

SEP 5 1997

Decision 97-09-050 September 3, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service.

R.95-04-043
(Filed January 22, 1997)

Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service.

I.95-04-044
(Filed January 22, 1997)

ORIGINAL

ORDER DENYING PETITION FOR MODIFICATION OF DECISION 96-12-086

Decision (D.) 96-12-086 established a Commission policy that generally requires the use of geographic splits (and not overlays) to relieve exhausting area codes through the year 2000. Pacific Bell (Pacific) filed what it characterized as an "application for rehearing" of D.96-12-086 in which it argued that the Commission's policy was flawed for four specific reasons. First, Pacific claimed that D.96-12-086 erred by finding that overlays would not expedite area code relief. Second, Pacific argued that D.96-12-086 erred by precluding consideration of overlays until the year 2001. Third, Pacific asserted that D.96-12-086 erred by requiring an overlay of the 310 Numbering Plan Area (NPA)¹ to last three years longer than a split of the 310 NPA. Finally, Pacific claimed that D.96-12-086 erred by requiring overlay proponents to show that sufficient NXX codes² would be available for new entrants.

Responses to Pacific's pleading were filed by GTE California Incorporated (GTE), the Office of Ratepayer Advocates (ORA), and the California Telecommunications

¹ An NPA is the geographic area served by an area code.

² An NXX code consists of the first three digits of a 7-digit telephone number.

Coalition (Coalition).³ GTE supports Pacific's application while ORA and the Coalition oppose it.

We have carefully reviewed Pacific's pleading and have found that it contains no colorable claim of legal error. What Pacific has apparently done is to use the rubric of "legal error" to cloak its disagreement with the policy choices made by the Commission in D.96-12-086. Since Pacific's pleading contains no arguably meritorious claim of legal error, such as would constitute a basis for rehearing, its application for rehearing must be denied. We will, nevertheless, exercise our discretion to treat its pleading as a petition for modification rather than an application for rehearing⁴ in order to efficiently resolve Pacific's policy arguments.

As explained below, in D.97-08-065 we addressed Pacific's allegation that D.96-12-086 erred by requiring an overlay of the 310 NPA to last three years longer than a split. In this decision we have carefully considered the other contentions raised by Pacific in its pleading and are of the opinion that good cause for modification of D.96-12-086 has not been shown.⁵ Any issue raised by Pacific but not addressed by this order is found to be without merit.

³ The members of the Coalition joining in this response were as follows: AT&T Communications of California, Inc.; MCI Telecommunications, Inc.; the California Association of Competitive Telecommunications Companies; California Cable Television Association; ICG Telecom Group, Inc.; Sprint Communications Company L.P.; Teleport Communications Group; The Utility Reform Network ("TURN"); and TimeWarner A&S.

⁴ We previously directed that Pacific's application to rehear D.96-12-086 should be treated as a petition for modification in D.97-08-065, Ordering Paragraph No. 1. Today's decision affirms our previous decision to treat Pacific's pleading as a petition for modification.

⁵ Pacific's claims of legal error were reviewed and evaluated by the staff of our Legal Division. Proposed Commission decisions on applications for rehearing are prepared by our Legal Division, while proposed decisions on petitions for modification are prepared by our Administrative Law Judge (ALJ) Division. Since Pacific's pleading has been treated as a petition for modification, this decision was prepared by our ALJ Division.

I. Whether Overlays Will Expedite Area Code Relief

Pacific alleges that the decision erred in concluding that an overlay would not expedite area code relief (D.96-12-086, at pages 28-30). To support its allegation, Pacific presents several arguments why it believes overlays would expedite area code relief when compared to a split. In addition, Pacific alleges that D.96-12-086 incorrectly states that an overlay might actually delay NPA relief because of "unforeseen problems and learning curve constraints." Pacific states this is mere speculation without any factual basis.

Pacific is mistaken in its assertion that D.96-12-086 concluded overlays would not expedite area code relief relative to a split. After weighing the evidence, the decision did not reach any definitive conclusion on whether overlays or splits could be implemented more quickly. Rather, the decision found that there was uncertainty as to how much time would be required to implement an overlay given the lack of experience with the implementation of overlays. Moreover, as the following excerpt from D.96-12-086 demonstrates, the decision did not rely upon speed of implementation as a deciding factor in the choice of a relief option:

"If the CA forecasts projected exhaust sufficiently in advance, and institutes relief measures early enough, there should be sufficient time to implement a relief plan under either a split or an overlay option . . . The proper solution to avoid premature exhaust is for the CA to begin relief planning efforts early enough so that there is sufficient time for implementation, whatever relief plan is selected. We believe the solution to ensure this outcome is better reporting and tracking of NXX code requests, rather than imposing an inferior relief alternative in the interest of saving time." (Decision at 29, emphasis added.)

