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Decision 98-10-020 October 8, 1998

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)

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OPINION

I. Introduction

In Decision (D.) 97-08-059 (the Decision) in connection with our ongoing program to promote a competitive local exchange telecommunications market, we among other things, directed Pacific Bell (Pacific) and GTE California (GTEC) to remove various restrictions on the resale of their telecommunications services. We further directed Pacific and GTEC to remove any restrictions prohibiting the resale of voice mail services by competitive local carriers (CLCs). The Decision also directed that further comments be taken regarding whether or to what extent a wholesale discount should be applied to voice mail.

On August 27, 1997, Pacific filed an Application for Rehearing of D.97-08-059 and a concurrent motion for a stay of the requirement for the filing of wholesale tariffs for voice mail service. The Commission's Executive Director granted Pacific a temporary stay of the required filing of wholesale tariffs for voice mail pending further Commission action. On October 9, 1997, the Commission issued D.97-10-033 extending the stay of D.97-08-059 with respect to voice mail resale until November 19, 1997.

On November 19, 1997, the Commission issued D.97-11-084 granting Pacific's Application for Limited Rehearing of D.97-08-059, concluding that the record needed to be further developed before a determination could be made as to whether or to what extent Pacific should be required to offer voice mail for resale. The Commission extended the stay in Ordering Paragraphs 1, 3, 5, and 6 of D.97-08-059 relating to voice mail resale until further Commission order. In this decision, we address the question of whether, to what extent, and under what conditions Pacific and GTEC should be required to offer their voice mail service to CLCs for resale.

Pacific currently offers its own retail customers voice mail through its affiliate, Pacific Bell Information Services (PBIS). Pacific markets PBIS voice mail to customers of Pacific's local exchange service. The voice mail services offered by PBIS are differentiated by customer segments and include: (1) The Message Center (TMC), which is primarily for residential customers; (2) Pacific Bell Voice Mail (PBVM) which is primarily for business customers; (3) Pacific Bell Call Management Voice Mail (PBCM-VM) which is primarily for larger business customers. Pursuant to the currently effective stay of D.97-08-059, Pacific does not offer voice mail service for resale to CLCs.

Pacific's prior policy was to terminate a customer's PBIS voice mail service if that customer switched to a CLC as his or her local service provider. Pacific has, however, recently agreed to modify its policy. Pacific now agrees that PBIS would sell its voice mail directly to the retail customers of a CLC reseller upon request of either the customer or of the CLC, when acting as the customer's agent. This offering will be associated with a resold line only and is not an option for facilities-based CLCs or CLCs purchasing UNEs.

GTEC offers the following voice mail options. A CLC can sign a wholesale contract with GTEC and resell GTEC's voice mail services to their end users. This offering is associated with a resold line only and is not an option for facilities-based CLCs or CLCs purchasing UNEs. A GTEC user who has voice mail and transitions to a CLC can still retain voice mail services from GTEC. GTEC will, however, still bill it as a residual GTEC service. A CLC end user who does not currently have voice mail and wants GTEC's voice mail can order voice mail from GTEC. GTEC will bill as a residual service. Here again, the service is only available with a resold line. GTEC's current wholesale rate for voice mail is equal to its retail tariffed rate, with volume and term discounts available.

Since the issuance of D.97-08-059, the Administrative Law Judge (ALJ) has taken further comments as noted above concerning whether a wholesale discount should be applied in setting the price CLCs would pay for Pacific's voice mail service for resale. Opening and reply comments were filed on September 15, and October 1, 1997, respectively on these issues. The ALJ solicited further comments seeking clarifying information on the cost of voice mail alternatives. Comments were filed by Pacific and PBIS, GTEC and by various parties representing CLCs (i.e., the Joint Parties): AT&T Communications of California (AT&T), MCI Communications Corporation (MCI), and Time Warner Connect, Working Assets Funding Services (Working Assets), and the

Telecommunications Resellers Association (TRA). Comments were also filed by the Commission's Office of Ratepayer Advocates (ORA).

Boston Technology, Inc. (BT), a worldwide provider of voice mail systems, filed a motion for acceptance of late-filed comments. Although not a party to the proceeding, BT expressed an interest in the voice mail issue as it relates to the competitiveness of the market. No party objected to the late filing. Therefore, we shall accept BT's comments.

The issues raised in these additional comments address the question of how competitive the market is for wholesale voice mail services, and whether CLCs can efficiently and economically offer voice mail services to their own customers without dependence on resale of Pacific's and GTEC's voice mail.

In granting rehearing of the voice mail resale issue, D.97-11-084 observed that parties had not been apprised that these filed comments on the discount rate would be used to reconsider the fundamental issue of whether voice mail should be subject to mandatory resale. Accordingly, in granting rehearing, we provided for an additional opportunity for parties to augment their previously filed comments explicitly addressing whether a Commission order requiring resale of voice mail was warranted. These augmented comments were filed on December 1, 1997, with replies on December 11, 1997. Specifically, D.97-11-084 granted rehearing and provided the opportunity for parties to be heard on the following issues.

1. "Whether CLCs require the ability to offer voice mail in order to compete effectively in the local exchange market." (D.97-11-084, mimeo, p.3).
2. "If so, whether CLC's can reasonably obtain competitive substitutes for the LECs' voice mail services which are comparable in quality and cost." (D.97-11-084, mimeo, p.3).
3. Whether the Commission is federally preempted from requiring the resale of voice mail pursuant to the Telecommunications Act of 1996 (the Act) which requires resale only of "telecommunications services" but not "information services," such as voice mail.
4. Whether the separate affiliate relationship of PBIS, distinct from Pacific, precludes the Commission from ordering Pacific to resale the voice mail service which is actually provisioned by PBIS.

Based upon the additional comments which have been received since the issuance of D.97-11-084, we find that the market for voice mail services is competitive at least with respect to large business customers. We shall; therefore, not require Pacific to offer voice mail for resale to serve large business customers.

