Decision 00-03-025 March 2, 2000

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
Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service.	I.95-04-044

ORDER MODIFYING DECISION (D.)99-12-018 AND DENYING REHEARING AS MODIFIED

I. SUMMARY

An Application for Rehearing of D.99-12-018 was filed by the California Telecommunications Coalition (the Coalition), claiming legal error based on an alleged lack of substantial evidence.[1] In D.99-12-018, the Commission granted interim pricing flexibility for Category II services, pursuant to GTE California, Inc's (GTEC's) Petition to Modify D.96-03-020. We find substantial evidence to support D.99-12-018. We therefore deny rehearing. However, we clarify why we deem GTEC's TELRIC studies to be suitable for use on an interim basis in setting price floors for Category II services. In addition, a minor clerical error in the date the Petition to Modify was filed is corrected.

[1] For purposes of this rehearing, the Coalition consists of the following parties: ICG Telecom Group, Inc., NEXTLINK California, Inc., the California Cable Television Association, Sprint Communications Company, Time Warner Telecom of California, MCI WorldCom, Inc., AT&T Communications of California, Inc., and GST Telecom California, Inc.

II. BACKGROUND

On June 24, 1998, GTE California (GTEC) filed a Petition to Modify Decision (D.) 96-03-020, seeking immediate interim pricing flexibility for Category II services.[2] D.96-03-020 ordered local exchange services to be classified as Category II services; however, pricing flexibility was delayed until price floors were developed in the Open Access and Network Architecture Development (OANAD) proceeding, R.93-04-003 and I.93-04-002. D.96-03-020 provided that Category I services reclassified as Category II should be priced at their currently tariffed rates with no pricing flexibility until appropriate cost studies are completed and the Commission adopts Category II price floors (Conclusion of Law No. 32). D.96-03-020 further provided that LECs should be permitted to implement pricing flexibility for tariffed Category II services once relevant price floors for the reclassified services are established in the OANAD proceeding (Conclusion of Law No. 33).

On December 2, 1999, in Decision (D.) 99-12-018 (hereinafter, the Decision), the Commission granted GTEC's Petition in a modified form. The Decision ordered that the services reclassified to Category II should be priced at their currently tariffed rates with no pricing flexibility until appropriate cost studies are completed and Category II price floors are adopted by the Commission, except that GTEC may seek interim pricing flexibility as provided in D.99-12-018. Interim pricing flexibility was permitted by means of the advice letter process, using the same methodology as adopted for Pacific in D.99-11-050 and GTEC's currently filed OANAD cost studies.

On January 3, 2000, the Coalition filed an application for the rehearing of D.99-12-018. The Coalition alleges legal error on the basis that there is no substantial evidence in the record to support the Decision, in violation of PU

[2] In *Re Alternative Regulatory Frameworks for Local Exchange Carriers* (33 CPUC 2d 43; D.89-10-031), the Commission placed local exchange carrier (LEC) services in three categories. Category I services are monopoly services. Category II services are partially competitive or discretionary services, and Category III are fully competitive services.

Code §1757 *et seq.* Conclusion of Law No. 7, alleged to be crucial to the Decision, is singled out as being legally vulnerable. The Coalition also claims that the Commission violated PU Code §1705 and §1708 in not providing an opportunity for parties to comment on the Commission's adopted relief which differed from GTEC's Petition and from the ALJ's proposed decision, and in failing to provide adequate findings.

On January 18, 2000, GTEC filed its Response to the application for rehearing, urging the Commission to deny rehearing on several grounds. First, GTEC asserts that the Coalition misstated GTEC's position regarding the use of its pending TSLRIC/TELRIC cost studies to set interim price floors. Second, GTEC maintains that D.99-02-018 meets the substantial evidence provisions of the Public Utilities Code. Finally, GTEC alleges that the Coalition had adequate notice of all issues determined in the final decision.

The Office of Ratepayer Advocates (ORA) filed a Motion for an Extension of Time to File a Response and its Response to the Application for Rehearing on January 19, 2000.[3] ORA concurs with the Coalition that the record lacks evidence to support interim price floors and pricing flexibility based on GTEC's cost studies. It further contends that the Petition to Modify is procedurally the wrong vehicle for the relief GTEC is seeking, and the advice letter process is procedurally flawed for use in setting GTEC's price floors and windows.

