BSEs, in which it has a great interest, will likewise be handled in a piecemeal fashion. (CBCHA Protest, pp. 3-4.)

Pacific denies that its filing is premature. Pacific argues there is no requirement that this Commission wait until the FCC has approved its ONA plan. Pacific points out that the FCC specifically established a procedure for the offering of enhanced services by the BOCs prior to the approval of ONA plans. The FCC required each BOC to first implement CEI for that service pursuant to an approved plan.³ Pacific's CEI plan for voice mail services has been approved by the FCC. Further, Pacific asserts that any changes ordered by the FCC to Pacific's ONA plan will take into account the fact that BOCs will have introduced BSE offerings in their respective state jurisdictions, as was contemplated in the ONA plans themselves. (Pacific's Response to MCI and CBCHA, p. 3.)

Finally, Pacific states that MCI has criticized the delay in introducing BSEs before the FCC. Pacific points to the inconsistency of MCI's position on the one hand, complaining about delay, and on the other hand, causing delay by filing its protest.

Should the prices for the services in
the Market Trial be required to be cost-based?

Sprint/Telenet, MCI, CBCHA, and TURN all object to the proposed differentiated pricing of the BSEs in the Market Trial. The protestants believe the prices should be cost based. TURN expresses concern that some of the BSEs will be offered below cost because the proposed price schedules differ so widely from the currently tariffed rates for essentially the same services. TURN believes that Pacific should prove that all the BSEs will not be

³ Amendment of Section 64-702 of the Commission's Rules and Regulations Third Computer Inquiry, Report and Order, 104 F.C.C. 2d 958, para. 115 (1986).

subsidized by other ratepayers before the Commission approves the Market Trial.

The other protestants are also adamant about cost-based pricing for the BSEs, but for different reasons. For example, MCI believes that the price variations proposed for the Market Trial will allow Pacific to manipulate market demand and therefore the outcome of the trial to achieve results that will give an advantage to its own enhanced service products. Likewise, Sprint/Telenet speculate that one of Pacific's Market Trial objectives might be to measure how high prices need to be set to squelch competitive demand.

The protestants urge that Pacific must employ cost-based pricing for its BSEs. Otherwise, they contend, Pacific will have unwarranted leverage over a competing ESP's costs, and could use that leverage in a discriminatory and anticompetitive manner.

Pacific responds by pointing out there is no FCC requirement to use cost-based pricing for BSEs. In fact, Pacific argues that the FCC has acknowledged that the states will be determining pricing issues for ONA services. Pacific refers to a recent FCC recognition of the role of the states in approving the rates and other terms of particular CEI offerings and BSEs.⁴ Pacific concludes that there is no requirement that the Market Trial BSEs be priced solely based on cost.

Should the BSEs be available
to ESPs only?

MCI and Sprint/Telenet, and TCA in its letter, object to what appears to be a restriction on the availability of the BSEs to enhanced service providers only. MCI expresses a concern that as

⁴ Amendment of Sections 64.702 of the Commission's Rules (Third Computer Inquiry), Memorandum, Opinion and Order, CC Docket No. 85-229, FCC 87-102, Released May 22, 1987, para. 133).

an interexchange carrier it will encounter difficulty obtaining BSEs even in support of enhanced services it might provide. (MCI Protest, p. 9.) Sprint/Telenet questions why there is any need to isolate the applicability of the BSE tariffs to ESPs, and suggests that Pacific's long-run intention as expressed in its FCC ONA plan filing is to require ESPs to move from relatively inexpensive basic business line rates to higher charges for exchange access. (Sprint/Telenet Protest, pp. 15-16.)

In its response to MCI, Pacific essentially acknowledges through reference to its proposed tariff that BSE purchasers will be limited to ESPs, but argues that MCI's concern is "refuted by the fact that to the extent MCI is an ESP...it may purchase BSEs." (Pacific Response to MCI, p. 5.) Pacific further argues that it needs to limit the availability of BSEs to ESPs so that it can meet its nondiscrimination reporting requirements for the FCC, and so that it can determine whether it is meeting ESP's needs. (Pacific Response to TURN, et al., p. 11.)

