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Mailed 4/26/99

Decision 99-04-071 April 22, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of Alternative Regulatory Frameworks for Local Exchange Carriers. (IntraLATA Presubscription Phase)	Investigation 87-11-033 (Petition to Modify Filed September 8, 1998)

O P I N I O N

1. Summary

Based on a recent decision of the United States Supreme Court and a subsequent order by the Federal Communications Commission (FCC), this decision directs Pacific Bell (hereafter, Pacific) to provide intrastate dialing parity to its California subscribers. Pacific is directed to comply with the FCC order to implement dialing parity no later than May 7, 1999, unless otherwise directed by the FCC or appropriate court order. We take official notice that Pacific on April 2, 1999, petitioned the FCC for a waiver of implementation until June 15, 1999. Pacific also is directed to comply with the equal access and consumer notice requirements established by this Commission. This decision denies a petition to modify our 1997 order dealing with intrastate dialing parity.

2. Background

On September 8, 1998, three telecommunications carriers and a telecommunications association[1] (Petitioners) filed a petition to modify Decision (D.) 97-04-083, 1997 Cal.PUC LEXIS 495, to require Pacific to provide

[1] Petitioners are AT&T Communications of California, Inc.; CALTEL; MCI Telecommunications Corporation; and Sprint Communications Company L.P.

intraLATA toll dialing parity (or intraLATA presubscription)[2] by February 8, 1999.

In D.97-04-083, this Commission directed Pacific to implement intraLATA dialing parity coincident with its entry into long distance service, which at that time was anticipated in 1997. The Commission also ordered that all local exchange carriers in California (including Pacific) "shall implement [dialing parity] in accordance with the requirements set forth in the Telecommunications Act of 1996...." (D.97-04-083, *slip op.* at pp. 46-47, Ordering Paragraph 1.) An FCC order in effect at that time interpreted the Telecommunications Act to require that Bell operating companies implement intraLATA dialing parity coincident with their entry into the long distance market or by February 8, 1999, whichever came earlier.[3] Pacific has not yet implemented long distance service or intraLATA dialing parity in California.

Four months after the Commission's decision, on August 22, 1997, the Eighth Circuit United States Court of Appeals overturned the FCC's rules on the timing of intrastate dialing parity on jurisdictional grounds, reserving such matters to the states.[4] Subsequently, on January 25, 1999, the United States

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[2] California has 11 Local Access and Transport Areas (LATAs), served primarily by Pacific and GTE California Incorporated. In D.97-04-083, the Commission directed Pacific to make intraLATA equal access – the ability to place local toll calls through another telephone carrier without having to dial additional numbers – available to all of its California customers coincident with Pacific's authority to offer long distance interLATA service. Pacific has not yet been authorized to offer long distance service.

[3] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Second Report and Order and Memorandum and Order, CC Docket No. 96-98 (August 8, 1996), at ¶ 59.

[4] Public Utilities Commission of California v. FCC (8th Cir. 1997) 124 F.3d 934, rev'd AT&T Corp. v. Iowa Utils. Bd. (1999) 119 S.Ct. 721.

Supreme Court reversed the Eighth Circuit in part, holding that the FCC has general jurisdiction to implement the local competition provisions of the Telecommunications Act, including dialing parity requirements. (AT&T Corp. v. Iowa Utils. Bd. (1999) 119 S.Ct. 721, 1999 WL 24568, *6-*7.)

Responding to the Supreme Court's ruling, the FCC on March 23, 1999, issued an order requiring that carriers whose plans for implementing dialing parity have been approved by a state commission must introduce dialing parity no later than May 7, 1999. Pacific's plan for dialing parity was approved by this Commission in D.97-04-083 on April 23, 1997.

3. Discussion

We deny the petition to modify D.97-04-83 because the relief requested by Petitioners is now either unnecessary or is beyond the authority of this Commission to grant.