We also find that certain alternative voice mail options exist for the small/mid-sized business and residential customers. Moreover, the offer of Pacific to provide voice mail directly to any end-user, as well as GTEC willingness to enter into wholesale contracts with resellers and to offer voice mail directly to any end-user convince us that the Commission need not intervene in the marketplace for call answering services. In particular, there is no longer any linkage between the provision of voice mail services and local exchange services that raises suspicion of anticompetitive behavior.

Because of this availability of voice mail services to all customers using a line resold by a CLC, competition does require that CLCs provide voice mail through resale to meet customer needs. No conditions in the market for call-answering services indicate any market failure that requires intervention by a regulatory commission to create conditions that competition requires. Moreover, government intervention may distort the market for call-answering services. Therefore, we order our inquiry into voice mail services terminated, with the stated caveat that we will revisit our inquiry should Pacific or GTEC fail to file the necessary tariff changes to make this service available to CLC end users for whom the CLC provides services using a resold line.

Concerning the issues of whether the Commission has regulatory jurisdiction over voice mail services, we need not reach any new conclusions on this matter.

II. Do CLCs Have Competitive Alternatives to PBIS Voice Mail?

A. Parties' Positions

An underlying premise justifying any need to resell voice mail is that CLCs or their customers lack competitive alternatives. Pacific contends that it is unnecessary to require mandatory resale of LEC voice mail because numerous providers of voice mail systems and related products compete with PBIS' voice mail and serve as significant market-power checks to the incumbent LECs' voice mail offerings. Pacific argues that, since customers of CLCs can procure comparable voice messaging services through various alternatives, the CLCs are not competitively harmed by Pacific's restrictions on voice mail resale. Pacific notes that over 1,000 retail outlets sell telephone answering machines and devices, and over 400 vendors serve the business marketplace within California with telephone answering and voice mail solutions.

Various forms of telephone answering and voice mail functionality are also available in other electronic products and services, including pagers, cellular and mobile telephones, voice/data modems, automatic call distributors, and personal computers equipped with software, microphone, and speakers. Voice mail service bureaus also offer voice mail service. Between the device manufacturers, software developers, and service providers, Pacific argues that a consumer has a wide selection of products and services from which to choose.

Pacific presents a declaration of Professor Jerry Hausman to support its claim that the voice mail market is competitive and that, consequently, mandatory resale of voice mail is unwarranted. Hausman states that the correct manner to assess whether PBIS can exercise significant monopoly power is to ascertain whether other providers of voice messaging services and equipment could increase their supply sufficiently to defeat an attempt by PBIS to restrict the supply in order to increase the price of its voice mail service. Hausman claims that PBIS has no significant market power because numerous substitutes are available. Hausman argues that competing vendors could expand their supply at no significant increase in cost. Thus, Hausman reasons, consumers would buy less of the PBIS service and more answering machines to defeat an attempted PBIS price increase.

Pacific further notes that the three largest interexchange carriers independently offer voice mail services. Sprint had 17.6% of the local exchange carrier voice messaging market in 1995.[1] AT&T offers Answer Advantage voice mail service to

[1] *Id.*, at 4-79.

its business customers.[2] Pacific claims that AT&T also provides voice mail services to its residential True Connections 500 service customers. MCI Telecommunications Corporation (MCI) offers a nationwide voice messaging system for business end-users (NetworkMCI Voice Mail). Pacific claims MCI also provides a regional voice messaging service for residential end-users (Standard Mailbox). In addition, Pacific notes that cable companies also offer voice messaging services. Time Warner has purchased high-capacity voice messaging services to serve its customers.

Pacific further claims that PBIS obtains no exclusive network services from Pacific, but that network services it receives are equally available to others. PBIS may only obtain network services from Pacific under tariffed terms, conditions, and prices and may use those network services to provide its own voice mail services. Any business wanting to provide local voice mail services may order those same network services under the same terms, conditions, and prices.

Pacific claims PBIS has no exclusive relationship with a vendor, nor does it own rights to any proprietary technology that would preclude others from providing voice mail services. Pacific argues that CLCs could contact PBIS' vendors (Unisys or Digital Sound) and obtain equipment, or contact numerous other vendors (e.g., Octel Communications Company or Boston Technology) in order to provide their own voice mail services. Pacific attached a recent letter from Octel to the President of the Commission in which Octel states that it markets voice mail services to CLCs in California, and that there are a number of similar companies offering voice mail systems.

Another voice mail vendor, Boston Technology, Inc. filed comments in the form of a letter from its attorney to the President of the Commission. Boston Technology supported Pacific's comments, and further claimed that requiring Pacific and GTEC to resell voice mail services at mandated discounts may hinder the

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[2] *Id.* At 4-98.

competitive marketplace for this service, and other providers, such as Octel, Lucent and Boston Technology, will be forced to reevaluate their marketing plans in view of regulated pricing schemes of the LECs. Boston Technology believes that its strategy of selling/licensing its voice mail systems and services to both CLCs and LECs could be affected detrimentally, and that some providers may withdraw from the state, thereby creating less competition in this service segment.

AT&T first disputes Pacific's claim that there are effective substitutes for the LECs' voice mail services, arguing that the claimed substitutes offer inferior features. For example, answering machines only record messages when the customer' telephone is not already in use. Voice mail, however, can automatically record messages even when the customer's telephone line is busy.

AT&T also challenges Pacific's claim that alternative voice mail providers offer equivalent substitutes to PBIS voice mail offerings. While conceding that residential and small business customers can purchase voice mail from alternative providers, AT&T argues that the LECs' offerings maintain significant price and feature advantages. Customers who purchase voice mail from an alternative provider must also purchase vertical features from the LECs in order to make their voice mail provider's service comparable to the LECs' voice mail. Specifically, customers must purchase Pacific's "call forwarding, busy/no answer" vertical feature in order to route a busy, or "no answer" call to the voice mail provider's platform.

