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Decision 91-10-040 October 23, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

OMNIPHONE, INC., PHONEQUEST, INC., THE FRIENDSHIP NETWORK, INC., CHRISTIAN FELLOWSHIP INSTITUTE, INC., AND S. CLAUS, INC., Complainant, v. PACIFIC BELL, a California public utility (U 1001 C), Defendant.	ORIGINAL Case 87-01-007 (Filed December 24, 1990)
And Related Matters.	Case 87-04-031 Case 88-11-004 Case 90-01-047 Case 90-09-013 Case 90-09-014 Case 90-09-015 Case 90-09-016 Case 90-09-017 Case 90-10-008 Case 90-10-010 Case 90-10-034 Case 90-11-003 Case 90-11-014

I N D E X

O P I N I O N

1. Summary

This proceeding involves a dispute between Pacific Bell (Pacific) and certain of its customers. The customers, called "information providers" (IPs), provide messages and programs to callers using the 976 telephone prefix.[1] This decision resolves competing motions for summary judgment in favor of the complainants. Regarding Pacific's obligation to bill and remit for 976 calls we find as follows:

1. Between September 8 and November 1, 1983, Pacific was obligated to remit only for calls originating from the 976 Calling Area in which the IP was located.

2. Between November 2 and December 31, 1983, Pacific was obligated to bill and remit for all directly dialed calls completed to the IP's program.

3. On and after January 1, 1984, Pacific was obligated to bill and remit for all directly dialed intraLATA calls connected to the IP, and for all interLATA calls required by the terms of Pacific's access tariffs.

4. Pacific's access tariffs require Pacific to apply to all calls over switched access in the terminating direction the charges per call as specified in the 976 tariff.

This decision denies Pacific's October 16, 1990 motion to dismiss. We also deny complainants' motion for an order to show cause why sanctions should not be imposed.

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1 The service using a 976 prefix is variously referred to as "976 service," "Information Access Service" or "IAS."

2. Background

On January 7, 1987, Omniphone, Inc. (Omniphone) and four other companies[2] filed a complaint (C.87-01-007) against Pacific, Allnet Communication Services, Inc. (Allnet), and General Telephone of California, Inc. (GTEC).[3] Complainants allege that Pacific, pursuant to its 976 tariffs, is required to "issue remittance checks monthly to each IP based on the total number of directly dialed, calling card and allowed operator-handled calls completed to the 976 IAS (Information Access Service) [provider's] announcement or program minus any calls adjusted by the Utility. (Schedule Cal. P.U.C. A9.5.2c.3.)" Complainants further allege that Pacific is obligated to provide, but until the present has "deliberately concealed, and failed and refused to provide, the number of calls completed to complainants' 976 numbers but for which no remittance were [sic] paid." Complainants allege that there are enormous unexplained discrepancies between the number of calls registered by their equipment and the number of calls for which they have received remittance from Pacific. In summary, complainants contend that Pacific has not remitted to the IPs for all calls for which it is obligated to remit under its tariffs.

Pacific filed an answer to the complaint on February 13, 1987 stating that at all times since the inception of 976 service, it has provided such service pursuant to and in full compliance with its tariffs. Pacific states that its investigation has found that its billing system was performing with "reasonable accuracy."

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2 Omniphone was joined in Case (C.) 87-01-007 by The Friendship Network, Inc., Phonequest, Inc., Christian Fellowship Institute, and S. Claus, Inc. All five complainants are Delaware corporations, with their principal place of business in Los Angeles, and their principal office at the same address in Seattle.

3 By stipulation of the parties, Allnet and GTEC have been dismissed as defendants in these proceedings.

Pacific believes that the major discrepancies between Pacific's counts of calls and Providers' counts are attributable to inaccurate Providers' counts, caused either by the Providers' equipment or by the Providers' inclusion of nonremittable calls, such as interstate, in its counts." (Pacific Answer, pp. 6-7.)

Between January 1987 and September 1990, 14 additional complaints were filed by IPs,[4] each containing allegations similar to those set forth in C.87-01-007. To these complaints Pacific filed timely answers similar to its answer to C.87-01-007.

