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Decision 98-08-031 August 6, 1998

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking on the Commission's Own Motion to
Establish a Simplified Registration Process for
Nondominant Telecommunications Firms.

Rulemaking 94-02-003
(Filed February 2, 1994)

Investigation into the Commission's Own Motion to
Establish a Simplified Registration Process for
Nondominant Telecommunications Firms.

Investigation 94-02-004
(Filed February 2, 1994)

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O P I N I O N

Background

On June 20, 1997, the Commission held oral argument in this proceeding. At oral argument, counsel for ICG Telecom Group, Inc., (ICG) presented a detariffing proposal that had also been included in the comments on the May 1997 Proposed Decision that ICG filed jointly with Time Warner AxS of California. Referred to as the "contract option," the proposal intrigued the Commissioners in attendance. To fully consider the contract option detariffing proposal, the interim decision deferred consideration of detariffing, but the remaining sections of the Proposed Decision addressing registration and document service requirements were considered by the Commission on June 27, 1997, and approved in Decision 97-06-107.

Subsequently, and pursuant to a schedule set by the assigned Commissioner, the parties submitted comments on the contract option proposal. The parties met and discussed the potential for a joint recommendation but were unable to agree.

On October 10, 1997, the parties presented oral argument before the assigned Commissioner and Administrative Law Judge. At oral argument, several parties proposed modifications to the contract option proposal which included publishing a price list and adopting additional consumer protection rules. Given those proposals, other parties concluded that the initial simplicity of the contract option would be overcome by the modifications such that the Commission would be better off abandoning the contract option and adopting the proposal contained in the May 1997 proposed decision.

The parties filed reply comments on October 17, 1997.

On December 15, 1997, Commissioner Knight issued his proposed decision on the detariffing issue. The parties filed comments on January 7, 1998, and reply comments on January 15, 1998.

Description of the Contract Option

As stated by ICG and Time Warner AxS of California in their reply comments, the contract option would dramatically simplify regulation of nondominant interexchange carriers (NDIECs) by substituting a written contract between the carrier and the customer, which contains all terms and conditions, for the currently-required tariffs. Prior to offering this means of obtaining service, carriers would need to file an advice letter with the Commission seeking authorization to offer a particular service on a detariffed basis. Any modifications to the contract would require a signed writing by the customer and the contract could include a clearly stated limitation on liability, to the extent permitted by law. In sum, the customer and carrier would strike a deal and reduce it to writing.

The specific proposal put forward by ICG:

"Nondominant carriers may detariff services other than basic exchange service on a service-by-service basis if, but only if, they (1) first notify the Commission by advice letter that they are offering a particular service on

a detariffed basis and (2) incorporate all of the rates, terms and conditions of service for each service purchased by the customer in a contract that must first be signed by the customer to be enforceable. No change in the rates, terms and conditions of any service specified in such a contract shall be enforceable unless such change is set forth in a writing signed by the customer. To the extent permitted by law, contracts for provision of detariffed services may include a clearly identifiable limitation on liability for failure or unavailability of any service covered by the contract."

Discussion

Section 495.7 of the Public Utilities (PU) Code allows the Commission to exempt certain telecommunications services, excluding basic exchange services, from the tariffing requirements of PU Code §§ 454, 489, 491 and 495 if the Commission finds that either (1) the specific telephone corporation lacks significant market power in the market for that service or (2) that a given market offers competitive alternatives to most consumers and that consumer protection rules and enforcement mechanisms minimize the risk of unfair competition or anticompetitive behavior.

The Commission has previously found that NDIECs "operate in a highly competitive and nonmonopolistic marketplace." *Re California Association of Long Distance Telephone Companies*, 21 CPUC 2d 549, 554 (1986) (Decision (D.) 86-08-057). The marketplace offers consumers many alternative providers of interexchange service. The Commission has authorized nearly 1,000 carriers to provide interexchange service. Therefore, this market offers most consumers alternative providers of interexchange services. Our current consumer protection rules are reflected in our Decisions, General Orders and other rules, as well as in the utilities' tariffs. Together with our enforcement mechanisms, i.e. the informal and formal complaint processes and the Commission investigation process and available sanctions, these rules minimize the risk of unfair competition and anticompetitive behavior. Accordingly, the Commission finds that the nondominant providers of interexchange services meet the requirements of § 495.7 and are eligible for an exemption from tariffing requirements.

Section 495.7 also requires that prior to establishing procedures allowing companies that meet the first prerequisite to apply for exemptions, that the Commission

establish consumer protection rules applicable to those exempted services. The content of those rules has been the primary focus of the detariffing debate.

A final precondition is found in subsection (d) which requires that the Commission find that there exists no improper cross-subsidization or anticompetitive behavior in connection with the service. To meet this requirement, we will limit the exemption from tariffs to those NDIECs that are *not* affiliates of incumbent local exchange carriers, the only telecommunications carriers over which the Commission exercises ratesetting jurisdiction. In this way, no improper subsidies can possibly exist.