AT&T argues these price and feature advantages of the LECs' offerings are due to the LECs' continuing market power over all local services, including the vertical features required for voice mail, and that the features and functionalities which make voice mail most attractive to consumers are provided from Pacific's local exchange switching facilities. Pacific does, and will for the foreseeable future, possess substantial market power over the provisioning of local switching. Thus, while voice mail can nominally be provided by alternative companies, AT&T argues, equivalent substitutes for LEC-provided voice mail, are not readily available.

AT&T agrees that for medium, multi-line, business customers, some alternate voice mail providers are available offering specialized applications. AT&T

views these as niche players, however, which are not prevalent enough to nullify the LECs' market power in this customer segment. AT&T agrees that large business customers can obtain voice mail service as part of the overall feature-package they receive when they install a PBX, but believes this is the only customer segment where the LECs' pricing actions reflect a diminished level of market power.

Various CLCs report that they have contacted a number of nonincumbent voice mail providers and have been informed that the vendors' products did not have all of the features available from Pacific, in particular, the "stutter tone" indicator. The Joint Parties argue that the only technological solution to achieve technical parity with Pacific voice mail would require Pacific to allow any CLC to place an SMDI (data) link in every LEC central office which serves a CLC customer and trunk each link to the CLC's voice mail system. The Joint Parties estimate the cost of this technological fix at $16.84 per month per line/box.

More specifically, Working Assets states it has contacted various voice mail vendors and has not located any that can offer a product that compares in price and functions to Pacific's voice mail product. In particular, Working Assets contacted Octel and BT. Octel never replied to Working Assets' inquiry. BT informed Working Assets that, under current scenarios, it would be cost-prohibitive from a network interface perspective to provide them with voice mail capability for residential customers. Working Assets concludes, based on its contacts with vendors, that to provide voice mail for residential customers, it needs access to the switches that serve the customers. One vendor told Working Assets that there are 18 central offices (COs) in the city of San Francisco alone, and that it costs $400 - $500 per month for stutter dial tone in *each* CO. Working Assets claims it would be cost prohibitive to offer stutter dial tone without having a very large concentration of customers in any one switch. Working Assets computes its total cost of providing voice mail would be $24.15 per month (=$19.95 for a stand-alone Series 50 mailbox + $4.20 for call forwarding). This compares with a charge of $6.95 for PBIS Voice Mail.

TCLA, another Voice Mail provider, charges $25 per month for its voice mail service, excluding "call forwarding, busy/no answer" which must be purchased separately from the LECs. Thus, the customer's total monthly cost for voice mail using an alternative provider like TCLA is four times more expensive than the LECs' offerings. In addition, customers using TCLA's service would not receive on-line message notification. This functionality, in the form of a "stutter dial tone," must also be ordered from the LECs.

Pacific denies that CLCs lack equivalent substitutes for PBIS Voice Mail. Pacific claims that CLCs can replicate PBIS voice mail through a combination of self-provisioning of a CLC's own voice mail switch and purchasing certain Pacific tariff services. Based on its analysis of providing residential service in LATA 1, Pacific claims that a CLC could hypothetically self-provision residential voice mail services for as little as $6.33 per residential mail box.[3] This compares to approximately $7.90 a month (including amortization of the applicable nonrecurring charge) to purchase PBIS' residential retail voice mail service. Thus, Pacific claims it is economically feasible for CLCs to self-provision residential voice mail service using Pacific Bell network services.

Other parties dispute Pacific's alleged cost of $6.33 for self-provisioning, and claim that Pacific underestimated expenses which the CLC would incur in self provisioning of voice mail. Parties state that Pacific used inconsistent assumptions regarding customer service costs, and assumed that end-of-year totals for customer mail boxes would continue in subsequent years without accounting for annual customer churn. Parties claim Pacific also understates the cost per voice mail port by failing to

[3] For the purposes of its analysis, Pacific assumed that a CLC would establish service throughout LATA 1 and would reach an average penetration of at least 2% of total LATA residential customers in four years. Additionally, Pacific assumed that a CLC would pay tariffed Pacific prices for services, including Centrex lines, Foreign Exchange mileage, UCD Line Feature, Forwarded Call Information, SMDI line and Complementary Network Services (Call Forward/Busy Line/Don't Answer and Message Waiting Indicator). Costs for the voice mail switch were based on assumed volumes over time. Finance, billing, service, and administrative costs were assumed to be incremental to existing service operations.

account for the effects of less-than-full utilization as the CLC ramps up from a small customer base, and by excluding costs incurred for testing and development.

Pacific's calculation also assumed CLCs would be able to achieve a sufficient customer base to make self-provisioning of voice mail economically feasible. In its study, Pacific assumed that the CLC will have approximately 170,000 mailboxes. Small and medium size resellers such as Working Assets and Time Warner state that they do not contemplate reaching a total of 10,640 mail boxes during the first year of operation. For these reasons, opposing parties claim that the $6.33 per mail box estimated by Pacific understates the likely cost which a CLC would incur to attempt to independently replicate Pacific's voice mail service.

Pacific submitted a third-round filing refuting parties' criticisms of Pacific's claimed cost of $6.33 per mail box for CLCs self-provisioning voice mail. Pacific alleges that parties' criticisms are unfounded and based on misunderstandings of Pacific's assumptions and calculations.