III. DISCUSSION

D.99-12-018 is challenged by the Coalition on the grounds that the Decision violates PU Code §1705 and §1757 *et seq.* in finding that GTEC's pending cost studies are suitable for setting interim price floors for Category II services, and in failing to include the necessary findings and conclusions as to why

[3] ORA sought a one-day extension of time, which was orally granted by the Administrative Law Judge. ORA filed its motion pursuant to Commission's Rules of Practice and Procedure 48(a) and 86.2.

GTEC's TELRIC studies are deemed suitable for price floor purposes. The Coalition argues that the Decision lacks substantial evidence in light of the whole record, as required by PU Code §1757(a)(4). We find that there is substantial evidence to support the Decision, however, additional findings are necessary in order to make clear our reasons for deeming GTEC's TELRIC studies suitable for setting interim price floors for Category II services.

A. There is Substantial Evidence to Support the Decision.

The Coalition asserts that Finding of Fact (FOF) No. 7 is critical to the Decision, and that without it there would be no basis for the Decision. (Coalition's Rhg. at 7.) They further argue that there is no factual basis for FOF No. 7, which reads as follows:

> "7. Although GTEC's currently submitted TELRIC studies remain to be litigated in OANAD, they provide a suitable basis to set *interim* price floors using the same methodology as adopted for Pacific in D.99-11-050." (Emphasis added.)

We disagree with the Coalition and believe they have overstated their case. The Commission has weighed the pros and cons of granting GTEC interim pricing flexibility of its Category II services and concludes that, on balance, GTEC should be allowed interim pricing flexibility, notwithstanding its as yet unapproved TELRIC cost studies. The Commission did not anticipate that there would be an extended delay in the approval of GTEC's cost studies. We recognize that in an ideal world, GTEC's TELRIC cost studies would have been approved by now. We also acknowledge GTEC's part in the delay, as well as other factors beyond GTEC's control.[4] Nevertheless, the unanticipated delay in the authorization of GTEC to exercise Category II pricing flexibility and changed circumstances persuade us, as part of our obligation to promote competition, that

[4] *See* D.99-12-018, *mimeo* at 6.

the time has come to allow GTEC interim pricing flexibility for Category II services so that consumers may benefit from any resulting reductions in price.

Our actions here are governed by PU Code §1757(a)(4), i.e., whether the findings in the Decision are supported by substantial evidence in light of the whole record. Regarding the substantial evidence standard, the California Supreme Court has stated as follows:

> "The definition of substantial evidence review in the appellate courts is very well settled.... It is an elementary, but often overlooked principle of law, that when a [finding] is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the [finding]. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." [Citation omitted.][5]

The Coalition appears to be convinced that only one inference can be drawn from the facts; however, the Commission does not subscribe to that viewpoint. The Commission views the facts through the lens of the agency with regulatory responsibility for implementing the state's pro-competitive telecommunications policy, and not from the viewpoint of a competitor who may stand to gain or lose from the outcome of the Decision. In construing substantial evidence, the Commission considers all factors that may have a bearing on our goal of achieving open competition in the California telecommunications market. This is consistent with the California Supreme Court which holds that the courts "must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute." (*California Hotel & Motel Assn*, 25 Cal.3d 200, 212, fn. omitted.)

[5] *Western States Petroleum Ass'n v. Sup. Ct.*, 9 Cal.4th 559, 571 (1995).

As we noted in D.96-03-020, "[t]oday's decision will help us meet the requirement of Public Utilities (PU) Code 709.5 that we 'ensure that competition in telecommunications markets is fair....'."[6] Our intention here is the same. Thus, the connection between allowing GTEC interim pricing flexibility without further delay, and implementing PU Code §709.5 could not be more clear.

