

Decision 90 03 030 MAR 14 1990

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Investigation )  
and Suspension on the Commission's ) (I&S)  
own motion of tariffs filed by ) Case 89-11-020  
Advice Letters Nos. 8 and 9 of ) (Filed November 22, 1989)  
Telesphere Network, Inc. )  
\_\_\_\_\_ )

Thomas J. MacBride, Jr. and Barbara Snider,  
Attorneys at Law, for Telesphere Network,  
Inc., respondent.

Kristin Ohlson, Attorney at Law, for Pacific  
Bell, protestant.

Randolph W. Deutsch, Attorney at Law, for AT&T  
Communications of California and Alan Weiss,  
Attorney at Law, for MCI Telecommunications  
Corporation, interested parties.

Janice Grau, Attorney at Law, and Tom Doub,  
for the Division of Ratepayer Advocates.

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## INTERIM OPINION

### I. Summary

This decision suspends Telesphere Network, Inc.'s (Telesphere) Advice Letters 8 and 9 consistent with Public Utilities (PU) Code § 455 until further Commission order. These advice letters request authority to provide intrastate 900 service.

### II. Background

#### A. 900 Services Generally

The California Legislature enacted three laws in 1988 regarding a class of information access services commonly referred to as "900" or "976" telephone services. These laws added §§ 2884(b), 2884.2, and 2884.5 to the PU Code.

In March 1989, the Commission issued Decision (D.) 89-03-061. This decision authorizes Pacific Bell (PacBell) to introduce the first intrastate 900 service in California and establishes a carefully considered framework of consumer safeguards for intrastate 900 service. PacBell's "California 900" tariff became effective on July 14, 1989.

US Telecom, Inc. (doing business as Sprint Services) filed Application (A.) 89-09-012 on September 11, 1989 for authority to provide intrastate 900 services. Protests were filed in October 1989. AT&T Communications of California, Inc. (AT&T) filed A.89-10-019 on October 6, 1989 for authority to provide intrastate 900 services. Protests were filed in November 1989.

On October 31, 1989, MCI Telecommunications Corporation (MCI) filed Advice Letter 85 to introduce MCI 900 service in California effective November 5, 1989. Commission D.84-01-037 authorizes nondominant interexchange carriers (NDIECs) to file advice letters which become effective five days after filing. On

November 3, 1989 by Resolution T-14021, the Commission rejected MCI's Advice Letter 85, finding that:

"The potential negative impacts of 900 service on children and consumers are so serious that a five-day effective advice letter is not appropriate to assure that consumer safeguards are in place and adequate." (Finding 1, p. 2.)

MCI filed A.89-11-019 on November 20, 1989 for authority to provide intrastate 900 services. Protests were filed in December 1989.

**B. Telesphere Advice Letters**

Telesphere filed Advice Letter 8 on November 6, 1989. Advice Letter 8 sets forth rates for an "InterLATA 900 Services Plan." The plan is an interactive nationwide telecommunications service which includes (a) network switching services between telephone callers and information providers (IPs) or program sponsors, and (b) billing and collection services through the appropriate serving telephone company of the caller. Telesphere asked that Advice Letter 8 be effective five days following the advice letter filing date.

AT&T filed a protest with the Commission Advisory and Compliance Division (CACD) on November 8, 1989. AT&T asked that the Commission reject Advice Letter 8 and order Telesphere to file an application. AT&T argued that an application would subject Telesphere's proposed service to the same standards as AT&T's current application for intrastate 900 authority. AT&T also requested that the Commission order Telesphere immediately to cease and desist any current provision of intrastate 900 service in California, which it documented.

PacBell protested on November 9, 1989. PacBell also asked that the Commission reject Advice Letter 8 and require Telesphere to file an application. PacBell argued that Telesphere used an "inappropriate procedure" to provide 900 service and did not adopt all the consumer safeguards established in D.89-03-061. PacBell also requested that the issues of intraLATA competition

raised by Advice Letter 8 be addressed concurrently with Phase III of I.87-11-033.

On November 9, 1989, the Division of Ratepayer Advocates (DRA) also protested Advice Letter 8, citing concerns similar to those of AT&T and PacBell regarding the lack of consumer safeguards. DRA requested that the Commission:

"...deny Telesphere's Advice Letter No. 8, order Telesphere to seek authority by application and apply (Pacific's) 900 ICS consumer safeguards to Telesphere's 900 services."

Telesphere did not respond directly to these protests, although the protests were received before the effective date of Advice Letter 8. On November 9, 1989, the Chief of the CACD Telecommunications Branch wrote Telesphere that, in light of Resolution T-14021, Advice Letter 8 was considered unsatisfactory and that CACD would be recommending that the Commission proceed accordingly. On November 13, 1989, Telesphere responded to this letter, outlining the reasons why it chose to file Advice Letter 8 and why it believed it is reasonable and lawful:

1. Telesphere states that it filed Advice Letter 8 in response to the threat of a formal complaint by AT&T. The complaint would allege that Telesphere is unlawfully providing intrastate 900 service. The complaint would not be made by AT&T if Telesphere filed an advice letter to tariff intrastate 900 service.
2. Telesphere reiterates its belief, stated in Advice Letter 8, that its 900 service is interstate in nature and outside the Commission's jurisdiction. It avers that the production of some of its 900 service programs within California "may not...alter, from a jurisdictional view, what is in essence an interstate service." However, rather than litigate this issue, Telesphere chose to file Advice Letter 8--an approach it says it also took in the state of New York.

3. Telesphere states that it has met the requirements of the PU Code, specifically § 2884 regarding the provision of "harmful matter" telephone information programs. It will not provide service to IPs with harmful matter messages and will terminate service if it discovers that an IP inaccurately described its program content. If access to harmful matter programs is provided, it will meet the requirements of § 2884 by providing a separate prefix and requiring presubscription.
4. Telesphere further bases the legality of Advice Letter 8 on the filing requirements established in D.84-01-037 and D.84-06-115 (which exempted NDIECs from General Order (GO) 96-A Sections IV, V, and VI regarding effective dates). Telesphere concludes that Resolution T-14021 illegally modified "the rights conferred on NDIECs in D.84-01-037 and D.84-06-115" without due process required by PU Code § 1708. That is, the Commission cannot reject an NDIEC advice letter on its own motion, as provided for in GO 96-A, without notice and hearing to adopt a modification to the filing requirements.
5. Telesphere agrees that the Commission's concerns expressed in Resolution T-14021 are legitimate regarding the potential negative effects of 900 service on children and consumers. As evidence of its sympathy, it will not offer 900 service to harmful matter programs nor to programs directed at children. Telesphere also invokes PacBell's tariffed blocking service, available to "any" PacBell subscriber. It further states that it "requires announcements for certain types of programs that may result in very high charges to end users," and that it blocks access to "certain subscribers that incur very large charges in a short period of time." (Note that with the exception of excluding harmful matter programs, none of the foregoing safeguards is included in Advice Letter 8.)

6. Notwithstanding its sympathy with the Commission's concerns, Telesphere further challenges the efficacy of Resolution T-14021, since "the Commission has never conducted a proceeding to determine precisely what those additional safeguards should be." Telesphere "urges the Commission to quickly institute a proceeding in which the affected IECs may offer evidence on the question of which of the remaining proscriptions set forth in D.89-03-061 should be applicable to IEC interLATA intrastate 900 offerings."
7. Finally, Telesphere also "urges the Commission to consolidate any type of generic proceeding, suggested above, regarding 900 service with the existing, perhaps hopelessly atrophied, OIR No. 85-08-042, the long dormant rule-making proceeding regarding rules governing NDIECs."