Should Pacific be allowed to terminate
or modify the Market Trial on its
own initiative?

Protestants raise concerns about the timing and duration of the Market Trial, and specifically object to the anticompetitive potential of Pacific having the discretion to discontinue or change the terms of the trial at its own initiative. (CBCHA Protest, p. 6.) TURN suggests that Pacific should be required to specify its notification plans for ESPs in the event Pacific decides to terminate the trial before the scheduled date.

Pacific responds by stating that the latitude to modify or cancel the trial is specifically permitted by the Guidelines for Conducting Technology Tests and Market Trials.

Will the market intelligence gleaned by Pacific as a BSE provider be available to Pacific enhanced services personnel, resulting in an unfair competitive advantage?

CBCHA and other protestants argue that Pacific will have an unfair competitive advantage over other ESPs. Pacific will have knowledge both as to the total demand for its BSE products as well as the total demand for its own enhanced services. With this information, Pacific will be able to deduce the relative success or failure of its competitors' own market trials, if and to the extent such competitors actually use the Market Trial BSEs.

Pacific responds that it will not share any information related to nonaffiliated ESP operations with its own ESP. However, Pacific gives no details of how this will be prevented.

Will Pacific be the primary beneficiary of the "single central office" in its Market Trial?

TASC asserts that the six BSEs will principally be of use to Pacific's ESP affiliates because of the following proposed tariff regulation:

"A customer's end user can only call forward to an ESP's seven (7) digit number within the same serving central office." (Proposed Tariff Section 5.11.1 c.1 b(6).)

In TASC's view, this would require a participating ESP, who wished to provide voice storage and retrieval services throughout an entire city, would have to either (1) establish some sort of physical presence within the serving area of each of the central offices located within that city or (2) bear the expense of establishing such a presence through the installation of inter-office direct inward dialing (DID) facilities trunked to the physical location of the ESP.

TASC alleges that the only potential ESP already possessing a physical presence in all the central offices in the state is Pacific. Other ESPs would be forced to go the second

route of installing DID numbers at considerable expense to themselves. (TASC Protest, pp. 3-4.) Thus, TASC concludes that Pacific is the primary beneficiary of the single CO provision of the above-quoted tariff.

Pacific acknowledges that TASC raised some valid concerns regarding the technical limitations of the BSE offering. However, Pacific argues that these first steps of ONA progress must be taken. Pacific states it will continue to work with ESPs to develop and make available functions, features, and services wanted and needed by ESPs. Further, Pacific claims TASC is mistaken in its belief that Pacific already has a presence in all central offices as an ESP. Pacific's voice mail ESP must either purchase and place voice mail machines in each central office, or, purchase the same inter-central office DID facilities to its physical locations at the same tariffed rates other ESPs will pay. Finally, Pacific points out that the FCC has already approved Pacific's CEI plan to offer its own voice mail service. (Pacific's Response to TURN, Sprint/Telenet, and TASC, pp. 12-13.)

Does Pacific's proposed Market Trial
meet the guidelines laid out in
Commission Resolution T-11083?

Several protestants argue that the Commission's guidelines for conducting technology tests and Market Trials, as adopted by Resolution T-11083, are not complied with by Pacific's proposal. Protestants argue that offering these BSEs in four of the largest LATAs does not meet the "small scale" requirement of the Guidelines.

Additionally, protestants argue that Pacific fails to specify any trial or cost objectives, nor make any effort to outline criteria for measuring their success in meeting those objectives. Protestants claim that no guidance is provided for assessing the results of this costly and wide-ranging trial.