Pacific also suggests a CLC could alternatively obtain voice mail service by purchasing a PBIS "stand-alone" Series 50 mailbox. The mailbox is stand-alone in that it is not associated with or dependent upon the end-user's telephone line. According to Pacific, this voice mailbox has features and functions similar to PBIS' residential offering, marketed as The Message Center. Pacific argues that a CLC end user could have a mailbox working in conjunction with the CLC's basis exchange service if the CLC purchased a Pacific Bell Complementary Network Service (CNS) "Call Forwarding/Busy Line/Don't Answer" vertical feature on behalf of its end-user, and the end-user subscribed to a stand-alone Series 50 mailbox. Unanswered calls would get forwarded to the stand-alone mailbox. This service configuration would work, however, only if the CLC is reselling Pacific's basic exchange service. The price for the Series 50 mailbox would be $19.95 and the "Call Forwarding/Busy Line/Don't Answer" feature from Pacific would be $0.70 per month, making the total cost $20.65. Pacific notes that PBIS pays the same prices for CNS as a CLC would.

B. *Discussion*

The voice mail market is one segment of a broader market reflecting various needs, feature preferences, and choices for voice messaging solutions. Market data indicates that a large majority of telephone customers prefer to have some means of automatically taking and storing telephone messages from a calling party when they are not able to answer the telephone. A variety of technologies and vendors compete within the broad market of voice messaging solutions, which may be broken into two major categories of vendors: (1) those offering some variation of a telephone answering machine and (2) those offering voice mail systems. Although both technologies answer and record calls, there are differences in the services provided. The features offered by a telephone answering machine do not necessarily provide a perfect substitute for those customers who prefer the special features offered by voice mail. Likewise, the features of voice mail services do not provide a perfect substitute for the services offered by an answering machine.

For example, answering machines cannot automatically record and store incoming calls while the phone line is being used. Answering machines cannot page their users, nor forward messages from the user's voice mail box to another's voice mail box. While a smaller segment of the market presently utilizes the voice mail option relative to answering machines, such distinguishing advantages of voice mail and inexplicable consumer preferences are important enough to such customers to cause them to subscribe to voice mail rather than to simply buy an answering machine. Thus, for that segment of the market seeking the specific features of PBIS voice mail, we conclude that telephone answering machines will be an imperfect substitute.

Similarly, voice mail systems fail to provide the "call screening" capability of answering machines. This feature allows the person called to hear the voice of the person calling and determine whether to answer. Thus, we conclude that voice mail is an imperfect substitute for an answering machine.

Within the voice mail market, parties disagree as to the extent of competitive alternatives. As noted by Pacific, there are two major segments within the voice mail market: (1) the provision of customer premise equipment where systems/ports are shipped to end-users and (2) voice information systems where systems/ports are shipped to Service Bureau Providers which serve end-users. The voice mail service offered by PBIS is of the second type.

Based on the voice-mail vendor data supplied by Pacific and GTEC, we acknowledge that a significant and competitive worldwide market exists for voice mail services in a broad sense, but this market predominantly serves large business customers. To a lesser extent, there is a market for medium and small businesses. We also recognize that certain CLCs have developed their own voice mail systems covering at least some sectors of the market. We must consider whether CLC or their customers are significantly disadvantaged in the local exchange market because of the denial of Pacific to resell PBIS' voice mail to a CLC so as to impair the market's funcitioning.

No CLC refutes Pacific's claim that for large business customers, there are adequate competitive voice mail alternatives. Large businesses can obtain voice mail services independently from the LECs, and CLCs' ability to compete for these customers is not impeded by their lack of access to PBIS' voice mail. Therefore, we find no basis to require Pacific to offer PBIS voice mail for resale to serve CLCs' large business customers.

We shall therefore focus our inquiry on the need for voice mail resale to CLCs' residential and small-to-mid-sized business customers. Parties disagree over the availability of viable substitutes for PBIS voice mail within the residential and small business markets. For medium, multi-line business customers, AT&T acknowledges some competitive alternatives exist, but mainly for specialized applications in niche markets. AT&T argues that limited competition in these niche markets is not sufficient to nullify the LECs' market power in this customer segment.

As noted by Pacific, only a relatively small fraction of residential telephone customers prefer voice mail over other voice messaging alternatives. Independent voice mail vendors generally have not found it to be commercially desirable to develop an extensive infrastructure to serve the residential market. Likewise, while certain CLCs have developed their own voice mail systems, those systems are generally designed for the business market, but not the residential market.

AT&T and MCI deny that they presently offer voice mail to their residential customers. Other CLCs, such as Brooks Fiber and TCG, offer their own voice mail systems only to business customers.

While Pacific argues that equivalent voice mail service could be self-provisioned by CLCs for less than the cost of PBIS retail voice mail, opposing parties argue that the cost would be significantly higher. Pacific challenged the claims of various CLCs regarding the costs they would incur for voice mail self-provisioning, arguing that those claims were not properly substantiated. Pacific claims its competitors have been permitted to submit baseless factual assertions without further inquiry while its claims were subjected to further scrutiny by the ALJ. For example, Pacific points to the Coalition's assertion that Pacific's call forwarding, busy/no answer feature costs are $6.50. Yet, the ALJ ruling of October 20, 1997 specifically permitted Pacific to refute the Coalition's asserted $6.50 cost of these features. Pacific, in fact, did refute the Coalition's claims in its response to that ALJ ruling.[4] Pacific, moreover, filed a responsive third-round pleading to refute opposing parties' criticisms of its calculations.

Pacific believes that the only fair procedure is to schedule evidentiary hearings to test the factual assertions made by those urging the forced resale of voice mail. In the consolidated comments of various CLCs, the parties oppose Pacific's claim that evidentiary hearings are needed. The parties argue that, in light of the extensive comments that have now been filed regarding the voice mail resale issue, the record is now sufficient for the Commission to rule on the voice mail resale issue.

In granting rehearing on the voice mail issue in D.97-11-084, the Commission was not persuaded at that point that evidentiary hearings were required, but stated that "because it may be that difficult factual disputes will arise in the course

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[4] Likewise, Pacific has not been prevented from undertaking discovery as to the basis underlying opposing parties assertions. In fact, Pacific references responses to its data requests in its filed comments (e.g., footnote 21, pg. 7, of Pacific's 12/1/97 comments).

of developing the record which cannot readily be resolved through comments..., parties should also address...whether evidentiary hearings are required....." (Decision at 4.)