Telesphere filed Advice Letter 9 on November 17, 1989. Advice Letter 9 adds additional consumer safeguards to Telesphere 900 services. Telesphere requested that Advice Letter 9 become effective five days after filing.

We issued Order of Investigation and Suspension (I&S) Case (C.) 89-11-020 on November 22, 1989. That I&S orders:

1. An investigation to determine if Advice Letters 8 and 9 are unreasonable or unlawful in any respect and to issue any order(s) that may be lawful and appropriate in the exercise of the Commission's jurisdiction.
2. Suspension of Advice Letters 8 and 9 pending the outcome of the investigation.

Telesphere filed a petition for a partial stay of C.89-11-020 on December 4, 1989 (requesting a stay of the effectiveness of I&S 89-11-020 until further order of the Commission). Telesphere filed an application for rehearing on

d. Whether irreparable injury will occur without suspension.

Telesphere argues that these standards cannot be met. It is virtually impossible to find that its tariffs contravene the PU Code, according to Telesphere. Telesphere asserts that the PacBell standards result from a settlement, are not precedential, and therefore cannot be found to apply to Telesphere. Further, Telesphere believes that irreparable injury is hard to find given the considerable safeguards Telesphere has implemented.

Telesphere claims that D.84-01-037 and D.84-06-113 authorize the filing of tariffs and revisions by NDIECs to become effective on not less than one day's notice. D.89-08-029 considered and rejected a PacBell proposed modification that would have extended the effective date to 40 days after filing. The later decision, therefore, does not modify the filing rules according to Telesphere. The Commission routinely accepts NDIEC advice letters for tariff revision to become effective on five days' notice. Telesphere requested that Advice Letters 8 and 9 become effective five days following the filing date. Telesphere states that the MCI resolution (Resolution T-14021) is not a legal way to modify tariff filing rules. Under PU Code § 1708, the Commission must issue notice and conduct a hearing if it wishes to modify the tariff effective date rule. Therefore, Telesphere's advice letters were in effect before the Commission issued its suspension.

According to Telesphere, there may be two practical impacts of Commission delay in authorizing 900 service in California according to Telesphere. First, the IP market will move out-of-state. That is, Commission delay in authorizing intrastate provision of IP services--PacBell 900 service notwithstanding--will force IP providers to move to neighboring states. From nearby states the service can be provided to California as an interstate service already authorized by the Federal Communications



# CORRECTION

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December 6, 1989 (requesting a rehearing of the order suspending the advice letters). By D.90-01-022, we granted limited rehearing.

### III. Limited Rehearing

The sole purpose of the limited rehearing is:

"...to determine whether Telesphere's Advice Letters Nos. 8 and 9 should be suspended pending the outcome of the investigation to determine whether Advice Letters Nos. 8 and 9 are unreasonable or unlawful in any respect."  
(D.90-01-022, p. 1.)

The hearing was held on January 24, 1990. Briefs were filed on February 2, 1990. The parties expressed the following positions.

#### A. Telesphere

Telesphere argues that the Commission cannot suspend an effective tariff without a hearing. If the Commission finds after a hearing that a tariff is unlawful or unreasonable, it shall determine and fix the lawful and reasonable tariff. Even if the Commission may suspend a tariff without finding it unlawful or unreasonable, the Commission should require a very strong showing. The showing should be similar to that which a civil court would apply in deciding whether to grant a preliminary injunction. The suspension of Telesphere's Advice Letters 8 and 9 is the imposition of extraordinary injunctive relief. The standards that should apply for imposing extraordinary injunctive relief are:

- a. Whether the proponent of suspension stands a substantial likelihood of prevailing on the legal arguments (e.g., that the tariff is unlawful or unreasonable).
- b. Whether the proponent of suspension is likely to prevail that the standards applied to PacBell in turn apply to Telesphere.
- c. Whether the burdens on Telesphere subscribers of suspension are less than the social benefits of suspension.

d. Whether irreparable injury will occur without suspension.

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According to Telesphere, there may be two practical impacts of Commission delay in authorizing 900 service in California according to Telesphere. First, the IP market will move out-of-state. That is, Commission delay in authorizing intrastate provision of IP services--PacBell 900 service notwithstanding--will force IP providers to move to neighboring states. From nearby states the service can be provided to California as an interstate service already authorized by the Federal Communications

Commission. California will lose both business and regulatory oversight.

Second, intrastate provision of 900 service will be found to be interstate and outside the Commission's jurisdiction. That is, Telesphere argues that this is basically an interstate service outside the Commission's jurisdiction. If that issue is pursued by Telesphere or others because of Commission delay in providing 900 service, and the Commission loses, intrastate provision of 900 services will be outside the reach of the Commission and the PU Code. California may retain the business, but will lose all authority to implement safeguards (such as the PU Code requirement for a separate prefix for harmful matter and presubscription to harmful services).

Similarly, there may be a practical problem if the Commission imposes the PacBell settlement safeguards on Telesphere. The PacBell safeguards are the result of a settlement. Telesphere states that all parties understood the settlement to be nonprecedential under the Commission's settlement rules. Telesphere and other parties may have sought certain changes if the settlement had been expected to be precedential. Those changes may have prevented a settlement. Understanding the settlement to not result in generic safeguards, however, Telesphere and others were able to allow a settlement to proceed. If the Commission now generically applies the PacBell safeguards, Telesphere argues that it will be denied its right of due process. Moreover, it asserts, a chilling effect will be placed on all future settlement discussions if the parties feel that the Commission may apply the results generically despite assurances to the contrary.

In Telesphere's view, the solution to prevent these practical problems is for the Commission to authorize all IEC requests to provide 900 services on an interim basis while a concurrent Commission investigation is undertaken to determine what safeguards are necessary and reasonable.

Telesphere has some safeguards for its 900 service that are either required by law (PU Code §§ 2884 et seq.) or that it has on its own determined to be necessary. These include: waivers of certain charges; monitoring of programs; not providing service for programs that contain harmful matter or are directed to children less than 18 years old; identification of charges in all advertising; preamble for programs of indefinite duration; and opportunity for the caller to disconnect the call without charge for a program of indefinite duration.

Telesphere presented one witness in support of its case. The testimony covers Telesphere's 900 service, complaints, and safeguards now in place. As background, Telesphere began 900 service in September 1987 in and around Chicago, Illinois and Gary, Indiana. Interstate provision of 900 service by Telesphere to California began in the fall of 1988. Telesphere now serves 48 states.

Telesphere has received no complaints from the Commission, the DRA, the Commission's Consumer Affairs Branch, or any other California state agency since service began in the fall of 1988. Telesphere receives about 20 written complaints per week (in addition to those made orally). On average there are about 1 or 2 written complaints per week from California. The complaints fall into five basic categories with the most likely resolution being as follows:

1. Mentally retarded users (children or adult). These charges are usually waived.
2. Children's use. Charges are usually waived when the child is less than 10 years old. Between ages 10 and 14 the charges are waived if the child is unsupervised (e.g., latchkey child). Over age 14, the charges are waived on a case-by-case basis.
3. Adult complaints for:
  - a. Poor line quality. These are generally waived.

- b. Simply not wanting to pay. These are generally denied.
- 4. Toll fraud. Telesphere either notifies the local exchange carrier (LEC) or has the subscriber notify the LEC for an investigation. Charges are or are not waived depending on the result of the investigation.
- 5. Program content. There are very few complaints about program content.

Telesphere's policy does not limit waivers to the first mistaken or inadvertent use only, but waivers may be given for more than just the first such use.