Pacific responds that by limiting the Market Trial to 30 central offices in those four LATAs, a "small scale" will result. Pacific expects only one or two ESPs to participate in the trial at each central office, and there may be some offices with no participation. Pacific claims it used 30 central office locations in order to get a sample of between 30 and 60 ESPs. (Pacific's Response to TURN, Sprint/Telenet, and TASC, p. 8.)

Pacific argues it has stated its objectives for the Market Trial in sufficient detail. Pacific's objectives are: to gather market information concerning customer response to the BSEs, to quantify and analyze demand for the BSEs, and to use that information to set reasonable prices for the BSEs that meet the principles set forth in Pacific's ONA plan:

1. Prices should be set to stimulate the ESP marketplace.
2. Prices should be set to optimize market impact of new service introductions on the end user.
3. Prices for access arrangements and BSEs must cover their relevant costs including an authorized rate of return.
4. Prices should be set to minimize the risk to all parties of BSE-related investment by reflecting the optimal serving arrangements.
5. Access arrangements and BSE prices should not disrupt the existing subsidy recovery mechanism. (Pacific's Response to TURN, Sprint/Telenet, and TASC, pp. 9-10.)

Pacific intends to submit cost and tracking data to CACD at six-month increments. In Pacific's view, the Trial Guidelines are being met in all respects by its proposed Market Trial for six BSEs.

Should Pacific share responsibility with
ESPs for educating and protecting consumers
from service and billing problems?

While under this application, the ESPs will be acting as agents for end users in ordering Pacific's services, TURN urges this Commission not to absolve Pacific of its ultimate responsibility to the ratepayer. TURN believes the ESP should not be solely responsible for disconnects, customer education, and payment of all BSE charges as stated in Pacific's application. (Application, p. 7.)

In its Response, Pacific indicates it will share the responsibility for consumer education and protection. Pacific claims it will deliver a "customer education package" to the ESPs; send end users confirmation letters about the BSEs ordered on their behalf by ESPs; and disconnect an ESP service if the end user so demands, although Pacific hopes that ESPs will place disconnect orders when necessary. (Pacific's Response to TURN, et al., pp. 13-14.)

DRA's Position

DRA filed comments September 1, 1988, supporting Pacific's application for ex parte relief to offer the six BSEs through a Market Trial. Despite concerns raised by protestants, DRA believes the Commission should endorse the ex parte Market Trial in order to encourage new telecommunications technologies and service offerings.

DRA argues that comprehensive scrutiny of costs behind a Market Trial is not essential. DRA notes that Commission staff has reviewed cost support data submitted by Pacific, finding the costs and charges reasonable in light of the recurring and nonrecurring charges associated with the Market Trial. DRA does not believe it is necessary for the Commission to hold hearings to determine the pricing of these six BSEs as part of the Market Trial. DRA points out that the resulting data on revenues, costs, and volumes from a

successful Market Trial will enable Pacific to price its products over costs to meet the concerns of the Commission staff and TURN. DRA argues that the data will also enable Pacific to determine a price the ESP market can bear.

DRA rejects the arguments of several protestants that the Commission should wait until the FCC approves Pacific's ONA plan. Like Pacific, DRA maintains that the FCC has clearly stated that it does not intend to establish rates for or the method of regulating intrastate BSEs. Although the states and the FCC disagree over other aspects of state regulation of enhanced services, DRA contends the states' authority over intrastate BSEs is clear.

In its September comments, DRA requests that the Commission attach one condition to its ex parte approval of this application. That condition was DRA approval of a tracking plan to monitor the Market Trial. For example, an adequate tracking plan will enable the Commission staff to monitor whether Pacific's own ESP group receives preferential treatment over other ESPs. By letter dated October 17, 1988, DRA withdrew its request that a tracking plan be approved by DRA as a condition of its authority to proceed with the Market Trial. Since the filing of its comments, DRA and Pacific have reached agreement on the procedures and format of a tracking plan.