Limitation on Liability

A critical issue in this proceeding is whether Exempt IECs will be permitted to include a limitation of liability provision in their contracts for detariffed services. Such permission turns on the construction of PU Code § 495.7(h). PU Code § 495.7(h) states in part that "[a]ny telecommunications service exempted from ...tariffing requirements shall not be subject to the limitation on damages that applies to tariffed telecommunications services."

In its comments, TURN contends that § 495.7(h) prohibits any limitation on liability from tariffs or any other source, including contracts. Although such limitations are routinely included in many business contracts, TURN believes that the Legislature imposed this restriction because the Legislature anticipated that all carriers would impose a contractual liability limitation such that consumers would effectively have no choice on this issue.

Other parties asserted that § 495.7(h) simply prohibits carriers offering detariffed telecommunications services from benefiting from the limitation of liability provision that applies to tariffed telecommunications services. According to these parties, carriers offering detariffed services may still insert a limitation of liability provision in a contract. These parties further stated that the limitation on liability is essential to doing business, and that absent the ability to include such provision in a contract, carriers would continue to offer services under tariffs that include such a provision. In a previous phase of this proceeding, a party even suggested that if all services were

detariffed for NDIEC's, except those that were affiliates of a competitive local carrier (CLC), then virtually all NDIECs would seek CLC operating authority solely to retain the liability limitation.

We have carefully considered the competing arguments, closely examined the statute and its purpose, and conclude that Section 495.7(h) does not constitute a blanket prohibition that forbids carriers offering detariffed services from imposing a limitation of liability provision in a contract. Instead, based on Waters v. Pacific Telephone Co., 12 C.3d 1 (1974), we interpret Section 495.7(h) as precluding a carrier offering detariffed services from enjoying the benefits that a Commission-sanctioned tariffed limitation of liability provision confers on a carrier.

In Waters, the California Supreme Court stated that a Commission-approved limitation of liability provision contained in public utility tariffs barred a damage suit, based on ordinary negligence, in civil court. The court reasoned that the Commission had authorized the telephone company to include a limitation of liability provision in its tariffs, which the Commission took into account in setting rates for the company. The court thus concluded that to allow a suit for damages against the telephone company would impermissibly interfere with the Commission's ratemaking functions and its policies limiting liability, and thus conflicted with Section 1759 of the PU Code.¹

The impact of the Waters decision is to insulate a carrier offering tariffed services from a civil damage suit based on ordinary negligence. A carrier offering detariffed services under contract with a limitation of liability provision would enjoy no similar immunity. An Exempt IEC would be free to include a limitation of liability provision in a contract to the extent allowed by law. See generally, 14 Cal. Jur. Contracts § 125 at 354 ("[e]xculpatory clauses contained in standard adhesion contracts are invalid if they

¹ The court went on to state that a limitation of liability tariff provision could only be challenged before the Commission or in the California Supreme Court.

affect a public interest.") (footnotes omitted).² A complainant in turn would be free to challenge the validity and operation of the limitation provision in civil court, and a court would have jurisdiction independently "to reappraise and reinterpret" the contractual language, and determine the provision's enforceability. Waters, 12 C.3d at 10.³

Applying the reasoning of Waters, we construe Section 495.7(h) to prohibit an Exempt IEC from including "the limitation of liability provision that applies to tariffed telecommunications services." (emphasis added). Section 495.7(h), however, would not preclude an Exempt IEC from including a contractual limitation of liability provision. We nevertheless emphasize that any such contractual limitation would neither be endorsed nor sanctioned by the Commission. Moreover, given the Commission's lack of power to award consequential damages, a contractual limitation would not be subject to interpretation, application, or adjudication before the Commission. All of these matters would necessarily be within the sole province of a court. The Commission, however, would retain its statutory jurisdiction to award reparations to an aggrieved customer, a fact that we will clarify, as indicated below, in our rules.

By allowing carriers to include a limitation of liability provision in contracts for detariffed services, we expect that carriers, previously reluctant to detariff services, will now be willing to do so in accordance with Section 495.7.⁴ Carriers that choose to continue offering tariffed services will be subject to the Commission-sanctioned

² In addition, "an exculpatory clause in an escrow agreement which purported to insulate an escrow company from its own negligence was invalid, where the transaction was one that affected the public interest, where the business was of a type suitable for public regulation, and where the exculpated party performed an important public service used as a matter of necessity by the other party and other members of the public." 14 Cal Jur 3d at 354 (footnotes omitted).

³ In any such action the "law does not look with favor on attempts to avoid liability or secure exemption for one's own negligence, and such provisions are strictly construed against the person relying on them." 14 Cal Jur 3d § 125 at 353.