The Supreme Court has held that the FCC has primary jurisdiction in addressing dialing parity under Section 251(b)(3) of the Telecommunications Act. (AT&T Corp. v. Iowa Utils. Bd., supra, *slip op.* at p. 17.) This Commission, and states in general, have limited authority under the Act, including Section 271(e)(2)(B), to impose timing requirements for dialing parity. Pursuant to Section 271(e)(2)(B), this Commission was authorized to direct Pacific to implement intraLATA dialing parity no earlier than the date the company enters the long distance market (which we have done in D.97-04-083), or three years after enactment of the Telecommunications Act (which is February 8, 1999, a date now past). What we may not do, under the Supreme Court's ruling, is unilaterally order Pacific to provide intraLATA dialing parity on a date later than February 8, 1999 if entry into long distance service has not taken place by that time. The authority to order an alternative date without regard to long distance

entry is in the hands of the FCC. See AT&T Communications of Virginia v. Bell Atlantic-Virginia. (E.D. Va., February 5, 1999) 1999 U.S. Dist. LEXIS 1259.)[5]

It follows that, to the extent that Petitioners and ORA urge that we set a new deadline after February 8, 1999, for Pacific intraLATA dialing parity, the request must be denied. Similarly, it is unnecessary for us to amend D.97-04-083 to require Pacific to comply with intraLATA dialing parity requirements of the FCC, since the decision in Ordering Paragraph 1 requires Pacific to implement dialing parity in accordance with requirements set forth in the Telecommunications Act, and the Supreme Court has ruled that those requirements are to be established by the FCC.

In its order issued on March 23, 1999, the FCC established the following deadlines for opening regional toll markets to competition:

- Carriers whose plans have been approved by a state commission must implement dialing parity no later than May 7, 1999.

- Carriers that have not yet filed dialing parity plans must file them with the appropriate state commission no later than April 22, 1999. States have until June 22, 1999, to review and approve the plan, following which the local carrier must implement dialing parity within 30 days of the state's approval.

- Carriers whose plans have not been approved by a state commission by June 22, 1999, must file the plan with the FCC no later than that date and must implement dialing parity within 30 days of FCC approval.

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[5] "We find that § 271(e)(2)(B) is, by its unambiguous terms, a restriction solely on the authority of states as to the earliest possible time at which they can order certain BOCs to implement intraLATA dialing parity. There is simply no way to read this provision either as imposing a deadline by which intraLATA toll dialing parity is required or as a limitation on the FCC's ability to implement intraLATA toll dialing parity." (AT&T Communications of Virginia, supra, 1999 U.S. Dist. LEXIS 1259, *20.)

In D.97-04-083, this Commission approved Pacific's plan to flashcut its implementation of dialing parity (i.e., to make the switch for all of its exchanges at the same time), and we adopted provisions for notification of subscribers. (See 47 U.S.C. § 51.213 – Toll dialing parity implementation plans.) Our order also required initial notice to customers through bill insert 45 days prior to implementation, followed by a direct mail notice 10 days before implementation. This Commission's decision also provides that subscribers may make one change in intraLATA toll providers without charge during the first six months of availability of dialing parity. Our order also established the means by which Pacific may recover costs of the changeover, and it adopted a schedule of liquidated performance remedies if Pacific does not promptly process the change orders submitted by other carriers.

The 45-day notice will continue to apply, if feasible, should the FCC subsequently permit Pacific to implement dialing parity on a date later than May 7, 1999. Otherwise, the requirement should be interpreted to require bill insert notice in the first available billing cycle prior to or after implementation.

This Commission has set the stage for Pacific's compliance with the FCC's order. As ORA points out, we have altered the New Regulatory Framework to position Pacific for an increase in competition. (See D.95-12-052, D.98-10-026.) We have established detailed equal access and consumer notice requirements for Pacific in implementing intraLATA dialing parity. (D.97-04-083, *slip op.* at pp. 47-53.) By Assigned Commissioner's Ruling dated February 3, 1999, we have required Pacific to submit to us the draft scripts that its representatives will follow in discussing dialing parity, and those scripts have been reviewed by our Telecommunications Division staff.