Discussion

As a preliminary matter, we must resolve whether TCA's letter received August 26, 1988 is a late-filed protest and if so, whether the arguments raised in the letter should be considered by us.

TCA couches its letter as one of support of the protest of CBCHA, rather than requesting permission to file a late protest of its own. Pacific is correct that, as a protest, TCA's letter is untimely and must be rejected on procedural grounds. Since TCA merely repeats the objections and arguments found in other protests and considered in this decision, TCA suffers no actual harm in

rejecting its letter as its own protest. We will accept the letter as a joinder in the protest of CBCHA.

We now must turn to the timely filed protests. Ordinarily, we are disinclined to go forward with ex parte treatment of an application when several protests are filed. However, our rules do not guarantee protestants the right to hearings; it is a matter within our discretion. We exercise that discretion cautiously here.

In most instances, we believe Pacific has adequately responded to the concerns raised by the protestants. Likewise, we are comforted by DRA's endorsement of ex parte approval of this application. We will deny the protests as far as requests for hearings, but will condition our approval today on several conditions aimed at taking into account the valid concerns of the protestants.

As to the issue of whether the filing is premature, we agree with Pacific and DRA and find that this application is ready for decision. As Pacific correctly points out, an application to tariff BSEs which will be used by Pacific's own voice mail operation is consistent with authority granted by the FCC in approving Pacific's voice mail CEI plan. The only legitimate issue of concern related to federal approval might be that any authority granted under this application not exceed the scope of services which were included in the CEI approval.

Likewise, the concern of some protestants that approval of this application will result in a piecemeal approach can be relieved through clarification on our part. Protestants raise a legitimate concern that BSE tariffing eventually be considered in the context of broad policy issues surrounding enhanced services and ONA. We fully intend to address such policy issues in a broad policy investigation concerning enhanced services which we will begin within the next several months. In the interim, however, we believe that it is fully consistent with our long-term policy

considerations--and indeed furthers our eventual investigation--to authorize a limited market trial to provide the Commission with some experience on which to base a comprehensive yet realistic set of policies for enhanced services. We emphasize that we will not use any specific aspect of the trial structure as a precedent for "permanent" treatment of BSEs, and that all Commission policies regarding enhanced services and the FCC's Open Network Architecture scheme will be "up for grabs" when they are explicitly considered in future regulatory framework proceedings. The trial terms and conditions will be in effect for a maximum of two years, and will be subject to termination or modification prior to that time to conform with policies established by the Commission during that period. In addition, the Commission explicitly reserves the right to make changes in the trial authority granted here based on developments before the FCC, the United States Ninth Circuit Court of Appeals, or the Consent Decree Court.

The lack of cost-based pricing is another area of concern to several protestants. We agree with Pacific and DRA that this Commission has the authority to determine appropriate rate levels for BSEs tariffed at the state level and is not compelled to adopt cost-based or any other specific pricing policy. Nevertheless, we wish to emphasize that we are interested in promoting the development of innovative new services. When we eventually set out our policies for enhanced services, our interest in protecting basic ratepayers through rates which adequately cover cost will be balanced with a consideration of the effects of pricing on encouraging valuable uses of the network. In this regard, the particular price levels authorized for this trial should not be regarded as any indicator of the price-cost relationships which may eventually be adopted by the Commission, but rather will be used to eventually provide us with some additional insight into how to assess the cost feasibility of BSEs in immature and highly uncertain markets for new services.