About one third of Telesphere's IP programs are sports related. The usual cost is between \$10 and \$20 per call. Financial programs comprise a second large group of IPs. These also average \$10 to \$20 per call. Another large group is entertainment (e.g., horoscopes, soap opera hotlines, tarot cards). The usual cost per call is \$2. Complaints tend to be lodged mostly against the low, not high, cost IPs. Users of high cost IPs tend to be more sophisticated and know what they are buying. Users of low cost IPs tend to have more impulse and inadvertent use. Telesphere routinely monitors its IP programs to insure sound quality and compliance with Telesphere requirements (e.g., no harmful matter programs). Telesphere has cancelled one or more IPs for providing harmful matter against Telesphere policy.

Telesphere does have IPs in California. There may currently be intrastate provision of Telesphere 900 service. Telesphere can block at its own switch. This will block caller access to Telesphere 900 IPs but will not block access to any other telephone corporation IP.

**B. Division of Ratepayer Advocates**

The DRA argues for a suspension of Advice Letters 8 and 9 for three reasons. First, Telesphere is not the only party

impacted by its filing. Sprint Services, AT&T, and MCI are also impacted. DRA asserts that it is unfair to let Telesphere proceed when the Commission blocked MCI from doing virtually the very same thing (Resolution T-14021). The Commission has not yet acted on the applications of Sprint Services, AT&T, and MCI. In DRA's view, it would be extraordinary to allow Telesphere to go ahead while the others wait.

Second, DRA believes safeguards similar to those adopted for PacBell are appropriate for Telesphere and the other applicants for 900 service. DRA believes that Telesphere: does not have a one-time adjustment policy consistent with that in place for PacBell; does not require an introductory message, nor time to disconnect the call without charges within a specified period; does not have either a per minute or a total call price limit; does not provide advanced notification when a customer's bill exceeds a certain limit; does not block further calls when the total bill for 900 services exceeds an even higher limit until the customer is contacted; does not have selective blocking; does not have a mechanism for paying the LEC's added costs due to Telesphere's IPs (e.g., blocking access to Telesphere IPs; notification of charges).

Third, by Commission order, PacBell has advertised its safeguards. Customers, however, cannot tell when they place a 900 call whether or not it is being transported by PacBell. Customers cannot help but be confused if Telesphere is allowed to proceed with 900 service before a decision is made regarding consistency between PacBell and Telesphere safeguards. Customers will believe that certain safeguards are in place that will turn out not to be in place for a 900 call transported by Telesphere.

DRA argues that the Commission can and should find Telesphere's advice letters are not in the public interest under PU Code § 451 and should suspend the advice letters for ten months under § 455. Telesphere should be required to file an application, and its application should then be consolidated with the other applications for 900 service.

C. AT&T

AT&T argues that the Commission has the right to suspend Telesphere's advice letters under PU Code § 701. Further, Telesphere does not have clean hands in coming before the Commission here. AT&T filed its application for 900 service on October 6, 1989. Protests were filed. Telesphere was able to see there is controversy and there are issues to be settled.

MCI's advice letter was suspended by Commission Resolution T-14021 on October 3, 1989. The resolution says that the potential negative impacts of 900 service require the matter to be considered in an application, not by an advice letter. Still, Telesphere filed Advice Letter 8 on November 6, 1989. Telesphere filed Advice Letter 9 on November 17 to try to resolve some of the concerns with Advice Letter 8. The Commission acted as quickly as it could to suspend Advice Letters 8 and 9 since it meets only every two weeks. The Commission could not have acted sooner. Therefore, AT&T submits Telesphere cannot argue that it has simply played by the rules and did not know of possible issues and concerns. Telesphere cannot claim that the Commission has changed the rules and that it is irreparably harmed.

AT&T contends that if a tariff is unjust, it is illegal under PU Code § 451. Sua sponte, the Commission can find that without certain rules and safeguards in its tariff, Telesphere's tariff cannot be found to be just and reasonable. The rules and safeguards have not yet been determined. Therefore, Telesphere cannot have a just and lawful tariff. Further, competition--and therefore the ratepayers of California--are harmed if Telesphere can file an advice letter and use a technicality to start service.

D. PacBell

PacBell argues that the Commission does have the authority to suspend Telesphere's advice letters, and that the tariffs were and are properly suspended. Three issues must be addressed by Telesphere and the Commission before Telesphere 900 service should be authorized: 1) safeguards, 2) intraLATA service



by Telesphere, and 3) reimbursement by Telesphere for blocking performed by PacBell.

Telesphere had notice by both Resolution T-14021 and the protests by PacBell and others to the pending applications for 900 service by Sprint Services and AT&T. The Commission can and should suspend Telesphere's advice letters pending the resolution of these issues.

**B. Closing Arguments and Briefs**

The parties repeated their positions with the following additions, elaborations, or changes.

DRA argues that the concerns and issues that led to the PacBell safeguards must be addressed by Telesphere. DRA is advocating the PacBell safeguards (perhaps modified to a limited extent), not as a result of a settlement in the PacBell case, but as a result of decisions on the part of the Commission that looked at a broader picture of safeguards for 900 service. (D.89-02-066 and D.89-03-061.) California first proceeded with 976 services without safeguards and numerous problems resulted. DRA asserts that California is now a leader in regulation of 976/900 services and the provision of safeguards. It is unlikely that business will leave California while safeguards are being established.

AT&T argues in closing that all 900 applications and Telesphere advice letters should be allowed to commence on an interim basis. Interim authority would be subject to modification after the completion of an investigation by the Commission into safeguards for all 900 services. AT&T asserts that the Commission prohibition on intraLATA service by interexchange carriers (IECs) is not a blanket prohibition. Rather, it is only for services where there is a contribution to universal service. PacBell 900 does not contribute to universal service. Therefore, there should be no prohibition of IECs providing intraLATA 900 service. Finally, blocking appears to be in existence or will be in existence for all subscribers that need blocking and have access to an equal access switch.

PacBell argues that the Commission has the authority to suspend tariffs on its own motion without conducting a hearing. PU Code § 455 permits the Commission on its own motion to hold a hearing to consider the adequacy of tariff schedules and suspend their effectiveness pending that hearing. PU Code § 306(b) permits the Commission to act upon matters of an emergency nature without agenda notice.

PacBell states that the Commission should not authorize 900 service by Telesphere or others on an interim basis with a concurrent investigation, but should first determine results on the three issues raised by PacBell: safeguards, intraLATA service by IECs, and reimbursement for blocking. PacBell filed a timely protest and is entitled to a hearing prior to the Commission granting the authority requested by Telesphere. D.89-08-029 finds that advice letters filed by NDIECs should not become effective if protested prior to the effective date. Since PacBell protested before Advice Letter 8 became effective, the Commission properly suspended the effective date pending a hearing. Further, customer confusion will occur if the Commission allows Telesphere interim authority while it later determines the final requirements for safeguards.

Finally, PacBell says interim authority will place PacBell at a competitive disadvantage. The Commission is required to consider the competitive impact of Telesphere's 900 service prior to authorizing that service. (Northern Calif. Power Agency v. PUC, 5 Cal. 3d 370 (1971).) Telesphere's 900 service has less stringent terms and conditions than those required of PacBell (e.g., no \$20 maximum charge per call as does PacBell). If IPs perceive Telesphere's safeguards are less burdensome, the IPs may use Telesphere rather than PacBell as the carrier. Telesphere will have a distinct and unfair competitive advantage in the intrastate 900 market.

MCI offered that Resolution T-14021 did not require MCI to file an application.

Telesphere argues there is neither an emergency now nor will there be a consumer crisis if Telesphere is allowed to operate in California without adopting each and every safeguard to which PacBell agreed. Rather, the evidence demonstrates Telesphere has been satisfactorily serving customers nationwide for over two years and California customers for 18 months with minimal complaints. The decision in this limited rehearing must be based on the record. The record cannot support the extraordinary action of suspending its 900 tariffs pending a full hearing on the lawfulness or reasonableness of those tariffs. The failure of any party to present any factual evidence of problems should alone cause the Commission to defer any action until the full investigation.