On March 1, 1990, Pacific filed an answer and motion to dismiss the most recently filed call-count complaint, C.90-01-047. Pacific states that the 976 tariff authorized Pacific to bill and remit only for certain types of calls made "within a 976 calling area." The motion further alleges that the tariff requires Pacific to remit only for calls for which it is able to bill. Complainants in C.90-01-047 filed a response to the motion on August 15, 1990.

On October 19, 1990, Administrative Law Judge (ALJ) Wheatland issued a ruling which denied the motion to dismiss C.90-01-047. The ruling concluded that the complaint set forth sufficient facts to state a cause of action against Pacific.

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4 These additional complaints are: C.87-04-031, C.88-11-004, C.90-01-047, C.90-09-013, C.90-09-014, C.90-09-015, C.90-09-016, C.90-09-017, C.90-10-008, C.90-10-010, C.90-10-034, C.90-10-063, C.90-11-003, and C.90-11-014.

These complaints, together with C.87-01-007, are referred to as "the call count complaints." C.90-10-063 was dismissed by D.91-05-062, upon request of the complainant.

On October 16, 1990, Pacific filed Motions to Dismiss and Answers to five more call-count complaints.[5]

On November 5, 1990, in response to Pacific's pleadings, complainants filed "Complainants' Memorandum of Points and Authorities in Opposition to Pacific Bell's Motions to Dismiss and in support of Complainants' Motion for Partial Summary Judgment and Motion for Issuance of Order to Show Cause Why Sanctions Should Not be Imposed."

On December 7, 1990, Pacific filed "Pacific Bell's Motion for Counter Partial Summary Judgment and Combined Response to complainants' Memorandum of Points and Authorities in Opposition to Pacific Bell's Motions to Dismiss and in Support of Complainants' Motion for Partial Summary Judgment and Motion for Issuance of Order to Show Cause Why Sanctions Should Not be Imposed and to Complainants' Additional Specification of Relief Sought."

As indicated in the title of the pleadings, three issues are before the Commission: (1) Pacific's motion to dismiss five complaints, (2) Competing motions for partial summary judgment by complainants and Pacific, and (3) Complainants' motion for an order to show cause why sanctions should not be imposed against Pacific. We will consider each issue in turn.

3. Discussion

3.1 Pacific's Motions to Dismiss

The five motions to dismiss filed by Pacific on October 16, 1990 are nearly identical to Pacific's motion to dismiss C.90-01-047. On October 19, 1990, ALJ Wheatland issued a ruling which denied Pacific's motion to dismiss C.90-01-047. We

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5 The five complaints are C.90-09-013, C.90-09-014, C.90-09-015, C.90-01-016, and 90-01-017. These complaints are similar to C.90-01-047. Pacific's Answer and Motion to Dismiss these complaints is similar to its Answer and Motion to Dismiss C.90-01-047.

will deny the October 16, 1990 motions to dismiss for the same reasons stated in the prior ruling.

3.2 The Motions for Partial Summary Judgment

Section 1701 of the Public Utilities Code states, "All hearings, investigations, and proceedings shall be governed by this part and by rules of practice and procedure adopted by the commission,...." While the only pretrial motion authorized by the Rules is a Motion to Dismiss (Rule 56), the Rules are to be liberally construed to secure "just, speedy, and inexpensive determination of the issues presented. In special cases and for good cause shown, the Commission may permit deviations from the rules." (Rule 87.)

The Commission has permitted deviation from the rules to accept the filing of a special pretrial motion--the motion for summary judgment. Where a contested matter turns on questions of law rather than questions of fact, a motion for summary judgment can help to expedite administrative proceedings by avoiding needless hearings.

To properly consider this motion, we will employ the procedure for summary judgment provided at Section 437(c) of the California Code of Civil Procedure and the relevant case law.[6]

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6 California Code of Civil Procedure Section 437(c) states:

> "(c) The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact, the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the

(Footnote continues on next page)

Inasmuch as summary judgment denies the right of the adverse party to full hearing of the case, it should be applied with caution. Summary judgment will be granted only when it is clear from the affidavits or declarations filed in connection with the motion that there are no triable issues of fact. Any doubts as to the propriety of granting the complainants' motion will be resolved in favor of the respondent.

