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Decision 88 11 027 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) for approval, to the extent required or permitted by law, of its plan to provide enhanced services.

Application 88-08-031 (Filed August 15, 1988)

NOV 11 1988

INTERIM OPINION

In this interim decision, we grant Pacific Bell (Pacific) interim authority to provide enhanced services as requested in its Emergency Motion for Immediate Interim Authority to Provide Voice Mail and Protocol Conversion Services (Emergency Motion), subject to several conditions outlined below.

Background

In the above-entitled application, Pacific requests approval of its plan to provide enhanced services within the Federal Communications Commission's (FCC's) Computer Inquiry III framework.¹ Pacific specifically requests interim authority to provide enhanced services under its FCC comparably efficient interconnection (CEI) plans or requests for waiver, and final approval of the application to provide such services under its FCC open network architecture (ONA) plan.

The legal and regulatory picture surrounding the FCC's Computer Inquiry III framework is the subject of 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 Bell Operating Companies (BOCs). This

¹ See the companion decision being issued today in Application (A.) 88-07-011 for a brief discussion of the FCC's Computer Inquiry III framework.

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.² 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 (Consent Decree Court) under the AT&T Consent Decree. These restrictions have been partially lifted by that court in recent decisions, but it retains some jurisdiction over antitrust and other public interest matters pertaining to enhanced services.

Under the FCC's preemption of state regulation of enhanced services, this Commission's authority with regard to such services is unclear at this time. It appears that under the status quo the Commission may have the authority to determine the accounting treatment of enhanced services, including whether or not revenues and expenses are included in utility revenue requirements. In addition, the Commission may be able to prescribe "non-structural safeguards" as long as they are not inconsistent with the FCC's provisions. The Commission may also specify terms and conditions regarding the price and usage of basic network services which underlie the provision of intrastate enhanced services. Finally, the Commission may wish to prescribe additional provisions to address areas not covered by the FCC rules, e.g., billing and other consumer protection measures.

In essence, Pacific requests interim authority to offer certain enhanced services while the Commission deliberates on its

² People of the State of California v Federal Communications Commission, Case Nos. 87-7230, et al., Ninth Circuit Court of Appeals.

requirements in these areas. Pacific pledges to follow the FCC's competitive safeguards during the period of interim authority and proposes to place the revenues and expenses in its "above-the-line" revenue requirement. It suggests that final resolution of the Commission's policy on ratemaking ("above-the-line" or "below-the-line") treatment for enhanced services would be deferred to later consideration by placing revenues and expenses in tracking accounts.

Pacific's Emergency Motion

On October 21, 1988 Pacific filed an Emergency Motion to expedite action on this application. Pacific alleges it has customers waiting to subscribe to both its voice mail and protocol conversion services and will face competitive harm while "awaiting regulatory approvals that its competitors do not seek or obtain prior to marketing their services in California." (Pacific's Emergency Motion, p. 2.) Pacific represents that three of the seven protestants to its application have agreed to sign a stipulation concerning interim approval of enhanced services attached to its motion.

At a prehearing conference (PHC) previously set for October 28, 1988 in this application the assigned Administrative Law Judge (ALJ) asked all the protestants to present their positions regarding Pacific's motion. ✓

No party present at the PHC opposed Pacific's motion for interim authority, although several parties declined to sign Pacific's proposed stipulation. Counsel for the Rueben H. Donnelley Corporation (Donnelley), an interested party, had not seen the motion and requested time to review it and file a response if necessary. The ALJ ruled that Donnelley or any other party could file responses by November 2, 1988. The ALJ announced the Commission's intention to place a decision granting interim authority on the November 9, 1988 Commission conference agenda. No party present objected to that procedure.

On November 2, 1988 Pacific served by express mail all appearances from the PHC who had not been served a copy of Pacific's Emergency Motion. Pacific was instructed by the ALJ to include in its cover letter that responses by these parties to the Emergency Motion would be accepted no later than November 7, 1988.

