

Decision 00-06-071 June 22, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking on the Commission's Own Motion into Universal Service and to Comply with the Mandates of Assembly Bill 3643.

Rulemaking 95-01-020
(Filed January 24, 1995)

Investigation on the Commission's Own Motion into Universal Service and to Comply with the Mandates of Assembly Bill 3643.

Investigation 95-01-021
(Filed January 24, 1995)

**OPINION DENYING MCI AND SPRINT'S
PETITION TO MODIFY DECISION 96-10-066**

1. Summary

This decision denies the petition to modify Decision (D.) 96-10-066 filed by MCI Telecommunications Corporation (MCI) and Sprint Communications Company L.P. (Sprint). In their petition, MCI and Sprint sought to modify D.96-10-066 to "clarify" that the requirement in D.96-10-066 for local exchange carriers (LECs) to offer a choice of flat-rate or measured-rate local service applies only to LECs that receive money from one of the universal service funds.

2. Background

This proceeding was established by Order Instituting Rulemaking (OIR) 95-01-020 and Order Instituting Investigation (OII) 95-01-021 ("the Universal Service Docket"). One of the purposes of the Universal Service Docket is to develop rules to ensure that basic telephone service remains affordable and ubiquitously available. To this end, the Commission issued D.95-07-050 which

proposed to require LECs to provide their residential customers with a minimum level of basic telephone service. The decision also proposed that the minimum level of basic telephone service provided to residential customers include a choice of flat-rate or measured-rate local service ("flat or measured service").¹

Comments on the aforementioned proposals were submitted by the parties on September 1, 1995. Reply comments were submitted on December 1, 1995. In D.96-10-066, the Commission adopted a modified form of the proposals that required all LECs, except 17 small carriers, to provide their residential customers with a choice of flat or measured service.²

On January 21, 1997, MCI and Sprint jointly filed a petition to modify D.96-10-066 ("petition"). In their petition, MCI and Sprint ("Petitioners") state that D.96-10-066 could be misinterpreted to mean that all LECs are required to offer a choice of flat or measured service. Petitioners ask the Commission to modify D.96-10-066 to "clarify" that LECs are not required to offer a choice of flat or measured service unless a LEC receives money from one of the universal service funds.³

Responses to the petition were filed by AT&T Communications of California, Inc. (AT&T), the California Department of Consumer Affairs (DCA), GTE California Incorporated (GTE), the Office of Ratepayer Advocates (ORA), Pacific Bell (Pacific), and Time Warner AxS of California, L.P. (Time-Warner). A joint response was filed by The Utility Reform Network (TURN) and Utility Consumers' Action Network (UCAN). On March 21, 1997, Petitioners filed a

¹ D.95-07-050, Appendix A, Rule 4.B.8.

² D.96-10-066, Appendix B, Rule 4.B.9.

³ The universal service funds are (i) the California High Cost Fund-A (CHCF-A), (ii) the CHCF-B, and (iii) the Universal Lifeline Telephone Service fund.

reply to the responses after receiving permission to do so from the assigned Administrative Law Judge (ALJ).

3. Positions of the Parties

Petitioners present several reasons why the Commission should modify D.96-10-066 to "clarify" that LECs are not required to offer a choice of flat or measured service unless a LEC receives money from one of the universal service funds. First, Petitioners assert that D.96-10-066 itself indicates that only those LECs that receive money from one of the universal service funds are required to offer a choice of flat or measured service. Second, Petitioners assert that there is no compelling reason to require LECs to offer a choice of flat or measured service. Third, Petitioners assert that the service requirements applicable to competitive local carriers (CLCs) are contained only in the "Local Competition Rules" adopted by the Commission in OIR 95-04-043 and OII 95-04-044 ("the Local Competition Docket").⁴ Petitioners state that the Local Competition Rules do not require CLCs to offer a choice of flat or measured service. Finally, Petitioners claim that if D.96-10-066 does require LECs to offer a choice of flat or measured service, then this would constitute a modification of the Local Competition Rules. Petitioners claim such a modification would violate Pub. Util. Code § 1708 because there was no notice or an opportunity to be heard regarding the modification.⁵

⁴ The Local Competition Rules are set forth in D.95-07-054, as modified by D.95-12-056, D.95-12-057, and D.96-02-072.

⁵ Pub. Util. Code § 1708 states, in relevant part, as follows: "The commission may at any time, upon notice to the parties, and with an opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it."

Time-Warner supports the petition. AT&T and GTE do not oppose the petition. DCA, Pacific, TURN, and UCAN oppose the petition.

4. Discussion

We have carefully reviewed the petition to modify D.96-10-066, the responses to the petition, and Petitioners' reply to the responses. Based on this review, we conclude that the petition should be denied. To begin with, the petition is based on the flawed premise that D.96-10-066 is ambiguous regarding the requirement for LECs to offer a choice of flat or measured service. The Decision is not ambiguous. As the following excerpts from D.96-10-066 demonstrate, the Decision clearly requires all LECs, except 17 small carriers, to offer their residential customers a choice of flat or measured local service:

In order to effectuate a policy of universal service throughout the state, the Commission first needs to develop a list of the service elements which make up residential basic service. If the basic service definition is too narrowly drawn, some service elements that may be essential for participation in society may only be enjoyed by those who can afford it. Or, certain urban areas of the state...may enjoy some essential service elements that customers in more rural areas may not have. (D.96-10-066, *mimeo*, p. 19.)