3.3 Pacific's Obligation to Bill and Remit for 976 Calls

A caller with 976 service can, for a charge, dial a number with a 976 prefix to receive a recorded message or an interactive program. The provider of the 976 program ("information provider," "IP" or "976 customer") is responsible for preparing and presenting the message or program which can be up to three minutes in length. The charge for the message ("information charge"), as determined by the IP, may range from $.20 to $2.00 per call. Pacific collects the information charge from the caller, deducts a fee to cover its costs of providing the service, and remits the balance to the IP.

A call to a 976 program may originate from almost anywhere. As used in this decision, an "intraLATA" call originates

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(Footnote continued from previous page)

court, and all inferences reasonably deductible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably deductible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact."

and terminates within the same LATA,[7] an "interLATA" call terminates in a different LATA within the same state, and an "interstate call" terminates in a different state.

Complainants contend that Pacific's tariffs obligate the utility to bill, collect, and remit for all direct-dialed, calling card, and allowed operator-assisted calls which are completed to the IP's program. Complainants emphasize that this obligation extends to all such calls (intraLATA, interLATA, and interstate). Pacific contends that it is obligated by its tariffs to bill, collect or remit only for intraLATA calls, not for interLATA or interstate calls.

On March 24, 1983, Pacific submitted a proposed tariff to the Commission[8] suggesting the initiation of a new service called "976 Information Access Service." The proposed tariff defined certain "Local Calling Areas," each consisting of a group of selected communities within one or more area codes. Under this proposal, the IP would "only receive reimbursement for calls originating from the 976 Local Calling Area as described in the attached tariff. The 976 IAS customer will not be reimbursed for toll, long distance, or coin calls."

Earlier in this proceeding Pacific argued that the 976 tariff permitted it to bill only for calls which originated within the local calling area. If the tariff had been adopted as originally proposed, Pacific's argument would have been correct. Under the original scheme, the IP would have received reimbursement only for calls originating from its local calling area.

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7 A LATA is a "Local Access and Transport Area." Ten LATAs in California were approved by the United States District Court. These LATAs became effective on January 1, 1984.

8 The Commission Advisory and Compliance Division (CACD) typically reviews proposed tariffs on an informal basis prior to formal filing of the tariff in an Advice Letter.

However, Pacific significantly revised the proposed tariff before it went into effect. The change is explained in Advice Letter 14603, filed on August 9, 1983:

> "The 976 IAS customer initially will receive a remittance only for calls originating from the 976 Calling Area as described in the attached tariff; however, after November 1, 1983, the customer will receive a remittance for all calls, as described in the attached tariff, to that customer's announcement or program."

The tariff, as attached to Advice Letter 14603, described Pacific's obligation as follows:

> "The utility will issue a remittance check monthly to the 976 IAS customer based on the total number of directly dialed, calling card and allowed operator handled calls completed to the 976 IAS customer's announcement or program." (Section 3.a.)

This language is unambiguous and unqualified.[9] It imposed upon Pacific an obligation, effective November 2, 1983, to issue a remittance for all directly dialed calls completed to the IP program, not just those originating within the local calling area.

Although Pacific has abandoned its argument that the 976 tariff permits it to bill only for calls within a local calling area, it continues to maintain that the scope of the tariff is limited. Pacific now contends that other portions of the 976 tariff limit its billing and collection obligation to intraLATA calls. Pacific argues that the phrase "directly dialed calls" must be read in the context of Pacific's toll rate tariff. (Cal. PUC A6.1.) This tariff, as cited by Pacific, applies to "all [message

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9 In contrast, the original version of section 3.a. required the utility to "bill callers for area local calls completed to the 976 announcement or program from flat and measured rate access lines."

toll service (MTS)] messages...furnished or made available by the utility over facilities within a LATA." (No. A6.1.) It defines the territory of two-point MTS as "Between two points within a LATA."

Thus, Pacific reasons, the term "directly dialed" as it is used in the 976 tariff can have only one meaning: a directly dialed call which is wholly within the LATA.