In D.96-03-020, we concluded that most local exchange services should be moved to Category II since they conform to our Category II definition of partially competitive services. We further concluded that it would enhance competition to allow this recategorization. D.96-03-020 provided that incumbent LECs would not be permitted to implement pricing flexibility for tariffed Category II services until price floors were established in the OANAD proceeding. The Commission did not anticipate that nearly four years later, GTEC would still not have pricing flexibility for its Category II services because GTEC's cost studies have not been approved in the OANAD proceeding

The Coalition places great weight on past criticism of GTEC's cost studies by other parties and by the Commission. (Coalition's Rhg., pp. 7-8.) That criticism is a part of the record in the OANAD proceeding, and we do not disavow it here. In D.96-08-021 (67 CPUC 2d 221), the Commission noted numerous deficiencies in GTEC's cost studies and ordered specific and broad-ranging adjustments to GTEC's studies so that they would conform to the Consensus Costing Principles (CCPs), as set forth in D.95-12-016 (62 CPUC 2d 575).[7] In D.99-06-060, we concluded that GTEC's TELRIC non-recurring cost studies have numerous deficiencies. Thus, those studies were found to be inadequate for use in setting *permanent* rates for unbundled network elements (UNEs). The difference

[6] D.96-03-020, *mimeo* at 2 (65 CPUC 2d 156, 167-168). PU Code §709.5 provides in pertinent part that the intent of the Legislature was to open to competition all telecommunications markets under its jurisdiction no later than January 1, 1997. It also required the Commission to expedite its OANAD, interconnection, universal service, and other related dockets so that additional rules that may be necessary to achieve fair local exchange competition shall be in place no later than January 1, 1997.

[7] D.96.-08-021, *mimeo* at 68-81; (67 CPUC 2d 221, 257-263.)

here is that we are dealing with *interim* recurring rates for retail services, not final non-recurring rates for UNEs. The Coalition itself recognized that "the criticism in D.99-06-060 was aimed at cost studies *other than those on which the PD proposes to grant 'interim' pricing flexibility to GTEC.*"[8] The issue for the Commission is whether there is justification for permitting GTEC to exercise Category II pricing flexibility before final price floors are established in OANAD. We believe there is.

We stated clearly in D.96-03-020 that "the measures we adopt for interim purposes are based on the best information available to us today."[9] We could not, and did not, know when we temporarily restricted GTEC's use of pricing flexibility for Category II services, that there would be such an extended delay in establishing price floors in the OANAD proceeding. The passage of time and changed circumstances have rendered this restriction unreasonable. Just as the arbitrator in *Steelworkers v. Enterprise Corp.* (1960) 363 U.S. 593, 597 was required because of changed circumstances "to bring his informed judgment to bear to reach a fair solution of a problem," so is our charge here.[10] Fairness dictates that GTEC not continue to be precluded from competing in price against competing LECs that are not similarly restricted. As we stated on page 7 in D.99-12-018, GTEC's preclusion from pricing flexibility renders it unable to offer packages of LMS, ZUM, and toll service at prices as low as its competitors. We believe this interim approach strikes a fair balance and promotes a more competitive market, pending the development of permanent price floors in OANAD.

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[8] *Comments of the California Telecommunications Coalition on the Proposed Decision of ALJ Pulsifer Regarding the GTEC Petition to Modify* (9/27/99), p. 6 (emphasis added).

[9] D.96-03-020, p. 3 (65 CPUC 2d 156 at 168).

[10] Cited by the California Supreme Court with approval in *Advanced Micro Devices v. Intel Corp.* (1994) 9 Cal.4th 362, 374.

It is not unprecedented for the Commission to adopt rates based on less than perfect cost studies, after necessary adjustments are made. The Commission did so in *Re Pacific Telephone and Telegraph Company*, wherein the Commission found Pacific Bell's cost studies to be deficient and failing to support rate increases to the levels requested.[11] The intervenors alleged numerous defects in Pacific's cost studies and successfully established that the study's disaggregated loop study was of limited value. The Commission concluded that Pacific failed to conduct cost studies that would permit the Commission to set rates for private lines services on a precise cost basis. However, subject to staff and other adjustments to protect against the imprecision of those studies, the Commission found it reasonable to authorize increases in private line rates and charges.[12]

The Commission was also faced with inadequate cost studies in *Re Open Access to Bottleneck Services and a Framework for Network Architecture Development of Dominant Carrier Networks*, but did not permit the deficiencies to thwart it from substantially complying with the implementation of PU Code §709.5 to open the telecommunications markets to competition in January 1, 1997.[13] D.99-12-018 continues our policy of promoting competition and fairness in California's telecommunications markets, with the ultimate benefits accruing to consumers.

