

Decision 89 05 020 MAY 10 1989

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)

ORIGINAL

SECOND INTERIM OPINION

In this second interim decision, we grant Pacific Bell (Pacific) interim authority to provide enhanced services as requested in its Motion for Interim Authority to Provide Electronic Messaging Services (motion) filed March 24, 1989, subject to several conditions outlined below.

Background

On November 9, 1988, we granted Pacific interim authority to provide Voice Mail and Protocol Conversion Services subject to several conditions. (Decision (D.) 88-11-027, November 9, 1988.) As described in that previous decision, Pacific seeks approval of its plan to provide enhanced services within the Federal Communications Commission's (FCC) Computer Inquiry III framework.¹ In its application, 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 ONA plan.

¹ See D.88-11-026 in Application 88-07-011 also issued November 9, 1988 for a brief discussion on the FCC's Computer Inquiry III framework. D.88-11-026 and D.88-11-027 were issued the same day, dealing with open network architecture (ONA) issues: Basic Service Elements, and Enhanced Services, respectively.

The legal and regulatory uncertainties surrounding the FCC's Computer Inquiry III framework have not changed since the issuance of D.88-11-027 last November. This Commission, along with a number of other parties, appealed the FCC's preemption of state regulation of enhanced services and prohibition of structural separation rules for the Bell Operating Companies. The United States Ninth Circuit Court of Appeals has heard oral argument. This review is still pending at this time.²

However, as stated in D.88-11-027:

"It appears that under the status quo the Commission may have 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." (Mimeo, p. 2.)

D.88-11-027 placed several conditions on the grant of interim authority for voice mail and protocol conversion including: the creation of separate memorandum accounts and the tracking of costs and revenues for each enhanced service; a "no disconnection" policy of any regulated service due to nonpayment of enhanced service charges; notification of customers of this "no disconnection" policy; recording and reporting of end-user

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

complaints regarding service quality or billing matters; a requirement that Pacific's enhanced services operation pay tariffed rates in all instances where tariffed services are available; and adoption of additional billing and consumer safeguards as the Commission may later determine necessary.

Since in D.88-11-027 we granted interim authority only to Pacific's voice mail and protocol conversion services, a Prehearing Conference (PHC) was held in January 1989 to determine how to proceed as to interim authority for additional enhanced services. As ordered in D.88-11-027, hearings were scheduled to consider billing and consumer protection for enhanced services. These hearings were held in April 1989 focusing on Pacific's proposed Gateway and Voice Store and Forward enhanced services. Pending a decision resulting from those hearings, all parties agreed at the PHC that Pacific could file a motion requesting ex parte interim authority for "uncontroversial" enhanced services. All parties were allowed 15 days to file opposition to any such motion with the Commission then determining whether ex parte treatment was appropriate.

Pacific's Motion for Interim Authority
to Provide Electronic Messaging Services

On March 24, 1989, Pacific filed a motion requesting interim authority to provide electronic messaging services consistent with the terms and conditions set forth in its application and D.88-11-027. Electronic messaging services are services which will support the creation, transmission, and reception of electronic messages in a variety of formats including, but not limited to: text, text to voice and facsimile. In addition, Pacific intends to provide conversions, such as text to hard copy paper printout, text to voice, text to telex, and text to facsimile, in order to allow users flexibility when sending and receiving messages. (Pacific's CEI Plan to Provide Electronic Messaging Services dated June 20, 1988 before the FCC.)

Electronic messaging services are sometimes referred to as "E-Mail". Pacific points out that the FCC has conditionally approved its CEI plan for electronic messaging services.³ In addition, Pacific maintains that its customers are interested in subscribing to its electronic messaging service. Pacific is currently conducting a technology test and claims the participants have expressed a willingness to purchase the electronic messaging service at the conclusion of the technology test. Pacific requests that it be allowed to continue provision of the electronic messaging service to these customers without disruption of service.

Pacific asserts that it faces competitive harm if it must tell customers that its service will be available at some later date, subject to regulatory approvals. Pacific believes the conditions imposed on its offering of enhanced services in D.88-11-027 and any additional conditions the Commission may adopt now or at a future date provide adequate safeguards to a grant of interim authority for electronic messaging services.

