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Decision 97-11-084 November 19, 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 April 26, 1995)
Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service.	I.95-04-044 (Filed April 26, 1995)

ORIGINAL

ORDER GRANTING LIMITED REHEARING OF DECISION 97-08-059

On August 1, 1997, the Commission issued Decision (D.) 97-08-059 (the Decision). In this Decision, we addressed outstanding issues regarding the competitive resale of the retail telecommunications services offered by Pacific Bell (Pacific) and GTE California, Inc. (GTEC), which had been designated for resolution in Phase III of the Commission's local competition OIR/OII. Several timely applications for rehearing were filed. Today's order deals only with the application for rehearing filed jointly by Pacific and its subsidiary, Pacific Bell Information Services (Pacific/PBIS or Applicants). The remaining applications, filed by MFS Intelenet of California, Inc., AT&T Communications of California, Inc. and MCI Telecommunications Corporation (jointly), and Business Telemanagement Inc. and Frontier Telemanagement Inc. (jointly), will be resolved in a future Commission order.

Pacific/PBIS's application for rehearing protests the Decision's determination that local exchange carriers (LECs) must offer voice mail services for resale at the retail tariff rate. Concurrent with their application for rehearing, Pacific/PBIS filed a motion requesting that the ordering paragraphs of the Decision dealing with voice mail resale be stayed until we could rule on the application for rehearing and pending judicial review. The California Telecommunications Coalition (Coalition) filed a response opposing the motion for stay. In D.97-10-033, we granted the motion for stay until November 19, 1997, unless we otherwise order that it be extended beyond that date.[1]

Pacific/PBIS allege six categories of legal error pertaining to the Decision's requirement that voice mail services be offered for resale. The Office of Ratepayer Advocates (ORA) and the Coalition have filed responses to Pacific/PBIS's allegations. Having considered all of the arguments presented, we are of the view that in several areas, limited rehearing should be granted. We discuss below the allegations of error raised by Pacific/PBIS.

1. Sufficiency of the Record, Notice and Opportunity to be Heard.

Pacific/PBIS argue that an insufficient record exists to support the Decision's discussion and finding that the competitive local exchange carriers (CLCs) need access to the incumbent LECs' voice mail service for resale purposes in order to permit CLCs to offer end users a competitive overall service package. We are persuaded that there is merit to this argument, and we will grant limited rehearing to adequately develop the record on the issues involved in such a determination. We conclude that the essential questions of fact underlying this determination are (1) whether CLCs require the ability to offer voice mail in order to compete

[1] Pacific/PBIS had also filed a letter with our Executive Director concurrent with their motion for stay, asking him to exercise his discretion to extend the time set forth in the Decision for filing tariffs making voice mail available for resale, and for those tariffs to become effective. The Executive Director granted a temporary stay, pending Commission action on the motion.

effectively in the local exchange market, and (2) if so, whether CLCs can reasonably obtain competitive substitutes for the LECs' voice mail services which are comparable in quality and cost.

We take notice of the fact that since the adoption of D.97-08-059, a further development of the record on the issue of whether the market for voice mail services is competitive has already been accomplished, at least in part, through the issuance of recent rulings by the assigned ALJ. On August 15, 1997, the ALJ issued a ruling on whether a mandatory discount should be adopted for the resale of voice mail pursuant to the directive in the Decision, soliciting comments on that pending issue. As a basis for resolving this question, the ruling solicited information concerning the extent of competitive voice mail alternatives available to CLCs. The ALJ subsequently issued two additional rulings soliciting follow-up information concerning the cost of competitive voice mail alternatives.

In the parties' responses to these ALJ rulings, we may already have much if not all of the record we will need to issue a further decision on the fundamental question of whether or to what extent resale of voice mail services is warranted at all. However, because parties responding to the ALJ rulings were not given prior notice that we were going to be using their responses in undertaking such a task, we will give them an additional opportunity to augment their comments, should they desire to do so, with due notice that we intend to use those comments to determine this fundamental question. We will also entertain any additional comments parties wish to make concerning the issues raised in Parts 2 and 3 below, concerning the relationship between Pacific and PBIS specifically as it relates to the provision, marketing and offering of voice mail services and as it relates to our jurisdiction over the regulation of voice mail.

For reasons similar to those we set forth in D.95-03-043 in our wireless investigation, we do not believe evidentiary hearings are necessary at this

time. See Re Mobile Telephone Service and Wireless Communications Providers [D.95-03-043] (1995) 59 Cal. P.U.C. 2d 91, 95-98. However, because it may be that difficult factual disputes will arise in the course of developing the record which cannot be readily resolved through comments as provided for above, parties should also address in any augmentation of their comments whether evidentiary hearings are required, or whether other procedural means, such as workshops, are necessary and sufficient to resolve certain limited factual issues.