By letter dated November 7, 1988 Donnelley informed the ALJ it did not oppose Pacific's motion, reserving its rights to challenge Pacific's views on ratemaking of enhanced services in I.87-11-033.

Discussion

We are interested in promoting the development of valuable new services, including those classified as enhanced services. We are convinced, based on representations at the PHC by Pacific, the Division of Ratepayer Advocates, and most protestants to the underlying application, that we can grant interim authority pursuant to Pacific's Emergency Motion without prejudicing a careful consideration of important policy issues at a later date.

There should be no mistaking this grant of interim authority as a sign that we take lightly the issues posed by the request for final approval in this application. The ratemaking treatment proposed by Pacific, in particular, will be subject to extensive consideration by the Commission.³

³ By ALJ ruling at the October 28, 1988 PHC, the Commission indicated that it expects to resolve the fundamental issue of whether enhanced services will be treated above the line or below the line in Phase II of I.87-11-033. Pursuant to Decision (D.) 88-08-024 dated August 10, 1988 the ratemaking treatment of enhanced services will be considered in conjunction with the general issue of how new services should be treated in LEC regulatory frameworks. We anticipate that in further action in this proceeding, A.88-08-031, we will address any more specific issues regarding enhanced services accounting treatment and cost allocation methodology that are not resolved in the policy foundation laid down in a Phase II decision.

We do not intend to determine the issue of above- or below-the-line treatment of enhanced services at this time. The only authority we grant at this time is for Pacific to institute separate tracking or memorandum accounts recording the complete research, development, deployment, operating and maintenance costs, and revenues of its voice mail and protocol conversion services. The authority granted today is conditioned on the approval of the format of the memorandum accounts by the Commission's Advisory and Compliance Division (CACD). We reserve the right to alter or add to these tracking procedures in our grant of final authority at a later date.

While the Emergency Motion asks for immediate interim authority for only voice mail and protocol conversion services, the application refers to other enhanced services that Pacific proposes to offer at a later date. We wish to preserve our options with regard to the appropriate treatment of these additional enhanced services as well. Accordingly, we will order Pacific to institute separate tracking or memorandum accounts for each additional enhanced service for which it begins, or has begun, planning, research, or development.

Since the issue of our ability to regulate Pacific's enhanced services is unresolved, this interim authority to set up memorandum accounts is not an endorsement of any of Pacific's proposed enhanced services offerings. Pacific proceeds with these offerings at its own financial risk. The memorandum accounts will allow Pacific to proceed with some enhanced services offerings without prejudicing our ability to determine the appropriate accounting treatment for enhanced services after all parties have had an opportunity to litigate their positions on that issue. We retain the option to place all enhanced services' costs below the line even though we authorize these memorandum accounts. We need not make a finding of imprudence on Pacific's part to place costs tracked in memorandum accounts below the line. The determination

of whether these services will be treated above or below the line is a policy question which will not turn solely on whether the funds have been prudently spent, and which indeed may be resolved without a consideration of prudence.⁴

Finally, we reserve the right to address additional issues or make changes in the authority granted in this decision should circumstances change due to action by the FCC or the federal courts.

Billing Issues

We note one further set of issues that must be addressed in this grant of interim authority. Information Providers Association (IPA), one of the protestants to this application, raises the question whether Pacific will be billing end-users for its own enhanced services in the same bill used for its regulated services. IPA alleges that Pacific will have "an enormous competitive advantage" over other enhanced service providers if it bills for itself and not for other providers. As we note in our companion decision on A.88-07-011, this issue has become controversial at the FCC and will likely be addressed soon in deliberations there.

As expressed in its CEI plan for voice mail, Pacific intends to use its regulated telephone bill to collect charges for enhanced services. As compensation for that service, Pacific's voice mail operation would be allocated costs based on the FCC's Part 64. We have a number of concerns with this approach.

⁴ For example, we may decide as a matter of general policy that all unregulated enhanced services shall properly be excluded from ratemaking accounts. Such a determination might be made without reference to any examination of specific enhanced services or their prudence. In contrast, if we should generally allow enhanced services investment and expenses into ratemaking, we may choose to also allow for the possibility of prudence reviews.