Opposition to Pacific's Motion

The Rueben H. Donnelley Company, a subsidiary of the Dun & Bradstreet Corporation, (Donnelley) opposes Pacific's request for interim authority to provide electronic messaging services. Donnelley claims that Pacific could inflict competitive damage if it is granted the interim authority it is seeking. Donnelley views the conditions imposed in D.88-11-027 to be inadequate safeguards. Donnelley suggests that the Commission should act on interim authority for electronic messaging services after consideration of the testimony in the hearings held on billing and consumer safeguards in April 1989. Donnelley argues that both ratepayers and competitors will be better served by the definition and

³ Memorandum Opinion and Order, FCC DA 89-151, released February 21, 1989.

implementation of necessary safeguards prior to the initiation of Pacific's competitive services.

The Division of Ratepayer Advocates (DRA) also filed opposition to Pacific's motion. DRA focused its concern on two areas. First, the DRA asserts that Pacific has failed to properly track revenues and expenses associated with voice mail as provided in D.88-11-027 and should not receive interim authority for additional enhanced services until proper tracking is established. Second, the DRA contends that Pacific has failed to provide adequate consumer safeguards for billing of electronic messaging services and other enhanced services.

By letter dated May 2, 1989, the DRA withdrew its opposition to Pacific's request for interim authority for electronic messaging services because the DRA and Pacific have resolved their disagreement over appropriate tracking procedures. However, the DRA requests that its position regarding billing issues, as set forth in its opposition, now be considered as comments on Pacific's motion.

The DRA's concerns regarding billing for electronic messaging services are derived from its testimony on billing and consumer safeguards heard in April 1989. Although electronic messaging services will be offered on a presubscription basis, the DRA asserts that Pacific intends to use the telephone number as a billing device and therefore could use the telephone number as a credit device. The DRA contends that Pacific will bill for electronic messaging services on the local telephone bill and plans eventually to make the billing name and address (BNA) of its subscribers available to other enhanced service providers.

The DRA recommends that the Commission require that Pacific file a billing and collections tariff which prohibits Pacific from disconnecting local telephone service for nonpayment of electronic messaging service charges, from including any enhanced service charges in the Centralized Credit Check System and

from billing customers for more than \$50 of enhanced service charges in a single billing cycle, including electronic messaging services, without a written request from the customer for a higher limit. In addition, the DRA argues that Pacific should reformat its local telephone bill to clarify which charges, if unpaid, could subject the subscriber to disconnection, describe the terms and conditions of the credit it is extending, and conform, wherever possible, to the spirit of the federal Consumer Protection Act, as implemented by Regulation Z.⁴

The DRA recommends that the Commission hold workshops to work out the details of its proposal. Lastly, the DRA opposes Pacific's proposal to make BNA available to other enhanced service providers.

Pacific's Response to Opposition

By letter dated April 10, 1989, Pacific informed the administrative law judge that the following parties did not oppose Pacific's motion for interim authority for electronic messaging services: AT&T Communications of California, Inc., Information Providers Association, MCI Telecommunications, Telenet Communications Corporation, and US Sprint.⁵ Pacific stated these parties' nonopposition to its motion was without prejudice to positions they might take in the April hearings on billing and consumer safeguards and any future hearings, either with this Commission or the FCC, regarding Pacific's offering of electronic messaging services or any other enhanced services. Pacific acknowledged that it will, to the extent ordered by the Commission,

⁴ See D.89-02-066 regarding 900 service for a discussion of federal consumer credit laws.

⁵ By letter dated April 7, 1989, the California Bankers Clearinghouse Association (CBCHA) informed Pacific that it did not consent to interim approval of electronic messaging services. However, CBCHA filed no opposition in this docket.

conform its electronic messaging services and all other enhanced services to the decision resulting from the April hearings on billing and consumer safeguards issues.

On April 14, 1989, Pacific responded to the oppositions of Donnelley and the DRA. Since the DRA's opposition was subsequently withdrawn, Pacific's response will not be summarized here except as to the DRA's comments regarding consumer safeguards.

Pacific argues that for the grant of interim authority, adequate safeguards are already in place as a result of D.88-11-027. Pacific reiterates its willingness to adopt more safeguards when ordered by this Commission. Pacific does not agree that the possibility that consumer safeguards will be added or altered is a persuasive reason to slow the introduction of its electronic messaging services to the California public.

Further, Pacific argues that the concerns raised by Donnelley indicate Pacific's "fears" are justified, in that parties offering enhanced services will attempt to use the regulatory process to delay Pacific's entry into the market to gain a competitive advantage over Pacific. Pacific acknowledges that the safeguards resulting from the April hearings may be ordered applicable to electronic messaging services. Therefore, Pacific, in requesting interim authority at this time, is aware of the risk it is accepting that the "rules of the game" may change.

