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MAIL DATE
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Decision 97-02-053 February 19, 1997

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the regulation of cellular radiotelephone utilities.	I.88-11-040 (Petition for Modification) Filed July 12, 1993)

ORDER DENYING REHEARING AND MODIFYING DECISION NO. 95-04-028

Decision (D.) 95-04-028 (Decision) substantially relaxes our prohibition against the practice of "bundling," - the combined sale of discounted cellular telephone equipment and tariffed cellular service. The Decision finds that applicable statutes, such as Business and Professions (B & P) Code Section 17026.1, permit such action, and that, subject to certain conditions, bundling will result in consumer benefits in the form of reduced prices for cellular equipment. The Decision notes that while the current wholesale cellular service duopoly prevents the direct price competition we would prefer, the equipment discounts provide an indirect substitute for such competition.

The California Resellers Association, Inc. (CRA) applied for rehearing on the grounds that the Decision: 1) violates Public Utilities Code Section 1709 and sanctions a violation of Rule 43 of the Commission's Rules of Practice and Procedure (Rules) by reversing the bundling prohibition in response to a petition for modification; 2) misinterprets laws which prohibit bundling; 3) fails to assess adequately the economic impact of bundling and its effect on competition; and 4) fails to make findings and conclusions on all material issues.[1]

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1 All citations are to the Public Utilities Code unless otherwise noted.

Bakersfield Cellular Telephone Company (Bakersfield); the Cellular Carriers Association of California (CCAC); AirTouch Cellular and its affiliates, Los Angeles SMSA Limited Partnership, Sacramento-Valley Limited Partnership, and Modoc RSA Limited Partnership (AirTouch); and GTE Mobilnet of California Limited Partnership and GTE Mobilnet of Santa Barbara Limited Partnership (GTE) filed responses opposing CRA's application for rehearing.

On December 20, 1996, we issued Investigation on the Commission's Own Motion Into Mobile Telephone Service and Wireless Communications [D.96-12-071] (1996) __ Cal.P.U.C.2d __, which reviews the extent to which the Omnibus Budget Reconciliation Act of 1993 (Budget Act) preempts our jurisdiction over commercial mobile radio service (CMRS).[2] One provision of the Budget Act generally removed state rate regulation for all CMRS providers effective August 10, 1994, but left in place the states' authority to regulate "other terms and conditions" of service. (See 47 U.S.C. § 332(c)(3) as amended by the Budget Act.)[3] The states' authority to regulate the "terms and conditions" of cellular service has been interpreted to include the authority to regulate bundling. (House Report No. 103-111, at 261, reprinted in 2 U.S. Code Cong. Admin. News 588 (1993).)

Among other things, D.96-12-071 concludes that "[t]he scope of 'rate regulation' preempted by the Federal Budget Act encompasses the authority to set, approve or prescribe rates charged by CMRS carriers" (Conclusion of Law 6) and that

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2 CMRS includes cellular service, personal communication service (PCS), wide-area specialized mobile radio service (SMR), and radiotelephone utilities (RTU or paging) service.

3 On August 8, 1994, we filed a petition with the Federal Communications Commission (FCC) to retain our jurisdiction over cellular rates for 18 months. The petition preserved our authority while the petition was reviewed. The FCC denied our petition, and we did not appeal. CRA's request for reconsideration of the FCC's denial was denied on August 8, 1995.

"[a]lthough the Commission has jurisdiction to regulate all CMRS terms and conditions other than rates, the forbearance from requiring the preapproval or filing of any tariffs or customer contracts will promote streamlined regulation" (Conclusion of Law 8). D.96-12-071 terminates the requirement in Re Mobile Telephone Service and Wireless Communications [D.94-12-042] (1994) 58 Cal.P.U.C.2d 111 for CMRS providers to continue filing tariffs for terms and conditions other than rates (Ordering Paragraph 1), states that CMRS providers shall not be required to make informational rate tariff filings (Ordering Paragraph 2), states that facilities-based CMRS carriers will no longer be required to file wholesale tariffs (Ordering Paragraph 6), and exempts all CMRS providers from the requirement for the preapproval or the filing of tariffs or customer contracts (Ordering Paragraph 7).

Although the states' authority to regulate the "terms and conditions" of cellular service has been interpreted to include the authority to regulate bundling, it is not entirely clear how we can effectively do so in the absence of authority over cellular rates. We find it necessary to reevaluate the consumer protection conditions in our bundling regulations in light of the Budget Act and D.96-12-071.

Ordering Paragraph 11 of D.96-12-071 directs the Administrative Law Judge (ALJ) assigned to Investigation (I.) 93-12-007 to issue a procedural ruling addressing the development of consumer protection rules for CMRS providers. We will order the ALJ to expand the scope of the procedural ruling to include a review of the consumer protections for bundling set forth in Ordering Paragraph 1 of the Decision to clarify the impact of the Budget Act and D.96-12-071.

We have carefully reviewed every allegation of error raised in CRA's application for rehearing and considered the responses thereto, and are of the opinion that insufficient grounds for rehearing have been shown. We find good cause to modify the Decision to clarify our conclusions regarding the probable impact of cellular bundling on competition, to correct several minor

errors, and to address other issues raised by the parties. Any issues raised by the parties but not discussed in this Order are deemed denied.

While the consumer protection phase of I.93-12-007 may provide the parties with a forum to reiterate their bundling concerns, it is still necessary to address the general merits of CRA's application for rehearing.

CRA's core concern is that our relaxation of our bundling prohibition will allow the duopoly wholesale cellular carriers to gain a competitive advantage over cellular resellers. CRA argues that the nationwide scope of many duopoly carriers allows them to buy cellular equipment (telephones) at a better price than many resellers. Duopoly carriers can provide these lower cost telephones to their retail branches, and to their agents and dealers, who can then sell them at lower prices than retailers affiliated with resellers. Also, duopoly carriers pay their own agents and dealers a commission for each new customer who activates service, which can subsidize further price discounting. Resellers do not get such commissions, and their agents and dealers lack this revenue to subsidize discounts. CRA argues that since bundling lets carriers offer telephone discounts that resellers can't easily match, the decision allowing bundling is anticompetitive and unlawful, violating both B & P Code Section 17026.1 and the Cartwright Antitrust Act.

CRA believes that if bundling is allowed, we should require duopoly carriers to offer resellers cellular telephones at the prices paid by the carriers' agents and dealers. This is one part of a stipulated agreement, adopted in Re Los Angeles Cellular Telephone Company (D.93-01-014) (1993) 47 Cal.P.U.C.2d 577 [abstract only], between LA Cellular and CRA for a rate incentive to encourage customers to switch from analog to dual-use and digital telephones.

Those opposing CRA argue that B & P Code Section 17026.1 permits the Commission to approve bundling, that bundling does not violate antitrust law, and that bundling is legal in other states

and yet has not driven resellers from the market. CCAC also argues that resellers buy wholesale service at a large discount, and can use part of this "margin" to subsidize telephone discounts by their own agents and dealers.

The basic issues before us here are whether the Decision allowing bundling is unlawful, because it violates B & P Code Section 17026.1 or some other provision of law, and whether the Decision adequately sets forth its reasoning in findings of fact and conclusions of law.

I. Allegations of Legal Error

A. Procedural Improprieties

1. Public Utilities Code Section 1709

CRA claims that Bakersfield's use of a petition to modify to overturn a final Commission decision is at odds with Section 1709, since such decisions can be altered only by the Commission's own action consistent with Section 1708.

Section 1709 states that: "In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive." And Section 1708 provides that we may rescind, alter, or amend any order or decision as long as we first provide parties with notice and an opportunity to be heard. The fact that Bakersfield proposed a change in the bundling policy does not show a violation of Section 1709. Neither Section 1708 nor Section 1709 require us to be the impetus for all changes. Thus, our final decisions are conclusive in collateral actions (Section 1709); but can be altered on our own initiative or in response to a petition for modification or other another procedural vehicle, as long we comply with Section 1708.

Before issuing the Decision, which modified Ordering Paragraph 16 (c) of Re Regulation of Cellular Radiotelephone Utilities [D.90-06-025] (1990) 36 Cal.P.U.C.2d 464, as modified by Ordering Modifying but Denying Rehearing of D.90-06-025 [D.90-10-047] (1990) 38 Cal.P.U.C.2d 39 [abstract only], we held an

evidentiary hearing in which CRA provided testimony. By giving the parties notice and an opportunity to be heard before we made any changes, we complied with Section 1708. No legal error has been shown.