As to the issue of whether only ESPs may purchase BSEs, the perspectives of both Pacific and protestants have merit. Pacific cites some legitimate needs to be able to identify ESPs for reporting and trial results analysis. MCI and Sprint/Telenet, however, raise equally important concerns about the significance of limiting the availability of BSEs to ESPs. There are a number of possible reasons why this Commission may eventually wish to impose restrictions or other special conditions on the availability of BSEs, including consideration of the effects of open arbitraging of different rates for various forms of exchange access. There are several other reasons why we may choose to reject such restrictions, including consideration of the public interest in the development of enhanced services and the difficulty of enforcing limits when the same purchaser may act as an ESP, interexchange carrier, and even end user in various capacities. Since the authority sought is intended to try the availability of new functions and for no other reasons, and since we intend to examine the desirability of purchase limitations in our future investigation, we see no reason to impose any such limitations and to raise such volatile issues at this time. We therefore direct Pacific to modify its proposed tariff to allow anyone, whether ESP or not, to purchase these trial BSEs.

To serve the ESP reporting and demand analysis needs previously mentioned, Pacific is authorized to require purchasers to identify whether or not the intended use of the BSEs is in conjunction with the provision of enhanced services.

We are extremely concerned about protestants' allegations that certain elements of the market trial have the potential to encourage anti-competitive behavior on the part of Pacific. We do not intend that this Market Trial allow Pacific to irreversibly prejudice the competitive relationship of its own ESP operation and other providers through manipulation of the Trial's terms. Accordingly, it is necessary for us to add some conditions to our

approval of Pacific's offering of these first ONA "building blocks."

We are particularly concerned about Pacific's proposal to allow itself the discretion to discontinue or change the terms of the trial at its own initiative. Although we believe that Pacific should appropriately be able to initiate the termination or modification of the trial based on its perception of the needs and interests inherent in the trial design, we recognize the legitimate and serious concerns about anticompetitive potential posed by Pacific's dual role as provider of "bottleneck" basic services and enhanced service competitor. We therefore require Pacific to notify affected parties in advance and obtain explicit Commission approval by the advice letter process prior to implementing any such termination or modification.

Additionally, we wish to ensure that market intelligence gleaned by Pacific as a BSE provider is adequately shielded from Pacific personnel involved with enhanced services. The protestants have raised a legitimate concern here. Pacific does promise, without specifying the entire scope of its planned safeguards, to prevent such unfair access to market intelligence. We require in this order that Pacific file within 5 days and serve on all parties a detailed proposal for safeguarding market intelligence about unaffiliated competitors' businesses. All interested parties may serve comments on CACD within 15 days thereafter. This proposal may be based, in part, on Pacific's FCC filing regarding CPNI, but in any event shall address concerns raised by both competitive and consumer interests. The CACD shall determine when a reasonable and enforceable plan has been developed, and may call for workshops to resolve differences among parties if appropriate.

TASC's concerns regarding the single central office provision in the tariff is also of concern to us. However, we accept Pacific's assertion that its own ESPs will receive no advantage over outside ESPs because of this technical restraint.

We urge Pacific to work with other potential ESPs in developing future BSEs which will meet their needs to promote a competitive environment in California for enhanced services.

Pacific is duly warned that we will be examining the results of this Market Trial on the lookout for any signs of anti-competitive behavior on the part of Pacific. To further this goal, we will order the tracking plan agreed upon by DRA and Pacific served on CACD within five days of this order. The tracking plan will be approved upon receipt of a letter of endorsement from the CACD.

Similar to our serious concern regarding the danger of anti-competitive behavior by Pacific, we view protection of consumer interests as vital for the future growth of the enhanced services market. There is potential for a major expansion in the incidence of consumer problems in light of an increasing number of situations in which consumers will receive communications-based services from third parties, i.e., providers unaffiliated with local telephone companies, with whom they have not previously done business, and to whom conventional utility consumer safeguards do not routinely apply. We emphasize to Pacific and the enhanced service industry our belief in the importance of finding effective ways to prevent abusive practices and to provide recourse for aggrieved consumers in this new business environment.

We believe that it is in the long-term business interests of the industry to assure that adequate protections are available as these new services develop. Our experience with 976 Information Access Service clearly indicates the importance of this principle for all participants and we know through that same experience that we cannot rely completely on industry cooperation. One aspect of this Market Trial which we will watch closely is the nature and incidence of consumer problems. Based in part on the experience gained up to that time, we intend to examine thoroughly in our upcoming investigation into enhanced services the extent to which

this Commission will need to lay out a basic framework of consumer protections.