⁴ We note, however, that our previously-adopted rules governing Exempt IECs did include a limitation of liability provision. See Rule 14 of D.96-09-098.

limitation of liability provision, and the benefits that flow from Commission endorsement.

The Contract Option Proposal

The Commissioners present at the June oral argument voiced a strong interest in the contract option because it sought to make the relationship between consumers and telecommunications service providers mirror that of a typical consumer/service provider relationship. Generally, consumers procure services through the use of a contract, which is sometimes written or may be oral. Contracts are not common in the telecommunications industry because tariffs were the vehicle for the Commission to establish rates and terms and conditions of service in this formerly monopolistic industry.

The Legislature in adopting PU Code § 495.7 recognized that tariffs are inconsistent with a competitive marketplace. Absent tariffs, a contract is the logical means to establish the rights and responsibilities between carriers and their customers. Moreover, customers routinely contract for a wide variety of services and thus are familiar with the process and consequences.

Written contracts between customers and carriers will require the carrier to fully state all applicable terms and conditions, including price, for consideration and possible acceptance by the customer. In this way, customers will be fully informed of all terms of the service prior to purchasing the service.

Substituting contracts for tariffs will simplify Commission regulation of NDIECs by allowing the carriers to develop flexible service offerings which will be immediately available to customers. Carriers will be better able to meet customers' needs in the dynamic and competitive interexchange market.

For these reasons, we will authorize NDIECs to replace tariffs with customer contracts as described in the ICG proposal, with the significant consumer protection limitations described under subsection (1) below.

Some parties suggested that the contract option will be used only with large business customers because securing written contracts with multitudes of residential

customers is impractical. While contract law certainly allows for both oral and implied-in-fact contracts, *see generally* 14 Cal Jur 3d Contracts § 4, we are unwilling, at this point, to approve these means for contracting for telecommunications services. If, after a period of time of experimentation with the more stringent rule, a carrier believes that the marketplace is ready for oral and implied-in-fact contracts, then that carrier may file an application seeking such authorization. For the moment, though, written contracts appear to be the most procedurally fair mechanism for consumers, as well as the only means to clearly comply with the liability limitation provisions.

Mandatory or Voluntary Detariffing

In earlier stages of this proceeding, we learned that not all carriers consider detariffing advantageous to their business objectives. Some carriers, even if given a choice, desire to maintain the status quo; that is, filing tariffs with the Commission.

No evidence was presented that the current tariff system harms consumers. Although doing away with the tariff filing requirements could reduce the Commission's administrative burden, this benefit does not outweigh the disadvantages carriers have attributed to mandatory detariffing. Accordingly, any detariffing by NDIECs shall be on a voluntary basis.

Carrier-by-Carrier, Service-by-Service or Customer-by-Customer

PU Code § 495.7 authorizes us to "partially or completely exempt certain telecommunications services" from tariffing requirements. Our earlier proposed decision on detariffing, D.96-09-098, contemplated that carriers would detariff all or none of their services. Several parties asserted in this proceeding that the contract-in-lieu-of-tariffs approach we adopt by this decision is not compatible with all types of service offerings. These parties have argued that signed written contracts are only feasible with relatively few large business customers and not with large numbers of residential customers. (Joint Comments of Sprint, MCI and AT&T.)

On the other hand, TURN in its reply comments states that service-by-service detariffing will be confusing for customers who submit complaints to the Commission because the Commission staff will not know if the tariffs or a separate contract control.

We have eliminated any potential confusion resulting from service-by-service detariffing because as discussed later in this decision, utilities will be required to file advice letters with revised tariffs indicating which services are detariffed. When a complaint is received, Commission staff can look in the tariffs to see if the service is tariffed or detariffed. Moreover, if the predictions of some parties are correct, and only large business customers are served under contracts, these sophisticated customers will be aware of the provisions of their contract.

For these reasons, carriers will be allowed to detariff on a service-by-service basis.

In its oral argument, the California Association of Competitive Telephone Companies presented the option of carriers providing the same service on both a tariffed and exempt-from tariff-basis. As TURN correctly observes, this amounts to customer-by-customer detariffing. Section 495.7, which allows the Commission to establish procedures for carriers seeking exemption from tariffing requirements for "certain telecommunications services", is silent on the specific question of whether carriers may detariff on a customer-by-customer basis. Consequently, we believe we could authorize detariffing on a customer-specific basis for customers who are not similarly situated. If customers are similarly situated, customer-specific detariffing could produce discriminatory pricing or offering of discriminatory terms and conditions among similarly-situated. Further, allowing large customer-specific detariffing for large businesses, but not for small businesses or residential customers, would create practical difficulties for the Commission in overseeing the contract option. Rather than create a patchwork approach which could result in different classes of customers treated disparately, we will not approve customer-by-customer detariffing. Thus, carriers must provide service to all similarly-situated customers on the same basis, i.e. detariffed or not.