We believe that it is important to adopt a uniform definition of basic service so that all residential telephone customers, no matter where they live in California, or what their level of income is, can expect a certain minimum level of service. This is especially important in a mobile society where people may move across town, or from one part of the state to another. For the vast majority of telephone customers, they have come to expect and rely on the service elements that we listed in D.95-07-050.⁶ (*Ibid.*, p. 27.)

⁶ The service elements listed in D.95-07-050 include "customer choice of flat or measured rate service." (D.95-07-050, Appendix A, Rule 4.B.8)

We do not adopt the suggestions by Pacific and AT&T Wireless that flat rate service be eliminated [from the definition of basic service]. At the [public participation hearings], many consumers expressed satisfaction with having a choice of flat or measured rate service. Depending on their circumstances, some preferred measured rate service, while others preferred flat rate service. The flat and measured rate options preserve customer choice, and provide consumers with a method by which to comparison shop among carriers. We believe that if wireless providers desire to compete in the local exchange market, they should be required to offer basic service in the same type of pricing formats that are offered today by wireline carriers. (*Ibid.*, p. 29.)

For the smaller LECs in California, of which there are 17, we shall exempt them from the service element that they be required to offer customers the choice of flat or measured rate service, unless the smaller LEC currently offers that option. If, however, a new carrier decides to offer local exchange service in the service areas of these small companies, the new carrier will be required to provide all the service elements listed in Rule 4 of Appendix B.⁷ Once competition arrives in these areas, the incumbent LECs that do not offer measured rate service will be forced by market considerations to decide whether such an option should be offered to their customers. (*Ibid.*, pp. 28-29.)

Universal service has developed over the years to mean that: (1) a certain minimum level of telecommunications service must be made available virtually everywhere in the state; and (2) the rate for such services remain affordable. (*Ibid.*, Finding of Fact (FOF) 15.)

In order to effectuate a policy of universal service throughout the state, the commission needs to develop a list of the service elements which make up residential basic service. (*Ibid.*, FOF 18.)

A minimum level of basic service should be adopted so that all residential telephone customers in California, regardless of their

⁷ The service elements listed in D.96-10-066, Appendix B, Rule 4, include "customer choice of flat or measured rate service." (Rule 4.B.9)

location or income, can expect a certain level of service. (*Ibid.*, Conclusion of Law 11.)

All incumbent local exchange carriers...and all competitive local carriers...who offer local exchange residential service, shall provide all of the service elements listed in Rule 4 of Appendix B. (*Ibid.*, Ordering Paragraph (OP) 7.a.)

Carriers providing local exchange residential service shall, at a minimum, provide all elements of basic service, except as provided in Rule 4.C. below.⁸ (*Ibid.*, Appendix B, Rule 4.A.)

Basic service includes the following service elements...customer choice of flat or measured rate service. (*Ibid.*, Appendix B, Rules 4.B and 4.B.9.)

Petitioners next assert that D.96-10-066 indicates that only those LECs that receive money from one of the universal service funds should be required to offer a choice of flat or measured service. The above excerpts from D.96-10-066 demonstrate that this assertion is incorrect. The Decision clearly requires all LECs, except 17 small carriers, to offer a choice of flat or measured service. There is no exemption for LECs that do not receive money from one of the universal service funds.

Petitioners next assert that there is no compelling reason to require LECs to offer a choice of flat or measured service. We disagree. We find that the above excerpts from D.96-10-066 present a persuasive case for why it is necessary for LECs to offer their residential customers a choice of flat or measured service.

Petitioners next assert that CLCs are only subject to the service requirements set forth in the Local Competition Rules (which do not include a

⁸ Rule 4.C. exempts 17 smaller LECs from the requirement to offer a choice of flat or measured service.

requirement for CLCs to offer a choice of flat or measured service). We disagree. Decision 96-10-066, which was issued in the Universal Service Docket, explicitly requires those CLCs that provide local exchange residential service to offer a choice of flat or measured service.⁹ Furthermore, in D.95-07-054, the decision that adopted the Local Competition Rules, the Commission stated that it had issued a decision (i.e., D.95-07-050) five days earlier in the Universal Service Docket that contained proposed "universal service rules."¹⁰ As noted previously in today's decision, the proposed universal service rules included a requirement for LECs to offer a choice of flat or measured service. Consequently, there is no basis to the Petitioners' assertion that Local Competition Rules adopted in D.95-07-054 decided the issue of whether CLCs should be required to offer a choice of flat or measured service.