Pacific asserts it will share in the responsibility for consumer education and protection. We intend to hold Pacific to that commitment. In addition, we order Pacific to track consumer complaints and to report their number and nature on a quarterly basis to the Commission's Consumer Affairs Division. Finally, we order Pacific to add provisions in its tariff requiring ESPs to provide the following notice prominently in all billing for enhanced services using any of the trial BSEs.

"This service is privately provided by [NAME OF ESP]. Complaints regarding billing or service should be directed to [ESP ADDRESS AND TELEPHONE NO.]. Although this service is NOT regulated by the California Public Utilities Commission, the provider of this service does pay for the use of regulated telephone facilities to provide service to you. These regulated facilities are being offered to your service provider on a temporary trial basis. To assist the Commission in evaluating this trial, you are encouraged to inform the California Public Utilities Commission Consumer Affairs Division of any unresolved problems at [CAD ADDRESS AND TELEPHONE NO.]."

We feel compelled to address a further issue closely related to these concerns raised by TURN. We note that Pacific has not requested authority in this application to provide billing services to collect unregulated enhanced services charges from the end user for its own enhanced service operations or for unaffiliated ESPs. As a result, no party has addressed this

issue.⁵ However, we believe the billing issue must be raised in both this application and the enhanced services application (A.88-08-031) pending before us.

In D.87-12-038, which laid out ground rules for access and billing for unregulated 976 services, we noted that:

"In light of the Open Network Architecture (scheme) mandated by the FCC, we anticipate that other third parties seeking access to telephone subscribers will require the local exchange companies to provide access and billing services. The issues of whether access is automatic or not...will be revisited."
(D.87-12-038, p. 28.)

Later, we concluded that the order was:

"...a transition decision in the context of the Commission's ongoing development and adoption of policies regarding access and billing arrangements for all information and enhanced services." (D.87-12-038, p. 33.)

We intend to address the conditions under which we may allow billing for enhanced services on the regulated Pacific bill

5 Pacific's amended FCC CEI plan for voice mail did indicate an intention at that time to bill for its own affiliated voice mail operation. The amended plan also indicated that Pacific did not have any current intention to bill for unaffiliated voice mail providers, although it was willing to consider doing so. The FCC approved Pacific's amended plan with that information regarding its intentions on billing, and declined to require the provision of billing services to competitors or any other conditions on billing at that time. Comments on subsequent CEI plans filed at the FCC, however, have raised substantial controversy regarding the competitive significance of billing. The FCC has recently indicated that it is considering whether the ability of the BOCs to discriminate in offering billing services needs to be addressed in its review of the BOC ONA plans. At least one Bell regional holding company has voluntarily offered to provide billing on a nondiscriminatory basis to all ESPs.

with regard to both the competitive and consumer protection aspects of billing in the course of our upcoming investigation into enhanced services.⁶

As discussed in our companion order today in A.88-08-031, we are concerned about Pacific's billing arrangements for enhanced services. Absent any presentation by Pacific as to how the competitive fairness issues regarding billing should be resolved for enhanced services, we are left to impose an interim approach subject to later reconsideration either on our own motion or at the request of a party. As the decision in A.88-08-031 states, this issue will be heard in that proceeding at the earliest possible opportunity.

We now turn to additional objections of Sprint/Telenet to several specific tariff provisions proposed by Pacific, to which Pacific does not respond. (Sprint/Telenet Protest, pp. 16-18.)

We agree that the tariff language proposed in Section 5.11.1.B which states that BSEs "will only be furnished...where facilities and operating conditions permit" is too vague and open-ended. Pacific is directed to delete this language, but as part of its advice letter filing of tariffs in compliance with this order shall instead insert any specific technical limitations.