2. Rule 43

CRA argues that the Commission's reversal of its bundling ban is improper because it is based on a petition to modify which, under Rule 43, can only be used for minor changes. CRA cites a United States Supreme Court decision which defined "modify" to mean to change moderately or in a minor fashion. (MCI Telecommunications Corp. v. American Telephone and Telegraph (1994) 512 U.S.___, 129 L.Ed.2d 182, 114 S.C. 2223.)

Bakersfield's use of a petition to modify was consistent with Rule 43 as it existed when the Decision was issued. Rule 43 had been interpreted to allow requests for significant changes, including policy changes, especially when the requests involved discrete issues which did not require us to rethink an entire decision or program (Re Pacific Gas and Electric Company [D.89-01-044] (1989) 30 Cal.P.U.C.2d 677, 681; In Re Alternative Regulatory Frameworks for Local Exchange Carriers [D.94-08-029] (1994) 55 Cal.P.U.C.2d 681), or were minor when viewed in a broader regulatory context (D.90-06-025, supra). The decision to relax bundling restrictions is a minor issue in the overall context of cellular regulation, as was our decision that interconnection agreements should be tariffed rather than negotiated. (Re Regulation of Cellular Radiotelephone Utilities [D.94-09-076] (1994) 56 Cal.P.U.C.2d 525, 527-528.) Thus, the use of Rule 43 here conformed with the Supreme Court's view of the word "modify."

In any event, petitions for modification are now governed by Rule 47, not Rule 43. Rule 47, adopted in Rulemaking on the Commission's own Motion for the purposes of compiling the

Commission's rules of procedure in accordance with Public Utilities Code Section 322 and considering changes in the Commission's Rules of Practice and Procedure [D.95-05-019] (1995) __ Cal.P.U.C.2d __, deletes the reference to minor changes and thus moots CRA's claim that the significance of the change sought here made it an improper subject for a petition for modification.

Even if Bakersfield's petition had been outside the scope of Rule 43, the changes made by the Decision would still be lawful since they were made in compliance with Section 1708. Finally, CRA should have questioned whether a petition to modify was the proper procedure before or during the hearing, and not after the proposed decision was issued. CRA's challenge is untimely and improper. (California Trucking Association v. Public Utilities Commission (1977) 19 Cal.3d 240.) No procedural impropriety has been shown.

B. Statutes.

1. Unfair Trade Practices Act

CRA complains that the Decision erroneously concludes that B & P Code Section 17026.1 gave the agency authority to loosen bundling restrictions in future decisions. The most relevant provisions of Section 17026.1 provide that:

> (b) In each retail location, all retailers of cellular telephones shall post a large conspicuous sign ... that states the following: 'Activation of any cellular telephone is not required and the advertised price of any cellular telephone is not contingent upon activation, acceptance, or denial of cellular service by any cellular provider.'...
>
> (c) No retailer of cellular telephones shall refuse to sell a cellular telephone to any customer solely on the basis of the customer's refusal to activate the telephone

> with the provider of cellular service for whom the retailer is an agent....
>
> The intent of this subdivision is to reaffirm the Legislature's support for the Public Utilities Commission's policy that makes illegal the act, or practice, of 'bundling,' as defined and described in the relevant decisions and orders of the commission.
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> (d) The Public Utilities Commission may adopt rules and regulations to fully implement and enforce the provisions of this section.
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> (e) Nothing in this section shall be interpreted to reduce, alter, or otherwise modify the authority of the California Public Utilities Commission to regulate, in any manner, or prohibit, the payment of commissions or rebates to distributors or vendors of cellular telephones. The provisions of this section shall be effective only to the extent that they do not conflict with any applicable regulations, rules, or orders promulgated or issued by the Public Utilities Commission.

CRA first argues that the last sentence in Subdivision (c) expressly affirms the antibundling policy promulgated and issued in Re Regulation of Cellular Radiotelephone Utilities [D.89-07-019] (1989) 32 Cal.P.U.C.2d 271, and that the Commission cannot negate the Legislature's support for this bundling ban by inserting the words "to be" promulgated or "to be" issued in the future, since those words are not contained in the statute. CRA claims that the Decision's interpretation of B & P Code Section 17026.1 is unsupported by the rules of statutory construction, arbitrary and capricious, and renders the Decision's findings and conclusions internally inconsistent. CRA also claims the Decision violates the California Constitution since it supersedes, rather than adheres to, statutes enacted by the

Legislature. Finally, CRA discounts Section 17026.1 (e)'s grant of power over commissions or rebates to distributors or vendors, claiming that bundling is a harmful business practice, not a commission or rebate.

The Decision properly reads B & P Code Section 17026.1 as deferring to our authority to regulate this rapidly changing field:

> Viewed in its entirety, B & P Code § 17026.1 declares the Legislature's support for the Commission's actions with respect to bundling so far. It also provides for minimal consumer protection to ensure that consumers are able to purchase a cellular telephone at the advertised price without having to subscribe to a particular provider's service. And in subsections (d) and (e), the Legislature defers to the Commission's authority to regulate in any manner this rapidly changing field.
>
> Thus, although the Legislature supports our actions to restrict bundling, it also entrusts the Commission with the authority to loosen those restrictions in appropriate circumstances, provided that adequate consumer protections are also maintained. (Decision, at 18.)

Ordering Paragraph 1 of the Decision greatly relaxes prior bundling limits by allowing carriers to provide or permit customer equipment price concessions tied to subscription to cellular service, subject to certain consumer protections:

> [A] provider of cellular telephone service may provide or permit any agent or dealer or other person or entity subject to its control to provide to any customer or potential customer equipment price concessions offered on the condition that such customer or potential customer subscribes to the provider's cellular telephone service.

However, such activity shall be permissible only to the extent that:

1. Only cellular equipment may be discounted; cellular service must be offered only at the tariffed rate.

2. Cellular telephone equipment shall not be tariffed.

3. Regulated facilities-based carriers may not require resellers, dealers, agents, or retailers to offer discounted cellular equipment as a [condition for the] provision of cellular service. [The bracketed phrase was omitted from the Decision.]

4. Facilities-based carriers, resellers, agents, dealers, and other persons under the control of a facilities-based carrier or reseller must also provide unbundled cellular service.

5. Providers conform to all applicable California and federal consumer protection and below-cost pricing laws.

Our bundling program does not conflict with B & P Code Section 17026.1.[4] Phrases such as "as defined and described in the relevant decisions and orders of the commission" (Subdivision (c)), and "regulations, rules, or orders promulgated or issued by the Public Utilities Commission" (Subdivision (e)), are not limited to the past tense, and can also refer to future

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4 In Re American Telephone and Telegraph Company (McCaw Cellular Communications, Inc. AT&T Merger) [D.94-04-042] (1994) 54 Cal.P.U.C.2d 43, we stated that: "Business and Professions Code § 17026.1 bars the bundling of cellular equipment and service." (54 Cal.P.U.C.2d. at 67 (Conclusion of Law 11).) Upon further review, we conclude that our earlier interpretation of Section 17026.1 was in error, and that this statute does in fact authorize us to modify our bundling policy.

actions. B & P Code Section 17026.1 grants the flexibility we exercised in the Decision.

First, the plain meaning of the statute and the basic principles of statutory construction support the Decision's interpretation of B & P Code Section 17026.1. Since Section 17026.1 did not conflict with Commission rules concerning bundling when it was enacted, the only reason for the Legislature to add the phrase "as described in the relevant decisions and orders of the commission" at the end of the last sentence in Subdivision (c) would have been to allow the definition of bundling to be modified in future Commission decisions.[5] Reading this phrase as referring only to past decisions renders the phrase meaningless. If the Legislature wanted a static definition of bundling, it presumably would have defined the offense independent of any Commission action.

Similarly, Subdivision (e)'s deference to conflicting Commission decisions and orders was also intended to allow the future flexibility. Since there was no conflict between our antibundling policy and Section 17026.1 (e) when that section was enacted, the legislative reference to conflicts with our rules, regulations, or orders only has meaning if it is meant to guide us in the event our policy changes. CRA's interpretation of B & P Code Section 17026.1 violates the rule of statutory construction which favors giving meaning to each word and phrase

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5 Some types of bundling were already permitted at the time B & P Code Section 17026.1 became effective: D.90-06-025, as modified by D.90-10-047, supra, allowed the bundling of cellular service with gifts of nominal value. The Decision allows more extensive bundling, but does not remove all restrictions. Bundling remains subject to the consumer protection rules in Ordering Paragraph 1.

of a statute. (See, e.g., California Manufacturers Association v. Public Utilities Commission (CMA) (1979) 24 Cal.3d 836, 844.)