Finally, the Coalition's claim that D.99-12-018 lacks substantial evidence because GTEC's TELRIC studies are in OANAD is without merit. This proceeding and OANAD are interdependent and closely interrelated. There are no firewalls between the two. Indeed, D.96-03-020 declares this rulemaking and

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[11] *See* 15 CPUC2d 232, 328-333 (D.84-06-111).

[12] 15 CPUC 2d at 333; also, Findings of Fact Nos. 6, 11, 14, 15 at p. 415.

[13] *See* 66 CPUC 2d 247 (D.96-05-034) (1996). In this case, cost studies submitted by Pacific were found to need considerable refinement before they could be used to distinguish between costs incurred to provide wholesale versus retail functions. The Coalition appealed an Assigned Commissioner Ruling (April 12 Appeal), arguing that preparing cost studies and holding hearings on wholesale rates should be deferred until sometime in 1997. The Commission thought it would be unfair to the LECs if consideration of permanent wholesale rates based on appropriate cost studies were deferred. Hearings on wholesale service rates were set for July 24 - August 2, 1996.

OANAD to be "companion proceedings."[14] Furthermore, there is enough evidence in this proceeding, which incorporates pertinent data from OANAD by reference, to support D.99-12-018.

We conclude that when all factors are considered, there is substantial justification for using GTEC's TELRIC studies as the basis for interim pricing flexibility of Category II services. We have determined that fair competition in the local exchange market would be well-served if GTEC were granted pricing flexibility at this time.

B. Lack of Party Support for the Decision, Were That the Case, Would not Render the Decision Devoid of Substantial Evidence.

The Coalition's rehearing application rests largely on its contention that if no party supports the Decision, that very fact means that the Decision lacks substantial evidence:

> "Where, as here, no party supports the Commission's action, then by definition the decision's findings do not rest on 'substantial evidence in light of the whole record' to support the Commission's decision."[15]

We disagree. We concur with ORA that "[w]hile this is not a legal bar to the decision, it is an indication that no party considered it desirable." (ORA Response at 5.) For the Coalition to accord any greater significance to these facts is overreaching. The determination as to whether there is substantial evidence does not hinge on party support or the lack thereof. Reasonable people can review the same evidence and differ in their findings or conclusions. As we discussed in the previous section, the Commission must take all factors into consideration.

As noted above, the Commission may well deduce an inference different from the parties, and the court is "without power to substitute its deductions for those of the trial court [Commission]."[16] The court observed that

[14] *See* D.96-03-020, p. 2 (65 CPUC 2d 156 at 168).

[15] Coalition's Rhg. App. at 7. *See also* pages 8 and 10.

[16] *Western States Petroleum, supra,* at 571.

"a court's role in reviewing evidence under the substantial evidence...test[] is different from the agency's role in reviewing that same evidence. Agencies must weigh the evidence and determine; 'which way the scales tip,' while courts conducting substantial evidence...review generally do not. If courts were to independently weigh conflicting evidence in order to determine which side had a preponderance of the evidence, this would indeed usurp the agency's authority and violate the doctrine of separation of powers."[17]

Contrary to the Coalition's assertions, the facts indicate that not all the parties object to the Decision. Although, originally, GTEC would have preferred that the Commission use LRIC as the basis for setting its price floors, GTEC supported the Decision in its Response to the rehearing application and requested that the Commission deny rehearing. The weight of the evidence points to GTEC support of the Decision. Assuming *arguendo* that no party supported the Decision, that would have not have presented a legal impediment to its adoption by the Commission.