In authorizing carriers to seek exemption from tariffing requirements for certain services, however, we are faced with the prospect that some carriers may seek to offer contracts which cover both tariffed and detariffed services. We will allow carriers to include both tariffed and detariffed services in a contract provided such a contract

follows the special contract rules required for tariffed services as well as the contract option rules required for detariffed services.

Consumer Protection Rules

In PU CODE § 495.7, the Legislature directed the Commission to establish consumer protection rules on six topics no later than September 30, 1996. In D.96-09-098, we adopted a set of consumer protection rules and, for reasons discussed in this decision, we have decided that those rules are incompatible with the contract option, either because they are rendered unnecessary by the use of contractual terms in lieu of rules, or for policy reasons we discuss below. Consequently, we adopt here a revised set of rules which we deem more appropriate in an environment where carriers and customers are free to negotiate business arrangements specific to the customers' needs.

1. Rules Regarding the Availability of Rates, Terms and Conditions § 495.7(c)(1).

The contract method set out above explicitly requires that all rates, terms, and conditions must be specified in the contract. This approach further requires that the information pertaining to rates, terms, and conditions be presented to the customer for review and acceptance or rejection. Thus, information about the customer's own service will be available to the consumer. Section 495.7, however, requires rules regarding the availability of rates, terms, and conditions of service, and does not limit that information only to that which applies to the customer's own service. Indeed, PU CODE § 453 mandates that public utilities shall not discriminate or "grant any preference or advantage" to any customer. In order to ensure that carriers continue to comply with the requirement that they not discriminate, our rules must afford an opportunity for customers to obtain information about the types of service arrangements a carrier offers to similar customers. To that end, we are incorporating in this new rule a requirement that a carrier make available to any customer, who requests in writing, information about other service plans pertaining to the product(s) or service(s) the customer is ordering and for which the customer is eligible.

In addition, we have concluded that some provisions of the rules adopted in D.96-09-098 will be supplanted by specific contract provisions, rendering moot the need

for broad rules. For example, rather than include here a rule requiring specific written notice to customers of major rate increases (Rule 7 in D.96-09-098), such notice should be incorporated into a carrier-customer contract. The same would hold true for written notice to a customer of changes in terms or conditions. The contract must specify how a customer is notified of changes in rates, or of changes in terms and conditions, thus obviating the need for rule mandating written notices to effect the same result.

Rule 1:

- a. Rate information and information regarding the terms and conditions of service shall be provided in writing upon request by a current or potential customer. All of the rates, terms and conditions of service must be stated in a contract that must be signed by the customer and otherwise be enforceable. Although no terms may be incorporated by reference, formulae may be used to calculate rates or charges, where the components of the formulae can be readily ascertained from a public source. All ambiguities will be construed against the carrier. A carrier shall make available to any customer, who requests in writing, information about other service plans pertaining to the product(s) or service(s) the customer is ordering and for which the customer is eligible.
- b. The contract must provide for written notice to the customer at least 7 calendar days prior to termination of service by the carrier, and refund of any customer deposits within 30 days after service has been terminated.

2. Rules Regarding Notices of Changes in Rates, of Terms and Conditions of Service, and of Ownership. § 495.7(c)(2).

This rules incorporates the requirement that all changes to the contract must be set out in writing and signed by the customer. In this manner, the customer will have notice of changes in rates, or terms and conditions of service. In addition, we have previously concluded that when a carrier's ownership changes, customers must be notified of the change. (See D.97-06-096, *Cherry/MIDCOM*.)

- Rule 2:* No change in the rates, terms, and conditions of any service specified in such a contract shall be enforceable unless such change is set forth in a writing signed by the customer who signed the original contract, or that customer's duly authorized agent. As currently provided in D.97-06-096 (as may be amended or superceded), customers must be notified of any change of ownership of the company providing service to the customer as follows:

- a. The notice must be in writing;
 - b. The carrier must provide it to customers no later than 30 days before the proposed transfer;
 - c. The notice must contain a straightforward description of the upcoming transfer, any fees the customer will be expected to pay, a statement of the customer's right to switch to another carrier, and a toll-free telephone number for questions; and
 - d. The notice and the carrier's description of service to customers must be included in the advice letter seeking approval of the change in ownership.
3. *Rules to Identify and Eliminate Unacceptable and/or Fraudulent Marketing Practices. § 495.7(c)(3).*

The Commission's Consumer Services Division (CSD) assists the Commission in developing and enforcing consumer protection rules in all regulated industries. CSD facilitates consumer awareness in competitive markets by providing information and helping to educate consumers so that they may make informed choices regarding competing service providers. CSD also alerts the Commission to consumer problems requiring preventive or remedial action.