Telesphere adamantly opposes any suggestion that the Commission's decisions in the PacBell 900 settlement have set any precedent for any carrier other than PacBell. Telesphere specifically asked the Commission to require PacBell to make necessary adjustments so that Telesphere could provide the same type of end-user blocking which Pacific would provide. The Commission did not believe this was a significant issue and declined to order the adjustments, according to Telesphere. (D.89-02-066, p. 59.) Telesphere avers that the consumer is currently protected by either PacBell's central office blocking or Telesphere's own blocking. Telesphere asserts that the lack of clarity in the allocation of blocking costs does not create a consumer threat warranting the suspension of the tariffs.

Telesphere notes there has been a plethora of inward long distance services tariffed by NDIECs for which the violation of intraLATA service argument could be made. Telesphere does not hold itself out as offering intraLATA service, and the PacBell intraLATA argument is irrelevant for this proceeding. Business is already leaving California as the Commission delays authorization of 900 services. Telesphere argues that the Commission should not suspend Advice Letters 8 and 9 but should concurrently conduct an investigation into what safeguards are necessary. Experience

during the interim authorization will then develop a practical track record upon which to base decisions regarding additional safeguards.

**F. Comments: ALJ's Proposed Decision**

The ALJ's proposed decision was filed and served on February 22, 1990, pursuant to Rule 77.1 et seq. of the Commission's Rules of Practice and Procedure. Comments were due March 5, 1990 and reply comments on March 9, 1990. This period for comments and replies was explained in the cover letter with the proposed decision and in the proposed decision itself as a shortening of the time to the Commission decision under PU Code § 311 and a concurrent shortening of the time for comments and replies.

Telesphere and AT&T filed comments on March 5, 1990. Telesphere's comments identify what it believes to be several errors in fact and law. Telesphere urges the Commission to reject the proposed decision or, in the alternative, to modify the decision to accurately reflect the record. AT&T finds no error in the result reached by the ALJ's proposed decision, but is concerned that it could be construed as prejudging a number of issues requiring further investigation. AT&T requests that the Commission state in its decision that it is not making a final determination of any issue based on the record in the one day hearing. PacBell did not file comments but served a letter on all parties on March 5, 1990. PacBell states that the proposed decision accurately reflects the record and the law.

We have carefully considered these comments. We have made certain changes based on the comments of Telesphere and AT&T. We have clarified the role of this hearing. We have clarified that this decision does not find that Telesphere's tariffs fail to comply with the law, only that legitimate issues have been raised that require investigation. Also, since there needs to be more than a casual chance that Telesphere's tariffs may not comply with the law, but we do not find that they do fail to comply, we

clarify that there is a substantial likelihood that Telesphere's tariffs do not now comply. We do not establish any safeguards for Telesphere's service nor prejudge the outcome of the investigation, but we do clarify the role of the PacBell safeguards and D.89-02-066 and D.89-03-061. We explain that given the substantial reasoning explained in adopting certain safeguards in those decisions, the burden will be on any party that seeks a change to justify that change. We clarify the intraLATA discussion, our concern that Telesphere's 900 service may conflict with our restrictions on intraLATA service by IECs, and that this issue needs to be explored in the investigation. Finally, we clarify our discussion on consumer confusion and irreparable harm, and that we believe notification is needed for not only the uninformed, but also the informed, customer.

#### IV. Discussion

The sole issue is whether to suspend Telesphere's advice letters pending the outcome of the investigation. The investigation will determine whether these advice letters are unreasonable or unlawful in any respect.

The background demonstrates that there has been controversy over the provision of intrastate 900 service. The question of whether we can suspend Telesphere's advice letters without a hearing (as argued by Telesphere), however, is moot since a hearing has been held. Under PU Code { 455, a rate, classification, contract, practice, or rule not suspended shall become effective subject to the power of the Commission after a hearing to modify the rate, classification, contract, practice, or rule. We have had a hearing and now consider modifying the rate, classification, contract, practice, or rule by suspension, pending the full investigation.

Telesphere's comments on the ALJ's proposed decision raised an issue about the bifurcation of this proceeding.

Telesphere argues that the parties were specifically instructed not to introduce evidence regarding the reasonableness of the tariffs at the January 24, 1990 hearing. We find nothing in our orders or the record to indicate that parties sought to present argument or testimony that was prevented. While true that the investigation will determine whether "...the tariff sheets under Advice Letters Nos. 8 and 9 are unreasonable or unlawful in any respect and to issue any order or orders that may be lawful and appropriate in the exercise of the Commission's jurisdiction" (Ordering Paragraph 1 in the Order of Investigation and Suspension), this hearing was the time and place for each party to present any and all legal argument and/or evidence it felt was necessary to address the issue and support its position on whether to suspend Telesphere's advice letters pending the outcome of the investigation. Parties were given the opportunity to present argument and evidence, and indeed Telesphere presented both argument and a witness to present evidence.

**A. Standards for Suspension**

The Commission applies two basic standards to determine whether to suspend a tariff or advice letter. First, is it substantially likely that the Commission will find after an investigation that the tariff or advice letter is (1) unlawful in any respect (e.g., in this case, does not meet PU Code §§ 2884 et seq.) or (2) unjust or unreasonable and therefore unlawful (e.g., PU Code § 451). Second, is irreparable injury likely to occur without suspension.

**1. Is the Tariff Lawful?**

**a. PU Code § 2884(a) and (b)**

The PU Code requires that the Commission shall specify a method(s) for telephone corporations to offer free blocking to residential subscribers for either (1) all information access programs or (2) those that contain harmful matter. (PU Code § 2884(a) and (b).) The issue before us is whether Telesphere's tariffs are likely to be found unlawful in any respect.

Telesphere's tariffs do not provide for the all programs blocking option and are therefore substantially likely to be found not in compliance with the law.<sup>1</sup>

Telesphere relies on the fact that PacBell offers blocking to its residential subscribers. Telesphere's witness could not confirm if blocking is available through LECs other than PacBell (e.g., GTE California Incorporated or the smaller LECs) for all residential customers in California who may use Telesphere's IPs. (Tr. p. 61.) Telesphere's witness testified that Telesphere can block access to IPs reached over Telesphere lines at Telesphere's switch when requested by any of its customers. Counsel for Telesphere offered that it would be a simple matter to amend the tariff to provide blocking by Telesphere at the request of end users who reside in service areas where blocking is not available from the LEC. (Tr. p. 87.) The suggestion by Telesphere's counsel that it would be a simple matter to amend the tariffs is an explicit admission that the tariff does not currently conform to state law.

Telesphere can block access to Telesphere IPs at Telesphere's switch, but Telesphere has no program to notify its customers of this option before a complaint arises. The PU Code requires that the blocking option be offered to all residential subscribers. We do not read the law to mean the offer comes after a complaint. Rather, we believe the code means the offer to block

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1 Telesphere's advice letters do not provide access for IPs vending harmful matter. The advice letters indicate that, in the event at some future time access is provided to an IP offering harmful matter messages, Telesphere will apply the safeguards required by the PU Code (presubscription, separate prefix, and harmful matter blocking). Given the discussion in this part of our decision, however, it is unclear how this will be accomplished by Telesphere.

must be made to all customers before problems otherwise occur.<sup>2</sup> That Telesphere makes no provision in its tariff to notify customers of its blocking option seemingly places the tariff in conflict with state law. Even if Telesphere amended its tariff to

<sup>2</sup> As we discussed in D.89-02-066, page 50, regarding the adjustment policy, customers:

"'have a right to be fully informed upon all points in which their interests are involved. This is not only required by the Railroad Commission as a general policy, but is advisable from a business standpoint as well.' (15 CRC 67, 72 (1918).)"