Second, it is not necessary to preface the words "defined and described in," and "promulgated or issued" with the phrase "will be" in order to read them to encompass potential future events. The California Supreme Court's interpretation of the Health and Safety Code Section 25249.11 (d) definition of a source of drinking water as "either a present source of drinking water or water which is identified or designated in a water quality control plan adopted by a regional board as being suitable for domestic or municipal uses" in People ex rel. Lungren v. Superior Court (1996) 14 Cal.4th 294 (emphasis added) exemplifies the application of similar language to future events. The defendants in that case argued that the first prong of the definition applied to bodies of water presently designated as sources of drinking water and that the second prong referred to bodies of water that may in the future be designated. (14 Cal.4th at 304.) The Attorney General argued that waters designated as suitable for domestic or municipal uses in a regional water plan include both existing and potential sources. (Id. at 304-305.) Both parties, and the Court, assumed without question that the word "designated" could be applied to future events. Just as the "ed" at the end of "designated" did not limit it to the past, the "ed" at the end of the words "defined, described, promulgated, and issued" does not limit those words to past events.

Reading the last phrase of the last sentence of B & P Code Section 17026.1 (c) and the last sentence of Section 17026.1 (e) in conjunction with the rules of statutory construction and the interpretation of grammatically similar language in People ex rel. Lungren, supra, it is evident that the words "as defined and described in relevant decisions and orders of the commission" and

the words "regulations, rules, or orders promulgated or issued by the Public Utilities Commission" were intended to refer to both current and future Commission decisions.

Finally, we note that while bundling has been offered in California since the Decision was issued in early 1995, the Legislature has said nothing. The almost two years of legislative silence since the Decision was issued indicates the Legislature's acquiesence in our relaxed bundling policy.

2. Cartwright Antitrust Act

CRA claims that the Decision violates the Cartwright Antitrust Act, specifically, B & P Code Section 16727, by allowing cellular carriers to tie the sale of cellular telephones (the tying product) to the sale of cellular service (the tied product).[6] CRA cites People v. National Association of Realtors (Realtors) (1984) 155 C.A.3d 578, 583, which states that:

> A tie-in arrangement is per se illegal under Business and Professions Code section 16727 ... if (1) two separate products are tied and (2) the seller has sufficient economic power over the tying product to restrain free competition in the tied product. Under section 16727 the seller has "sufficient economic power" if (a) the seller has a dominant monopolistic position in the tying product or (b) the tie-in restrains a

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6 In all but one instance, CRA refers to cellular telephones as the "tying" product. (Application for Rehearing at 20-21, 23). On page 21 of its application for rehearing, however, CRA refers to cellular telephones as both the "tying" and the "tied" product. For the sake of consistency, cellular telephone sales are considered the "tying" product here.

> substantial volume of commerce in the tied product. (Emphasis in original.)

CRA contends that the duopoly carriers' economic power over the tying product, cellular telephones, is shown by the facts that: 1) duopoly carriers sell cellular telephones both directly and through exclusive retail agents, and each such carrier and its retail agent network makes a substantial percentage of all cellular telephone sales; 2) many cellular telephone buyers sign up for service from the carrier associated with the business that sold the telephone; 3) all duopoly carriers have national contracts with cellular equipment companies that allow them to sell telephones at less cost than resellers, and 4) the duopoly carriers dominate the cellular service market. CRA also argues that a unique tying product or a seller's ability to impose a tie-in may indicate market power, and that a carrier's duopoly status proves such power here.

CRA contends that foreclosure of competition in the tied product, cellular service, is shown by: 1) the testimony of Connecticut Telephone's Vice-President McWay that bundling seriously harms reseller profit margins and threatens their existence by driving up the cost of customer acquisition; and 2) the testimony of CRA witness McLaughlin, the owner of a California reseller, Personal Cellular Service, Inc., that, in the long run, bundling will stop the growth of resellers and threaten their viability or existence.

CRA's argument that bundling constitutes a per se violation of the Cartwright Act is unpersuasive. First, the Decision does not permit tie-ins within the meaning of the Cartwright Act. Ordering Paragraph 1 states that:

> 1. Only cellular equipment may be discounted; cellular service must be offered only at the tariffed rate.
>
> 2. Cellular telephone equipment shall not be tariffed.

3. Regulated-facilities based carriers may not require resellers, dealers, agents, or retailers to offer discounted cellular service as a (condition for the) provision of cellular service.

4. Facilities-based carriers, resellers, agents, dealers, and other persons under control of a facilities-based carrier or reseller must also provide unbundled cellular service. (Decision at 42.)

While bundling is allowed, service must also be offered separately at a nondiscriminatory price. The FCC has similar requirements. (In The Matter of Bundling of Cellular Customer Premises Equipment and Service (Bundling Report and Order) (1992) 7 FCC Rcd. No. 13, 4028, at 4032 (Paragraph 30).)

Second, as the Decision notes, tie-ins violate antitrust laws only under certain conditions not present here, such as where a seller wields market power in the tying product. (Decision at 12.) There is no evidence that cellular carriers dominate the cellular telephone market.

The Decision points out that:

> [T]he cellular equipment manufacturing market consists of large entities not regulated by this Commission. Manufacturers include Audiovox, AT&T, Ericsson, Fujitsu, Mitsubishi, Motorola, NEC, and Uniden. This market is reasonably competitive. Further, cellular equipment is distributed through a variety of channels, from wholesale cellular carriers to large retail chains. Our order allowing bundling of cellular equipment with services will not diminish the competitiveness of the equipment market.

> (Decision at 14; see also, 38 (Finding of Fact 7).)[7]

The Decision's conclusion that the cellular telephone market is competitive is supported by the record. Bakersfield's Ducharme testified that there are 40 to 50 cellular telephone retailers in Bakersfield alone. (RT: 2134-2135; see also, Ex. 11-94.) CRA's witness Weinstein testified that:

> Based on my review of testimony in this record, and particularly Dr. Larner's testimony and Mr. Ducharme's testimony, as well as my own review ..., it seems to me that the market for the sale of equipment, that is, telephones, is presently pretty competitive. (RT: 2230; see also, RT: 2240, 2251.)

The FCC's Bundling Report and Order, supra, supports the Decision's finding that the cellular telephone market is competitive:

> The record is uncontroverted that the cellular CPE market is extremely competitive ... (Paragraph 9); We agree with the DOJ [Department of Justice] that cellular carriers do not have the potential to engaged in sustained predatory pricing practices in the CPE retail market (Paragraph 13); It is uncontested that there is a robust level of competition that exists in the CPE markets notwithstanding the common marketing practice of packaging CPE and cellular service. This marketing practice ... has existed for several years and benefited consumers

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7 Given the wide variety of cellular telephones on the market, there is no merit to CRA's claim that the alleged tying product is unique or distinctive. In 1992, the FCC noted that there were between 17 and 25 manufacturers distributing more than 28 brands of cellular telephones, and that the number was growing since there were low barriers to market entry. (Bundling Report and Order, supra 7 FCC Rcd at 4029.)

(Paragraph 14). (7 FCC Rcd. at 4028, and 4029-4030.)

CRA does not cite any support in the record for its claim that each carrier makes a substantial percentage of all retail cellular telephone sales. CRA's bare assertion proves nothing. Nor does CRA's reference to the testimony of Bakersfield's Ducharme that many telephone customers also sign up for cellular service.

CRA's statement that all carriers have contracts with cellular telephone manufacturers is unsupported by the record, although it is clear that many carriers have such contracts. Even if this claim were true, it would prove little. The fact that a large company may buy in bulk and thus obtain better prices than a smaller company does not show an antitrust violation.

If the existence of a duopoly cellular service system proved that duopoly carriers have power over the cellular telephone market, one would expect quantitative evidence that specific carriers controlled a substantial share of that market. Yet there is no evidence in the record that any carrier has a dominant share of the market for cellular telephones.

Furthermore, CRA provides no evidence of any specific, substantial, dollar-volume of cellular service sales (the alleged "tied" product) foreclosed to competitors by a carrier's tie-in of cellular service and equipment. The vague statements of McWay and McLaughlin that bundling will hurt resellers are not sufficient to to sustain an antitrust complaint. CRA fails to prove a per se violation of Section 16727 based on any cellular carrier's domination of the market for the tying product. (See, Kim v. Servosnax, Inc. (1992) 10 Cal.App.4th 1346, 1360-1361.)