First, our policy regarding transactions with unregulated affiliates continues to be that the utility must charge its affiliate at least the greater of cost or value for any assets or services transferred (and we have imposed additional requirements in many circumstances). We have not reviewed Part 64, and we are unable to certify that its allocations meet this criterion. Second, Pacific may disconnect basic service for customers who do not pay its bills for regulated services (with the exception of 976 information access service). Pacific's enhanced service competitors can enforce no such sanction for nonpayment. It would also be unfair to permit Pacific to disconnect customers for unpaid bills where our authority to resolve disputes regarding these services is unclear. Third, Pacific's bills carry a certain legitimacy in the minds of ratepayers that should reduce uncollectibles even in the absence of an overt threat of disconnection (although certain other billing arrangements through other firms may offer this same advantage). Fourth, the use of the phone bill as a deferred collection mechanism raises the issue of extending unsolicited credit to the phone customer for new and potentially unregulated services through the use of the customer's phone. Considering these issues in toto, it is not obvious that Pacific's billing plan is fair to enhanced service competitors.

However, we are also concerned about the need for Pacific to offer these two services now for the reasons discussed elsewhere. We would prefer to condition this interim grant of authority on billing terms that may not be ideal but that would at least be workable and not disadvantage Pacific's competitors or Pacific's ratepayers in any certain or obvious way. We will therefore approve Pacific's billing plan on an interim basis only provided that no customer will be disconnected from any regulated service for failure to pay for any enhanced services offered by Pacific. Every customer who is billed for either of these enhanced services by Pacific should receive a clear bill notice to this

effect initially and at least once every six months thereafter. We will also order a hearing in this docket to consider these and other issues regarding billing for enhanced services, including consumer protection measures and whether or on what terms Pacific's competitors should be able to have access to Pacific's regulated telephone bill to collect payment for enhanced services they provide. This hearing should be scheduled contemporaneously with the hearing we have ordered regarding the viability of Pacific's packet switching service.

In this situation, it would have been preferable for Pacific to better identify relevant issues, such as customer billing when applying for extraordinary relief from this Commission.

Findings of Fact

1. The Commission has been preempted from requiring tariffs, structural separation, or inconsistent non-structural competitive safeguards for Pacific's enhanced services pending our appeal of these issues in the Ninth Circuit Court of Appeals.
2. The memorandum accounts authorized today allow this Commission to defer consideration of the appropriate ratemaking treatment for enhanced services to a future date.
3. The Emergency Motion requests permission for Pacific to commence offering voice mail and protocol conversion services only.
4. Pacific asserts that it has customer demand for these enhanced service offers which it is unable to fill without the regulatory approval it seeks in its Emergency Motion.
5. Pacific asserts that its competitors neither seek nor obtain regulatory approval before offering competing enhanced services in California.
6. The Commission does not endorse any of Pacific's enhanced service offers at this time.

7. Pacific's voice mail CEI plan proposes to render bills for enhanced services through Pacific's regulated telephone bill using the FCC's Part 64 to allocate costs for this service.

8. Pacific's billing plan raises issues of appropriate compensation for the billing service, extension of unsolicited and unlimited credit for the provision of new and potentially unregulated services, possible disconnection of regulated customers for nonpayment of enhanced services bills, the intangible credibility of a regulated utility bill, and potential access by enhanced services competitors to Pacific's billing service.

9. The ability to disconnect regulated services for nonpayment of enhanced services charges would be a competitive advantage for Pacific vis a vis its enhanced services competitors.

10. Disconnection of regulated customers for nonpayment of enhanced services charges would raise serious consumer protection concerns.

11. On a permanent basis, these billing issues will require examination and clarification to assure that Pacific's customers and competitors are treated fairly.

Conclusions of Law

1. Interim authority to provide voice mail and protocol conversion services pursuant to Pacific's Emergency Motion should be granted, subject to conditions stated herein.