We continued:

"In a 1925 decision we similarly upheld a ratepayer's right to know the terms under which service is provided:

"'It is essential, that a utility make every reasonable attempt to explain to its subscribers and the public its operations and practices, and the reasons and methods followed by it in the charging and collection of its various rates. That the subscriber have this fundamental knowledge is a very important factor in rendering satisfactory service and in establishing proper public relations.' (26 CRC 807, 809 (1925.)

"The principles stated in 1925 are no less true today. That is why we directed Pacific and GTE to provide reasonable customer notice..."

We went on to discuss that customers may elect to block or not based on their knowledge of the adjustment policy. Just as we stated there regarding the adjustment policy, we believe there is a substantial likelihood that we will find in the investigation here that customers have a reasonable right to know. That reasonable right to know means the offer of blocking must be made before, not after, a complaint occurs.



provide the blocking option after complaint, it would still appear ✓  
to be in conflict with state law.

Telesphere argues we cannot find blocking to be a significant issue. Telesphere asked in the PacBell 900 hearings (A.88-04-004, A.87-05-049, and I.85-04-047) that we require PacBell to make the necessary technical adjustments to its access facilities and tariffs so that Telesphere and other IECs would be able to provide the same type of end-user blocking of 900 service which PacBell would be providing. Telesphere indicates that we did not believe this was a significant issue and cites that language in our decision where we said:

"We recognize that there are differences between the proposed interLATA and proposed intraLATA 900 services but we agree with IPA that it is not self-evident that these differences are either unfair or anticompetitive."  
(D.89-02-066, mimeo, p. 59.)

We declined to order changes be made by PacBell because--contrary to Telesphere's contention--the unfairness or anticompetitiveness due to the differences between the proposed interLATA and intraLATA 900 services was not self-evident and could not be inferred without evidence. We suggested that Telesphere could pursue the issue by proposing modifications to Advice Letter 15395. Thus, even if we declined to address IEC blocking through the LECs at that time, the issue of Telesphere's abilities to perform blocking consistent with the PU Code is relevant here.

The PU Code further indicates that the Commission will determine and implement a method by which telephone corporations will be recompensed their expenses for providing this deletion option. (PU Code § 2884(a) and (b).) Telesphere claims that the added costs of blocking incurred by PacBell due to Telesphere IPs are paid by Telesphere as part of customer inquiry costs. These customer inquiry costs are paid pursuant to billing and collections agreements between Telesphere and each LEC that bills for

Telesphere. PacBell does not agree and believes that blocking cost allocation is an issue. PacBell claims that its billing and collection interstate contract with Telesphere was executed in 1987, prior to Telesphere's 900 service offering in California and before the Commission's decision on 900 blocking. PacBell asserts that its intrastate billing and collection tariff (No. 175-T, Section 8) does not now, nor has it ever, recovered the costs of 900 blocking. No rates have changed and no negotiations were made concerning compensation to PacBell for blocking. We believe there is reasonable doubt whether Telesphere is recompensing PacBell (and perhaps other IECs) for the expenses of providing this deletion of access option.

Therefore, it is substantially likely to be found that Telesphere's tariffs do not comply with the blocking required by the PU Code. Further, to the extent an offer to block at the Telesphere switch is made only after a complaint, this offer to block is substantially likely to not be in compliance with the law. Finally, there is reasonable doubt that Telesphere is not recompensing PacBell its expenses for providing blocking. Thus, it is substantially likely that we will find after an investigation that the tariffs and advice letters are unlawful.

b. PU Code § 2884(c)

PU Code § 2884(c) requires a complaint procedure, including provision for a waiver of charges for the first inadvertent or mistaken use. Telesphere indicates that it not only waives charges for the first inadvertent or mistaken use, but will do this for more than just the first such use. (Tr. p. 48.) The tariffs attached to the advice letters, however, do not contain this policy.

The issue is whether the tariffs filed with the advice letters are likely to be found just and reasonable and consistent with the PU Code. On their face they do not comply.

Telesphere's existing tariffs provide that all bills are presumed accurate and are binding on the customer unless objection is received by Telesphere within 30 days after the bill is rendered. (Rule 10(c).) This rule, however, does not provide that the charges shall be waived for the first inadvertent or mistaken use (either "regular" use or 900 use), only that they are no longer presumed to be accurate and binding. It is not clear what happens other than they are not longer presumed to be accurate and binding.

Telesphere's comments on the ALJ's proposed decision point out that tariffs only set forth the general rules and rates for services. Telesphere argues that tariffs cannot possibly include every rule and regulation which is required by law. The waiver provision is legally mandated and cannot be avoided even if it is not in the tariff.

It is true that a tariff cannot supersede the law. The PU Code presents the more general requirement for waivers, however, and it is the tariff that makes the code more specific. As we stated in D.89-02-066 (pages 47-53), this is an area that requires resolution of implementation issues and some specificity.

Without a specific complaint procedure in the tariff which includes a waiver provision for at least the first inadvertent or mistaken 900 use, Telesphere could modify its waiver policy as quickly as it was implemented, or discriminate in its use as it may from time to time elect. Thus, there is a substantial likelihood that Telesphere's advice letters will be found to not comply with PU Code § 2884(c). ✓

c. Is the Tariff Just and Reasonable?

The question of whether Telesphere's existing safeguards are adequate cannot be answered until the investigation is complete. We are persuaded, however, that parties have a substantial likelihood of prevailing in an argument on the need for certain safeguards Telesphere currently does not have. Before

covering these safeguards, we will address the role of the PacBell safeguards.

DRA argues that we adopted policies on consumer safeguards for 900 services in D.89-02-066 and D.89-03-061 (the decisions authorizing PacBell California 900 service), and that we found less comprehensive safeguards are not in the public interest. Those decisions are not limited to the adoption of a settlement agreement, according to DRA. The decisions modify a settlement agreement and adopt interim safeguards for 900 services which are to be reexamined in a billing investigation or rulemaking. DRA says that the Telesphere advice letters fail to conform to the spirit of our decisions and can be suspended.

Telesphere argues that it actively participated in the PacBell proceedings and was of the clear understanding--as were the other IEC parties involved--that the settlement would not be held as setting any precedent. Telesphere says the settlement agreement itself clearly states that the agreement should not be held as setting precedent. The Commission's Rule 51.8 expressly states that settlement agreements cannot be used as precedent. Further, Telesphere contends that the Commission's settlement process will be undermined for future settlements if an existing settlement becomes precedent to the surprise of participants.

The point must not be lost in this debate that the PacBell safeguards are adopted to address specific concerns. In D.89-02-066 we found that certain minimum requirements are necessary for 900 service tariffs to be found in the public interest, and therefore just and reasonable. We refused to approve PacBell's proposed tariffs with these provisions missing. D.89-02-066 specifically rejects the proposed settlement and explains the reasons at some length. D.89-03-061 approves a 900 program for PacBell after comment by the parties. To the extent Telesphere's tariffs fail to contain these minimum protections explained in D.89-02-066 and D.89-03-061, we believe it is

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substantially likely that we will reject Telesphere's tariffs as unjust and unreasonable just as we did similar tariffs in D.89-02-066. Thus, we hold Telesphere accountable to address at a minimum all the underlying concerns and safeguards in the PacBell 900 program. The burden will be on Telesphere (or any party seeking changes) in the investigation to convincingly argue for any deviations from the safeguards adopted for the PacBell 900 program. At this point, Telesphere has failed to address adequately the underlying concerns in at least three areas, as discussed below, and therefore we find the Telesphere advice letters are substantially likely to be found unjust and unreasonable and therefore unlawful under PU Code § 451.

d. Safeguards and PU Code § 451

(1) Introductory Message

The first safeguard is an introductory or disclosure message. An introductory message addresses the concern about the level of information reasonably provided to consumers. We believe it is reasonable to require IPs to inform callers, when first connected, of the program reached along with some preliminary information (e.g., cost). We concurred with the introductory (disclosure) message safeguard requirement for PacBell's 900 service. ✓

Telesphere's witness testified that Telesphere encourages its IPs to have an introductory message because it is good business practice. We agree with Telesphere that an introductory message is a good business practice. Telesphere does not require an introductory message, however, and some of its IPs do not use one. We can only wonder what motivates some IPs to not follow this good business practice and introduce their program.