Discussion

As we stated in D.88-11-027, we are interested in promoting the development of valuable new services, including enhanced services. We believe the granting of interim authority for individual enhanced services in no way prejudices our careful policy considerations at a future date. The outcome of the pending appeal in the Ninth Circuit Court of Appeals regarding the degree of our jurisdiction over regulating intrastate enhanced services could greatly affect our final disposition of this application. In the interim, we are concerned that we not prejudice our eventual

consideration of these issues, yet not delay the offering of valuable new services to California consumers. This interim authority is not an endorsement of any of Pacific's proposed enhanced services offerings. Pacific proceeds with these offerings at its own financial risk.

The issue of whether enhanced services should be treated above or below the line for ratemaking purposes has already been referred to Phase II of Order Instituting Investigation 87-11-033. (D.88-11-027, mimeo. p. 4.) 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 electronic messaging services. It is our understanding that Pacific and the DRA have finally reached agreement on the appropriate tracking mechanisms that should be employed for enhanced services. As we did last November, we condition the authority granted today on the approval of the format of the memorandum accounts by the Commission Advisory and Compliance Division (CACD). Once again, we reserve the right to alter or add to this tracking procedure in our grant of final authority at a later date.

We now turn to our concerns regarding billing and consumer safeguards raised by this request for interim authority for electronic messaging services.

In D.88-11-027, we discussed extensively our concerns surrounding Pacific's intention to use its regulated bill to collect charges for enhanced services. We ordered that Pacific could not disconnect local service because of such charges and required customer notification of the "no disconnection" policy. We incorporate those conditions on this grant of interim authority for electronic messaging services.

We further directed in D.88-11-027 that hearings be held on billing and consumer safeguards for enhanced services. Those

hearings were held in April 1989 and the matter will be submitted on June 9, 1989 with the filing of reply briefs.

Meanwhile, in D.89-02-066, in the 900 proceedings before this Commission, we indicated our intent to eventually address the broad range of policy issues bearing on the use of Local Exchange Carrier billing services and related network functions.

"The new billing proceeding will serve to consolidate long-term treatment of billing-related issues in a variety of existing Commission proceedings, providing greater assurance that we will have a consistent and effective set of policies and procedures to govern this sensitive area. We hope to use the resources of both the Commission staff and parties more efficiently than if we continued to treat each instance where billing issues arise in a separate proceeding governing the application of billing on a solely service-by-service, carrier-specific basis. At the same time, creation of a unified proceeding will provide an opportunity to address issues which have not yet reached the "crisis" stage, but which we anticipate will be crucial to maintaining effective and sustainable policies in the future." (D.89-02-066, mimeo. p. 72.)

At this time we specifically put parties on notice that the long-term treatment of billing for enhanced services will be the subject of policies developed in the new billing proceeding. The decision resulting from the April hearings will, like this one, be interim in nature and subject to change depending on both the outcome of our jurisdictional dispute at the Ninth Circuit Court of Appeals and the upcoming billing proceeding.

Despite these uncertainties, we will allow Pacific to go forward at its own risk regarding use of its regulated bill for electronic messaging services. We will not be sympathetic to a later argument on Pacific's part that a final resolution of billing issues should be governed by what has been allowed for this interim authority.

We realize that both Donnelley and the DRA express concerns regarding interim authority for electronic messaging services at this time. Donnelley's opposition is based on an argument that interim authority for electronic messaging services should be postponed until after a decision results from those hearings. While the DRA has withdrawn its opposition, it "comments" that it believes the Commission should basically adopt the recommendations presented by the DRA during the April hearings now for purposes of electronic messaging services.

We disagree with both parties. First, we have sufficiently warned Pacific that reliance on the directives in this decision is strictly interim in nature. Electronic mail services shall be offered on a subscription basis only, with an account being established when a customer contacts Pacific. In its March 15, 1989, amendment to its CEI Plan for the Provision of Electronic Messaging Services, Pacific further acknowledges that currently under applicable CPUC tariffs (Rule 35 of A.2 tariffs) BNA cannot be made available to other enhanced service providers at this time. Since this is an issue which will be resolved as a result of the April hearings, we do not authorize any change to the availability of BNA for purposes of interim authority granted today.