We conclude that the factual disputes which have been raised on both sides regarding the cost of self-provisioning voice mail involve complex technical issues. This precludes us from concluding whether CLCs can purchase perfect substitutes for PBIS' voice mail without evidentiary hearings. Thus, if market conditions warranted that we impose such a requirement, evidentiary hearings are essential. We need proceed to evidentiary hearings, however, only if we determine that the resale of voice-mail service is critical to the competitive functioning of the local exchange market. Thus, we now turn to the question of whether the resale of voice mail services to the residential and small business customers by CLCs is critical to the functioning of a competitive market in local exchange services.

III. Do CLCs Require the Ability to Resell Pacific's and GTEC's Voice Mail in Order to Compete in Local Exchange Markets?

A. *Parties' Positions*

Pacific also disputes the CLCs' arguments that the availability of voice mail is a significant factor in a customer's choice of local carrier. Pacific claims that CLCs can effectively compete in the local exchange market even without the ability to resell Pacific's voice mail. Pacific claims that its own new residential customers are not ordering PBIS voice mail at a rate that would affect local competition, noting that only 8% of Pacific's customers who ordered residential access lines also order PBIS voice mail.

The majority of residences in California meet their voice messaging needs through the use of some sort of electronic telephone answering machine. Pacific reports that in 1996, 80.9% of all California residences owned a telephone answering machine. Less than 10% of Pacific's residential access lines have voice mail services, while over 70% of Pacific residential access lines are estimated to be used in conjunction with telephone answering machines. Therefore, Pacific argues, the issue of voice mail availability is not a significant factor in CLC's ability to compete in the local exchange market.

Certain CLCs, however, claim that they have specifically targeted sectors of the residential market for their local exchange offering which use voice mail to a much greater extent than the average for all of Pacific's residential customers. For example, Access Network Services, Inc. (Access) states that more than 70% of the residential customers which Access has targeted initially for its local exchange service offering in California use Pacific's voice mail services. Access expects it will have great difficulty attracting those customers to its resold local exchange telecommunications services unless it also can resell Pacific's voice mail services. Working Assets states that voice mail availability is important to 20% of its customers based on market tests.

Notwithstanding its arguments that CLCs do not need to offer voice mail in order to compete in the local exchange market, Pacific now agrees to permit retail customers who switch to a CLC who provides local service over a resold line to obtain voice mail service from PBIS. At the time we issued D. 97-08-059, Pacific's policy was to link the offering of PBIS voice mail with the requirement for a customer to use Pacific as its local service provider. If a customer changed local service providers, it would lose its PBIS voice mail service. Thus, Pacific has now substantially revised its position.

It is important to understand exactly what Pacific now offers. Unlike the pure resale of voice mail by CLCs, which could be offered and billed as part of a single package of CLC services (to which Pacific still objects), Pacific's new proposal would permit a CLC reseller's retail customers to separately purchase PBIS voice mail through Pacific. End-users or CLC resellers (acting as the end-user's agent) would need to contact PBIS sales personnel and inform them that a customer buying resold Pacific service desires PBIS' voice mail service. If the CLC reseller orders the voice mail service on behalf of its customers, the end-user need not call PBIS to establish service. PBIS would provide that service and bill the end-user customer at the same prices PBIS charges Pacific's own customers. The customer would still have to deal with two separate companies, one for phone service, and PBIS for its separately-branded voice mail. Customers would thus receive separate bills from each company for phone service and voice mail service.

Pacific argues that, since CLCs' customers will be able to purchase voice mail services from PBIS, CLCs cannot argue they will be precluded from serving customers for whom the availability of voice mail service is a critical factor. Pacific minimizes the significance of the fact that a customer would have to deal with two separate companies if it sought to retain PBIS voice mail but choose a CLC for local telephone service. Pacific points out that its own customers must deal with both Pacific for local service and an interexchange carrier for long distance service.

Parties representing CLCs remain unsatisfied with Pacific's revised position as being inadequate, and argue that resale directly by the CLC is still needed in order to be able to offer a comparable service package to that offered by Pacific. By requiring the CLC customer to deal separately with PBIS for voice mail, parties claim the CLC telephone service package would be perceived by the customer as inferior to Pacific's service, according to the CLC parties.

B. Discussion

Based on the statistics provided by Pacific, we acknowledge that only a minority of its residential customers choose to subscribe to voice mail. Pacific's willingness to independently offer PBIS voice mail directly to retail customers of the CLC resellers is an immense improvement over its prior position of requiring customers to use Pacific as their local telephone service provider in order to subscribe to PBIS voice mail. We conclude that Pacific's revised position, which ends the linkage between PBIS' voice mail and Pacific Bell's local exchange service, greatly increases the choices available to a CLC's customers and ends substantial disparities in service offerings. Although retail customers of CLCs who select PBIS voice mail would still lose the convenience of one-stop shopping for their package of services, Pacific rightly points out that this is the very practice in telecommunications markets today. Moreover, true market competition does not require that all service providers make identical offerings. No customer is denied access to PBIS' voice mail, and each customer can assess how a separate bill for voice mail service affects his or her decision to choose a particular carrier.

We therefore conclude that there is no need for the Commission to intervene in the market for answering services in order to correct a failure of the market place to provide services to customers. Therefore, as long as Pacific and GTEC expeditiously alter their tariffs to make voice-mail services available to end-users of the resellers of local exchange services, there is no need to pursue this matter further. Should Pacific or GTEC fail to make these services available, then we would need to revisit the voice mail issue to determine whether facts warrant a different regulatory approach to this matter.