Even if cellular service were the "tying" product, and cellular telephones the "tied" product, CRA's position would not be persuasive. The record contains no quantitative evidence that any carrier's dominance of the cellular service market allows it

to foreclose any specific, substantial, dollar-volume of business to competitors in the cellular telephone market.

The exhibits and testimony in this proceeding, including the FCC record on bundling, show that the cellular telephone and service markets are separate and that the cellular telephone market is competitive. The Decision rightly states that:

> [T]he bundling of cellular equipment and services will not diminish competition, nor tend to create a monopoly in either the equipment or cellular service markets. Bundling, then, does not meet the criteria under B&P § 16727 that would cause us to prohibit this practice pursuant to this code section. We conclude that B&P § 16727 will not be violated by the type of bundling permitted if we granted an exception under PU Code § 532. (Decision at 14; see also, 41 (Conclusion of Law 6).)

If CRA believes that cellular carriers who bundle are violating the Cartwright Act, it may complain in civil court. The court, not the Commission, has jurisdiction to determine violations of antitrust laws. (Northern California Power Association v. Public Utilities Commission (NCPA) (1971) 5 Cal.3d 370, 377; see also, Cellular Plus, Inc. v. Superior Court (1993) 14 Cal.App.4th 1224, 1247). Our duty is merely to "place the important public policy in favor of free competition in the scale along with the other rights and interests of the general public" when we develop regulatory policy. (NCPA, supra, 5 Cal.3d at 379.)

3. Public Utilities Code Section 532

Section 532 provides that a utility cannot charge a rate different from that set forth in its tariffs, or provide direct or indirect refunds of a portion of the generally applicable rates. The last sentence of Section 532 states that:

> The Commission may by rule or order establish such exceptions from the operation of this prohibition as it may consider just and reasonable as to each utility.

CRA argues that cellular bundling indirectly refunds a portion of the tariffed cellular rates. CRA claims the Decision creates an improper class-wide exception to the ban on charging other than the tariffed rates. CRA implies that exceptions may be granted to specific utilities, but not to classes of utilities.

CRA's argument falls short. First, Ordering Paragraph 1 of the Decision states in part that "cellular service must be offered only at the tariffed rate."[8] Clearly, direct rate refunds are not allowed. Second, even if bundling were considered an indirect rate refund, bundling would remain lawful since it was authorized by a Commission order complying with Section 532. Nothing in Section 532 prevents us from finding it just and reasonable to create an exception to the tariffed rate rule for a class of utilities during a single proceeding in which the members have an opportunity to be heard. We are not required

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8 Federal preemption of our authority over cellular rates raises doubts as to the enforceability of this portion of Ordering Paragraph 1.

to create specific exceptions for each utility within the class during a series of separate but virtually identical proceedings.

4. Federal Developments

CRA argues that the Decision's approval of cellular bundling is out of step with recent federal developments in the form of two then pending bills, H.R. 1275 and S. 664, which contained provisions prohibiting bundling, and with Judge Green's order in U.S. v. Western Electric Communications, Inc. 890 F.Supp. 1 (D.D.C. 1995), which authorized regional Bell operating companies to provide both long distance and cellular service subject to conditions prohibiting the bundling of those two services.

We are not required to tailor our decisions to pending federal legislation, and thus did not err in issuing a decision that may not have been consistent with H.R. 1275 and S. 664, which, had they been enacted, would have prohibited bundling. Nor are we required to tailor our decisions to ensure their consistency with Judge Green's orders. CRA has failed show legal error in this regard.

We are, of course, required to comply with enacted federal legislation such as the Telecommunications Act of 1996, currently under appeal in the 8th Circuit Court of Appeals, which may contain provisions affecting the relationship between cellular carriers and resellers.

C. Case Law

1. Re Los Angeles Cellular Telephone Company [D.93-01-014]

Re Los Angeles Cellular Telephone Company [D.93-01-014], supra, adopted a stipulated agreement between CRA and LA Cellular for a rate incentive to convert customers to digital

equipment. Part of the agreement required the carrier to sell equipment to resellers on the same basis it sold equipment to its own agents.

CRA asserts that we erred in finding that D.93-01-014 is not precedent because it adopted a stipulated agreement. CRA repeats its policy argument that we should apply the D.93-01-014 principles here to protect resellers from telephone price competition, under our duty to assess the economic impact of our decision on competition (United States Steel Corporation v. Public Utilities Commission (1981) 29 Cal.3d 603, 609-610. CRA claims that D.93-01-014's policy is consistent with the FCC's Bundling Report and Order, supra, 7 FCC Rcd. at 4035 (Footnote 48): "Any restrictions on resellers' ability to buy packages of CPE and service on the same basis as other customer[s] would be unlawful."

We did not err in finding that D.93-01-014 is not precedential and in not using one element of a stipulated agreement as part of our bundling policy. The Decision accurately paraphrases our Rule 51.8, which provides that:

> Commission adoption of a stipulation or settlement is binding on all parties to the proceeding in which the stipulation or settlement is proposed. Unless the Commission expressly provides otherwise, such adoption does not constitute approval of, or precedent regarding, any principle or issue in the proceeding or in any future proceeding. (See, Decision at 29; see also, 41 (Conclusion of Law 8).)

D.93-01-014 did not expressly approve the stipulated agreement as precedent, and could not and did not set policy for those who did not participate in that proceeding. The Decision properly notes that: "D.93-01-014 did not set any Commission policy.... CRA and other parties are free to negotiate agreements

consistent or inconsistent with the agreement approved in D.93-01-014 as long as such agreements are in the public interest and consistent with this order." (Decision at 30).

The Bundling Report and Order, supra, does not help CRA. The Bundling Report and Order approved cellular bundling, finding that cellular telephone market was highly competitive, that bundling would benefit consumers by lowering the cost of cellular equipment, and that while resellers may not always benefit, bundling would not likely be anticompetitive or raise antitrust concerns. Footnote 48 indicates that cellular carriers must sell bundled telephones and service to resellers on the same basis as they sell such bundles to other customers, but does not require carriers to treat resellers the same as they treat their own retail distribution networks.

Finally, while we must assess the economic impact of our actions, we are not required to guarantee that every competitor will be successful or to adopt CRA's policy advice. We did not err by not requiring duopoly carriers to sell telephones to resellers on the same basis they are sold to the carriers' retail agents.

2. Re Mobile Telephone Service and Wireless Communications [D.94-08-022.]

Re Mobile Telephone Service and Wireless Communications [D.94-08-022] (1994) 55 Cal.P.U.C.2d 538 finds among other things that: 1) wholesale cellular carriers still dominate the market; 2) the resellers' share of the California market has decreased since 1989-90; 3) the extent of competition from Nextel is unknown; and 4) new competitive technologies such as PCS (Personal Communication Service) and ESMR (Enhanced Specialized Mobile Service) are unlikely to provide significant near term

competition. CRA claims the Decision should have considered these findings.[9]

We did not err by failing to base the Decision on findings and conclusions in D.94-08-022. First, we are not required to base our decisions on findings and conclusions reached in a prior decision, especially when the prior decision had not been issued when the record for the current decision was submitted. Second, the Decision does in fact discuss D.94-08-022's findings regarding the lack of competition in the market for cellular services.

For example, the Decision notes that:

> As to cellular services, we found in D.94-08-022 that this market is already not competitive. Moreover, under Bakersfield's bundling proposal cellular companies would be precluded from discounting the tariffed rate for cellular services pursuant to PU Code § 532. Our permitting of bundling cellular equipment and services will not in and of itself make the cellular service market less competitive. We are taking steps in our Investigation 93-12-007 to encourage competition in the cellular services market, hence our D.95-03-042 in that docket setting forth the unbundling of wholesale cellular rates. (Decision at 14; see also, 38 (Finding of Fact 8).)

While the Decision's conclusion that bundling would not in itself make the market less competitive is at odds with the

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9 CRA mistakenly cites D.94-08-022 as D.94-08-014, a decision which grants a certificate of public convenience and necessity to WATS International Corp. to operate as a reseller of interLATA telecommunications services. (WATS International Corp. [94-08-014] (1994) 55 Cal.P.U.C.2d 520 [abstract only].)

conclusion reached by CRA, we clearly considered D.94-08-022's findings and conclusions regarding market dominance.

The fact that the Decision does not cite D.94-08-022's recognition that California resellers have lost market share since 1990 is not legal error. We are not required to cite every element of every arguably relevant Commission decision. The market share citation CRA seeks would be not further its argument in any event. A decline in the market share of California resellers during a time when bundling was banned raises the question whether the decline in reseller market share in states such as New York, which allowed bundling, should be attributed to bundling or to other economic forces at work in the cellular market.