We wish to address one area of concern that has not been raised by any party. Pacific acknowledges that it has conducted a technology test for its electronic messaging services. We are concerned that customers be apprised that the technology test has just concluded, and problems may arise as electronic messaging evolves from a testing phase to a mature service. In plain language, there as yet may be modifications and changes made to the service as "bugs" continue to be worked out.

We shall require Pacific to include the following language in a notice to customers:

"Pacific Bell has completed a technology test of its electronic messaging services in May 1989. Pacific Bell will continue development of this product until it becomes a mature service."

This notice should be incorporated into the Public Information Package Pacific makes available to interested parties after interim authority has been granted. Further, Pacific shall provide each customer subscribing to its electronic messaging services with a copy of its Public Information Package. ✓

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.

Findings of Fact

1. The Commission has been preempted from requiring tariffs, structural separation, or inconsistent nonstructural competitive safeguards for Pacific's enhanced services pending our appeal of these issues in the Ninth Circuit Court of Appeals.
2. The Commission issued D.88-11-027 in this proceeding granting interim authority for voice mail and protocol conversion enhanced services subject to several conditions.
3. Pacific seeks authority for electronic messaging services only at this time.
4. Pacific has conducted a technology test for its electronic messaging services.
5. It is reasonable that Pacific's customers be informed via the Public Information Package that the technology test has just concluded and changes and modifications should be expected as electronic messaging evolves from a technology test to a mature service.
6. Pacific asserts it has customer demand for these enhanced service offerings which it is unable to fill without the regulatory approval it seeks in its motion.

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

8. The Commission does not endorse Pacific's electronic messaging services at this time.

9. Hearings regarding billing and consumer safeguards for enhanced services as ordered by D.88-11-027 were held in April 1989.

10. The Commission intends to open a generic billing investigation and/or rulemaking in the near future to assure that Pacific's customers and competitors are treated fairly.

11. It is reasonable to grant interim authority today for electronic messaging services pending resolution of issues discussed in Findings of Fact 8 and 9, so long as no issues are prejudged by that interim authority.

12. Provision of BNA by Pacific to other enhanced service providers at this time would prejudice the issue.

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

14. Disconnection of regulated customers for nonpayment of enhanced service charges would raise serious consumer protection concerns.

Conclusions of Law

1. Interim authority to provide electronic messaging services pursuant to Pacific's motion should be granted subject to the conditions adopted in D.88-11-027 as modified below in the ordering paragraphs.

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 not provide BNA to any other enhanced service provider pursuant to its tariffs until it receives further direction on this subject from the Commission.

8. 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, as modified in the ordering paragraphs.

9. The Commission should require Pacific to notify its customers that electronic messaging service has completed a testing phase and may require modification and changes as the service evolves.

10. 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 Ninth Circuit Court of Appeals case, or further action by the FCC or the Consent Decree Court.

11. In addition to the uncertainties mentioned in Conclusion of Law 9, Pacific should be aware that the Commission's own upcoming billing proceeding could affect and/or alter some aspects of the interim authority granted today.

SECOND INTERIM ORDER

IT IS ORDERED that:

1. Pacific Bell (Pacific) shall institute separate memorandum accounts following the directives of Ordering Paragraph 2, tracking the complete research, development, deployment, operating and maintenance costs, and all revenues attributed to its electronic messaging 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 6 months thereafter. As it did for voice mail and protocol conversion, 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 or in the resolution of its upcoming billing proceeding.

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. As set forth in its application, Pacific shall provide the Commission CACD staff and all parties information packages regarding its electronic messaging services which will be noticed on the Commission's calendar. Pacific may begin offering its service 6 days after calendaring of its submission. In addition, Pacific's Public Information Package shall include the following language in a notification to the customer:

"Pacific Bell has completed a technology test of its electronic messaging services in May 1989. Pacific Bell will continue development of this product until it becomes a mature service."

Each customer subscribing to Pacific's electronic messaging service shall receive a copy of the Public Information Package.

11. In the future, 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 MAY 10 1989, at San Francisco, California.

G. MITCHELL WILK
President
FREDERICK R. DUDA
STANLEY W. HULETT
JOHN B. OHANIAN
PATRICIA M. ECKERT
Commissioners

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



Victor Weissert, Executive Director

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"Pacific Bell has completed a technology test of its electronic messaging services in May 1989. Pacific Bell will continue development of this product until it becomes a mature service."

This notice should be incorporated into the Public Communication Package Pacific makes available to interested parties after interim authority has been granted. Further, Pacific shall provide each customer subscribing to its electronic messaging services with a copy of its Public Information Package.

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.

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