The Commission seeks to eliminate unacceptable or fraudulent marketing practices by all public utilities. Presently, telephone corporations are prohibited by PU CODE § 2889.5 from transferring a customer's service without authorization. Carriers providing detariffed services must continue to comply with § 2889.5. We incorporate here provisions intended to reinforce the requirements of § 2889.5, including portions of Rule 9 in D.96-09-098 pertaining to a carrier's obligations associated with an unauthorized change of service provider. In addition, to ensure that a customer does not confuse marketing materials with the contract itself, we will require that marketing materials be contained in a document wholly separate from the contract the customer signs. Finally, all terms must be in simple, plain, understandable language. In the event that the carrier markets its detariffed services in languages other than English, we will require that the written contract be in the same language employed when the carrier negotiated the contract with the customer.

In a separate docket, the Commission currently is investigating the possibility of additional rules to reduce unauthorized transfer of telephone customers and of billing

fraud, R.97-08-001/I.97-08-002. Carriers offering detariffed service will be subject to rules adopted in R.97-08-001/I.97-08-002 unless otherwise determined in that proceeding.

Rule 3:

- a. Pursuant to Public Utilities Code § 2889.5, no carrier or any person, firm, or corporation representing a carrier, shall change a customer's presubscribed telephone service provider without the customer's authorization. All carriers shall comply with the provisions of § 2889.5 as well as other applicable state and federal law as they may be amended or superceded from time to time. Carriers shall be held liable for any violation of § 2889.5 including, but not limited to, the unauthorized termination of a customer's service with an existing carrier and the subsequent unauthorized transfer of the customer to the carrier's own service. Violations may incur a penalty or fine pursuant to Public Utilities Code § 2107 as well those allowed pursuant to other law and Commission policy..
- b. No carrier whose service has been terminated by a customer shall re-establish service for that customer without the express consent of the customer, which consent may not be founded upon any purported term in an agreement for service that binds the customer to take service from the carrier for a specified term, or continually.
- c. All solicitations by carriers or their agents provided to customers must be legible and printed in 10 point type at a minimum.
- d. All promotional and marketing materials used in the offering of detariffed telecommunications services shall be wholly separate from the written contract the customer signs. All terms must be plainly stated in understandable language, and must be in the same language employed when the carrier negotiated the contract with the customer.

4. Rules to Assure Aggrieved Consumers the Right to Speedy, Low-Cost, and Effective Relief. § 495.7(c)(4)

All aggrieved customers should have access to a speedy means for obtaining relief from a public utility that is not in compliance with Commission requirements. The Commission's Consumer Services Division works with aggrieved customers to informally resolve disputes before the matter rises to the level of a formal complaint. Many disputes are resolved in this informal stage. Disputes that are not informally resolved advance to the formal complaint process pursuant to Rules 9 through 13.2 of the Commission's Rules of Practice and Procedure. Certain complaints may also be

heard under the expedited process pursuant to Rule 13.2, which requires a hearing no more than 30 days after the defendant files the answer.

No party asserted that existing informal and formal complaint processes are inadequate or otherwise fail to complainants with a speedy and effective avenue for relief in the event of a dispute with a carrier. For this reason, we will apply our existing rules and not require additional rules. TURN specifically noted that Exempt IECs must expressly be prohibited from disconnecting service in the event of a billing dispute where the customer deposits with the Commission the amounts in dispute. The rules we adopt will incorporate such a provision.

Rule 4:

- a. Each bill must prominently display a toll-free number for service or billing inquiries, along with an address where the customer may write to the carrier.
- b. In case of a billing dispute between a customer and the carrier, the carrier will comply with any customer request for the carrier to undertake an investigation and review of the disputed amount.
- c. If a customer fails to pay the undisputed portion of the bill by the Due By Date (no sooner than fifteen days of the date of presentation) shown on the bill, the carrier may notify the customer in writing of such delinquency and indicate that service may be terminated
- d. A carrier may not disconnect service to a customer who has submitted a claim to CSD for investigation and decision, has either paid the disputed amount or has deposited the amount in dispute with the Commission within seven calendar days after the date the carrier notifies the customer that the carrier's investigation and review are completed. However, in no event shall the carrier disconnect service prior to the Due By Date shown on the bill. .
- e. In no event shall a carrier disconnect service to a customer who has deposited the full amount in dispute with the Commission so long as the undisputed amount is paid.

5. Rules Regarding Customers Right to Informational Privacy. § 495.7(c)(5):

All telephone corporations are subject to PU Code §§ 2891, 2891.1, and 2893 which impose restrictions on the availability of nonpublic customer information of residential subscribers.³ Before a telephone corporation may release the information set forth in § 2891, it must obtain written consent from the customer. Section 2891(e) also provides a customer with a civil remedy for any violations of the statute's provisions. Certain types of information, such as billing information, are not subject to these provisions so long as the information is provided between telephone corporations.