Sprint/Telenet's concern with how capacity limitations in particular will be handled is also well-founded. (Sprint/Telenet Protest, pp. 16-17.) As part of its specific technical limitations therefore, Pacific shall indicate the number of "input/output

⁶ On occasion we may, for convenience, refer to enhanced services, like 976 information provider services as "unregulated" services. The regulatory status of enhanced services is, of course, at issue in the Computer Inquiry III appeal. Furthermore, we mean "unregulated" loosely in the sense that we do not comprehensively set prices and all terms and conditions of the service. We may still, however, set some limited terms and conditions for competitive or consumer protection purposes.

ports" installed as of the effective date of this order and which are available for this trial, and consequently the number of trial participants that may be accommodated in each central office within existing facilities. Service under this trial authority shall be limited to the stated port capacity, unless modified through an additional advice letter filing. In addition, Pacific shall indicate in its compliance filing how it will allocate port capacity in the event that demand is greater than availability.

Sprint/Telenet's objection to proposed Tariff Section 5.11.1.c.2.b.2 which requires the prior approval by Pacific of ESP advertising is also reasonable. Although Pacific has a legitimate interest in preventing ESPs from implying any endorsement by Pacific of unaffiliated providers' services, the proposed provision is unreasonably broad for this purpose. We find the approval of "language" from which Pacific's name might be implied to be particularly intrusive as it would appear to require even the mention that a competitor's service involves call forwarding, for example, be subject to prior approval. We therefore order Pacific to delete the word "language" from this tariff section.

We dismiss the other objections to specific tariff provisions at this time, and determine that the remaining tariff language is reasonable given Pacific's service quality obligations. Should trial participants find the actual application of any provision to be abusive, however, our existing complaint process remains available to resolve such disputes. We also reserve the right to revisit our approval of these provisions should a pattern of abuse develop.

In conclusion, we stress that our handling of these first six BSEs ex parte in no way predisposes the issue of how future ONA-related offerings will be handled. All protestants have the right to participate in the eventual hearings which will encompass broader ONA issues in a future proceeding.

Findings of Fact

1. Pacific adequately responded to some of the issues raised in the protests.

2. Hearings are not necessary in this case because of the conditions we have imposed on the requested authority.

3. TCA's letter was too late to be accepted as an independent protest, but will be viewed as a joinder in CBCHA's protest.

4. The Commission need not wait until the FCC has approved Pacific's ONA plan to authorize this Market Trial for six BSEs under a provisional tariff.

5. The Commission reserves the right to make changes in the Market Trial authority granted here due to developments before the FCC, the United States Ninth Circuit Court of Appeals, or the Consent Decree Court.

6. The particular price levels authorized in this Market Trial are not an indicator of the price cost relationships which may be eventually adopted by the Commission for BSEs.

7. The protestants' concerns that the proposed Market Trial may have the potential to encourage anti-competitive behavior on Pacific's part, require the Commission to impose certain conditions on the authority granted by the decision.

8. Pacific is directed to allow anyone, whether ESP or not, to purchase these trial BSEs since the purpose of the Market Trial is to test demand for the BSEs.

9. Pacific should require purchasers to identify whether or not the intended use of the BSEs is to provide enhanced services.

10. As raised by the protestants, Pacific's proposal to allow itself the discretion to discontinue or change the terms of the trial at its own initiative has anti-competitive potential.

11. It is reasonable to require Pacific to notify affected parties in advance and obtain explicit Commission approval by

advice letter prior to implementing any termination or modification of the trial.

12. Pacific gives no details regarding safeguards it will employ to shield market intelligence on the BSEs from its personnel involved with enhanced services.

13. The concerns of the protestants regarding access to market intelligence require the filing of a detailed proposal for safeguarding market intelligence by Pacific within 5 days of this order with service on all parties.