IV. Impediments to Offering Voice Mail for Resale

A. Parties' Positions

Pacific argues that it makes no business sense for PBIS to arrange for resale of its voice mail services to CLC end-users, because it is too complicated and costly to provision. Pacific states that The Message Center and some of the PBVM services (namely, the Series 50+ and Series 100+) currently could not be provided to CLC reseller end-users, without extensive system modifications, training, and the development of new business processes to make such services available to CLC end users.

Pacific claims that resale would also require changes in the way CNS is ordered and provisioned on the lines of CLC reseller end-users, and could only be provided if voice mail is currently available in the particular switch serving the CLC. Pacific believes that the remaining PBVM (Series 50 and Series 100) services could be made available to CLC reseller end-users; but claims that PBIS would need an "availability tool" to determine what voice mail machine would provide these services.

Pacific states that TMC and some of the PBVM services (Series 50+ and Series 100+) cannot be made available to the end-users of facilities-based CLCs. PBIS' voice mail services must be able to receive and interpret switch and network information in order to function properly. Because PBIS' voice mail services use shared access lines and common voice mail resources, Pacific states it is not feasible to modify PBIS' network and systems to accept CLC switch and network information. Pacific argues that the remaining PBVM services (i.e., the Series 50 and Series 100) could be made available to the end-users of facilities based CLCs, and that PB Call Management-Voice Mail service possibly could be made available to CLC end-users generally, but would require customized integration and would need to be addressed on a case-by-case basis.

Pacific claims the CLCs are seeking voice mail resale in order to avoid the risks of investing in self-provisioning of voice mail services in strategic areas, and to enjoy a free ride on PBIS' capital by reselling PBIS' services at a discount. With mandatory resale, Pacific claims, a company like AT&T can selectively invest capital to provide its own voice mail system in certain lucrative markets, while merely reselling PBIS voice mail without making a capital investment in markets where voice mail is available on a resale basis. Pacific expresses concern that AT&T could eventually build up its own voice mail network and migrate its customers subscribing to PBIS' resale service to the AT&T network. PBIS then would have made investments to expand its capacity to meet AT&T's demands, only to suffer financial loss when AT&T migrates its customers to AT&T's voice mail network. Pacific argues that such a result is unfair to PBIS. Further, the declaration of Professor Haussman on behalf of Pacific (at page 8) states that: "If the Commission decides to "change the rules" and forces PBIS to allow resale at a discount of its successful new services such as voice mail, significant consumer harm will result." The declaration states that the consumer harm would result from the decreased incentive to introduce new telecommunications services.

AT&T, MCI and Time Warner Connect dispute Pacific's claims that the Voice Mail resale requirement causes it serious harm. AT&T et al. argue that CLCs represent a potential business opportunity, and is willing to accept a risk which Pacific shirks. AT&T claims that Pacific is improperly withholding Voice Mail service to CLCs as a competitive weapon, in order to maintain its dominant position for all local services, and to make it more difficult and expensive for CLCs to enter the local exchange market.

TRA argues that all of the underlying functions of Pacific's switching and transmission facilities remain the same whether service is provided directly to a Pacific end-user or indirectly through a CLC reseller. Accordingly, TRA believes adding the voice mail option onto resold dialtone service should be just as easy to accomplish as adding voice mail to a Pacific end-user's service, and sees no technical network or switching problem connected with Pacific's offering of wholesale voice mail services. All that is at issue is how a voice mail resale order can be passed on to PBIS or Pacific so that it can open a voice mail box and remit a proper bill to the CLC.

TRA argues that if the service ordering and related support systems that Pacific wants to use are so complex that it will indeed take many months of work to provide resellers with the same service ordering capability as Pacific's service representatives, or Pacific does not have the capability to easily pass along PBIS' billings to the end-user, an obvious alternative would be to simply permit resellers to submit their orders directly to PBIS on behalf of their end-users.

TRA argues that Pacific could offer Voice Mail on a less complex basis to resellers of Pacific dialtone. Since GTEC apparently has the capability to do so, TRA argues that Pacific be able to find a way to do so, too.

B. Discussion

As noted earlier, if the Commission were to determine that the functioning of telecommunications market would improve with intervention, it would need to take a series of steps before ordering incumbent carriers to provide voice mail services for resale.

The first step would include the scheduling of evidentiary hearings to determine whether, in fact, CLCs could procure alternative voice mail services as cheaply or more cheaply than the cost of Pacific's and GTEC's voice mail. In the event that no cost-effective alternatives were available, then we would need to further address in evidentiary hearings whether it would be economically efficient for the

Pacific and GTEC to invest in the infrastructure necessary to offer voice mail for resale. As long as the Pacific and GTEC are reasonably compensated for the voice mail service they provide, it would not be confiscatory to require them to offer such service. Thus, we would need to provide a memorandum account mechanism for recording of the implementation costs that the Pacific and GTEC would incur in undertaking the investment necessary to offer this service for resale, as we have done for others. These amounts would be subject to appropriate disposition, as would all reasonable costs recorded in the accounts at a later date.

Furthermore, the record remains unclear concerning the precise voice mail features which would have to be made available for resale to target those customers who have no competitive alternatives and whether manual processing of voice mail resale orders would be sufficient or whether a fully automated OSS version of wholesale voice mail service would be necessary. This issue would also need to be addressed in the evidentiary hearings. The latter alternative would require additional cost and time to implement. Depending on the ultimate treatment of the implementation costs of such OSS, CLC resellers and their customers would likely be required to fund at least some portion of these implementation costs. These factors would have to be taken into account in determining the true cost and precise form of voice mail resale, if any, which should be implemented.

In the event that we subsequently required the resale of Pacific and GTEC's voice mail in the residential and small business markets, certain modifications to the LEC/CLC resale interface would need to be implemented before resale could become effective. Pacific listed a number of implementation concerns in its request for an extension to the filing deadline of the voice mail resale tariff. Certain CLC parties have objected to Pacific's requested delay, stating that Pacific assumes implementation would have to wait until full electronic parity of OSS systems could be achieved. The CLCs claim that resale implementation could be accomplished much sooner using manual ordering processes which did not entail full OSS implementation.