In its comments, TURN urges the Commission to adopt the rule governing informational privacy applicable to Exempt IECs as set forth in D.96-09-098. Among other things, Rule 15 provides that for each new customer, and on an annual basis for continuing customers, Exempt IECs shall disclose in writing how the carrier uses the customer's proprietary information and whether the carrier transfers such information to others. Rule 15 further requires Exempt IECs to remain subject to the rules regarding release of credit information and calling records pertaining to all customers -- residential and business -- which the Commission adopted in D.92860 and D.93361, as modified by subsequent decisions.

We find, that the protections embodied in existing law and in D.92860 and D.93361 provide sufficient privacy protection to customers. After reflection, we see no need to hold detariffed services offered under a signed contract to a higher standard of privacy protection than that afforded customers taking tariffed services. There is no annual notice required of tariffed services and it would be contrary to the intent of this decision to impose a greater burden on detariffed services than the regulatory protections required when services are offered under tariff. We will continue to require Exempt IECs to comply with D.92860 and D.93361.

Rule 5: Carriers are restricted from releasing nonpublic customer information in accordance with PU Code §§ 2891, 2891.1, and 2893, and any other applicable state or federal statutes or regulations, as they may

³ The Federal Communications Commission may also exercise jurisdiction on this matter.

be amended from time to time, that pertain to customer privacy. Carriers shall also comply, so long as those rules remain generally applicable to other carriers, with the Commission's rules set forth in Appendix B of Decision Nos. 92860 and 93361, as modified, which generally prohibit, with certain exceptions, the release of calling records and credit information of all subscribers—both residential and business—absent the receipt of a search warrant under federal or state law or in response to a subpoena or subpoena duces tecum authorized by a federal or state judge.

6. Rules to Assure Telephone Corporation's Cooperation. § 495.7(c)(6)

The Commission is responsible for supervising and regulating every public utility in the state and may do all things necessary and convenient in the exercise of its power and jurisdiction. PU Code § 701. The Commission issues certificates of public convenience and necessity which allow firms to provide telecommunications services in the state. PU Code § 1001. The Commission may also revoke a certificate where the provider is not in compliance with applicable statutes and regulations. The Commission may order a public utility to pay reparations to customers who have been overcharged. PU Code § 734. The Commission also has jurisdiction to impose sanctions, including fines and imprisonment, on public utilities and their officers which fail to comply with Commission directives. PU Code §§ 2107, 2110, 2111.

In sum, the Commission has ample authority over public utilities, including telephone corporations, to ensure that they cooperate with Commission investigations. As discussed in Rule 5, *supra*, we have provided aggrieved consumers with a process to obtain speedy and effective relief. To ensure such result, we will also require the carriers to provide timely access to the Commission or its staff to information and documents, including, but not limited to, the customer-carrier contract, billing records, solicitations and correspondence from the carrier to the customer, and any applicable third-party verification, in order to resolve customer-carrier disputes.

Rule 6: Consistent with our authority over all other carriers, IECs offering detariffed service are directed to cooperate fully by responding in a timely fashion to any request by the Commission or its staff for documents including but not limited to the customer-carrier contract, billing records, customer calling records, solicitations and correspondence from the carrier to the customer, applicable third party verifications, and any other

information or documentation regarding a customer complaint. The carrier shall fully comply with a request for such documents or information by the Commission or its staff no later than ten business days from the date of request. Failure by an IEC to comply with this rule may result in penalties as set forth in PU Code §§ 2107, 2110, and 2111. 7.

Any limitation of liability provision contained in a contract for detariffed services shall in no way limit the ability of a complainant to recover reparations before the Commission

7. Conclusion

As set out above, we have carefully considered each consumer protection directive established by the Legislature in PU Code § 495.7 (c). The particular type of detariffing mechanism adopted by this decision does not create new opportunities for unscrupulous carriers to take advantage of customers such that unique rules are needed. Should any unanticipated issues arise, the Commission will move quickly to protect the public.

Carriers Currently Operating With Tariff Exemptions

While this proceeding was pending, the Commission has authorized numerous carriers to provide service on a detariffed basis, subject to the consumer protection rules adopted in D.96-09-098. This decision significantly changes the terms under which detariffed service may be provided and replaces in its entirety the rules adopted in that decision. For this reason, all carriers currently authorized to provide services which are exempt from tariff requirements may continue to provide service subject to the consumer protection rules adopted in Decision 96-09-098 during a transition period of 120 days from the effective date of this decision. At the conclusion of the 120-day transition period, all previously detariffed carriers must comply with this decision.

It is our view that the contract option will afford consumers greater protection than the superseded rules. For example, under those rules consumers had to request notification of a rate increase. Under the contract option, all consumers must agree in writing before a rate increase or any change to the contract may be implemented.

All carriers which obtain Commission authorization to provide service on a non-tariffed basis subsequent to the effective date of this order, must comply with this order. To assist in notifying carriers of this revised detariffing policy, the instructions which now accompany the registration form for new NDIECs will be updated to reflect that detariffed services must comply with this decision.