In summary, in view of the Supreme Court's decision and the FCC's recent order on this subject, we direct Pacific to comply with the directions of the FCC

in its March 23, 1999, order and with this Commission's requirements in D.97-04-083 in implementing intraLATA dialing parity.

4. Comments by Parties

The draft decision of the Administrative Law Judge was mailed to parties on March 25, 1999. Comments were filed on April 6, 1999, by Pacific; jointly by Petitioners, and by eight small local exchange carriers (Small LECs).[6] Reply comments were filed on April 12, 1999, by Pacific, Petitioners and the ORA.

Petitioners and the ORA urge the Commission to adopt the draft decision.

Pacific in its comments notes that on April 2, 1999, it filed a petition for waiver with the FCC seeking, for operational reasons, to postpone implementation of dialing parity until June 15, 1999. We take official notice of this filing. We take official notice, as well, that the FCC has called for comments on April 13, 1999, and reply comments on April 16, 1999, on Pacific's petition for waiver. (FCC File No. NSD-L-98-121, CC Docket No. 96-98, DA 99-681.)

Pacific further asserts that the draft decision before us is in error, and it urges us to make five modifications:

1. While acknowledging that its dialing parity plan was submitted to this Commission and was approved in D.97-04-083, Pacific argues that its plan was premised on offering dialing parity coincident with its entry into long distance service. Therefore, Pacific argues that its plan must be revised and re-submitted to this Commission under the FCC rule that would be applicable "if a plan has not yet been filed with such state commissions." (FCC Order, ¶ 7.)

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[6] The Small LECs are Evans Telephone Company, Happy Valley Telephone Company, Hornitos Telephone Company, Kerman Telephone Co., Pinnacles Telephone Company, The Siskiyou Telephone Company, The Volcano Telephone Company, and Winterhaven Telephone Company.

We disagree. In D.97-04-083, we deemed the timing of dialing parity to be moot in view of the requirements of the Telecommunications Act. (D.97-04-083, *slip op.* at 9; Finding of Fact 7, at 42.) It explicitly was not a premise of our decision that Pacific's failure to implement dialing parity in 1997 (as the parties then contemplated) would delay dialing parity beyond any federal deadline. Indeed, Ordering Paragraph 1 of the decision requires "[l]ocal exchange carriers in California" (including Pacific) to implement dialing parity in accordance with federal law. The FCC Order requires implementation by May 7, 1999 "notwithstanding any date subsequent to May 7, 1999, that may have been ordered by the state commission." (FCC Order, ¶ 7.) Pacific is free, of course, to seek FCC waiver of the May 7 implementation date, and it has in fact done so in its April 2 waiver petition to the FCC. As explained in our decision, this Commission is not free to unilaterally modify the federal deadline.

2. Pacific argues that the Settlement Agreement between it and other telecommunications parties in D.97-04-083 must be rescinded because it contemplated that Pacific would have a long distance affiliate in service when it implemented dialing parity, and that Pacific would pay "liquidated remedies" if it favored its affiliate over other carriers.

The "parity standard" is one of two performance standards for the imposition of liquidated remedies. The other standard provides that Pacific shall pay liquidated remedies for not processing change requests of other carriers within three business days, subject to some exceptions (D.97-04-083, Appendix A, II(D)(1), at 9.) To the extent that the Settlement Agreement requires liquidated remedies if Pacific favors its long distance affiliate, Pacific would be relieved of that risk until such time as the affiliate begins service. No party objects to this reduced risk of liquidated remedies.