Pacific's argument is fatally flawed. The language Pacific cites in the toll rate tariff was not filed with the Commission until March 4, 1985. It therefore cannot be read to retroactively modify a tariff filed in 1983.[10]

Because LATAs were implemented after 976 service was initiated, we cannot accept Pacific's argument that when the 976 tariff was filed, the terms "directly dialed" or "sent paid" referred only to "intraLATA" calls. Instead, we find that this tariff, after November 1, 1983, applied to all directly dialed calls connected to the IP.

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10 Pacific first filed its MTS tariff on October 3, 1983. The Commission suspended this tariff on November 22, 1983. The Commission rejected it by RS1 on April 18, 1984. Although the original tariff never took effect, the language suggests that Pacific's initial formulation of MTS service was not restricted to intraLATA service. The initial language does not refer to LATAs. Instead, it states that MTS "applies to all MTS messages...furnished or made available by utility over facilities wholly within or partly within and partly without the State of California." Similarly, the MTS tariff as originally filed defines the territory of two-point MTS service as "between two points within the state of California where the respective rate centers of such points also are located in said state." Thus, if we were to accept Pacific's argument that the MTS tariff governs the 976 tariff, the originally filed MTS tariff is consistent with the view that Pacific was obligated to bill and remit for all directly dialed 976 calls connected to the IP from any point within the state, or partly within and partly outside the state.

3.4 The Effect of Divestiture

While the 976 service was being initiated in 1983, the telephone industry was undergoing a major restructuring which would have an immediate impact on the new 976 tariff.

On August 25, 1982 a federal court entered a Modified Final Judgment (MFJ) which required the restructuring of the Bell System. (United States v. American Telephone and Telegraph Company, 552 F.2d 131, (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983). The effect of the restructuring is described in Decision 83-12-024:

> "According to the terms of the MFJ, the regional Bell operating companies [BOCs], including Pacific, must be divested from their corporate parent, AT&T, by February 1984, and will henceforth be restricted in their business activities, their primary business being local telecommunications services provided between points within exchange areas. These exchange areas have been designated as LATAs.... [Ten LATAs were approved for California by the United States District Court.]
>
> "The MFJ expressly prohibits the BOCs, including Pacific, from providing interexchange service (interLATA) telecommunications services, and so requires Pacific to transfer its interLATA toll facilities and operations to AT&T. However, the MFJ does envision the BOCs furnishing exchange access, which is defined as 'the provision of exchange services for the purpose of originating or terminating interexchange communications.'" (13 CPUC 2d 337-338.)

At midnight on December 31, 1983, AT&T spun off Pacific Telephone and Telegraph Company (PT&T). PT&T became a separate corporation named Pacific Telesis Group (Telesis). Those public utility operations of PT&T that were assigned to the BOCs by the MFJ were assumed by the wholly-owned subsidiary of Telesis, Pacific Bell.

AT&T formed a national subsidiary, AT&T Communications, to conduct international, interstate, and interLATA

telecommunication services retained by AT&T under the MFJ. AT&T Communications, in turn, formed a subsidiary in California named "AT&T Communications of California, Inc." The scope of operations retained by AT&T Communications and its subsidiaries, formerly known as "toll" were now called "interLATA." (15 CPUC 2d 248.)

Although the language of the 976 tariffs, as drafted and implemented prior to divestiture, is quite broad, Pacific's authority to bill and remit for 976 calls was sharply limited by the terms of the MFJ, which became effective on January 1, 1984. Effective January 1, 1984, Pacific was prohibited from providing interLATA service, except on an exchange access basis.

In summary, Pacific's obligation to bill and remit for 976 calls has changed over time:

1. From September 8 through November 1, 1983, Pacific was obligated to remit only for calls originating from the 976 Calling Area in which the IP was located.

2. From November 2 through December 31, 1983, Pacific was obligated to bill and remit for all directly dialed calls completed to the IP's program.

3. On and after January 1, 1984, Pacific was obligated to bill and remit for all directly dialed intraLATA calls connected to the IP, and for all interLATA calls required by the terms of Pacific's access tariffs.

In the next part of this decision we will examine Pacific's obligations under its exchange access tariffs.