C. There is No Merit to the Coalition's Claims of Due Process Violations.

The Coalition contends that the Commission violated PU Code §1705 and §1708 "when it modifies prior decisions in ways that, as here, neither the petitioning party requested nor the ALJ proposed" and in failing to state the justification for its actions.[18] The Coalition is mistaken. The Commission's authority to modify its decisions is not necessarily limited to, or triggered by, requests by petitioning parties or proposed decisions by the ALJ. The Commission may *sua sponte* modify its decisions, provided it gives notice to the

[17] *Id.* at 576.

[18] Coalition's Rhg. App. at 9.

parties and an opportunity to be heard.[19] The Commission met those requirements in D.99-12-018. As we demonstrate below, the Coalition's comments on the proposed decision undermine its claims of lack of notice and an opportunity to be heard on the issue of using GTEC's TELRIC cost studies as the basis for interim pricing flexibility of GTEC's Category II services.

The Commission has solid grounds for not modifying D.96-03-020 in precisely the manner GTEC originally requested, i.e., to use GTEC's LRIC studies as the basis for interim pricing flexibility. As the Commission expressed in D.99-12-018, using the LRIC standard, which was based on outdated information dating back to IRD, could understate the price floors for Category II services. Moreover, the LRIC studies were replaced by TSLRIC after the IRD decision. The Commission ultimately adopted the TELRIC methodology. It is disingenuous for the Coalition to criticize the Commission for rejecting GTEC's LRIC studies as the basis for interim pricing flexibility on the one hand, when, on the other hand, it asserts that "the PD rightly rejects GTEC's proposal to base interim pricing flexibility on LRIC." (Coalition's Comments on PD, pp. 3-4 (9/27/99).) The Coalition remarked that the PD's approach was an improvement over GTEC's proposal. Furthermore, the Coalition cannot claim surprise that the Commission proposed to use TELRIC methodology since, in the same comments, it acknowledges that the proposed decision bases the price floors on TELRIC. (*Ibid.*)

IV. CONCLUSION

We conclude that there is substantial evidence to support our decision in D.99-12-018. However, we clarify why we deem GTEC's TELRIC studies to be suitable for use on an interim basis in setting price floors for Category II services. In addition, we change the date of the Petition to Modify D.96-03-020,

[19] PU Code §1708 provides in pertinent part that "the commission may *at any time*, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it." (Emphasis added.)

which is shown as June 26, 1998, on page 1 of D.99-12-018. The record indicates the date to be June 24, 1998.

Therefore, IT IS ORDERED that:

1. The first sentence on page 1 should be modified to read:

> "On June 24, 1998, GTE California Incorporated (GTEC) filed a Petition to Modify Decision (D.)96-03-020."

2. Decision 99-12-018 is modified to clarify the Commission's reasons for using GTEC's TELRIC cost studies as the basis for interim pricing flexibility for GTEC's Category II services. Therefore, the following language is added to page 10, at the end of the second full paragraph:

> "The passage of time and changed circumstances have rendered the continued restriction of GTEC from pricing flexibility for Category II services unreasonable. In carrying out its duties, the Commission must bring its informed judgment to bear to reach a fair solution. Fairness dictates that GTEC not continue to be precluded from competing in price against competing LECs that are not similarly restricted. As we noted on page 7 in D.99-12-018, GTEC's preclusion from pricing flexibility renders it unable to offer packages of LMS, ZUM, and toll service at prices as low as its competitors. Fairness also requires that consumers not be deprived of lower prices that could result from allowing GTEC to have pricing flexibility for its Category II services. Accordingly, we conclude that the interim approach we adopt here strikes a fair balance and promotes a more competitive market, pending the development of permanent price floors in OANAD."

3. The following is added as Finding of Fact No. 8:

> "GTEC's TELRIC studies provide a sufficient framework to use on an interim basis in setting price floors for Category II services, pending the approval of GTEC's cost studies in OANAD."

4. The following is added as Finding of Fact No. 9:

"Changed circumstances make it unreasonable to continue restricting GTEC from exercising pricing flexibility for Category II services, pending approval of its cost studies in OANAD."

This order is effective today.

Dated March 2, 2000, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
CARL W. WOOD
LORETTA M. LYNCH
Commissioners