The fact that the Decision did not cite D.94-08-022's findings that the extent of competition from Nextel is unknown, and that PCS and other nonregulated wireless providers were unlikely to provide much competition soon is not legal error either. The reservations expressed in D.94-08-022 concerning the overall competitiveness of the cellular service market are not inconsistent with the Decision's relaxation of the bundling prohibition. Nor do these reservations conflict with the Decision's conclusion that when competitors who are free to bundle begin operating, they will have a competitive advantage unless existing carriers can also bundle.

Finally, it is important to recognize that D.94-08-022 was issued in Investigation on the Commission's Own Motion into Mobile Telephone Services and Wireless Communications, (OII) I.93-12-007, dated December 17, 1993, a proceeding designed to address general wireless issues. I.93-12-007 purposefully steered clear of the bundling question:

> [T]he ability to bundle heavily-discounted equipment with new service sign-ups may be essential to overcome the marketing barrier

> presented by the need to acquire new subscriber equipment.... In particular, it may make sense to eliminate the Commission's prohibitions against bundling handset equipment prices with service, as well as relaxing the restrictions on commissions and discounts. [Footnote omitted.] At present, this issue is being considered in Bakersfield Cellular's petition to modify D.90-06-025 in Investigation 88-11-040. Consequently, in order to conserve the Commission's resources, we will not duplicate that effort here. (I.93-12-007 at 30.)

We did not err in basing our bundling specific decision on findings and conclusions concerning bundling, rather than on findings and conclusions in our generic wireless decision.

3. Re AT&T Communications of California [D.93-02-010]

In Re AT&T Communications of California [D.93-02-010] (AT&T) (1993) 48 Cal.P.U.C.2d 31, 61, the Commission concluded that, with regard to AT&T, a restriction on bundling of a tariffed service with a non-regulated product or service "promotes competition by allowing the purchaser of a nonregulated product or service to seek out the service provider which best fits its needs." CRA argues that AT&T compels the conclusion that a restriction on cellular bundling best fits consumers' needs.

While AT&T reflected our view at the time, the evolution of our approach to bundling is not legal error. We are free to modify or reverse a prior position on an issue such as bundling so long as we comply with Section 1708. Our changing bundling rules reflect our greater comfort with the competitive marketplace.

In 1992, the FCC authorized cellular bundling, finding that the benefits to consumers from lower cost cellular equipment outweighed the potential adverse impact of bundling on cellular resellers. (Bundling Report and Order, supra, 7 FCC Rcd. at 4028

(Paragraph 7), and 4030-4031 (Paragraphs 19-21).) As noted earlier, our own I.93-12-007, supra, stated that bundling may be essential to overcome the marketing barrier presented by the cost of cellular telephones and that it might make sense to eliminate the bundling prohibition, but deferred resolution of that issue to the current proceeding. In Re American Telephone and Telegraph Company, supra, 54 Cal.P.U.C.2d at 58, which approved a merger between AT&T and McCaw Cellular Communications Corporation, we were not yet ready to approve bundling, but did note that: "If it is demonstrated in the future that bundling can have competitive or consumer benefits, we may remove our restrictions." Finally, in the Decision, we review in detail the Public Utilities Code and the Business and Professions Code and determine that bundling is lawful and that bundling would benefit consumers by reducing the cost of cellular equipment, with such cost reductions indirectly substituting for the price competition for cellular service that we would prefer. (Decision at 1, 6-18, and 23.) In the end, our relaxation of the bundling prohibition serves the goals pursued in D.93-02-010 by promoting new forms of competition and by creating opportunities for consumers to seek cellular services and equipment which best serve their needs (eg., for less expensive cellular equipment). Our policy changes are lawful.

4. In Re Application of Pacific Gas and Electric Company

CRA argues that the bundling prohibition set forth in D.89-07-019, supra, was based in part on our case law holding that special rates offered on one product conditioned upon the purchase of a tariffed product constitute an indirect and unlawful discount on the tariffed product. (In re Application of Pacific Gas and Electric Company (PG&E) [D.7576] (1920) 18 CRC

201). CRA complains that we neither discuss nor distinguish PG&E, and that the Decision's attempt to nullify this precedent by omission is unlawful.

It is reasonable for CRA to ask us to explain why we relied upon PG&E when we banned bundling in D.89-07-019, and yet now feel unconstrained by that decision. While we are free to alter our policies and legal analysis over time, we should provide a rationale for doing so. We will do so now.

PG&E found that special contracts which allowed customers who took steam service and electric service to pay less for steam service than customers who only took steam service were unlawful in part because they provided a direct or indirect refund of a portion of the generally applicable rates in the absence of a Commission rule or order establishing such an exception from normal rates, in violation of then Section 17 (b) (now Section 532)). Although the PG&E decision is very old, the substance of the law is the same.

CRA cites the portion of PG&E which found that special rates on one product conditioned upon the purchase of a tariffed product constituted an unlawful indirect discount on the tariffed product. This element of PG&E is easily distinguished.

Although PG&E acknowledged that Section 17 could be read to authorize the Commission to create just and reasonable exceptions to that section's bar against charging other than the tariffed rate or offering discounts from a tariffed rate to less than all customers, that decision denied PG&E's request for permission to charge certain steam customers a contract rate less than the proposed rate schedule because "the evidence in this case does not disclose facts which would constitute just and reasonable grounds for an exception." (18 CRC at 207.) Here, however, we found a reason to create an exception to the section's general restrictions: "To allow bundling, as proposed

by Bakersfield, could benefit California consumers so long as cellular equipment and services also continue to be offered in a separate, nondiscriminatory manner." (Decision at 34.) As long as we find it just and reasonable to create an exception from the standard requirements of Section 532, the exception is valid. Our interpretation of Section 532 is consistent with PG&E's interpretation of the earlier version of that provision.

To sum up, we now conclude that Section 532 provides a degree of flexibility greater than we believed existed when we reviewed Section 532 and PG&E in D.89-07-019. In light of our revised reading of Section 532, PG&E is not a problem.

5. Coombs v. Burke

CRA argues that the bundling prohibition set forth in D.89-07-019 was partly based on common law prohibitions against restrictions of trade (Coombs v. Burke (1919) 40 Cal.App. 8), and complains that the Decision nullifies this precedent by omission. Coombs found that a utility which offered customers gas appliances in exchange for an agreement to take gas only from that utility tended to prevent competition in a business impressed with a public character and was thus an unlawful restraint of trade. CACC and AirTouch contend that Coombs v. Burke is too old to be relevant.

CRA properly asks us to explain why we relied so heavily upon Coombs in D.89-07-019, and yet do not do so now. The short answer is that we now believe that D.89-07-019 failed to recognize that subsequent case law has not accepted Coombs' per se rejection of exclusive dealings contracts and per se condemnation of any restrictions on businesses affected with a public interest. (See, eg., Webb v. West Side District Hospital (Webb) (1983) 144 Cal.App.3d 946, 951-953.) More recent cases considering restraint of trade challenges against businesses

affected with a public interest now weigh that public interest against other competing concerns, and uphold restraints if they are found reasonable. (Id. at 952.) Webb states that:

> The reasonableness of contracts which tend to restrain trade is measured by a number of factors, including the appropriateness of the restraint to advancing the interests to be protected; the availability of less harmful alternatives; the nature of the interest interfered with; the intent of the parties or the tendency of the restraint to create a monopoly; and the social or economic justification for any monopoly, if it does result. (Id. at 953.)

Applying the Webb analysis here, we find that the interest bundling seeks to protect is the bundling cellular carrier's interest in providing discounted cellular telephones only to those who subscribe to the carrier's service. Bundling appropriately advances this interest. The only interest bundling appears to potentially interfere with is the financial interest of those in competition with the carrier. Bundling does not interfere with the interests of cellular customers. A customer is not required to accept a bundled equipment and service package in order to obtain a cellular telephone, since such telephones are available both from competing carriers and from numerous consumer retail outlets. Nor is a customer required to accept a bundled package in order to obtain cellular service. The Decision requires that carriers also offer service separately at nondiscriminatory rates. Further, customers can always seek service from the competing duopoly carrier or from a reseller. Given these many customer options, it does not appear that bundling will tend to create a monopoly. In light of the above discussion we find that bundling is reasonable and without an

unlawful restraining effect. We no longer believe that Coombs bars bundling.