While an expedited form of resale implementation using less automated functions might be feasible sooner, some additional implementation lead time might be required even for these manual ordering processes. Given the highly technical nature of this issue, the most expedient way to develop a schedule for implementation using manual processes would be to bring the technical subject matter experts together in a workshop to determine the steps and timetable for implementation. In the event that we subsequently ordered that voice mail be offered for resale, we would need to expeditiously convene such a workshop. Our first priority would be to consider implementation of manual ordering and billing processes. Our second priority would be to consider the need for fully automated OSS implementation. We have established a separate docket to address OSS implementation issues. We would need to defer setting a deadline for the filing of voice mail tariffs until the workshop had concluded and a report submitted to the assigned ALJ.

This brief discussion of regulatory realities makes clear that ordering the resale of voice mail services would constitute a major extension of regulation. In particular, it makes clear that we would necessarily extend the scope of cost-of-service rate-of-return regulation, the very form of regulation that the Commission has spent the last decade replacing. Moreover, the complex steps that would need to be taken before ordering the provision of this service for resale would take months or years to conclude. It is clear that the costs of embarking on this path are large, cumbersome and antithetical to the functioning of a market.

V. Jurisdictional Issues

A. Discussion

D. 97-11-084 permitted parties to make extensive comments on jurisdictional issues. No party contends that federal or state statutes compel us to order the resale of voice mail services. We agree. No federal statute requires the Commission to order the resale of voice mail services. No state statute requires the Commission to order the resale of voice mail services.

Parties dispute whether federal or state statutes permit us to order the resale of voice mail services. Since we decline to order Pacific or GTEC to provide voice mail services on a resale basis, we need not address the issues of Commission jurisdiction further.

VI. Comments on Alternate

A draft decision was mailed to all parties in this proceeding on September 3, 1998 and provided parties with an opportunity for comment. The Commission received comments on September 14, 1998 from Working Assets, Time Warner Connect, GTEC and Pacific. The Commission has considered the comments of the parties, and modified the decision to clarify its reasoning and conclusions.

Findings of Fact

1. Pacific offers voice mail services to its retail local exchange customers through its affiliate, Pacific Bell Information Services (PBIS).

2. Pacific does not offer voice mail services to CLCs for purposes of resale.

3. The Commission has required that voice mail service be tariffed, and be subject to imputation rules and minimum prices.

4. The retail market for telephone answering machines and devices is competitive.

5. Because voice mail offers various call forwarding and processing features not available with a telephone answering machine, an answering machine is not a perfect substitute for voice mail.

6. Because answering machines offer the ability to screen incoming calls, voice mail is not a perfect substitute for answering machines.

7. While a significant number of alternative providers of voice mail exist, the primary market served by such providers is for large business customers.

8. While certain large CLCs such as AT&T and MCI have independent facilities to provide voice mail to their local exchange customers, those facilities are designed to serve large business customers.

9. Smaller CLCs do not have independent facilities with which to provision voice mail.

10. While the voice mail market offers large business customers a choice of many vendors, there remains uncertainty regarding the availability of competitively priced

voice mail alternatives for sale or for resale by CLCs to small/mid-sized business customers and residential customers of CLCs.

11. The CLC resellers seeking to provide voice mail to their end-users through alternative vendors cannot do so without going through Pacific for access to its vertical functionalities.

12. Pacific offers PBIS voice mail to its retail local exchange customers for $6.95 per month, including call forwarding, busy/no answer functionality.

13. The majority of residences in California meet their voice messaging needs through the use of some sort of electronic telephone answering machines; less than 10% of Pacific's residential access lines have voice mail services.

14. Certain CLCs have specifically targeted sectors of the residential market for their local exchange offering which use voice mail to a greater extent than the average usage rate for all of Pacific residential customers.

15. The record remains unclear concerning the precise voice mail features which would have to be made available for resale, and whether manual processing of voice mail resale orders or a fully automated OSS version of wholesale voice mail service would be necessary.

16. At the time D.97-08-059 was issued, Pacific's policy was to link the offering of PBIS voice mail with the requirement to use Pacific as the local service provider.

17. Pacific recently offered to change its policy to permit retail customers who switch to a CLC for local service to obtain voice mail service directly from PBIS.

18. PBIS agrees to sell its voice mail directly to the retail customers of a CLC reseller upon the request of either the customers or of the CLC, when acting as the customer's agent. This offering will be associated with a resold line only and is not an option for facilities-based CLCs or CLCs provisioning the customer via a UNE.

19. Pacific's new proposal would permit CLC retail customers to separately purchase PBIS voice mail.

20. Resale of voice mail to facilities-based CLCs would require changes in the way complementary network services from Pacific are ordered and provisioned on the lines

of CLC end-users, and could only be provided if voice mail is available in the particular switch serving the CLC.

21. GTEC currently allows CLC customers to subscribe separately to GTE voice mail on a non-discriminatory basis.

Conclusions of Law

1. A competitive telecommunications market does not require that CLCs have the opportunity to offer voice mail services under their own name in a fashion identical to the ways in which Pacific and GTEC offer such service to their own customers.

2. In the event that Pacific or GTEC fail to amend their tariffs to provide for the direct offering of their voice mail to retail customers of CLCs, the Commission may elect to revisit the issue of whether such an offering should be mandatory.

3. The development of an adequate record as to whether CLCs are able to procure competitive alternatives to the voice mail of Pacific and GTEC at a comparable cost for sale or resale by the CLC would require evidentiary hearings.

4. An acceptable alternative to holding evidentiary hearings would be for Pacific Bell and GTEC to file tariff changes that provide directly to retail customers of a CLC reseller a voice mail service that is the same in functionality and price to the voice mail service that Pacific and GTEC provide to their own retail customers.