3.5 Pacific's Exchange Access Tariffs

In response to the MFJ and Commission decisions which implemented the restructuring, Pacific filed exchange access tariffs. These tariffs, consisting of more than 700 pages of detailed rates terms and conditions for access services, were divided into three main categories: switched access (such as MTS), special access (such as private line or wide area telephone

service), and ancillary services (such as billing and collection services).

Section 8 of Pacific's tariffs established an optional billing and collection service for interLATA calls. Initially, only AT&T subscribed to the service.

Under Section 8, in addition to the interexchange carrier's (IEC) rated messages, Pacific must bill for the information charges:

> "Other message-related charges, such as directory assistance and DIAL-IT charges, will be billed to the End User based on the message data received from the recording service or from the customer." (8.2.1.(B)(2)(k)&(m).)[11]

"This is why," according to Pacific, "Pacific bills for 976 intrastate interLATA calls carried by AT&T and any other IEC who subscribes to Section 8 and does not block 976 calls in their switch." (Pacific's Motion, p. 30.)

Section 6 of Pacific's tariffs describes Pacific's obligations to provide interLATA ("switched") access. The rate regulation section of the switched access tariff provides as follows:

> "Calls over Switched Access in the terminating direction to certain community information services will be rated under applicable rates for Switched Access Service as set forth in 6.8 following. In addition, the charges per call as specified under the Utility's local and/or general exchange service tariffs, e.g., 976 (DIAL-IT) Network Services, will also apply. Schedule Cal. PUC. No. 175-T Section 6.7.12."

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11 As used in this tariff, the "End User" is the caller; the "customer" is the IEC. "DIAL-IT" is the term used to describe IAS, such as 976.

Noting the language that the "charges per call as specified under the Utility's local...service tariffs...will also apply," Pacific argues as follows:

> "[w]hen one turns to Pacific's 976 tariff, one finds nothing in that tariff which describes rates applicable to an IEC for the interLATA calls described in Section 6.2 or Section 6.7. The only charges set forth in Pacific's 976 tariff are those applicable to the information provider (the California 976 Customer) and to the caller of the 976 number (the 976 Caller). As explained in Section IV.A. above, these charges are strictly intraLATA. The 976 tariff does not specify a 976 charge applicable to an IEC who transmits interLATA calls. Since Sections 6.2 and 6.7 each refer to another tariff for the 'applicable rate,' and no such applicable rate can be found in that tariff, there is no 'applicable rate' to bill the IEC. Clearly, there is no 976 rate that Pacific can bill the IECs under Sections 6.2 and 6.7."

Pacific's argument lacks merit for many reasons. First, it is not necessary for the 976 tariff to expressly specify that the charges are applicable to the IEC. Section 6.7.12 incorporates the 976 tariff ("the Utility's local and for-general-exchange service tariffs, e.g., 976") and makes it expressly applicable to the IEC.

Second, Pacific is wrong in characterizing the 976 tariff as "strictly intraLATA." As set forth earlier in this decision, the 976 tariff became effective before LATAs were created.

Divestiture prohibited Pacific from direct transmission of interLATA calls. However, the MFJ clearly allowed Pacific to bill and remit for interLATA charges pursuant to an access tariff. The 976 tariff establishes applicable rates and terms for both intraLATA and interLATA calls.

Finally, as complainants note, Pacific has, in fact, billed 976 charges to some IECs that deliver interLATA calls to Pacific via Feature Group A access. Under Pacific's Section 8

billing services, Pacific has also billed the information charge to the end user for interLATA calls carried by an IEC. To determine the 976 charges that are applicable to the IEC or the end user, Pacific applied the charges set forth in the 976 tariff. This practice confirms that the 976 tariff establishes an "applicable rate" for Section 6 and 8 billing services.