6. Adequacy of Findings and Conclusions Regarding Impact of Bundling on Competition

CRA claims that the Decision inadequately considers the antitrust implications of its relaxation of the bundling prohibition and the impact of bundling on the ability of resellers and new market entrants to compete with duopoly carriers. CRA argues that the Decision thus violates the Commission's obligation to make findings and conclusions on the economic impact of bundling on competition (NCPA, supra; United States Steel Corp., supra); and to make separately stated findings and conclusions on all material issues (CMA, supra). CRA also claims the Decision's findings and conclusions do not show that the Commission acted within its authority as required by Toward Utility Rate Normalization v. Public Utilities Commission (TURN) (1978) 33 Cal.3d 529.

Specifically, CRA complains that the Decision does not consider: 1) CRA witness Weinstein's testimony that resellers will have trouble competing if bundling is allowed because duopoly carriers control the bulk of resellers' costs and because resellers do not receive activation commissions which they can use to help their retail agents to sell telephones at competitive prices; 2) Connecticut Telephone's McWay's testimony that bundling threatens resellers' profit margins and viability by raising customer acquisition costs; 3) CRA witness McLaughlin's testimony that in the long term bundling will stop the growth and threaten the viability of resellers; 4) the consumer benefits resulting from the constraining impact of resellers on the conduct and prices of other market participants; 5) the impact of bundling on the future market shares and power of carriers,

resellers, and new market entrants; 6) whether bundling will aid or inhibit competition by new market entrants; 7) whether bundling will substantially lessen competition or create a monopoly; and 8) whether the agency can detect and deter below-cost pricing in a timely way.

CRA complains that the Decision relies on statistics that resellers activate more telephones in bundled states than in California, yet fails to note that even in those states resellers' market share is declining as a result of bundling. Finally, CRA claims the Decision errs in stating that the average margin for profitable California resellers is 4.7%, when it is really 3.7%; that California resellers have qualified for high volume discounts but not lowered rates; and that Connecticut Telephone has operated profitably.

Contrary to CRA's contention, the Decision fully considers the effects of bundling on competition. The Decision addresses CRA's contention that bundling is an unlawful tie-in under the Cartwright Act, and finds the CRA is wrong since bundling will neither diminish competition nor tend to create a monopoly. (Decision at 12-14.) The Decision notes that competition will be expanded with the entry of unregulated wireless providers such as Nextel, and that such unregulated entities are free to bundle and may have a competitive advantage if regulated carriers are not allowed to bundle. (Id. at 19-20.) The Decision also considers the impact of bundling on equipment prices (id. at 21-23), cellular dealers (id. at 24-25), cellular resellers (id. at 26-28, and 30-31), and cellular retailers (id. at 28-29). The Decision concludes that:

> With bundling, a competitive cellular market among duopoly carriers, agents, dealers, resellers, and retailers (soon to be supplemented with additional unregulated wireless carriers) should continue to exist, with the added benefit of increasing

> economies of scale. Consumers can expect to benefit from competition not only between the different market segments but within each individual market segment. Competition between and within such varied market segments will promote consumer satisfaction through operational efficiency and the offering of consumer choices, as is taking place in states which permit cellular equipment to be bundled with cellular service. (Decision at 34.)

The Decision finds that "[c]onsumer benefits from bundling include lower equipment costs, no adverse impact on cellular rates, and increased consumer choices." (Id.) Findings of Fact 7, 10, 20, 21, 24, and 25 specifically address the effect of bundling on competition, as does Conclusion of Law 10, which makes the Decision effective immediately because of the public interest in competition. (Decision at 38-41.)

Although the Decision does not mention CRA's witnesses by name, it discusses each of the issues raised by CRA. For example, the Decision notes resellers' fears that bundling would threaten their market share and viability because they could not compete with the duopolists' bundled prices. (Decision at 13; see also, 12.) The Decision also notes CRA's belief that "the resellers' presence in the cellular service market constrains the conduct of other participants in the cellular market, which makes market participants provide better service while being more careful about their pricing," and its expectation that bundling "would further hinder their economic ability to continue operating in California" unless "duopoly carriers make available, on a nondiscriminatory basis, cellular equipment and tariff commissions to all entities, including resellers, who activate cellular consumers." (Id. at 26; see also, 29-31.) CRA's concerns were not ignored. The fact that the Decision reached different conclusions than CRA is not legal error.

The Decision discusses at length the probable impact of bundling on resellers. (Decision at 26-28, 30-31.) For example, the Decision finds that "viability does not appear to be a

problem for resellers in states which permit bundling" (Decision at 26); that resellers had a 5.9% share of McCaw's New York market, but only a 1.9% share of McCaw's California market (id. at 27); and that while the resellers' share of McCaw's New York market in 1993 was lower than their share in 1992, it was still substantially higher than their share of McCaw's California market (id.).

The Decision did not err in failing to note that the market share of resellers in bundled states declined as a result of bundling, since there is no evidence for this conclusion. D.94-08-022, supra, notes that the resellers' share of the California market has been steadily declining over the last decade. (55 Cal.P.U.C.2d at 581 (Finding of Fact 20).) The parallel market share decline in a state which allowed bundling (New York) and a state which then did not allow bundling (California) suggests that some factor other than bundling is responsible for the resellers' declining market shares. Further, a declining market share does not in itself show that individual resellers suffer economically.

The Decision cites Connecticut Telephone as an example of a growing and profitable reseller in a state which permits bundling, noting that Connecticut Telephone has been in business ten years, and has operated profitably even without consistently bundling discounts on cellular equipment and service.[10]

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10 Contrary to CRA's contention, the record contains ample evidence from which Connecticut Telephone's profitability can be inferred. Connecticut Telephone has been in business for ten years; has six outlets; has a growing subscriber base and has as a result qualified for larger discounts from carriers; has not

(Footnote continues on next page).

(Decision at 27.) The Decision also states that California resellers operate on a set gross wholesale margin, and can be profitable to the extent they keep direct costs and overhead below the profit margin, and operate efficiently. Although D.96-12-071, supra, ended the Commission's wholesale margin structure, the essence of the Decision's finding that efficient resellers can remain profitable is still true. (Decision at 39 (Finding of Fact 23.) The Decision also properly notes that the longer a consumer remains a customer of a reseller, the higher the reseller's profit, since the reseller's fixed costs to attract and maintain that customer will be less on a monthly basis over time. (Id. at 28; see also, McLaughlin, RT: 2498-2503.) In other words, resellers can recover equipment discounts from their customers over time, and thus reduce the impact of the initial need to assist their retailers in offering cellular telephones at competitive prices.

The Decision could have, but did not, note that CRA's witness Weinstein admitted that resellers had not been eliminated from the bundling markets he had studied. (Weinstein, RT: 2245;

(Footnote continued from previous page)

lowered its standard plan rate since it began operating; favors volume business accounts over the personal user market; only recently reduced its personal limited user plan rates to track a carrier's rate reduction; offers free installation and a lifetime warranty on all telephones; does not require customers to sign duration contracts (unlike the carriers); and has no deactivation penalty. (McWay, RT: 2459-2463, 2473-2477.)

see also Ex. 8-94, at 2-3 (Larner).) Weinstein's testimony, in essence, is that "if" resellers were adversely affected by bundling, competition would be reduced. (RT: 2244.) While CRA's witnesses certainly advanced theoretical arguments why bundling might harm resellers, no witness established any actual relationship between bundling and reduced reseller competition.

The Decision addresses, and rejects as unnecessary, CRA's proposal to require facilities-based carriers to provide resellers with cellular equipment on a nondiscriminatory basis. The Decision notes that: "Facilities-based carriers such as Bakersfield already make equipment available to all of their agents on a nondiscriminatory basis." (Decision at 30.)

The Decision also addresses and rejects CRA's continuing effort to obtain activation commissions. (Decision at 30-31.) The Decision properly notes that "[t]he payment of commissions has been a major issue in numerous proceedings before this Commission;" that D.89-07-019 concluded that commissions are lawful; that Ordering Paragraph 17 of D.90-06-025 specifically directs that commission rates paid by cellular carriers to their agents shall not be restricted; that CRA's proposal would require modification of Ordering Paragraph 17 of D.90-06-025, a matter which was not included in Bakersfield's petition and which parties would not reasonably expect to be addressed here; that there is insufficient evidence to provide a basis for revisiting the commission issue; and that, to the extent we permit bundling, there is nothing to prevent resellers or agents from negotiating commissions with carriers for services that they may provide. (Id.) CRA may not like the outcome, but it can hardly complain that its commission issue was not addressed.