More to the point, the principal focus of the Settlement Agreement dealt with Pacific's desire for a "flashcut" implementation of dialing parity (i.e.,

implementation on a simultaneous basis across the state, rather than a phased-in basis) and other parties' desire for performance standards and remedies for Pacific's processing of prescribed interexchange carrier (PIC) change requests. The Settlement Agreement provides: "Pacific Bell agrees to the performance standards and remedies set forth herein only on condition that Pacific Bell is permitted to implement intraLATA presubscription on a flashcut basis." (D.97-04-083, Appendix A, III(A.), at 10.) There is no provision in the Settlement Agreement (indeed, there is no mention) dealing with the timing of Pacific's entry into long distance service.

The Settlement Agreement is not conditioned on the start of Pacific's long distance service, and that intent did not find its way into the Settlement Agreement itself. Pacific and the other settling parties agreed that "they have not relied and do not rely upon any statement, promise or representation by any other party or its counsel, whether oral or written, except as specifically set forth in this Agreement." (D.97-04-083, Appendix A, III(P), at 12.)

Since the Settlement Agreement by its own terms does not rely on Pacific having a long distance affiliate in service when the agreement goes into effect, and since Pacific is not disadvantaged in terms of the risk of liquidated remedies, Pacific's argument that the Settlement Agreement must be rescinded has no merit, and is rejected.

3. Pacific argues that the customer and carrier notification provisions of D.97-04-083 must be revised in view of the FCC Order on implementation of dialing parity.

The Commission's order requires Pacific to notify customers by bill insert 45 days in advance of implementing dialing parity and to provide a direct-mail notice 10 days before implementation. Other carriers are to be notified 45 days in advance of implementation.

We see no reason to change these notice requirements while Pacific is seeking an FCC waiver of the implementation date. However, if the implementation date ultimately required by the FCC does not provide sufficient time for Pacific to give the notices within the prescribed time period, our order today requires that the billing insert be sent in the first available billing cycle before or after implementation, with direct-mail notice 10 days prior to implementation. Pacific should notify other carriers of the implementation date as soon as that date is known to Pacific.

4. Pacific argues that the 45-day moratorium on solicitation of primary interexchange carrier (PIC) freezes should be revised to coincide with the customer notice requirements.

The Commission's order requires that no local exchange carrier shall solicit PIC freezes (that is, a solicitation to block changes in a customer's choice of intraLATA carrier without the customer's personal request) during the period of introduction of dialing parity. The period of introduction is deemed to be 45 days before and 45 days after implementation. (D.97-04-083, Ordering Paragraph 9, at 49.)

We see no reason to revise this requirement. The FCC Order dated March 3, 1999, directed implementation 45 days later (May 7, 1999), and we assume that Pacific has not solicited PIC freezes during that period. If the FCC grants Pacific's waiver of implementation to June 15, 1999, then the no-solicitation rule would apply 45 days before and 45 days after that date.

5. Pacific argues that revised scripts will have to be submitted to the Telecommunications Division for review prior to implementation because existing scripts assume that Pacific will offer long distance service at the same time it offers intraLATA dialing parity.

The Commission in D.97-04-083 required local exchange carriers to provide Commission staff with copies of scripts that will be used by customer service

representatives when handling questions regarding intraLATA presubscription. (D.97-04-083, Ordering Paragraph 14, at 52.) Staff, in turn, was to provide a one-time review and suggest changes to assure the neutrality of the scripts.

By Assigned Commissioner's Ruling dated February 3, 1999, Pacific was directed to submit to our staff draft scripts "that comply with the substantive provisions of Ordering Paragraph 14 of D.97-04-083." (Assigned Commissioner's Ruling, at 3.) We take official notice that the scripts were submitted, our staff has reviewed them, and suggestions for changes have been made to Pacific.

Accordingly, we see no reason to change the script review requirement of D.97-04-083. Obviously, if there is information in the scripts that is incorrect at the time the scripts are put to use, then Pacific should correct that information.

In summary, apart from reinterpreting notice requirements in light of impossibility of performance within particular time limits, we deny Pacific's recommendations for changes in the draft decision that is before us today.