The decision does state that "[b]ecause an overlay has never been implemented in California, we believe there is still some uncertainty about whether unforeseen problems and learning curve constraints associated with an initial overlay might lead to delays, thereby risking premature code exhaust." (D.96-12-086, pp. 29-30.) By making this observation, the Commission was not speculating as alleged by Pacific, but merely acknowledging an area of uncertainty in the record of this proceeding. It would, however, be speculation to conclude the opposite -- that despite Pacific's complete lack

of experience with an overlay, there is no risk of delay and premature number exhaustion. Accordingly, D.96-12-086 did not err by stating the obvious point that there is no guarantee that Pacific can implement an overlay without the risk of premature NXX code exhaustion. On this point, Pacific has not shown grounds for modifying D.96-12-086.

II. Precluding The Use of Overlays Until the Year 2001

Pacific alleges that the decision's "greatest error" was its rejection of an overlay for the 213 NPA. Pacific also claims that the Commission erred by generally precluding the use of overlays for other NPAs until the year 2001 (D.96-12-086 at 26). Pacific states that the decision arrived at these errors by giving insufficient weight to several factors favoring overlays.

Pacific is mistaken that D.96-12-086 gave inadequate consideration to the advantages of overlays. In D.96-12-086 the Commission gave due consideration to the advantages and disadvantages of overlays by virtue of the weight given by the decision to three consumer surveys⁴ which together provided a statistically meaningful profile of consumers' preferences for overlays versus splits. (Decision at 20.) In conducting the surveys, respondents were told in extensive detail about the advantages and disadvantages of both splits and overlays. Thus, the surveys accurately gauged consumers' perceptions of the advantages as well as the disadvantages of both options. All three surveys yielded results showing a majority preference for splits, including a split of the 213 NPA, even after taking into account the advantages of an overlay.

Because the Commission considered the advantages and disadvantages of both overlays and splits for all NPAs, including the 213 NPA, through the weight given to the consumer surveys, the Commission properly concluded that the net advantages of a split outweighed the net advantages of an overlay as a policy option through the year

⁴ Pacific, GTE, and the Coalition each conducted their own consumer survey.

2000 (with the possible exception of the 310 NPA).⁷ Therefore, Pacific has failed to show that rejection of the overlay option constitutes error of any kind. Accordingly, we decline to modify D.96-12-086 regarding this matter.

III. Requiring an Overlay for the 310 NPA to Last Three Years Longer Than a Split

Pacific claims that the decision erred by requiring that an overlay for the 310 NPA would have to last at least three years longer than the average lives of the two sides of a split in order to be considered (D.96-12-086 at 25). According to Pacific, this "three-year rule" is not adequately justified by the record.

Pacific's claim that D.96-12-086 erred by imposing the "three-year rule" is similar to issues raised in a Petition for Modification of D.96-12-086 filed by the Telephone Connection of Los Angeles, Inc. and other parties (referred to collectively as TCLA) on April 24, 1997. On August 1, 1997, we issued D.97-08-065 which addressed the claims of Pacific and TCLA regarding the "three-year rule." In particular, we granted Pacific's petition to modify D.96-12-086 insofar as Pacific sought to eliminate the test adopted therein that an overlay for the 310 NPA must last three years longer than the average life of a split of this NPA in order to be considered.⁸

IV. Requiring Overlay Advocates to Show NXX Codes are Available for New Entrants

Pacific asserts that the decision erred by placing the burden on overlay advocates to demonstrate that a proposed overlay meets the Federal Communications Commission's (FCC's)⁹ requirement that each new entrant have one NXX code in the

⁷ D.96-12-086 acknowledges that changing circumstances may favor the use of overlays for small, congested NPAs in the future, and that the Commission shall "revisit...the merits of overlays for new area code relief which would be scheduled to take effect...after the year 2000." (D.96-12-086 at 26.)

⁸ D.97-08-065, Ordering Paragraph No. 5.

⁹ Second Report and Order (FCC 96-333) CC Docket No. 96-98 (Released August. 8, 1996), at ¶286.

exhausting NPA 90 days before the overlay is implemented (D.96-12-086 at 31).¹⁰ According to Pacific, placing this burden on overlay proponents is unreasonable because it forces the proponents to obtain confidential information from competitive local carriers (CLCs) who will refuse to provide such information. Pacific also claims that placing this burden on overlay proponents is unlawful because it goes beyond what the FCC required.¹¹

Pacific is incorrect that D.96-12-086 requires overlay proponents to obtain confidential data from CLCs. Instead, the decision requires the Code Administrator (CA) to forecast whether sufficient NXX codes are available to meet the FCC's "90-day rule." (D.96-12-086 at 31.)¹² If parties challenge a forecast that sufficient NXX codes are available, then D.96-12-086 requires overlay proponents to produce empirical data to support the CA's forecast. (Ibid.) This empirical data is to come from the CA and not from CLCs as asserted by Pacific.¹³ To the extent the empirical data is proprietary in

¹⁰ This requirement was adopted by the FCC to ensure that no competitor would suffer a competitive disadvantage as a result of an overlay.