Finally, Petitioners state that if D.96-10-066 does require LECs to offer a choice of flat or measured service, this would constitute a modification to the Local Competition Rules. Petitioners assert that they were not provided with notice and an opportunity to be heard on this modification to the Local Competition Rules as required by Pub. Util. Code §1708. We find no merit in this assertion for two reasons. First, the Local Competition Rules do not address the issue of whether LECs should be required to offer the choice of flat or measured service. Therefore, the adoption of this requirement in D.96-10-066 did not modify the Local Competition Rules. Since there was no modification to the Local Competition rules, Pub. Util. Code §1708 is not applicable. Second, even if Pub. Util. Code §1708 were applicable, the statute's requirement for notice and an

⁹ D.96-10-066, OP 4 and Appendix B, Rule 4.B.9.

¹⁰ 60 CPUC 2d 611, at 637.

opportunity to be heard has been met: the Petitioners were repeatedly notified that the Commission was considering whether to require LECs to offer a choice of flat or measured service¹¹; and Petitioners were provided with an opportunity to be heard on this matter.¹²

5. Public Utilities Code Section 311 (g)

The draft decision of Administrative Law Judge Kenney was served on the parties in accordance with Pub. Util. Code § 311(g) and Article 19 of Commission's Rules of Practice and Procedure. No comments were filed.

Findings of Fact

1. In D.96-10-066, the Commission stated that all LECs, except 17 small carriers, are required to offer a choice of flat or measured service.

2. In D.95-07-054, the decision that adopted the Local Competition Rules, the Commission indicated that (i) it had issued D.95-07-050 five days earlier in the Universal Service Docket, and (ii) D.95-07-050 contained proposed universal service rules.

¹¹ D.95-07-050, *mimeo*, pp. 15, 6, 18, 19, FOFs 1, 5, 17, COLs 4-7, OPs 2, 3, 5, and Appendix A. Rule 4.B.8; D.95-07-054, 60 CPUC 2d 611, at 637; and D.95-12-021, 62 CPUC 2d 690, at 694, 695, and 697. Petitioners were served with these decisions and did not object to the Commission's consideration in the Universal Service Docket of the issue of whether LECs should be required to offer a choice of flat or measured service. In fact, Petitioners filed joint comments with other parties in the Universal Service Docket that supported the Commission's proposal to require LECs to offer a choice of flat or measured service. (Reply Comments of the California Telecommunications Coalition, dated December 1, 1995, Fns. 1 and 13.)

¹² D.95-07-050, OPs 3 and 4. Petitioners did not pursue their opportunity to be heard on this matter. (D.95-12-021, 62 CPUC 2d 690.)

3. In D.95-07-050 the Commission (i) stated its intent to consider in the Universal Service Docket a requirement for LECs to offer a choice of flat or measured service, and (ii) provided instructions on how to request a hearing on this matter.

4. Petitioners were served with D.95-07-050 and D.95-07-054.

5. Petitioners did not object to the Commission's consideration in the Universal Service Docket of the issue of whether LECs should be required to offer a choice of flat or measured service.

6. Petitioners filed joint comments with other parties in the Universal Service Docket that supported the Commission's proposal to require all LECs to offer a choice of flat or measured service.

7. The Petitioners did not request a hearing on the issue of whether LECs should be required to offer a choice of flat or measured service.

Conclusions of Law

1. In D.96-10-066, the Commission required all LECs, except 17 small local carriers, to provide a choice of flat or measured service. The Commission did not exempt from this requirement those LECs that do not receive money from one of the universal service funds.

2. There is no merit to the Petitioners' assertion that (i) D.96-10-066 could be "misinterpreted" to mean that LECs are required to offer a choice of flat or measured service, and (ii) D.96-10-066 did not require LECs to offer a choice of flat or measured service if a LEC does not receive money from one of the universal service funds.

3. The excerpts from D.96-10-066 in the body of this decision demonstrate that it is reasonable to require LECs to offer a choice of flat or measured service.

4. There is no merit to the Petitioners' assertion that there is no compelling reason to require LECs to offer a choice of flat or measured service.

5. Service requirements pertaining to CLCs were promulgated by the Commission in both the Local Competition Docket and the Universal Service Docket.

6. There is no merit to the Petitioners' assertion that CLCs are only subject to the service requirements set forth in the Local Competition Rules.

7. The Local Competition Rules do not address the issue of whether LECs should be required to offer the choice of flat or measured service.

8. The requirement for LECs to offer a choice of flat or measured service, which was proposed in D.95-07-050 and adopted in D.96-10-066, did not modify the Local Competition Rules adopted in D.95-07-054.

9. The Commission provided Petitioners with notice and an opportunity to be heard regarding the issue of whether LECs should be required to offer a choice of flat or measured service.

10. There is no merit to the Petitioners' assertion that the adoption of the requirement in D.96-10-066 for LECs to offer a choice of flat or measured service violated Pub. Util. Code § 1708.

11. The following order should be effective immediately.

O R D E R

IT IS ORDERED that the petition to modify Decision 96-10-066 jointly filed by MCI Telecommunications Corporation and Sprint Communications Company L.P., is denied.

This order is effective today.

Dated June 22, 2000, at San Francisco, California.

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

President Loretta M. Lynch, being necessarily absent, did not participate.