The Small LECs in their comments state that they intend to file implementation plan advice letters on April 22, 1999, in conformance with the FCC Order. They are concerned that the notice requirements of D.97-04-083 may conflict with implementation dates required by the FCC Order. As this decision notes, the FCC has exclusive jurisdiction in setting dialing parity implementation dates after May 7, 1999. To the extent those requirements make it impractical or impossible to comply with this Commission's notice requirements, we will expect Small LECs to propose reasonable alternatives for notice in their advice letter filings.

In response to the comments of the parties, we have made minor changes and corrections in the text of the draft decision where appropriate.

Findings of Fact

1. The Commission in D.97-04-083, issued on April 23, 1997, directed Pacific, among other things, to implement intraLATA dialing parity coincident with its entry into long distance service.

2. The Commission in D.97-04-083 also directed Pacific and other local exchange carriers in California to implement dialing parity in accordance with the requirements of the Telecommunications Act of 1996.

3. Pacific has not yet entered the long distance market, nor has it implemented intraLATA dialing parity.

4. Petitioners on September 8, 1998, moved to modify the order in D.97-04-083 to require Pacific to implement intraLATA dialing parity on the earlier of Pacific's entry into the long distance market or February 8, 1999.

5. ORA filed in support of the petition for modification.

6. Pacific opposes the petition, contending that D.97-04-083 was correctly decided as to the implementation of intraLATA dialing parity.

7. The United States Supreme Court on January 25, 1999, issued a decision that, in effect, establishes that the FCC has primary jurisdiction in addressing the implementation dates for intraLATA dialing parity.

8. In response to the Supreme Court's ruling, the FCC on March 23, 1999, issued an order requiring carriers whose dialing parity plans have been approved by a state commission to implement dialing parity no later than May 7, 1999.

9. Pacific's dialing parity plan was approved by this Commission on April 23, 1997, in D.97-04-083, and remains viable today.

Conclusions of Law

1. Pacific has the duty under Section 251(b)(3) of the Telecommunications Act to provide intraLATA dialing parity in California.

2. The Commission was authorized by Section 271(e)(2)(B) to direct Pacific to implement intraLATA dialing parity no earlier than the date the company is authorized to enter the long distance market or three years after enactment of the Telecommunications Act.

3. The Commission in D.97-04-083 required intraLATA dialing parity by Pacific coincident with its entry into long distance service.

4. The Commission in D.97-04-083 directed local exchange carriers to implement dialing parity in accordance with the requirements of the Telecommunications Act of 1996.

5. The FCC has primary jurisdiction in addressing dialing parity under Section 251(b)(3) of the Telecommunications Act.

6. Pacific should comply promptly with the directions of the FCC and with this Commission's requirements in D.97-04-083 in implementing intraLATA dialing parity.

7. The petition for modification of D.97-04-083 seeks relief that is either moot or is beyond the authority of this Commission to grant.

8. The petition for modification of D.97-04-083 should be denied.

9. This order should be made effective immediately in order promptly to provide benefits of intraLATA dialing parity to Pacific subscribers.

ORDER

IT IS ORDERED that:

1. The Petition to Modify Decision 97-04-083 is denied.

2. Pacific Bell is directed to comply with the Federal Communications Commission (FCC) order dated March 23, 1999, as such order may be modified by the FCC or appropriate court order, in implementing dialing parity.

3. Pacific Bell is directed to comply with the equal access, consumer notice and other requirements of this Commission in Decision 97-04-083; provided that, if the requirement for consumer notice 45 days prior to implementation cannot be met, Pacific is directed to provide such notice in the first available billing cycle prior to or after implementation of dialing parity, with direct mail notice 10 days prior to implementation.

This intraLocal Access and Transport Area Presubscription Phase of this proceeding is closed; Investigation 87-11-033 remains open to address other issues.

This order is effective today.

Dated April 22, 1999, at San Francisco, California.

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