14. Pacific and DRA have not served their agreed upon tracking plan on all parties to this proceeding.

15. Protection of consumer interests is vital for the future growth of the enhanced services market.

16. Pacific is required to track consumer complaints and report their number and nature to the Commission's Consumer Affairs Division.

17. Since Pacific made no mention of providing billing services in its application, no party addressed the issue in its protest.

18. The proposed tariff language in Section 5.11.1.B, stating that BSEs "will only be furnished...where facilities and operating conditions permit" is too broad.

19. Pacific's proposed tariff section regarding prior approval of ESP advertising is overbroad as far as requiring approval of "language from which Pacific's name might be implied."

Conclusions of Law

1. Ex parte treatment of this application is reasonable and it should be granted conditioned on the requirements set forth in the ordering paragraphs below.

2. TCA's letter of August 17, 1988, should be rejected as a late-filed protest.

3. An interim treatment for Pacific's billing has been decided today in A-88-08-031.

O R D E R

IT IS ORDERED that:

1. Pacific Bell (Pacific) is granted ex parte authority to proceed with a Market Trial for six Basic Service Elements (BSEs) under a two-year provisional tariff, conditioned on the following:

- a. Pacific shall allow anyone to purchase BSEs.
- b. Pacific shall require purchasers to identify whether or not the intended use of the BSEs is to provide enhanced services.
- c. Pacific shall notify affected parties in advance and obtain explicit Commission approval through the advice letter proposal process prior to implementing any termination or modification of the Trial.
- d. Pacific shall file a detailed proposal for safeguarding market intelligence from Pacific's enhanced services personnel regarding this Market Trial with the Commission Advisory and Compliance Division (CACD) within 5 days of this order, serving all interested parties. All interested parties may submit comments to CACD within 15 days thereafter. CACD shall determine when a reasonable plan has been developed and may hold workshops if appropriate.
- e. Pacific shall serve the tracking plan agreed to with Division of Ratepayer Advocates on all parties and CACD within 5 days of this order. The tracking plan will be approved upon receipt of a letter of endorsement from the CACD.
- f. Pacific shall track consumer complaints and report their number and nature on a quarterly basis to the Commission's Consumer Affairs Division.
- g. Pacific shall add provisions to its tariff requiring enhanced service providers to prominently provide the following notice in

all billing for enhanced services using any of the Trial BSEs.

"This service is privately provided by [NAME OF ESP]. Complaints regarding billing or service should be directed to [ESP ADDRESS AND TELEPHONE NO.]. Although this service is NOT regulated by the California Public Utilities Commission, the provider of this service does pay for the use of regulated telephone facilities to provide service to you. These regulated facilities are being offered to your service provider on a temporary trial basis. To assist the Commission in evaluating this trial, you are encouraged to inform the California Public Utilities Commission Consumer Affairs Branch of any unresolved problems at [CAB ADDRESS AND TELEPHONE NO.]."

- h. Pacific shall modify its tariff provisions in 5.11.1.B to state any specific technical limitations regarding the provision of BSEs. Regarding capacity limitations Pacific shall indicate the number of "input/output ports" installed as of the effective date of this order and which are available for this trial. Pacific shall also indicate the number of trial participants that may be accommodated in each central office.
- i. Service shall be limited in this Market Trial to stated port capacity and Pacific shall include in its tariff a method for allocating port capacity in the event demand is greater than availability.
- j. Pacific shall delete the word "language" from its proposed tariff section 5.11.1.c.2.b.2.

2. When all of the conditions provided by Ordering Paragraph 1 have been met, Pacific shall file a compliance tariff filing with service on all protestants. That compliance filing shall be effective upon resolution by the Commission.

This order is effective today.

Dated NOV 9 1988, at San Francisco, California.

STANLEY W. HULETT
President

DONALD VIAL
FREDERICK R. DUDA
G. MITCHELL WILK
JOHN B. OHANIAN
Commissioners

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

Victor Weiss
Victor Weiss, Executive Director