Advice Letter Filings

Carriers may detariff services either when obtaining a certificate of public convenience and necessity or by advice letter. Such an advice letter must clearly state the services to be detariffed and must also contain a revised tariff sheet showing the following information:

- Current Name of Service
- Brief Description of Service
- This service was detariffed as of ____ (date) ____ by Advice Letter No. ____.

Detariffing advice letters will be effective five days after filing where no customers are currently receiving service on a tariffed basis. Where customers are receiving service on a tariffed basis, the customers must be given 30 days' notice of the change to non-tariffed.

Findings of Fact

1. The Commission has previously found that the NDIECs operate in a highly competitive marketplace.
2. The marketplace offers consumers many alternative interexchange service providers such that the NDIECs are offering services in the interexchange market for which competitive alternatives are available to most consumers. Our current consumer protection rules are reflected in our Decisions, General Orders and other rules, as well as in the utilities' tariffs. Together with our enforcement mechanisms, i.e. the informal and formal complaint processes and the Commission investigation process and available sanctions, these minimize the risk of unfair competition and anticompetitive behavior.

3. Section 495.7 of the PU Code allows the Commission to exempt certain telecommunications services, excluding basic exchange services, from the tariffing requirements of PU Code §§ 454, 489, 491 and 495 if the Commission finds that either (1) the specific telephone corporation lacks significant market power in the market for that service or (2) a given market offers competitive alternatives to most consumers and that consumer protection rules and enforcement mechanisms minimize the risk of unfair competition or anticompetitive behavior.

4. The "contract option" allows IECs to provide detariffed service where the customer signs a written contract which incorporates all the terms and conditions of service.

Conclusions of Law

1. The Commission is not prepared, at this time, to make the findings required by § 495.7 for an exemption for competitive local carriers.

2. The Commission finds that the nondominant providers of interexchange services meet the requirements of § 495.7 and are eligible for an exemption from tariffing requirements.

3. We will limit the exemption from tariffs to those NDIECs that are *not* corporate affiliates of incumbent local exchange carriers, to meet the requirement of § 495.7 that no improper subsidies exist.

4. There is no evidence in the record that the legislature intended to remove the limitation on liability from utilities which remained willing to file tariffs, so NDIECs that do avail themselves of the benefits of detariffing will be subject to the burden of increased liability unless they include a limitation of liability in the contract. .

5. A limitation of liability provision in a customer contract will not be subject to interpretation, application or adjudication before the Commission, but should be in the sole province of a court.

6. Detariffing decisions should be made on a service-by-service basis, not on a carrier-by-carrier basis or customer-by-customer basis.

7. PU Code § 495.7(n) forbids detariffed services from relying on the limitation on liability that is currently reflected in most filed tariffs.

8. Although a limitation on damages for detariffed services may not arise from a tariff, other lawful sources of such a limitation are not prohibited by § 495.7(h).

9. A mutually agreed upon contract provision may limit liability for a detariffed service.

10. PU Code § 495.7(h) allows detariffing of those services for which the carrier obtains a signed, enforceable contract.

O R D E R

Therefore, IT IS ORDERED that:

1. Pursuant to Public Utilities (PU) Code § 495.7, nondominant interexchange carriers may request as part of their application for a certificate of public necessity and convenience or by advice letter filing as set out in this decision that certain services be exempt from the requirement to file tariffs found in PU Code §§ 454, 489, 491, and 495. All offerings must be for services other than basic exchange service and on a service-by-service basis. The carrier must first submit an advice letter that it is offering a particular service on a detariffed basis, which will be effective five days after filing unless customers are currently receiving service on a tariffed basis, then the advice letter will be effective 30 days after notice to customers and filing. All detariffed services must be listed in the carrier's tariffs on file with the Commission. All service offerings must comply with the rules set out in the body of, and attached as Appendix A, to this decision. To the extent permitted by law, contracts for provision of detariffed services may include a clearly identifiable limitation on liability for failure or unavailability of any service covered by the contract.

2. The instructions which accompany the registration form adopted in Decision 97-06-107 shall be updated to reflect that all carriers which provide service on a detariffed basis must comply with this decision.

3. All carriers currently authorized to provide services which are exempt from tariff requirements may continue to provide service subject to the consumer protection rules adopted in Decision 96-09-098 during a transition period of 120 days from the effective date of this decision. At the conclusion of the 120-day transition period, all previously detariffed carriers must comply with this decision.

4. This proceeding is closed.

This order is effective today.

Dated August 6, 1998, at San Francisco, California.