2. This interim authority shall have no precedential effect with regard to other enhanced services which Pacific may wish to have authorized in this application, or with regard to the conditions for permanent authority under the application.

3. Consistent with Pacific's request for interim procedures pending resolution of accounting treatment and other issues, the Commission should grant interim authority to provide enhanced services with the understanding that no decision is being made about the accounting treatment of intrastate enhanced services at this time, and that all services provided pursuant to the

interim authority will be subject to the appropriate accounting treatment determined by the Commission when a final decision on the application is made. The utility in exercising this interim authority will accept the financial risk associated with proceeding under this uncertainty about the eventual accounting treatment and its impact on interim operations. The accounting treatment issues being deferred include whether the revenues, investment, and other expenses of each service will be included in any revenue requirement or other measure used for ratemaking purposes. In addition, procedures for determining what specific amount of total utility costs will be included or excluded from intrastate revenue requirements or other measures used for intrastate ratemaking is also deferred.

4. Pending final resolution of the Commission's policy regarding the ratemaking treatment of enhanced services, Pacific should make no effort to recover the costs through ratemaking associated with enhanced services provided pursuant to interim authority.

5. Interim authority for Pacific to set up memorandum accounts for enhanced services should be granted to the extent set forth below.

6. Pacific should be ordered not to disconnect regulated services for nonpayment of enhanced service charges, and affected customers should be given clear and regular notice in this regard.

7. Pacific should follow the procedures set forth in its application for the submission of information packages to the Commission staff and all parties herein prior to the introduction of services.

8. The Commission reserves the right to change and, if appropriate, impose additional requirements at any time in the future whether before or after the "final" disposition of the application for good cause including a change in the Commission's legal options as a result of developments in the Computer III

judicial appeal or further action by the FCC or the Consent Decree Court.

INTERIM ORDER

IT IS ORDERED that:

1. Pacific Bell (Pacific) shall institute separate memorandum accounts following the directives of Ordering Paragraph No. 2, tracking the complete research, development, deployment, operating and maintenance costs, and all revenues attributed to its voice mail and protocol conversion services.

2. All revenue, investment, and other expense amounts which are directly or indirectly incurred or otherwise might be associated via cost allocation with the services offered under this interim authority shall be placed in separate tracking accounts and reported monthly to the Commission Advisory and Compliance Division (CACD). Wherever estimated or allocated amounts are involved, the methodology used for such estimation or allocation shall be described and worksheets detailing computations shall be provided. Separate accounts shall be maintained for each enhanced service offered under this interim authority. For tracking purposes, all revenues received and investment and other expenses incurred from the date that planning, research or development began for each service should be included. If this date for any given service is prior to the date of this decision, a summary report of all amounts incurred prior to the date of this decision shall be provided within 90 days from today. All amounts incurred from the effective date of this decision forward shall be reported within 45 days of the close of the month in which the revenues or expenses accrue. In addition, Pacific shall set up such accounts for each other enhanced service for which it begins, or has begun, planning, research, or development.

3. Pacific shall obtain CACD's written approval of its proposed memorandum accounts prior to their implementation.

4. All of Pacific's rates subject to regulation (including rates subject to potential regulation contingent on the outcome of judicial appeal) from the effective date of this decision forward are subject to refund based on ratemaking adjustments as a result of the final disposition of the issue of whether some or all of Pacific's enhanced services should be accounted for above or below the line.

5. Pacific shall not disconnect any regulated services solely for nonpayment of enhanced services charges. Pacific shall notify customers receiving bills for enhanced services of this rule when customers receive the first such bill, and at least each six months thereafter. Pacific shall coordinate this notice with the Commission's Public Advisor.

6. Any terms and conditions governing access to and the use of regulated billing services by Pacific's enhanced services operations shall be considered as interim pending a review of billing services issues by the Commission.

7. Any end-user complaints about service quality or billing matters which are received by Pacific's enhanced services operations or Pacific's regulated business offices shall be recorded as to number and nature and reported to CACD within 45 days of the close of the month in which the complaints are received.