¹¹ The Commission has appealed to the Eighth Circuit Court the preemption of state authority asserted by the FCC in 96-333. Therefore, the Commission's requirement that overlay proponents have the burden of demonstrating compliance with the FCC's "90-day rule" (which was promulgated in 96-333) should not be interpreted as the Commission's acceptance of the FCC's preemption of state authority.

¹² Each CLC has the responsibility to report their need for NXX codes to the CA in a timely manner in order to promote reliable forecasts of code exhaustion. In turn, the CA has the responsibility to forecast aggregate code demand and code availability based upon the information provided by the CLCs. We acknowledged in D.96-12-086 that better reporting and tracking of NXX code requests was needed to avoid premature area code exhaustion. To achieve this goal, D.96-10-067 authorized our staff to actively monitor Pacific's collection, analysis, and validation of data used by Pacific, in its role as interim CA, to predict area code exhaustion throughout California (D.96-10-067 at 19.) We shall continue to consider measures to facilitate timely and accurate code forecasts by the CA.

¹³ Whether the data supplied by the CA supports a forecast that a proposed overlay complies with the FCC's "90-day rule" is a question of fact that will be decided on a case-by-case basis.

nature, appropriate protective measures can be employed to keep confidential the identity of individual carriers and/or their specific market sensitive data.

Pacific is also mistaken that D.96-12-086 is unlawful because it goes beyond what the FCC required by placing the burden on the proponents of an overlay to demonstrate that the overlay meets the "90-day rule." Any party asking us to take a specific course of action has the burden of demonstrating that the requested action is lawful. Accordingly, D.96-12-086 correctly places the burden on the proponents of an overlay to demonstrate that the overlay complies with applicable regulations, including the "90-day rule" which has been adopted by both us and the FCC. Accordingly, Pacific has failed to demonstrate grounds for modification.

Findings of Fact

1. Pacific filed what it characterized as an application to rehear D. 96-12-086 on January 22, 1997.
2. Responses to Pacific's application were filed by the Coalition, GTEC, Pacific, and ORA.
3. Pacific has identified no factual or legal errors in D.96-12-086.
4. D.97-08-065, Ordering Paragraph No. 1, directed that Pacific's application to rehear D.96-12-086 should be treated as a petition to modify D.96-12-086.
5. D.96-12-086 did not reach any definitive conclusion on whether overlays or splits could be implemented more quickly.
6. D.96-12-086 did not rely upon speed of implementation as a deciding factor in the choice of a relief option.
7. D.96-12-086 considered the advantages and disadvantages of overlays via the weight given by the decision to three consumer surveys conducted by Pacific, GTEC, and the Coalition.
8. Pacific alleged that D.96-12-086 erred by requiring an overlay for the 310 NPA to last at least three years longer than the average lives of the two sides of a split in order to be considered. A similar allegation was raised in a petition to modify D.96-12-086 filed by TCLA and other parties on April 24, 1997.

9. D.97-08-065, issued on August 1, 1997, granted Pacific's petition to modify D.96-12-086 so as to eliminate the requirement that an overlay for the 310 NPA must last at least three years longer than the average life of a split of this NPA in order to be considered.

10. D.96-12-086 does not require overlay proponents to obtain confidential data from CLCs.

Conclusions of Law

1. Pacific's application to rehear D. 96-12-086 identifies no legal error in the decision.
2. Pacific's application to rehear D.96-12-086 should be denied.
3. Pacific's application should be treated as a petition to modify D.96-12-086.
4. D.96-12-086 gave due consideration to the advantages and disadvantages of overlays.
5. Any party asking the Commission to take a specific course of action has the burden of demonstrating that the requested action is lawful.
6. Those aspects of Pacific's petition that were not granted in D.97-08-065 should be denied.

O R D E R

IT IS THEREFORE ORDERED that:

1. Pacific Bell's (Pacific) application to rehear Decision (D.) 96-12-086 is denied.
2. Pacific's application to rehear D.96-12-086 shall be treated as a petition to modify this decision.
3. Pacific's petition to modify D.96-12-086 so as to eliminate the requirement that an overlay for the 310 Numbering Plan Area (NPA) must last three years longer than the

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average life of a split for this NPA was granted in D.97-08-065. In all other respects, Pacific's petition to modify D.96-12-086 is denied.

This order is effective today.

Dated September 3, 1997, at San Francisco, California.

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