Before we leave this discussion, we will comment briefly on Pacific/PBIS's arguments that we failed to give them notice or opportunity to be heard on the voice mail issue. While it is a moot issue at this point, we find Pacific/PBIS's arguments to be without merit. There can be no question that all retail services the LECs provide were under inquiry in terms of possible competitive resale requirements. The Decision itself details the history of this issue generically. While other parties did little better in terms of specific reference to voice mail, this was hardly their responsibility. We are quite surprised that Pacific/PBIS let what appears to be a highly significant issue to them go by without a more substantial showing. In any event, through our limited rehearing, all parties will have the opportunity to address the voice mail issue thoroughly.

2. The Federal Telecommunications Act of 1996. Pacific/PBIS argue that the Decision violates the federal Telecommunications Act of 1996 (the Act), because the Act requires resale only of "telecommunications services," which according to Pacific/PBIS does not include voice mail. Applicants cite federal definitions of "telecommunications services" and "information services," contend that voice mail is the latter, and argue the Commission cannot subject this service to resale, even at retail rates. ORA states that the Commission must decide whether voice mail is or is not a telecommunications service under the federal Act, and if it is not, must then decide whether reasons other than the mandate of the Act

compel it to be made available for resale. The Coalition maintains that whether voice mail is a telecommunications service under the Act is irrelevant, since the Decision bases its authority to require resale of this service on state law;[2] the Coalition further argues that whereas the Act requires that telecommunications services be offered for resale, the Act does not preclude a state commission from requiring that a retail service which does not meet the technical definition of telecommunications service also be offered for resale, if deemed necessary in the furtherance of full and fair competition.

Pacific/PBIS cite BellSouth, 7 FCC Rcd 1619 (1992), an FCC decision holding as preempted by federal law the Georgia Public Service Commission's attempt to prohibit BellSouth's provision of its voice mail service to new customers until the Georgia Commission enacted regulatory controls to prevent anticompetitive conduct, including, in relevant part, tariffing and rate regulation of enhanced services. Id. This case appears to us to be distinguishable from the situation before us. The FCC itself stated: "The limited step of preempting the Georgia PSC *Order* insofar as it freezes the provision of BellSouth's voice mail service neither requires nor precludes state or federal examination of anticompetitive conduct by BellSouth or other BOCs. The Georgia PSC can continue its proceeding to fashion regulatory controls, . . ." Id. at 1620, n.18.

The Act provides states considerable leeway in imposing requirements designed to further competition, including those related to resale of LEC-offered retail services. See, e.g., sections 261(b), 261(c), and 601(c)(1); see also, Iowa Utilities Board v. FCC (8th Cir. 1997) 120 F.3d 753, which held, among other things, that states have authority over resale and resale pricing. We are not

[2] See Public Utilities Code sections 489, 495.7, 709.5, and 2882.3 see also Commission Resolution T-15139 (March 24, 1993).

persuaded at this point that a decision to require resale of voice mail services based on our authority under state law would be inconsistent with the federal Act.

We recognize, however, that these issues were not fully explored prior to the issuance of D.97-08-059. Therefore, in the course of giving parties an opportunity to augment the record on competitive voice mail alternatives available to CLCs and issues relating to the corporate structure of Pacific and PBIS, we will also accept additional legal arguments on the jurisdictional issues discussed above. This will give every party wishing to address these issues a full and fair opportunity to do so, and will provide us with maximum input in determining whether we should require a mandatory resale of voice mail.

3. The Relationship Between Pacific and PBIS. Pacific/PBIS thirdly allege that since PBIS, and not Pacific, technically provides voice mail service, the Commission cannot lawfully order Pacific to resell a service it does not provide. Related to this allegation, the Applicants claim we lack jurisdiction over voice mail providers like PBIS, and thus cannot order provision of resale voice mail service. Both ORA and the Coalition find these arguments to be without merit.

As the Coalition points out, we have previously rejected the argument that the structural separation between PBIS and Pacific has precluded our asserting regulatory authority over PBIS, as well as tariffing authority over the enhanced services offerings of Pacific Bell's affiliates. We have stated that our regulatory authority over entities like PBIS is not dependent on PBIS having "public utility" status, but comes from our section 701 authority over Pacific Bell's utility enterprise. See Re Pacific Bell [D.92-02-072] (1992) 45 Cal. P.U.C.2d 109, 119, 122. See also City of Los Angeles v. Public Utilities Commission (1972) 7 Cal.3d 331, 344; Re SBC/Telesis Merger [D.97-03-067] (1997) slip opinion at 12-13, __ Cal. P.U.C. 2d __ (utility enterprise must be viewed as a whole).