8. Any existing consumer and competitive safeguards shall be considered to be interim. The Commission will consider applying additional or complementary safeguards in its final decision on the application.

9. In all instances where tariffed services are available, Pacific's enhanced services operations shall pay tariffed rates for the use of such services.

10. The billing issues referenced in the discussion, findings of fact, and conclusions of law will be the subject of a duly-noticed hearing in this proceeding. After this hearing, the Commission may revise or modify any or all aspects of Pacific's interim authorization to bill for enhanced services.

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 Weissor, Executive Director

First, our policy regarding transactions with unregulated affiliates continues to be that the utility must charge its affiliate at least the greater of cost or value for any assets or services transferred (and we have imposed additional requirements in many circumstances). We have not reviewed Part 64, and we are unable to certify that its allocations meet this criterion. Second, Pacific may disconnect basic service for customers who do not pay its bills for regulated services (with the exception of 976 information access service). Pacific's enhanced service competitors can enforce no such sanction for nonpayment. It would also be unfair to permit Pacific to disconnect customers for unpaid bills where our authority to resolve disputes regarding these services is unclear. Third, Pacific's bills carry a certain legitimacy in the minds of ratepayers that should reduce uncollectibles even in the absence of an overt threat of disconnection (although certain other billing arrangements through other firms may offer this same advantage). Considering these issues in toto, it is not obvious that Pacific's billing plan is fair to enhanced service competitors.

However, we are also concerned about the need for Pacific to offer these two services now for the reasons discussed elsewhere. We would prefer to condition this interim grant of authority on billing terms that may not be ideal but that would at least be workable and not disadvantage Pacific's competitors in any certain or obvious way. We will therefore approve Pacific's billing plan on an interim basis only provided that no customer will be disconnected from any regulated service for failure to pay for any enhanced services offered by Pacific. Every customer who is billed for either of these enhanced services by Pacific should receive a clear bill notice to this effect initially and at least once every six months thereafter. We will also order a hearing in this docket to consider these and other issues regarding billing for enhanced services, including consumer protection measures and

whether or on what terms Pacific's competitors should be able to have access to Pacific's regulated telephone bill to collect payment for enhanced services they provide. This hearing should be scheduled contemporaneously with the hearing we have ordered regarding the viability of Pacific's packet switching service.

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4. Pacific asserts that it has customer demand for these enhanced service offers which it is unable to fill without the regulatory approval it seeks in its Emergency Motion.

5. Pacific asserts that its competitors neither seek nor obtain regulatory approval before offering competing enhanced services in California.

6. The Commission does not endorse any of Pacific's enhanced service offers at this time.

7. Pacific's voice mail CEI plan proposes to render bills for enhanced services through Pacific's regulated telephone bill using the FCC's Part 64 to allocate costs for this service.

8. Pacific's billing plan raises issues of appropriate compensation for the billing service, possible disconnection of regulated customers for nonpayment of enhanced services bills, the intangible credibility of a regulated utility bill, and potential

access by enhanced services competitors to Pacific's billing service.

9. The ability to disconnect regulated services for nonpayment of enhanced services charges would be a competitive advantage for Pacific vis a vis its enhanced services competitors.

10. Disconnection of regulated customers for nonpayment of enhanced services charges would raise serious consumer protection concerns.

11. On a permanent basis, these billing issues will require examination and clarification to assure that Pacific's customers and competitors are treated fairly.

Conclusions of Law

1. Interim authority to provide voice mail and protocol conversion services pursuant to Pacific's Emergency Motion should be granted, subject to conditions stated herein.

2. This interim authority shall have no precedential effect with regard to other enhanced services which Pacific may wish to have authorized in this application, or with regard to the conditions for permanent authority under the application.