We do not need to decide here if an introductory message will be a safeguard requirement for Telesphere's intrastate 900 service in our final determination. Given our strong rejection in D.89-02-006 of the argument that a disclosure message is unlawful

and unwise, however, we are substantially likely to find again that an introductory message is a necessary safeguard. Telesphere's advice letters do not require an introductory message, and there is a substantial likelihood that they will thus be found to be unjust and unreasonable and therefore unlawful in violation of PU Code § 451.

(2) Delay Until Charges Begin

The second safeguard is a delay period after the introductory message before charges begin. A delay period addresses the concern of when charges reasonably begin. A delay period allows the caller to disconnect if the call is misplaced or if, on reconsideration, the caller decides to not complete the call within a reasonable time. We found this to be a reasonable safeguard for PacBell's 900 service. ✓

Telesphere's current safeguards require an opportunity for the caller to disconnect without charge for calls to programs of indefinite duration. Telesphere provides the delay period if the IP requests it for other types of programs, but it is not required by Telesphere. Again, it appears that some IPs provide this safeguard as a good business practice. We believe that it is a good business practice. We again can only wonder at the motivation of an IP that does not give a caller the opportunity to disconnect without charge if the call is misplaced or the caller decides to not complete the call within a reasonable time.

As with the introductory message, we do not need to decide here if a delay period before charges begin will be a safeguard requirement for Telesphere's intrastate 900 service in our final determination. Based on this background, however, we believe that there is a substantial likelihood that the party advocating a delay period will prevail. Telesphere's tariff will therefore be found to be unjust and unreasonable and therefore unlawful in violation of PU Code § 451.

(3) Notification and Automatic  
Blocking at Predetermined Limits

The third safeguard is a provision to notify callers if their bill exceeds a predetermined limit and automatically block callers if their bill exceeds an even higher limit (until they can be contacted to confirm they desire to continue 900 access). Notification and automatic blocking at predetermined limits addresses the concern of providing reasonable information to customers about their cumulative use of 900 service (between normal billing cycles) so customers can make informed decisions. Notification and automatic blocking warns customers when bills are getting large and limits the granting of additional credit without the customer's knowledge and agreement for this special service.

Telesphere safeguards in Advice Letter 9 do not contain notification and automatic blocking provisions at specified bill limits. Telesphere's letter of November 13, 1989, indicates that Telesphere blocks access to "certain subscribers that incur very large charges in a short period of time," but this safeguard is neither explained nor included in its advice letters. It is not clear, for example, which "certain" customers qualify for this safeguard and which do not. It is not clear how large the charges must be and how short is the period. It is not clear if we would agree that any of these determinations by Telesphere are reasonable (e.g., which customers, how large the charges, and how short the duration). Even if we did agree, however, that Telesphere's application of this safeguard is reasonable, it is not in the tariff. Without being in the tariff, Telesphere could reverse this policy without the Commission's or telephone customers' knowledge.

Further, to the extent Telesphere applies this safeguard to certain of its customers, it would apply only to bills for Telesphere IPs and not all IPs reached by a caller. Telesphere has not, for example, contracted with all LECs in California to make

this provision apply to bills for all 900 calls, including those carried by Telesphere.

Telesphere agrees notification to certain customers is reasonable. We believe it can assist customers to make good use of this service by providing useful information. We required notification and automatic blocking at specified limits for PacBell's 900 service. Whether the final safeguards for Telesphere IP service contains a similar limit or a differently constructed limit, we believe that there is a substantial likelihood that parties recommending some limit will prevail.

(4) PU Code § 451

Therefore, based on the discussion above, we find a substantial likelihood that Telesphere's advice letters fail to address adequately the underlying concerns in at least these three areas. To the extent Telesphere's tariffs fail to at least contain the minimum protections we found necessary in D.89-02-066 and D.89-03-061 for 900 service to be just and reasonable, we find there is a substantial likelihood that we will reject the Telesphere tariffs as unjust and unreasonable, just as we did similar tariffs in D.89-02-066. As such, Telesphere's advice letters are substantially likely to be found unjust and unreasonable and therefore unlawful under PU Code § 451.

2. Irreparable Injury

Another standard to determine whether to suspend an advice letter or tariff is whether irreparable injury will occur without suspension. We believe irreparable injury is substantially likely to occur. Telesphere currently requires neither an introductory message nor a delay period before charges begin (to allow for misdials or a caller deciding not to complete the call within a short time). We believe that, without an introductory message and a delay period, mistaken calls may be placed that are not waived under Telesphere's adjustment policy. For example, a supervised child between the ages of 10 and 14 may make a call that



he or she would otherwise terminate after hearing an introductory message and/or having a moment before charges begin. The parents may not appeal the charges but, even if they do, they may not be waived by Telesphere under its current adjustment policy.

This problem is compounded by the customer confusion that will result given the public's expectations of specific safeguards (see below). A caller with PacBell as the LEC who has seen PacBell's advertising will expect these safeguards. As long as the California 900 (PacBell's 900 service) is less than \$75, there will be no customer notification or temporary blocking. Callers having been advised of the 900 safeguards of PacBell may make a 900 call carried by Telesphere and not get an introductory message, a delay period before charges begin, or notification at a specified bill limit. The caller may incur hundreds of dollars of Telesphere-carried calls and be expecting a notification when the bill exceeds \$75. No notification will occur, but they will be billed for the calls, including those over \$75. These bills may not be waived (including those over \$75) if the caller is over 14 and does not want to pay. Irreparable harm is the result.

Telesphere's comments on the ALJ's proposed decision state that our policy on the waiver and notification is

"...to serve customers who are unaware... It is abundantly clear that these procedures are not designed to protect the customer who already 'comprehends the expense' of 900 service."  
(p. 12.)

As we discussed in D.89-02-066, "...we find that advance notification can be an important consumer safeguard...". (p. 54.) This is even for customers who know there are charges per call and understand the expense of 900 service. It is a protection that does not inconvenience most regular use, while it prevents serious abuses by unauthorized users or those who may simply not be aware of the mounting costs. This approach is similar to that which is commonly offered by credit cards and other forms of third party

credit. (D.89-02-066, p. 54.) Thus, we feel that without notification and with Telesphere's current waiver policy, irreparable harm is substantially likely to occur.

**B. Other Considerations**

We consider two other items in deciding whether to suspend Telesphere's 900 service: intraLATA service and customer confusion.