In oral argument on the motion for summary judgment, counsel for Pacific conceded that Pacific has billed the information charge for some interLATA calls, but argued that this practice should be found to exceed its authority:

> "What Pacific did here is perhaps not entirely supported by its 976 tariff. When Pacific applied that $2 rate on these interLATA calls, we submit that we perhaps went beyond, we had no tariff authority to apply that rate, because all that it says in the Section 8 provision that I referred to you, it says the dial-it charge will also be billed, et cetera. But there is an imperfect reference here. It doesn't specify what the dial-it charge should be.
>
> "But why did Pacific do this? What Pacific did is it found that it had the ability, because it had the recording information because the customer was also Pacific's customer, its billing system, for lack of more technical words, had the ability to attach this 976 charge in its system. And it worked smoothly through, and we were able to remit for the benefit of Mr. Selby's clients and all the other information providers, we were able to give them an additional service beyond the four corners of our 976 tariff."

We reject Pacific's argument that its practice of billing the information charge for some interLATA calls is in violation of its tariffs. Instead, we find that Pacific violated its tariffs by failing to bill and remit for all interLATA calls carried by IECs pursuant to Pacific's access tariffs.

Pacific has offered a number of practical reasons why it has not billed information charges for calls carried on Feature Groups B, C, and D. Complainants dispute whether these problems really exist. It is not necessary for us to determine the validity of Pacific's arguments. Even if we assume that Pacific was faced with some practical impediments in billing information charges for all interLATA calls, these impediments neither diminish the legal requirements of the tariff, nor excuse Pacific's failure to comply with it. If Pacific believed it had the authority to bill and remit for interstate calls,[12] and yet found it impractical to implement the tariff uniformly, it should have either resolved the problems or promptly amended the tariff to accurately reflect its actual billing practices.

We conclude, therefore, that Pacific's access tariffs require Pacific to apply to all calls over switched access in the terminating direction the charges per call as specified in the 976 tariff.

3.6 Motions for Sanctions

Complainants moved for an order to show cause why sanctions should not be imposed against Pacific for submitting a verified statement which is alleged to be false and misleading. Complainants contend that Pacific's first verified statement conflicts with its second verified statement and that Pacific knew

12 Counsel for Pacific stated that Pacific's employees apparently believed Pacific had authority to bill for such calls until Pacific's new legal interpretation was issued in late 1990.

or should have known that the statements were in conflict and were at odds with its own conduct.[13]

Complainants do not seek pecuniary or disciplinary sanctions. Instead, they believe that an appropriate sanction would be to strike the second tariff interpretation.

Pacific responds that the motion to show cause is frivolous. Pacific contends that the change in its argument is merely an elaboration upon its legal position, and that there is no basis to bar it from propounding a more thorough interpretation of its tariffs.

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13 The contradictions in Pacific's argument are summarized by complainants' response to Pacific's motion for summary judgment:

> "In its February 28, 1990, Motion to Dismiss in Case No 90-01-047, Pacific argued that, 'The tariff is clear and unambiguous on its face [that] Pacific is authorized by its tariffs to bill and remit only for flat and measured rate access lines, calling card and allowed operator-handled calls which are made within a 976 Calling Area." (Id., p. 2.) Pacific then changed its position in its October 16, 1990, Motion to Dismiss in Case Nos. 90-09-013 through 90-09-017, by asserting the same language as quoted except that it changed the words 'within a 976 Calling Area' to 'from within its California exchanges.' (Id., pp. 3-4. Now Pacific has changed its position once again, this time admitting that it is not always necessary for a 976 call to have originated from within either the 976 Calling Area or its California exchanges in order for the call to be billable and remittable....Pacific has now given the Commission three (3) distinct readings of its tariff, yet it asks the Commission to accept the proposition that its 976 tariff is 'clear and unambiguous on its face.' Such a request should obviously be rejected: the one thing the 976 tariff is not is 'unambiguous.' The 976 tariff may be the most ambiguous tariff in all of Pacific's tariff schedules."

We find that Pacific's second argument, that the 976 tariff is strictly "intraLATA," is fundamentally inconsistent with its first argument, that the tariff is limited to calls within the local calling area. The second argument is also expressly contrary to Pacific's own past interpretation and application of the tariff. While we are troubled by the inconsistencies in Pacific's arguments, we are not persuaded that these inconsistencies require us to strike Pacific's pleadings. The long-term interests of the parties and the ratepayers are better served by a decision on the merits of the pending motions for summary judgment, rather than by a sanction which would prevent us from reaching the ultimate issues in the case. The motion for issuance of an order to show cause is denied.