3. Consistent with Pacific's request for interim procedures pending resolution of accounting treatment and other issues, the Commission should grant interim authority to provide enhanced services with the understanding that no decision is being made about the accounting treatment of intrastate enhanced services at this time, and that all services provided pursuant to the interim authority will be subject to the appropriate accounting treatment determined by the Commission when a final decision on the application is made. The utility in exercising this interim authority will accept the financial risk associated with proceeding under this uncertainty about the eventual accounting treatment and its impact on interim operations. The accounting treatment issues being deferred include whether the revenues, investment, and other expenses of each service will be included in any revenue

requirement or other measure used for ratemaking purposes. In addition, procedures for determining what specific amount of total utility costs will be included or excluded from intrastate revenue requirements or other measures used for intrastate ratemaking is also deferred.

4. Pending final resolution of the Commission's policy regarding the ratemaking treatment of enhanced services, Pacific should make no effort to recover the costs through ratemaking associated with enhanced services provided pursuant to interim authority.

5. Interim authority for Pacific to set up memorandum accounts for enhanced services should be granted to the extent set forth below.

6. Pacific should be ordered not to disconnect regulated services for nonpayment of enhanced service charges, and affected customers should be given clear and regular notice in this regard.

7. Pacific should follow the procedures set forth in its application for the submission of information packages to the Commission staff and all parties herein prior to the introduction of services.

8. The Commission reserves the right to change and, if appropriate, impose additional requirements at any time in the future whether before or after the "final" disposition of the application for good cause including a change in the Commission's legal options as a result of developments in the Computer III judicial appeal or further action by the FCC or the Consent Decree Court. ✓

INTERIM ORDER

IT IS ORDERED that:

1. Pacific Bell (Pacific) shall institute separate memorandum accounts following the directives of Ordering Paragraph

No. 2, tracking the complete research, development, deployment, operating and maintenance costs, and all revenues attributed to its voice mail and protocol conversion services.

2. All revenue, investment, and other expense amounts which are directly or indirectly incurred or otherwise might be associated via cost allocation with the services offered under this interim authority shall be placed in separate tracking accounts and reported monthly to the Commission Advisory and Compliance Division (CACD). Wherever estimated or allocated amounts are involved, the methodology used for such estimation or allocation shall be described and worksheets detailing computations shall be provided. Separate accounts shall be maintained for each enhanced service offered under this interim authority. For tracking purposes, all revenues received and investment and other expenses incurred from the date that planning, research or development began for each service should be included. If this date for any given service is prior to the date of this decision, a summary report of all amounts incurred prior to the date of this decision shall be provided within 90 days from today. All amounts incurred from the effective date of this decision forward shall be reported within 45 days of the close of the month in which the revenues or expenses accrue. In addition, Pacific shall set up such accounts for each other enhanced service for which it begins, or has begun, planning, research, or development.

3. Pacific shall obtain CACD's written approval of its proposed memorandum accounts prior to their implementation.

4. All of Pacific's rates subject to regulation (including rates subject to potential regulation contingent on the outcome of judicial appeal) from the effective date of this decision forward are subject to refund based on ratemaking adjustments as a result of the final disposition of the issue of whether some or all of Pacific's enhanced services should be accounted for above or below the line.

5. Pacific shall not disconnect any regulated services solely for nonpayment of enhanced services charges. Pacific shall notify customers receiving bills for enhanced services of this rule when customers receive the first such bill, and at least each six months thereafter. Pacific shall coordinate this notice with the Commission's Public Advisor.

6. Any terms and conditions governing access to and the use of regulated billing services by Pacific's enhanced services operations shall be considered as interim pending a review of billing services issues by the Commission.

7. Any end-user complaints about service quality or billing matters which are received by Pacific's enhanced services operations or Pacific's regulated business offices shall be recorded as to number and nature and reported to CACD within 45 days of the close of the month in which the complaints are received. ✓

8. Any existing consumer and competitive safeguards shall be considered to be interim. The Commission will consider applying additional or complementary safeguards in its final decision on the application.

9. In all instances where tariffed services are available, Pacific's enhanced services operations shall pay tariffed rates for the use of such services.