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

R.94-02-003, I.94-02-004 COM/JXK/jva*

APPENDIX A

Appendix A
Consumer Protection Rules
Detariffed Services (Contract Option)

Rule 1:

- a. Rate information and information regarding the terms and conditions of service shall be provided in writing upon request by a current or potential customer. All of the rates, terms and conditions of service must be stated in a contract that must be signed by the customer and otherwise be enforceable. Although no terms may be incorporated by reference, formulae may be used to calculate rates or charges, where the components of the formulae can be readily ascertained from a public source. All ambiguities will be construed against the carrier. A carrier shall make available to any customer, who requests in writing, information about other service plans pertaining to the product(s) or service(s) the customer is ordering and for which the customer is eligible.
- b. The contract must provide for written notice to the customer at least 7 calendar days prior to termination of service by the carrier, and refund of any customer deposits within 30 days after service has been terminated.

Rule 2: No change in the rates, terms, and conditions of any service specified in such a contract shall be enforceable unless such change is set forth in a writing signed by the customer who signed the original contract, or that customer's duly authorized agent. As currently provided in D.97-06-096 (as may be amended or superceded), customers must be notified of any change of ownership of the company providing service to the customer as follows:

- a. The notice must be in writing;
- b. The carrier must provide it to customers no later than 30 days before the proposed transfer;
- c. The notice must contain a straightforward description of the upcoming transfer, any fees the customer will be expected to pay, a statement of the customer's right to switch to another carrier, and a toll-free telephone number for questions; and

d. The notice and the carrier's description of service to customers must be included in the advice letter seeking approval of the change in ownership.

Rule 3:

a. Pursuant to Public Utilities Code § 2889.5, no carrier or any person, firm, or corporation representing a carrier, shall change a customer's presubscribed telephone service provider without the customer's authorization. All carriers shall comply with the provisions of § 2889.5 as well as other applicable state and federal law as they may be amended or superceded from time to time. Carriers shall be held liable for any violation of § 2889.5 including, but not limited to, the unauthorized termination of a customer's service with an existing carrier and the subsequent unauthorized transfer of the customer to the carrier's own service. Violations may incur a penalty or fine pursuant to Public Utilities Code § 2107 as well those allowed pursuant to other law and Commission policy..

b. No carrier whose service has been terminated by a customer shall re-establish service for that customer without the express consent of the customer, which consent may not be founded upon any purported term in an agreement for service that binds the customer to take service from the carrier for a specified term, or continually.

c. All solicitations by carriers or their agents provided to customers must be legible and printed in 10 point type at a minimum.

d. All promotional and marketing materials used in the offering of detariffed telecommunications services shall be wholly separate from the written contract the customer signs. All terms must be plainly stated in understandable language, and must be in the same language employed when the carrier negotiated the contract with the customer.

Rule 4:

A. Each bill must prominently display a toll-free number for service or billing inquiries, along with an address where the customer may write to the carrier.

B. In case of a billing dispute between a customer and the carrier, the carrier will comply with any customer request for the carrier to undertake an investigation and review of the disputed amount.

- C. If a customer fails to pay the undisputed portion of the bill by the Due By Date (no sooner than fifteen days of the date of presentation) shown on the bill, the carrier may notify the customer in writing of such delinquency and indicate that service may be terminated
- D. A carrier may not disconnect service to a customer who has submitted a claim to CSD for investigation and decision, has either paid the disputed amount or has deposited the amount in dispute with the Commission within seven calendar days after the date the carrier notifies the customer that the carrier's investigation and review are completed. However, in no event shall the carrier disconnect service prior to the Due By Date shown on the bill. .
- E. In no event shall a carrier disconnect service to a customer who has deposited the full amount in dispute with the Commission so long as the undisputed amount is paid.

Rule 5: Carriers are restricted from releasing nonpublic customer information in accordance with PU Code §§ 2891, 2891.1, and 2893, and any other applicable state or federal statutes or regulations, as they may be amended from time to time, that pertain to customer privacy. Carriers shall also comply, so long as those rules remain generally applicable to other carriers, with the Commission's rules set forth in Appendix B of Decision Nos. 92860 and 93361, as modified, which generally prohibit, with certain exceptions, the release of calling records and credit information of all subscribers – both residential and business – absent the receipt of a search warrant under federal or state or in response to a subpoena or subpoena duces tecum authorized by a federal or state judge.

Rule 6: Consistent with our authority over all other carriers, IECs offering detariffed service are directed to cooperate fully by responding in a timely fashion to any request by the Commission or its staff for documents including but not limited to the customer-carrier contract, billing records, customer calling records, solicitations and correspondence from the carrier to the customer, applicable third party verifications, and any other information or documentation regarding a customer complaint. The carrier shall fully comply with a request for such documents or information by the Commission or its staff no later than ten business days from the

date of request. Failure by an IEC to comply with this rule may result in penalties as set forth in PU Code §§ 2107, 2110, and 2111. 7.

Any limitation of liability provision contained in a contract for detariffed services shall in no way limit the ability of a complainant to recover reparations before the Commission.