In addition, as ORA points out, it strains credulity to assert that because PBIS in some less than visible way may "provide" voice mail service, Pacific itself does not "offer" this service. ORA asserts that PBIS provides voice mail only to Pacific, and only Pacific can sell PBIS' voice mail. As a casual perusal of the White Pages, Pacific's advertising, a voice mail brochure, or the Voice Mail User's Guide will show, Pacific markets voice mail as "Pacific Bell Voice Mail" service. ORA argues persuasively in addition that it is Pacific's policy, not its subsidiary PBIS's policy, that voice mail not be resold to CLCs and their customers.

We will allow parties to provide further comment, as stated in Part 1 above, on the corporate relationship between these two entities, with particular respect to the provision, marketing, and "offering" of voice mail services, once again for the purpose of assuring a complete record on the fundamental question of whether voice mail services should be subject to mandatory resale.

4. Taking of Property Without Just Compensation. Pacific/PBIS argue that "[t]he Decision's requirement that Pacific resell PBIS's voice mail service to Pacific's competitors is an unlawful taking which confiscates shareholder property." App/rhg at 24. This is because, according to Applicants, PBIS is not a public utility, PBIS was funded entirely by shareholders and not utility customers, and voice mail is not a public utility service that has been regulated by the Commission. We find this argument to be totally without merit.

First of all, as discussed above, we have never ceded regulatory authority over PBIS or tariffing authority over the enhanced services it may provide. Second, given today's disposition of Pacific/PBIS's application for rehearing, we note that we have not done anything with respect to any voice mail "property." Third, we find persuasive the Coalition's argument that even if today's order had affirmed the Decision's requirement that voice mail services be

resold at retail rates, it could not be an unconstitutional taking because it would not affect the price at which voice mail is sold, but would merely continue the long-standing regulation of the joint marketing of this particular enhanced service.

5. The Tying Arrangement Argument. Finally, Pacific/PBIS argue that neither Pacific nor PBIS have engaged in an illegal tying arrangement involving voice mail, thus the language to the contrary in the Decision should be deleted. This argument proves too much. The Decision says we will further develop the record to see if such has occurred; it says nothing about our concluding that it has. As we have already noted, the BellSouth opinion cited by Pacific/PBIS in support of their argument that our Decision contravenes the federal Act explicitly allows state commissions to undertake this kind of inquiry into anticompetitive possibilities, specifically with regard to voice mail. 7 FCC Rcd. 1619, 1620, n.18. The argument is without merit.

Therefore, **IT IS ORDERED** that:

1. The application for rehearing of Decision 97-08-059 filed by Pacific Bell and PBIS is granted for the limited purpose of developing an additional record relative to the fundamental question of whether or to what extent voice mail services should be made subject to mandatory resale to the CLCs. Parties shall have until December 1, 1997, to augment comments they have already filed in response to the ALJ ruling of August 15, 1997 and follow-up rulings which sought information relating to the issue of requiring voice mail services to be resold at a wholesale rate. Parties shall have until December 11, 1997 to file reply comments. Before providing augmented comments, parties should consider carefully the extent to which such comments are necessary for the Commission to have a complete record upon which to determine whether or to what extent resale of voice mail should be required. Parties should not simply reiterate points they have already made. Parties may include in these augmented comments information on

the corporate structure of Pacific Bell and PBIS as it relates to the provision, marketing and offering of voice mail services. Parties may also include in these comments their views as to whether any evidentiary hearings are required to resolve the issues discussed above, or whether other procedural options are sufficient and/or more desirable.

2. The Pacific Bell/PBIS application for rehearing of Decision 97-08-059 is also granted for the limited purpose of receiving additional legal arguments on the issue of the Commission's jurisdiction pursuant to both federal and state law to order that voice mail services be offered for resale, at retail or at wholesale rates. These arguments should be included in any comments filed pursuant to Ordering Paragraph 1 above, and are due on the same schedule, i.e., initial comments are due December 1, 1997; replies are due December 11, 1997. Parties wishing to submit arguments on this issue should review the arguments made in the application for rehearing and responses thereto, and in comments filed pursuant to the August 15 ALJ ruling, in order that the arguments they present are not reiterative or repetitive of those already presented.

3. The above Application for Rehearing is denied in all other respects.

4. The Applications for Rehearing of Decision 97-08-059 filed by MFS Intelenet of California, Inc., AT&T Communications of California, Inc. and MCI Telecommunications Corporation (jointly), and Business Telemanagement Inc. and Frontier Telemanagement Inc. (jointly) will be resolved in a future Commission order.

5. The stay imposed by Decision 97-10-033 (as corrected by Decision 97-10-078) on Ordering Paragraphs 1, 3, 5, and 6 of Decision 97-08-059 pertaining to the tariffing of voice mail services offered for resale is hereby continued in effect until further Commission order.

This order is effective today.

Dated November 19, 1997 at San Francisco, California.

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