**1. IntraLATA Service**

PacBell raises the issue of Telesphere providing intraLATA service. Telesphere's witness testified that there are Telesphere IPs within California. (Tr. p. 55.) Telesphere assumes and believes that a caller from within California can reach a Telesphere 900 IP within California. (Tr. p. 55, 84.) There may be ways to block by region or to provide an interrupt message (to tell the caller that the call cannot be completed since it is an intraLATA call, for example), but the witness was not sure of the details. (Tr. p. 66.) The record does not indicate that intraLATA calls are either not possible or that Telesphere now blocks or in any way prevents their occurrence. ✓

We believe PacBell raises a legitimate concern. AT&T argues our restrictions of intraLATA carriage by IECs is not a blanket prohibition but is directed at maintaining a contribution to universal service. We do not authorize intraLATA calls to be carried by other than the LEC, however, with limited exceptions, as indicated by AT&T. Calls to IPs are not one of the exceptions--at least at this time. This record does not show the extent to which 900 service does not offer a contribution to universal service and may therefore be an exception. The extent of intraLATA competition we will allow is to be determined in Phase III of I.87-11-033 (Investigation into Alternative Regulatory Frameworks). We will not prejudge the outcome of that investigation by allowing intraLATA calls to IPs over the lines of an IEC. More importantly, this hearing and decision is not the place to make a determination ✓

on intraLATA carriage of 900 service by IECs. Rather, now before us is the narrow issue of whether to suspend Telesphere's tariffs or not. IntraLATA carriage is a legitimate issue and should be examined in the investigation before Telesphere's 900 service is authorized. There is a substantial likelihood that, in the full investigation of the reasonableness of Telesphere's advice letters, we will find that Telesphere's service conflicts with our restrictions on intraLATA service and that 900 service is not an exception to the restrictions on intraLATA competition. This substantial likelihood justifies a suspension pending the full investigation. ✓

## 2. Customer Confusion

We are persuaded by the argument that callers will be confused if Telesphere is given interim authority with safeguards that are different than PacBell's before we have the opportunity to determine what safeguards are necessary for Telesphere's 900 service. PacBell has advertised its 900 service and safeguards consistent with our orders. But callers have virtually no way to determine the carrier of their call to an IP (e.g., whether it is carried by PacBell, Telesphere, or--if we also give interim authority as discussed below--by AT&T, Sprint Services, MCI, or another IEC). Customer confusion and harm may occur. For example, callers could incur hundreds of dollars of 900 calls billed to their PacBell bill. As long as the California 900 (PacBell's 900 service) is less than \$75, no customer notification or temporary blocking will occur. Callers having been advised of the 900 safeguards of PacBell may make a 900 call carried by Telesphere and not get an introductory message, a delay period before charges begin, or notification at a specified limit, contrary to their expectations. They will be billed for charges above \$75 and/or \$150 without having received notification. The charges may not be waived if the caller is over 14 and states that the call(s) running the total past \$75 and/or \$150 was not intended or authorized, and

they just do not want to pay for the call(s). Confusion and harm are the result. ✓

C. Interim Authority

Telesphere argues that its service--as well as that for Sprint Services, AT&T, and MCI--should be allowed on an interim basis pending the final determination of IEC safeguards. Telesphere asserts its safeguards are adequate to prevent harm greater than the good to society of 900 service. Telesphere--and other IECs--already serve California customers through their interstate service. The service will remain the same with intrastate authority. Telesphere says that delaying authorization will only continue PacBell's monopoly on intrastate 900 service and drive IPs to other states, outside the jurisdiction of this Commission and the PU Code. AT&T joins in this argument and indicates that IPs are already leaving California.

DRA and PacBell argue against interim authority. Interim authority for Telesphere will result in unequal regulatory treatment with respect to other applications for 900 service. A consolidated proceeding should be undertaken to determine a consistent and uniform set of safeguards for all 900 service, and this should occur before authority is given, to prevent caller confusion and harm. PacBell also argues that we must consider the competitive impact of Telesphere's 900 service prior to its authorization.

We decline to grant interim authority. There is a reasonable likelihood that Advice Letters 8 and 9 may violate the PU Code. A proponent(s) of suspension has a substantial likelihood of prevailing that the advice letters are unjust and unreasonable and therefore unlawful under PU Code ( 451. Consumer confusion and irreparable injury may result from interim authority. IntraLATA service by an IEC may occur if interim authority is granted in contravention to our intent not to allow such intraLATA service

until explored further in the Telesphere investigation or Phase III of I.87-11-033.

Considerable upset occurred with the introduction of 976 service. That upset led to legislation and action by this Commission to protect customers. We have taken time to carefully consider and adopt safeguards for PacBell's 900 service. We cannot lightly ignore that history and our efforts. We do not wish to cause consumer confusion and undo gains already made by allowing interim authority pending the final determination of safeguards for Telesphere.

Furthermore, similar regulatory treatment of all similarly situated companies under our regulation is a reasonable expectation. If we grant interim authority to Telesphere, we must either directly grant interim authority to all applicants for 900 service or have it occur indirectly by each applicant filing its own petitions or advice letters for the same end. We would necessarily reverse Resolution T-14021. That resolution was correct, however, and we decline to reverse ourselves.

The fundamental issue is whether we proceed with partial safeguards or delay until a more reasoned and complete review and decision can be made. Problems resulted from introduction of 976 service, which led to changes in the law and our regulation. To the extent we rejected PacBell's first tariffs without certain minimum safeguards and Telesphere's advice letters fail to contain these minimum protections, it is substantially likely that we will reject Telesphere's tariffs as unjust and unreasonable. The PacBell safeguards were thoughtfully considered before being adopted. We find we need here to faithfully follow the PU Code and have a reasoned program in place before granting further authority.

D. PU Code { 311

PU Code { 311 provides that the Administrative Law Judge (ALJ) shall prepare and file an opinion setting forth recommendations, findings, and conclusions. The Commission shall

issue its decision not sooner than 30 days following filing and service of the ALJ's proposed decision, except that the 30-day period may be reduced or waived by the Commission in certain circumstances.

We will reduce the 30-day period due to this suspension constituting an emergency. Telesphere's 900 tariffs are substantially unlikely to comply with the PU Code. Confusion and irreparable injury will occur until Telesphere's 900 tariffs are suspended. There is a substantial likelihood that Telesphere is in conflict with our restrictions of IEC intraLATA service. ✓

By our own rules we use the 30-day period to receive and consider comments and reply comments to the ALJ's opinion. (Commission Rules of Practice and Procedure, Rule 77.2 et seq.) We reduced the time for comments and reply comments consistent with the reduction of the 30-day period under PU Code { 311. ✓

#### E. Conclusion

We have held a hearing consistent with PU Code { 455 and find we need to alter or modify Telesphere Advice Letters 8 and 9. Suspension alters or modifies an advice letter. We will suspend the advice letters consistent with PU Code { 455 until further order.

We note that workshops began on March 1, 1990 for all LECs and IECs to address the concerns and issues that are raised with LEC and IEC intrastate provision of 900 service. We are optimistic that all parties are well on their way to a fast resolution of the issues and concerns. We look forward to authorizing as quickly as possible reasonable intrastate 900 service by telephone corporations other than PacBell. We will do this as soon as the proposed tariffs are fully in compliance with the law, contain all just and reasonable safeguards, and address any and all remaining issues (e.g., issues unique to IEC offering of 900 service). ✓

Findings of Fact

1. PU Code { 455 provides that the Commission may alter or modify any rate, classification, contract, practice, or rule not otherwise suspended upon its own motion after a hearing.
2. A hearing was held January 24, 1990, on the Commission's own motion, regarding Telesphere's Advice Letters 8 and 9.
3. Suspending a rate, classification, contract, practice, or rule modifies or alters that rate, classification, contract, practice, or rule.
4. Standards to use in determining whether to alter or modify a rate, classification, contract, practice, or rule by its suspension are:
  - a. Whether the proponent(s) of suspension stands a substantial likelihood of prevailing on the legal arguments.
  - b. Whether irreparable injury will occur without suspension.
5. Telesphere itself has imposed some safeguards that are either required by law (PU Code ({ 2884 et seq.) or that it has on its own determined to be necessary.
6. PU Code { 2884(a) and (b) requires that the Commission shall specify a method(s) for telephone corporations to offer free blocking to all residential subscribers for either (1) all information providing programs, or (2) those that contain harmful matter; and that the Commission will determine and implement a method by which telephone corporations will be recompensed their expenses for providing this deletion of access option.
7. Telesphere's Advice Letters 8 and 9 do not address all program blocking.
8. Blocking is available to Telesphere customers through PacBell when PacBell is the customer's LEC.
9. Telesphere can provide blocking at its own switch when requested by its customers.