CRA's allegation that the Decision fails to address the potential negative impact on consumers that might result if the rate and service competition provided by resellers is reduced is

not persuasive. First, the Decision finds that bundling is unlikely to have a substantial negative impact on resellers, as discussed above. Second, the Decision finds that bundling will provide significant consumer benefits. For example, the Decision states that: "Consumer benefits from bundling include lower equipment costs, no adverse impact on cellular service rates, and increased consumer choices" (id. at 34; see also, 21-22); that: "Cellular telephone equipment prices would fall in California with the introduction of bundled equipment and services" (id. at 39 (Finding of Fact 15)); and that: "Lower telephone equipment costs in states that permit bundling do not result in higher cellular service rates" (id. at 39 (Finding of Fact 16). And Finding of Fact 31 states that: "Consumers have benefited from bundling in other states" (id. at 40). The Decision implicitly finds that consumers are more likely to be benefited by bundling than they are to be harmed by the coming to pass of CRA's concern that bundling will force resellers from the market to the detriment of consumers.[11] We will amend the Decision to make more explicit our conclusions regarding the probable impact of bundling on California consumers.

The Decision recognizes that the equipment discounts that bundling makes possible provide but an indirect substitute for cellular service competition, finding that: "Although we would much prefer to see healthy and direct price competition for

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11 The record contains ample evidence to support our findings regarding the benefits of bundling. (Falconer, Ex. 4-94, at 6-7, 11-13, 15-16; RT: 1838; Wehner, Ex. 5-94, at 5, 11, 13-14; RT: 1910; Ducharme, Ex. 11-94; RT 2121-2122; Larner Rebuttal, Ex. 8-94, at 6; Roderick, Ex. 1-94, at 10-11, 13, 15-16; see also, Bundling Report and Order, supra, FCC Rcd. at 4028 (Paragraph 7), and 4030-4031 (Paragraphs 19-21).)

cellular service, the consumer benefits represented by bundled equipment discounts may be the best we can hope for under the current market structure." (Id. at 23, see also, 1.)[12]

Direct service competition is addressed in the Decision's discussion of the competitive impact of bundling on new entrants. (Decision at 20.) The Decision notes that Nextel, an unregulated firm that has begun to provide a wireless service that competes with cellular service in some areas, chose not to introduce any evidence on the impact of lifting the bundling restriction on its ability to compete with regulated facilities-based entities. (Id.) The Decision also noted that other parties, such as CRA, testified that the entry of a competitor like Nextel would inject a tremendous element of competition that doesn't presently exist, that McCaw's witness testified that unregulated Enhanced Specialized Mobile Radio (ESMR) providers like Nextel will be able to bundle equipment and service without any regulatory restriction, and that: "The entry of Nextel and other ESMR providers will add a much-needed alternative to the current duopoly...." (Id.) In addition, the Decision found that "Nextel's unrestricted ability to bundle discounted equipment and service suggests that in the future current bundling restrictions may unfairly restrain competition...." (Id.) In other words, the failure to allow duopoly carriers to bundle could place such carriers at a competitive disadvantage. In the absence of

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12 CRA witness McWay (Connecticut Telephone) would also evidently prefer to see cellular service competition, or, at least, reduced wholesale rates. McWay testified that he did not believe that bundling affects retail rates one way or the other; he viewed bundling as a symptom of excess wholesale rates and the absence of true wholesale cost-based rate regulation. (RT: 2480.)

testimony by Nextel or other new potential new entrants, the Decision did not err in focusing on the impact of new entrants on existing carriers, rather than the reverse.

CRA correctly notes that the Decision does not contain a finding of fact or conclusion of law stating that bundling will not have a substantial adverse effect on competition or tend to create a monopoly. However, the Decision's textual discussion of B & P Code Section 16727 (Cartwright Antitrust Act) states that:

> We find here, that the bundling of cellular equipment and services will not diminish competition, nor tend to create a monopoly in either the equipment or the cellular service markets. Bundling, then, does not meet the criteria under B & P § 16727 that would cause us to prohibit this practice pursuant to this code section. We conclude that B & P Code § 16727 will not be violated by the type of bundling permitted if we granted an exception under PU Code § 532. (Decision at 14.)

While NCPA, supra, does not specify where in a Commission decision findings regarding competition must be located, we will, in deference to CRA's concerns, amend the Decision to reiterate this conclusion in the findings of fact and conclusions of law.

The relevance of our ability to detect and deter below-cost pricing to the issue of competition between duopoly carriers and resellers is not clear. The Commission does not regulate cellular equipment sales, the FCC having long ago concluded that customer premises equipment was severable from the provision of transmission services, and that the tariffing or other regulation

of such equipment was neither necessary nor required.[13] Ordering Paragraph 1 of the Decision conditions bundling authority on, among other things, compliance with federal and state below-cost pricing laws. (Decision at 41-42.) If an entity violates below-cost pricing law as set for in B & P Code Section 17026.1 or any other law, it is subject to the usual consequences for such violations. We note that while we would, of course, review a below-cost allegation brought before us in an appropriate proceeding, we are certainly not the primary enforcer of below-cost pricing law.

CRA correctly points out that the profitable resellers in California had an average profit margin of 3.7%, not 4.7%. This error will be corrected. And while the evidence shows that at least one reseller, Connecticut Telephone, qualified for high volume discounts without passing the discounts through to its consumers, the evidence does not show that California resellers failed to pass on such volume discounts. The Decision will be amended accordingly.

Before leaving the subject of competition altogether, we note that under NCPA we are required to consider antitrust issues, but are free to determine that overriding public interests justify the adoption of a proposed action, even if we find that the action might have certain anticompetitive consequences. (NCPA, supra, 5 C.3d at 381.) In the current proceeding, of course, it was not necessary for us to exercise

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13 Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384, recon., 84 FCC 2d 50 (1980), further recon., 88 FCC 2d 512 (1981). aff'd sub nom Computer & Communications Industry Ass'n. v. FCC, 693 F.2d 198 (D.C.Cir. 1982), cert. denied, 461 U.S. 938 (1983), second further recon., FCC 84-190 (released May 4, 1984).

this authority to balance competitive concerns against other issues involved in the determination of the public interest, since we find that bundling should not have an adverse impact on competition.

We believe the Decision adequately addresses antitrust concerns and the competitive impact of our decision to authorize cellular bundling, and sets forth the issues in enough detail to allow a reviewing court to follow our reasoning in reaching our conclusions that the relaxation of our prior bundling prohibition is both lawful and in the public interest. Thus, we have met our obligation under NCPA, supra; United States Steel Corp., supra; CMA, supra; and TURN, supra. We are, of course, free to interpret the evidence in a manner different than CRA; the existence of conflicting interpretations is not legal error.

To sum up, CRA correctly points out several minor factual errors in the Decision, but fails to demonstrate legal error warranting rehearing. External events such as the Budget Act and D.96-12-071, however, demonstrate the need for a review of the consumer protection provisions of our bundling decision. Given the preemption of our authority over cellular rates, the bundling program authorized in the Decision may no longer be entirely enforceable.

We will modify the Decision to correct certain minor factual errors and supplement the findings of fact and conclusions of law concerning the likely impact of bundling on competitors. We will also direct the Adminstrative Law Judge responsible for implementing Ordering Paragraph 11 of D.96-12-071 to initiate a reevaluation of the Decision's consumer protection conditions on bundling in the consumer protection phase of I.93-12-007, in which we continue to explore the implications of the federal Budget Act. The consumer protection phase of I.93-12-007 will clarify the impact of the Budget Act and D.96-12-071 on the

consumer protections associated with cellular bundling as authorized in the Decision.

Findings of Fact

1. On December 20, 1996, we issued Investigation on the Commission's Own Motion Into Mobile Telephone Service and Wireless Communications (D.96-12-071) (1996) __ Cal.P.U.C.2d __, in Investigation (I.) 93-12-007, which reviews the extent to which the federal Omnibus Budget Reconciliation Act of 1993 (Budget Act) preempts some of our jurisdiction over many aspects of commercial mobile radio service, including rates. Given the federal preemption of our authority over cellular rates, it may not be possible for the Commission to enforce the consumer-protection bundling conditions set forth in Ordering Paragraph 1 of the Decision.

2. California resellers used to operate on a set gross wholesale margin, however, facilities-based commercial mobile radio service (CMRS) providers are no longer required to file wholesale tariffs. (D.96-12-071, supra, at 20, 26-27, 30-31 (Finding of Fact 20), 32-33 (Conclusions of Law 13-17), 34 (Ordering Paragraphs 6-9).)