3.7 Future Proceedings

The ALJ will set a further prehearing conference within 30 days of the effective date of this decision. The parties shall file and serve a prehearing conference statement, no more than ten pages in length, five days before the prehearing conference. The statement shall set forth the agenda for this conference, the issues to be resolved, and a proposed schedule.

Findings of Fact

1. On January 7, 1987, Omniphone and four other companies filed a complaint (C.87-01-007) against Pacific, Allnet, and GTEC.

2. Complainants contend that Pacific has not remitted to the IPs for all calls for which it is obligated to remit under the terms of its tariffs.

3. Between January 1987 and September 1990, 14 additional complaints were filed by IPs, each containing allegations similar to those set forth in C.87-01-007.

4. Advice Letter 14603, filed on August 9, 1983 states:

> "The 976 IAS customer initially will receive a remittance only for calls originating from the 976 Calling Area as described in the attached tariff; however, after November 1, 1983, the customer will receive a remittance for all

calls, as described in the attached tariff, to that customer's announcement or program."

5. This language is unambiguous and unqualified. We find that it imposed upon Pacific an obligation, effective November 2, 1983, to issue to the customer a remittance for all directly dialed calls completed to the IP program, not just those which originated within the local calling area.

6. Because LATAs were implemented after initiation of 976 service, we cannot accept Pacific's argument that when the 976 tariff was filed, the terms "directly dialed" or "sent paid" referred only to "intraLATA" calls. Instead, we find that this tariff, after November 1, 1983, applied to all directly dialed calls connected to the IP.

7. On August 25, 1982 the U.S. District Court entered the MFJ which required the restructuring of the Bell System.

8. Pacific's authority to bill and remit for 976 calls was sharply limited by the terms of the MFJ, which became effective on January 1, 1984. As of this date, Pacific was expressly prohibited from providing interLATA service, except on an exchange access basis.

9. Pacific has, in fact, billed 976 charges to some IECs that deliver interLATA calls to Pacific via Feature Group A access. Pacific has also billed the end user for the information charge for interLATA calls carried by an IEC using Pacific's tariff Section 8 billing services. To determine the 976 charges that are applicable to the IEC or the end user, Pacific applied the charges set forth in the 976 tariff.

10. Pacific's access tariffs require it to apply to all calls over switched access in the terminating direction the charges per call as specified in the 976 tariff.

11. The long-term interests of the parties and the ratepayers are better served by a decision on the merits of the pending

motions for summary judgment, than by a sanction which would prevent us from reaching the ultimate issues in the case.

Conclusions of Law

1. Pacific's October 16, 1990 motion to dismiss should be denied.

2. Complainants' motion for an order to show cause why sanctions should not be imposed should be denied.

3. Complainants' motion for partial summary judgment should be granted to the extent set forth in this decision.

4. Pacific's motion for partial summary judgment should be denied.

O R D E R

IT IS ORDERED that:

1. Complainants' motion for partial summary judgment is granted as follows:

    1. Between September 8 and November 1, 1983, Pacific was obligated to remit only for calls originating from the 976 Calling Area in which the IP was located.

    2. Between November 2 and December 31, 1983, Pacific was obligated to bill and remit for all directly dialed calls completed to the IP's program.

    3. On and after January 1, 1984, Pacific was obligated to bill and remit for all directly dialed intraLATA calls connected to the IP, and for all interLATA calls required by the terms of Pacific's access tariffs.

    4. Pacific's access tariffs require Pacific to apply to all calls over switched access in the terminating direction the charges per call as specified in the 976 tariff.

2. The parties shall file and serve a prehearing conference statement, no more than 10 pages in length, 5 days before the prehearing conference. The statement shall address how this conference should proceed, the issues to be resolved, and a proposed schedule.

This order becomes effective 30 days from today.

Dated October 23, 1991, at San Francisco, California.

PATRICIA M. ECKERT
President
JOHN B. OHANIAN
DANIEL Wm. FESSLER
NORMAN D. SHUMWAY
Commissioners

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

NEAL J. SHULMAN, Executive Director