10. Telesphere has no program to notify its customers of its blocking option before a complaint would otherwise arise.

11. Telesphere customers are not necessarily offered the blocking option if they are served by an LEC other than PacBell and have not complained to Telesphere so they may learn of the blocking option by Telesphere.

12. The Commission has not yet specified a method(s) for Telesphere to offer free blocking to all residential subscribers.

13. The Commission requires the offer to block be made before, not after, a complaint would otherwise occur.

14. That Telesphere does not notify its customers of the Telesphere blocking option before a complaint occurs, but does so only after a complaint, is substantially likely to be found not consistent with PU Code ( 2884(a) and (b). ✓

15. Even if we declined to address IEC blocking through LECs in D.89-02-066, the issue of Telesphere's abilities to perform blocking consistent with the PU Code is relevant here.

16. There is reasonable doubt that PacBell's intrastate billing and collection tariff recovers the costs of 900 blocking. ✓

17. There is reasonable doubt that Telesphere compensates PacBell for any increase in PacBell's costs due to blocking access to Telesphere IPs.

18. PU Code ( 2884(c) requires a complaint procedure, including a provision for a waiver of charges for the first inadvertent or mistaken use.

19. Neither Advice Letters 8 or 9 nor any other provision of Telesphere's existing tariffs contain a provision for a waiver of charges for the first inadvertent or mistaken 900 service use.

20. D.89-02-066 rejects a proposed settlement and explains why certain safeguards are necessary before a 900 program can be found to be reasonable, consistent with the law, and in the public interest; D.89-03-061 adopts Commission proposed safeguards after comment by the parties.



21. Telesphere's provision of 900 service must address at least the same concerns discussed in D.89-02-066 and D.89-03-061. ✓

22. Telesphere's tariffs fail to adequately address at least three safeguard concerns, in the areas of introductory message, a delay period until charges begin, and notification and automatic blocking when the bill exceeds specified limits. ✓

23. Telesphere encourages, but does not require, its IPs to have an introductory message because it is good business practice.

24. It is good business practice to have an introductory message.

25. It is substantially likely that parties advocating an introductory message will prevail at the time of the full investigation. ✓

26. Telesphere Advice Letter 9 contains the safeguard of a delay period before charges begin, but only for programs of indefinite duration.

27. Telesphere provides for a delay period before charges begin for other IP programs at the request of the IP, but Telesphere does not require a delay period.

28. Some IPs provide a delay period before charges begin as a good business practice.

29. It is a good business practice to have a delay period before charges begin.

30. It is substantially likely that parties advocating a delay period before charges begin will prevail at the time of the full investigation. ✓

31. Advice Letters 8 and 9 do not contain a safeguard of notifying customers when the bill exceeds a specified limit and automatically blocking calls if the bill exceeds an even higher limit until the caller can be contacted to confirm the desire to continue 900 access.

32. Telesphere blocks certain subscribers that incur very large charges in a short period, but this provision is not in its tariff contained with Advice Letters 8 and 9.

33. It is unknown what criteria place customers in the class of "certain", how large are large charges, and how short is a short period for Telesphere's existing blocking.

34. Additional credit results when a caller can incur a bill for hundreds of dollars or more to IPs without notification or automatic blocking.

35. It is substantially likely that parties advocating notification and automatic blocking at specified limits will prevail at the time of the full investigation. ✓

36. Without an introductory message, a delay period, and notification or automatic blocking at specified limits, it is substantially likely that mistaken calls will be placed that are not waived under Telesphere's adjustment policy and irreparable harm will result. |

37. Telesphere has IPs within California.

38. Callers within California using Telesphere 900 service can reach Telesphere IPs within California. ✓

39. There is no indication that intraLATA calls are either not possible or that Telesphere now blocks or in any way prevents their occurrence.

40. Calls to IPs are not one of the exceptions we have made for intraLATA provision of service by IECs.

41. There is a substantial likelihood that in the full investigation we will find Telesphere's 900 service conflicts with our restrictions of IECs providing intraLATA service. |

42. Telesphere safeguards in Advice Letters 8 and 9 are not the same as the safeguards employed by PacBell.

43. PacBell has advertised its safeguards.

44. Customers have virtually no way to determine the carrier of their call to an IP.

45. Customer confusion will occur if Telesphere is granted interim authority with safeguards that differ from PacBell's before we have had the opportunity to determine the safeguards that are necessary for Telesphere.

46. Considerable upset occurred with the introduction of 976 service that led to legislation and remedial action by this Commission to protect consumers and much progress has been made.

47. Whether or not the final safeguards for Telesphere's 900 service are the same as PacBell's, we do not wish at this time to cause consumer confusion and undo gains made by allowing interim authority.

Conclusions of Law

1. Telesphere has not established that Telesphere's tariffs do comply, and there is a substantial likelihood that Telesphere's tariffs do not comply, with PU Code § 2884(a) and (b), which requires free residential blocking to all Telesphere information access programs; there is reasonable doubt that Telesphere is not recompensing PacBell its expenses for providing blocking as required by this section of the PU Code.

2. There is a legitimate issue and a substantial likelihood that Telesphere's tariffs do not comply with PU Code § 2884(c), which requires a complaint procedure including a waiver of charges for the first inadvertent or mistaken 900 service use. ✓

3. Protestants have raised a legitimate issue, and there is a substantial likelihood that, for its 900 tariffs to be just and reasonable, Telesphere's tariffs must contain at least three safeguards they do not now have (an introductory message for all programs, a delay period before charges begin for programs other than of indefinite duration, and notification and automatic blocking when the bill exceeds specified limits), and without these safeguards the tariffs will be found to be unjust and unreasonable and therefore unlawful under PU Code § 451.

4. There is a substantial likelihood that Telesphere's 900 service is in conflict with this Commission's restrictions of intraLATA service by IECs and that Telesphere's 900 service does not fall into any exception to our restrictions. The issue of intraLATA use and limitations on such use should be investigated before Telesphere's 900 service is authorized.

5. Interim authority should be denied given that legitimate issues have been raised, the substantial likelihood that the tariffs will be found in the investigation to be in violation of PU Code (( 451, 2884(a), 2884(b), and 2884(c), and that consumer confusion and irreparable harm will result from interim authority. ✓

6. The 30-day period in PU Code ( 311(d) should be reduced because an unforeseen emergency exists. ✓

7. Telesphere Advice Letters 8 and 9 should be suspended as a modification or alteration under PU Code ( 455.

8. To protect the public this order should be effective today.

INTERIM ORDER

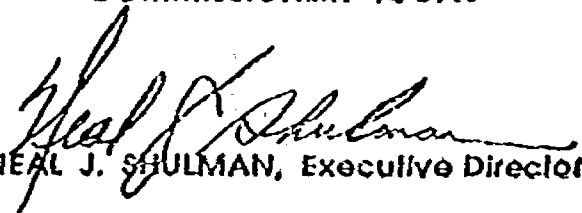
IT IS ORDERED that Telesphere Network, Inc.'s Advice Letters 8 and 9 are suspended consistent with Public Utilities Code § 455. ✓

This order is effective today.

Dated MAR 14 1990, 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

  
NEAL J. SHULMAN, Executive Director

pc