5. The resale of Pacific's and GTEC's voice mail by CLCs is not required by state or federal statute.

O R D E R

IT IS ORDERED that further Commission inquiry into voice mail resale requirements is terminated, provided that Pacific and GTEC file proposed tariffs within 60 days for implementing the necessary tariff changes needed to make voice mail services available to end users of a CLC when the end-user's service is provided on a resold line of the incumbent carrier. The tariffs should permit the end user or a CLC acting as the agent of the end user to order the services. The tariffs should provide voice mail services that are the same in functionality and price as the voice mail services which Pacific and GTEC provide to their own retail customers. Should either Pacific or GTEC fail to make this filing within the period provided, the Commission will revisit the issue of whether voice mail resale should be made mandatory.

This order is effective today.

Dated October 8, 1998, at Laguna Hills, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners

We will file a written dissent.

/s/ P. GREGORY CONLON
Commissioner

/s/ JESSIE J. KNIGHT, JR.
Commissioner

Commissioners Jessie J. Knight, Jr. and P. Gregory Conlon, Dissenting:

We dissent from the majority opinion in the decision on Phase III of the Commission's rulemaking and investigation into local exchange competition addressing additional issues related to the resale of voice mail. We find that the incumbents' bargain bought by the majority, though easy to swallow for some, is in fact a bad pill for competition.

Over one year ago, we voted based on the record of the case to support Decision (D.) 97-08-059, an order that required the resale of Pacific Bell and GTEC's voicemail products to competitive local carriers without a wholesale discount. This step would have enabled resellers to compete on a more equal footing with the incumbent monopolies by permitting resellers to offer potential customers a more complete range of services. We cast our votes despite assertions made during ex parte contacts on both sides of the issue that attempted to raise new facts. At the time we voted, we noted that further delay in reselling voicemail merely shored up the market power of the incumbents, for we considered voicemail an essential building block of effective local exchange competition. Nevertheless, a few months thereafter, upon rehearing, this Commission unanimously decided that a further development of the evidentiary record was needed to fully justify the resale mandate contained in D.97-08-059.

We waited patiently, and indeed so did many competitive local carriers, as the record was painstakingly developed on the question of whether those competitors require access to the incumbents' voicemail to compete effectively in the local exchange market. The result of this wait was a balanced draft order put forth by the Administrative Law Judge (ALJ) which took some initial steps while recognizing that the record still needed further elaboration. The draft order dismissed the need for resale requirements in the large business market and ordered Pacific Bell and GTE-California to offer their retail voicemail services directly to the competitors' end users. Although we, and some of the competitors, were disappointed with the need for further delay on the overall need for resale, we were ready to allow the ALJ to proceed as he had stated in his order. The majority closed its eyes to this effort and chose instead to accept a voluntary bid by the incumbents that could have easily been made two years ago and perhaps saved this waste of resources.

We cannot support the order of the majority because it prematurely ends the evidentiary inquiry which this Commission began with the grant of rehearing. This order does not answer the fundamental question of whether competitive local carriers can self-provision their own voicemail products at comparable costs, equivalent to the service quality levels and features offered by the incumbent carriers. Only through continued inquiry such as that laid out by the ALJ in his proposed decision will this Commission ever elucidate the answer to this fundamental question. For example, as the ALJ points out in his proposed order, no other competitor currently provides switch-based ubiquitous voice mail service within Pacific Bell's territory necessary for competitors to offer equivalent voicemail features, such as the stutter tone and call forwarding. As long as Pacific Bell and GTE-California can sell voicemail bundled with their local service, the proper course is for the Commission to continue its inquiry and deduce whether resellers can mount an effective counterassault with voicemail options of their own. The current record on which this alternate order stands is inconclusive.

Further, we cannot agree with the conclusion contained in the majority opinion regarding "one stop-shopping," that is, the ability of a carrier to offer customers all of their desired services on one bill. The majority makes the incredible conclusion that one- stop shopping is not needed by resellers to compete with the incumbents. Claims by parties to this proceeding, and from experts across the state and the country, shout loudly to the contrary. We find it ironic that the negation of "one-shop shopping" as a business strategy is rejected here, yet even Pacific Bell has touted its value in many past proceedings before this Commission, including its merger with Southwestern Bell, and the ongoing proceedings evaluating Pacific Bell's readiness to enter the in-region long-distance market.

We also disagree with the statements made by the majority decision that the inquiry into and ordering of the resale of voicemail needlessly extends the scope of cost of service regulation. By this same logic, perhaps other arduous proceedings such as the Rulemaking and Investigation on the Commission's Own Motion to Open Access and Network Architecture Development of Dominant Carrier Networks (OANAD) should be terminated also. Clearly, that would be silly. Many of our proceedings might look costly in hindsight, but not to the competitors who rely on this Commission's efforts to obtain their toehold in the market. Rather, the voicemail inquiry is warranted because it would deduce whether a monopolist's market power justifies intrusion by way of resale to enhance competition in the fledgling local exchange market. This is the type of inquiry where the cost is more than offset by the gains to the competitive market that can be achieved, especially when an incumbent's share of local customers approaches 100%, while the market share of competitors is closer to zero.

In short, the record this Commission voted on rehearing to obtain has not been achieved. Questions about the competitors' need for the resale of voicemail are unanswered. We should not close the inquiry because we are satisfied with the voluntary offerings of Pacific Bell and GTEC which preclude resellers' customers from one- stop shopping. For this reason, we cast a negative vote on this order and file this dissent for the record.

Dated this October 8, 1998 at Laguna Hills, California.

Jessie J. Knight, Jr.
Jessie J. Knight, Jr.
Commissioner

P. Gregory Conlon
P. Gregory Conlon
Commissioner

R. 95-04-043/I. 95-04-044
D. 98-10-020

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