Conclusions of Law

1. It is necessary to review the consumer protection conditions in Ordering Paragraph 1 of the Decision in light of the Budget Act and D.96-12-071. Ordering Paragraph 11 of D.96-12-071 directs the Administrative Law Judge assigned to that proceeding to issue a procedural ruling addressing the development of consumer protection rules for CMRS providers. This procedural ruling should be expanded to encompass a review of the consumer protection provisions in Ordering Paragraph 1 of the Decision.

2. CRA's proposal that cellular resellers be given activation commissions would require modification of Ordering

Paragraph 17 of D.90-06-025, supra, a matter which was not included in Bakersfield's petition and which parties would not reasonably expect to be addressed; further, there is insufficient evidence to warrant revisiting this issue, especially in light of the Budget Act, supra, and D.96-12-071, supra.

THEREFORE, for good cause shown, **IT IS HEREBY ORDERED THAT:**

1. CRA's application for rehearing is denied;
2. Decision (D.) 95-04-028 is modified as follows:

   a. On page 26, the percentage "4.7%" at the end of the last sentence of the second paragraph is replaced with the percentage "3.7%"

   b. On page 27, the following sentence is added after the first sentence of the first full paragraph:

      The record does not suggest that California resellers have qualified for high-volume discounts and not passed those discounts on to their customers.

   c. On page 38, Findings of Fact 7a through 7g are added, to read as follows:

      7a. CRA witness Dr. Weinstein testified that, on the basis of the testimony of Dr. Larner and Mr. Ducharme, and his own review, he believed that the market for cellular telephones was presently pretty competitive.

      7b. In 1992, the Federal Communications Commission's (FCC) Bundling Report and Order, supra, found that:

         1. There were between 17 and 25 manufacturers distributing more than 28 brands of cellular telephones, and that the number was growing annually since there were low barriers to market entry;

2. There is a robust level of competition in the cellular customer premises equipment (CPE) market (cellular telephones), despite the common practice of packaging CPE and cellular service;

3. Cellular carriers do not have the potential to engage in sustained predatory pricing practices in the CPE market;

4. It appears unlikely that any carrier engaged in bundling would be able to restrict competition in the CPE market.

7c. The fact that a large company may buy in bulk and thus obtain better prices than a smaller company does not show an antitrust violation.

7d. The record contains no evidence that any cellular carrier has a dominant share of the market for cellular telephones.

7e. The record contains no quantitative evidence of any specific dollar-volume of cellular service sales foreclosed to competitors by a carrier's tie-in of cellular service and equipment.

7f. The record contains no quantitative evidence of any specific dollar-volume of cellular telephone sales foreclosed to competitors as a result of a carrier's dominance of the cellular service market.

7g. The bundling of cellular service and cellular telephones will not substantially lessen competition or tend to create a monopoly in either the cellular service market or the cellular telephone market.

d. On page 38, Finding of Fact 8, the word "the' is inserted between the word "that" and the word "cellular."

e. On page 38, Findings of Fact 8a through 8h are added, to read as follows:

8a. Nextel, a firm unregulated by this Commission, has begun to provide a wireless service that competes with cellular service in some areas; Nextel chose not to introduce any evidence on the impact of lifting the bundling restriction on its ability to compete with regulated facilities-based entities.

8b. The entry of Nextel and other ESMR providers will add a much-needed alternative to the current duopoly. The presence of new competitors should create pressure to reduce the price of cellular service, whether it is offered independently or as part of a bundle of equipment and service.

8c. Nextel's unrestricted ability to bundle discounted equipment and service suggests that in the future the current bundling prohibition may unfairly restrain competition in this market; if cellular carriers currently in the market were faced with competitors who have the ability to bundle cellular equipment and services, yet were themselves unable to bundle, they would be at a competitive disadvantage.

8d. The record does not show that allowing existing carriers to bundle will place new entrants with the ability to bundle at a competitive disadvantage.

8e. The record does not demonstrate that bundling will reduce competition between cellular carriers and resellers.

8f. Resellers can recover equipment discounts from their customers over time, and thus reduce the impact of the initial assistance given to their telephone retailers in order to enable such retailers to offer cellular telephones at competitive prices.

8g. The decline in the market share of resellers in California during a period in which bundling was not permitted suggests that the

decline in the market share of resellers in New York between 1992 and 1993, where bundling was permitted, was due to a factor other than bundling.

8h. Connecticut Telephone, a reseller in a state which permits bundling, has increased its customer base and qualified for larger volume discounts from cellular carriers.

f. On page 39, Finding of Fact 21a is added, to read as follows:

21a. Connecticut Telephone's profitability can be inferred from the facts that Connecticut Telephone has been in business for ten years; has six outlets; has a growing subscriber base and has as a result qualified for larger discounts from carriers; has not lowered its standard plan rate since it began operating; favors volume business accounts over the personal user market; only recently reduced its personal limited user plan rates to track a carrier's rate reduction; offers free installation and a lifetime warranty on all telephones; does not require customers to sign duration contracts (unlike the carriers); and has no deactivation penalty."

g. On page 40, Findings of Fact 31a-31c are added, to read as follows:

31a. Consumer benefits from bundling include lower equipment costs, no adverse impact on cellular service rates, and increased customer choices.

31b. Since bundling lowers equipment costs, does not have an adverse impact on cellular rates, and increases customer choices, it is more likely that consumers will be benefited by bundling than it is that they might be harmed by the coming to pass of CRA's concern that bundling will force resellers from the market to the detriment of consumers.

31c. The FCC's 1992 Bundling Report and Order, supra, found that bundling has has benefited consumers.

h. On page 41, Conclusions of Law 6a-6c are added, to read as follows:

6a. Since there is no evidence in the record of any specific dollar-volume of cellular service sales foreclosed to competitors by any carrier's tie-in of cellular service and equipment, CRA has failed to prove a per se violation of B & P Code Section 16727 based on any cellular carrier's domination of the cellular telephone market.

6b. Since there is no evidence in the record of any specific dollar-volume of cellular telephone sales foreclosed to competitors by any carrier's tie-in of cellular equipment and service, CRA has failed to prove a per se violation of B & P Code Section 16727 based on any cellular carrier's domination of the cellular service market.

6c. Since the bundling of cellular equipment and services will not diminish competition, nor tend to create a monopoly in either the cellular equipment or the cellular services market, bundling does not meet the criteria under B & P Code Section 16727 that would cause us to prohibit this practice."

i. On page 41, Conclusions of Law 7a and 7b are added, to read as follows:

7a. B & P Code Section 17026.1 (e), which states that Section 17026.1 shall not be interpreted to reduce, alter, or otherwise modify Commission authority to regulate or prohibit the payment of commission or rebates to distributors or vendors of cellular telephones, and that its provisions shall be effective only to the extent they do not conflict with any applicable regulatory rules or orders

promulgated or issued by the Commission, authorizes the Commission to change its regulatory policies concerning bundling.

7b. Reading the last phrase of the last sentence of B & P Code Section 17026.1 (c) and the last sentence of Section 17026.1 (e) in conjunction with the rules of statutory construction and the interpretation of grammatically similar language in People ex rel. Lungren, supra, it is evident that the words "as defined and described in relevant decisions and orders of the commission" and the words "regulations rules, or orders promulgated or issued by the Public Utilities Commission" were intended to refer to both current and future Commission decisions.

j. On page 41, Conclusion of Law 12 is added, to read as follows:

12. If CRA believes that cellular carriers who bundle are violating the Cartwright Act, it may purse its remedies in civil court. The court, not the Commission, has jurisdiction to determine violations of the Cartwright Act. (Northern California Power Association v. Public Utilities Commission (1971) 5 Cal.3d 370, 377; see also, Cellular Plus, Inc. v. Superior Court (1993) 14 Cal.App.4th 1224, 1247.)

k. On page 42, Ordering Paragraph 1 is modified by the insertion of the phrase "condition for the" between the word "a" and the word "provision" in the third numbered subparagraph.

3. The Administrative Law Judge responsible for issuing the procedural ruling addressing the development of consumer protection rules for CMRS providers mandated by D.96-12-071 in I.93-12-007 shall expand the scope of that procedural ruling to include a review of the consumer protection provisions

of Ordering Paragraph 1 of the Decision in light of the Budget Act and D.96-12-071.

4. This order is effective today.

Dated February 19, 1997 at San Francisco, California.

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners