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Decision 99-04-072 April 22, 1999

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.	Rulemaking 95-04-043 (Filed April 26, 1995)
Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service.	Investigation 95-04-044 (Filed April 26, 1995)

ORDER GRANTING LIMITED REHEARING AND MODIFYING DECISION 97-08-059

I. INTRODUCTION

In Decision (D.) 97-08-059 the Commission addressed several outstanding issues concerning competitive retail telecommunications services offered by Pacific Bell (Pacific) and GTE California Incorporated. (GTEC), which had been designated for resolution in Phase III of that proceeding. The decision addressed (1) the additional retail services to be offered for resale to competitive local exchange carriers (CLCs); (2) what restrictions on the resale of services are appropriate; and (3) the extent to which wholesale discounts should apply to services subject to resale.

Several parties filed applications for rehearing of D.97-08-059. In November, 1997, we issued a decision which granted limited rehearing on the issue raised in Pacific's application for rehearing (filed jointly with Pacific Bell Information Services) regarding the requirement that voicemail services be offered for resale. We deferred ruling on the remaining applications for rehearing filed by

MFS Intelnet of California Inc. (MFS), AT&T Communications of California, Inc. (AT&T) and MCI Telecommunications Corp. (MCI) (filed jointly), and Business Telemanagement Inc. (BTI) and Frontier Telemanagement Inc. (Frontier) (filed jointly). Responses were filed by the Office of Ratepayer Advocates (ORA), Pacific, GTEC, and Telecommunications Resellers Association (TRA). This order accordingly addresses issues raised in the remaining applications for rehearing.

Common to all applications is the allegation of legal error in the Commission's decision allowing incumbent local exchange carriers (ILECs) to continue to prohibit CLCs from qualifying for volume discounts based on aggregating the traffic volume of multiple small users. MFS and BTI/Frontier further allege that limiting the resale of Centrex and CentraNet Services as a business system to single businesses is unjustified and discriminatory. MCI and AT&T further allege that the Commission's finding that an alternative supply of inside wire services is readily available to CLCs is factual error. MCI/AT&T also urge the Commission to expressly order that promotions of less than ninety days duration be subject to resale at the promotional rate.

II. DISCUSSION

TOLL AGGREGATION RESTRICTION

In D.97-08-059, the Commission considered the basis for continuing restrictions prohibiting end user aggregation originally adopted in D.96-03-020. The Commission provided the ILECs an opportunity in Phase III comments to seek to justify any resale restrictions which they believed were necessary. When the FCC issued its First Report and Order in its Local Competition Proceeding[1] (Local Competition Order or FCC Order), the assigned ALJ solicited another round of comments from the parties regarding what changes might be necessary to

[1] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Interconnection between Local Exchange Carriers and Commercial Radio Service Providers, CC Docket No. 95-185, First Report and Order, FCC 96-235 (rel. August 8, 1996).

conform the Commission's resale rules to those of the FCC Order. GTEC argued that the rebuttable presumption established in the FCC Order did not impose a strict burden of proof on the ILEC, but merely a showing by a preponderance of evidence that the proposed resale restriction is reasonable and nondiscriminatory. GTEC claimed it had already met this burden and urged the Commission to retain those restrictions imposed in D.96-03-020. Regarding the toll aggregation restriction, GTEC stated that CLCs should be restricted from purchasing any services with volume discounts. In its comments, Pacific set forth several reasons why CLC resellers should not be permitted to qualify for volume discounts by aggregating the calling volume of multiple end users (see D.97-08-059, pp. 46-50). Based on the comments put forth by Pacific, we determined that the resale restriction on end-user aggregation for volume discounts was adequately justified and we retained the restriction.

Central to all the applications for rehearing is the allegation that nothing in the record before the Commission meets the ILECs' heavy burden to demonstrate that any restriction imposed on the resale of services is reasonable, necessary, nondiscriminatory and narrowly tailored, as is required by FCC regulations. Specifically, MFS argues that the Commission's concern for "parity" between wholesale and retail offerings does not provide a basis for overcoming the strong presumption against this particular resale restriction. Similarly, MFS claims that the Commission's reliance on the possibility that the ILECs would withdraw all volume discount plans is also not supported by the record. The restriction also discriminates between multi-location large end users and resellers serving multi-locations, according to MFS. ORA filed a response supporting MFS Intelenet's arguments on this issue.

BTI/Frontier argue that the restriction on toll aggregation is not "reasonable" in light of the purposes of the Act. According to BTI/Frontier,

preventing resellers from qualifying for bulk discounts based on aggregate usage levels will preclude resellers from offering any variations in the pricing of telecommunications services. Resellers will be locked into selling their services at virtually the same retail prices as are offered by the ILECs and will not be able to offer their subscribers any innovations in discount plans or packages. Thus, BTI/Frontier argue, end users will get the same prices from resellers as they currently get from ILECs and will ultimately be denied the benefits of competition.

MCI and AT&T argue that the Commission disregarded the lynchpin showing that the ILECs must make to rebut the presumption that any restriction on the aggregation of CLEC end user volumes for the purpose of qualifying for ILEC retail volume discount plans is unreasonable. MCI/AT&T argue that the critical burden that the ILECs must bear to rebut a presumption of unreasonableness is to show that such a restriction is based on a difference in the cost or avoided cost of providing the service at retail to its end users versus at wholesale to resellers. According to MCI/AT&T, discrimination which is not cost-based is unreasonable, unless it is supported by some overriding social or public policy. Even if the ILECs were to prove a difference in cost, it would not justify an outright proscription against resale, but only a difference in the avoided cost discount. MCI/AT&T argue that the Commission provides no valid overriding public policy to support the discriminatory treatment. TRA filed a response urging the Commission to grant rehearing on the toll aggregation limitations as requested by AT&T and MCI.

Pacific filed a response to the applications for rehearing arguing that the toll aggregation restriction is perfectly consistent with the Act. Pacific argues that the restriction is compelled by the language of the Act which requires Pacific to "offer for resale at wholesale rates any telecommunications service that the

carrier provides at retail..." (Pacific Application for Rehearing, p. 3, citing §251(c)(4)(A).)[2]

We find that the applications for rehearing have merit to the extent that they argue the ILECs have not met their burden of proving that the resale restrictions are reasonable and nondiscriminatory under the Act and relevant FCC regulations. Since the filing of these applications for rehearing we note that there have been recent developments in the law relevant to the resolution of this issue, as explained below.

The toll aggregation issue was decided by the Commission in the AT&T/Pacific Bell arbitration proceeding (A.96-08-040). In that proceeding, the Arbitrator's Report found that § 251(c)(4) of the Act and the FCC's implementing regulations 47 C.F.R. 51.613(b) required that CLCs be allowed to aggregate the volumes of its end users to qualify for ILEC volume discount plans. In D.96-12-034 (the decision adopting the interconnection agreement between AT&T and Pacific), the Commission reversed the holding of the arbitrator and imposed the restriction prohibiting toll aggregation for the purposes of qualifying for volume discount plans. That decision was appealed to the U.S. District Court, Northern District of California.[3] Three later decisions issued by the Commission in the MCI/Pacific, MCI/GTE, and AT&T/GTE arbitration proceedings, in which the Commission imposed the toll aggregation restriction based on its reasoning in the AT&T/Pacific agreement, were also appealed to the U.S. District Court.[4]

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2 All statutory references are to the 1996 Telecommunications Act, unless otherwise stated.

3 AT&T Communications of California, Inc. v. Pacific Bell, Case No. C-97-0670 SI. The District Court issued an Order in this case on May 11, 1998.

4 MCI Telecommunications Corp., et al. v. Pacific Bell, et al., Case No. C-97-0670 SI; GTE California Inc. v. AT&T Communications of California, et al., Case No. C-97-1756 SI; GTE California Inc. v. MCI Telecommunications Corp., et al., Case No. C-97-1757 SI. The District Court issued an Order in these cases on September 29, 1998.

In challenging the AT&T/Pacific decision, AT&T argued that the Commission failed to address the FCC's "presumptively unreasonable" standard set forth in ¶953 of the Local Competition Order, and that Pacific did not make the requisite showing to overcome the FCC's presumption. The court found that the FCC's Local Competition Order was enforceable and binding on the Commission and that the Commission applied the incorrect standard when deciding the reasonableness of resale restrictions. The court noted that the Commission did not address the FCC's presumptively unreasonable standard, and focused instead only on whether the restriction was reasonable and nondiscriminatory.

The court further reasoned that even if the Commission did not ignore ¶953, it did not apply ¶953 correctly as the Commission never specifically found that Pacific had rebutted the presumption of unreasonableness set forth in ¶953. Additionally, the court found that the Commission misapplied the standard as two of the arguments the Commission relied on to support its position were considered by the FCC in connection with its Local Competition proceeding, and the FCC nevertheless determined that the restriction was presumptively unreasonable. The third rationale, existence of a prior decision, was declared an invalid basis for overcoming the presumption. In the AT&T v. Pacific case, the court vacated the Commission's decision and reinstated the arbitrator's report. In the latter three cases, the court relied on its rationale in the AT&T v. Pacific case and similarly overturned the Commission's decisions imposing restrictions prohibiting toll aggregation.

However, because the FCC regulations recognize that there are situations in which incumbents can successfully rebut the presumption of unreasonableness that attaches to aggregation restrictions on resale, the court invited GTEC and Pacific to seek modification from the Commission by presenting such evidence to be evaluated in accordance with ¶953 of the FCC's

Local Competition Order. Pacific subsequently filed a Petition to Modify D.96-12-034, in which it asks the Commission to retain the aggregation restriction based on our decision in D.97-08-059. Alternatively, Pacific has requested an opportunity to present additional evidence, including cost avoidance studies, to rebut the presumption of unreasonableness regarding its volume discount plans as contemplated by the court's Order. That petition is still pending.

We find the District Court's analysis helpful in evaluating whether we appropriately applied the standard set forth in ¶953 of the FCC's Order. In light of the District Court's analysis, we find that we did not make the appropriate findings addressing the rebuttable presumption in accordance with ¶953. While the decision notes generally that resale restrictions are presumptively unreasonable under ¶939 of the FCC's Local Competition Order, it never addresses the specific language of ¶953 concerning restrictions on end user toll aggregation. Nor is there any specific finding in the Decision that Pacific, or GTEC, had rebutted the presumption of unreasonableness set forth in ¶953.

We also find that the reasons relied upon in the Decision are insufficient to meet the standard for retaining the toll aggregation restriction as set forth in the Act and the FCC's Local Competition Order. In order to retain this restriction, ILECs must overcome a presumption of unreasonableness and demonstrate that the restriction is both reasonable and nondiscriminatory. In its Local Competition Order, the FCC discusses the meaning of the term "discrimination" as used in the 1996 Act, including its use in § 251(c)(4) which requires that in making resale available, carriers not impose "discriminatory conditions or limitations on resale." The FCC concluded that the term "nondiscriminatory" as used in the 1996 Act must be interpreted to have a more stringent standard than merely "unjust and unreasonable discrimination." (FCC Local Competition Order ¶859.) The FCC further stated that "State regulations

permitting non-cost based discriminatory treatment are prohibited by the 1996 Act." (Id. at ¶862.) Thus, conditions or limitations placed on resale of telecommunications services based not on cost differences but on "such considerations as competitive relationships, the technology used by the requesting carrier, the nature of the service the requesting carrier provides, or other factors not reflecting costs...would be discriminatory and not permissible under the new standard." (Id. at ¶861.)

Further guidance on appropriate justifications which may support a finding that a resale restriction is reasonable and nondiscriminatory is found in the FCC's discussion in a recent case on toll aggregation restrictions on the resale of Contract Service Agreements (CSA) volume minimums:

> "...the Commission determined in the Local Competition First Report and Order that the matter of resale restrictions attached to promotions and discounts is best left to state commissions. The Commission created an exception to this determination, however, by concluding that it is presumptively unreasonable for incumbent ILECs to require individual customers of a reseller to comply with incumbent LEC high-volume discount minimum usage requirements so long as the reseller, in aggregate, under the relevant tariff, meets the minimal level of demand. [Footnote omitted.] Thus, a CSA resale restriction simply forbidding volume aggregation, without economic justification, is presumptively unreasonable. There may be, however, reasonable and non-discriminatory economic justifications for certain narrowly-tailored volume aggregation restrictions such as, for example, geographic limitations on the location of lines, when economically relevant. [Footnote omitted.] These would constitute exceptions to our conclusion regarding volume aggregation." In re Application of BellSouth Corporation, et al., for Provision of In-Region, InterLATA Services in Louisiana, Docket No. 98-121, Memorandum Opinion and Order, 13 FCC

Rcd 20599, 1998 FCC LEXIS 5298, at *188-189 (1998).

While this case is not binding on this Commission, it does provide guidance in interpreting and applying ¶953 of the FCC's Local Competition Order, which is binding on this Commission. In light of the above discussion, we find that we did not correctly apply the standard set forth in ¶953 of the Local Competition Order. We will grant rehearing to allow GTEC and Pacific the opportunity to present additional evidence to rebut the presumption of unreasonableness regarding the retention of the toll aggregation restriction as set forth in ¶953. In doing so, we note that in its May 11th, 1998 and September 29th, 1998 Orders, the District Court specifically invited Pacific and GTEC to present evidence to the Commission for proper evaluation under ¶953 of the FCC's Local Competition Order. We note that Pacific has already responded to the court's invitation by filing its Petition to Modify D.96-12-034, and we will deal with that Petition in due course. In the meantime, we will allow Pacific and GTEC the opportunity to present evidence to justify the restriction in accordance with ¶953. Such evidence may include avoided-cost studies, but parties may also present other evidence supporting economic or cost-based justifications for toll aggregation restrictions. We will instruct the ALJ to solicit such evidence through comments with evidentiary hearings to be set if necessary.

RESTRICTIONS ON THE RESALE OF CENTREX AND CENTRANET

In D.96-03-020, we authorized certain interim restrictions on the resale of Centrex and CentraNet, with the proviso that the ILECs would be required to provide justification in Phase III that such restrictions were necessary and nondiscriminatory. In that decision, we determined that Centrex and CentraNet should be resold only as a business system to a single business and not as a network infrastructure toll aggregation tool. The concern was not with the

aggregation of toll traffic, as an end in itself. Rather, these restrictions were established due to the concern that allowing the aggregation of toll traffic through Centrex would undermine the federal law on presubscription timing.[5]

In D.97-08-059, we concluded that Centrex toll aggregation at the retail level did not constitute presubscription, and that the removal of the Centrex restriction on the use of FRS for toll aggregation would not amount to the premature implementation of presubscription. As such, we found no basis to continue the Centrex/CentraNet toll aggregation restriction for resellers based on this claim. Nonetheless, we found it appropriate to retain the restriction which limits Centrex resale to single businesses, and further declared our "intent that CLCs, themselves, not use the Centrex or CentraNet toll aggregation feature to qualify for volume discounts which are only available to end-user customers." (D.97-08-059, p. 64.)

MFS and BTI/Frontier argue that limiting the resale of Centrex as a business system to single businesses is unjustified and discriminatory. Both MFS and BTI/Frontier specifically argue that there is nothing in the decision that explains the reason for allowing such a restriction, nor is there any basis in the record supporting the Commission's determination to retain this restriction.

We find that the applications have merit. It was Pacific and GTEC's burden to prove that these restrictions were necessary, reasonable, and nondiscriminatory. A review of Pacific and GTEC's April and October comments reveal only that Pacific argued to retain the restriction based on its concern that toll aggregation would undermine the federal law on presubscription timing. As

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[5] Section 271(e)(2)(B) prohibits states from ordering a Bell operating company to implement intraLATA toll dialing parity before it has been granted authority to provide interLATA services. In D.95-05-020, the Commission defined presubscription "as a process which allows an end-user served by a central office to select an IXC to automatically provide interLATA or intraLATA communications."

mentioned above, we did not find this a valid basis for retaining the restriction.[6] The only other arguments offered by Pacific for retaining these restrictions were that their removal would result in a "significant negative effect on revenues" and would undermine subsidies used to support Universal Service. However, as we correctly noted in the decision, "the protection of the incumbent ILEC's market share against competition is not a proper justification for a resale restriction." (D.97-08-059, p. 65.) Moreover, the Commission noted that a Universal Service funding mechanism was set up in D.96-10-066 which is designed to ensure universal service is not jeopardized with the introduction of competition in the local exchange.

We accordingly grant rehearing on this issue as well. For the same reasons explained above regarding the toll aggregation restriction on volume discounts, we will allow the parties to present additional evidence to justify the retention of this restriction on the resale of Centrex and CentraNet.

INSIDE WIRE SERVICES

AT&T/MCI allege that the Commission's decision to deny CLCs the right to resell ILEC inside wire installation and maintenance is grounded on factual error and is accordingly arbitrary and capricious. AT&T/MCI dispute the Commission's finding that an independent source of vendors for inside wire installation and maintenance is available to CLCs, such that CLCs confront no substantial barriers to entry in the local exchange and inside wire services market. In their application for rehearing, AT&T/MCI allege that they "have found that while certified electricians qualified to install and maintain inside wire are

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6 Moreover, in the case of GTEC's CentraNet, the presubscription argument has no relevance, since GTEC is not a Bell Operating Company and is unaffected by the presubscription timing provisions in the Act. The Commission found that Pacific's claims regarding presubscription offer no basis to restrict resale of GTEC's CentraNet with respect to aggregation of toll traffic for routing to an alternative carrier.

available, they are unwilling to stand ready to provide inside wire services to consumers without a commitment of a substantial volume of business within a limited geographic scope." (AT&T/MCI Application for Rehearing, at 12.) TRA's response also alleges that failure to require ILECs to resell inside wire services will significantly impair the competitive position of many smaller carriers and "will thwart the Commission's purposes in authorizing local resale competition." (TRA Application for Rehearing, at 4.)

These arguments fail to establish legal error with respect to the Commission's determination that Pacific and GTEC are not required to resell their service plans or maintenance services. Nothing in the Act or FCC regulations impose a duty on ILECs to resell inside wire maintenance plans or services. While we have sufficient authority pursuant to state law to require that inside wire plans be offered for resale, we found no compelling basis to require the ILECs to offer their inside wire services for resale to the CLCs as long as there are independent vendors available to CLCs who can provide this service. We found that inside wire maintenance and repair are services which any certified electrician can replicate and there are relatively low technical barriers to enter this market. MCI and AT&T's allegations to the contrary are unsubstantiated and fail to demonstrate factual error in our finding. Our decision rests on sufficient evidence to reasonably conclude that CLCs confront no substantial barriers to entry in the inside wires services market. As such, we find no legal error on this point and deny MCI/AT&T's application for rehearing on this issue.

RESALE OF PROMOTIONS OF LESS THAN NINETY DAYS

In D.97-08-059 we determined that promotional offerings of the ILECs must also be made available for resale in a manner consistent with the Act. We noted that under the FCC's Local Competition Order, an ILEC shall make available for resale at a discount all promotional offerings except those involving

rates which will be in effect for 90 days or less. We further noted that the FCC established a presumption that promotional prices offered for a period of 90 days or less need not be offered at a wholesale discount to resellers. Accordingly, we determined that the avoided-cost discount rate shall be applied to the promotional retail rate (as opposed to the ordinary rate) for all such plans exceeding 90 days. (D.97-08-059, p. 22.)99

However, the decision is silent as to whether promotions of less than 90 days should be available for resale, and if so, whether they should be offered at the promotional rate or at the wholesale discount rate. AT&T/MCI argue that the "proper interpretation" of D.97-08-059 requires resale of promotions of less than 90 days duration at the special promotional rate, and not with a wholesale discount. AT&T/MCI urge the Commission to clarify this point and expressly order that ILEC promotions of less than 90 days duration are subject to resale at the promotional rate. In its response, Pacific argues that the FCC held that short-term promotions are not offered at "retail." As such, they are not subject to resale under §251(c)(4) at any price according to Pacific.

We will take this opportunity to clarify our intent regarding the resale of promotions of 90 days or less. It is our intention that ILECs are required to offer promotions of 90 days or less for resale, but at the normal retail (non-promotional) rate less the prescribed wholesale discount, and not at the promotional rate as claimed by MCI/AT&T. We note that this comports with the District Court's interpretation of the FCC's regulations on this issue, as explained in its September 29, 1998 Order. Accordingly, we shall modify the decision to clarify our intent on this matter, and deny AT&T/MCI's request.

Therefore, **IT IS ORDERED** that:

1. The applications for rehearing filed by MFS Intelenet of California, Inc., AT&T Communications of California, Inc. and MCI Telecommunications

Corporation (jointly), and Business Telemanagement Inc. and Frontier Telemanagement Inc. (jointly) are granted for the limited purpose of developing an additional record for the retention of restrictions on the resale of Centrex and CentraNet services, as well as restrictions prohibiting CLCs from aggregating end user toll usage in order to qualify for ILEC volume discount plans. In the time and manner to be determined by the ALJ, the parties may provide comments containing specific allegations of cost-based or economic justifications for the retention of resale restrictions for these services. Parties shall identify in their comments specific evidence to be presented to the Commission in support of their allegations of cost-based or economic justifications for these resale restrictions, for evaluation in accordance with ¶953 of the FCC's Local Competition Order. Such evidence may include, but is not limited to, avoided-cost studies. Parties may also include in these comments their views as to whether any evidentiary hearings are required to resolve the issues discussed above. Based on the comments received, the Commission will determine whether further proceedings are necessary.

2. MCI/AT&T's application for rehearing of the Commission's determination that an alternative supply of inside wire services is readily available to CLCs so as not to present a substantial barrier to the inside wire services market is denied.

3. MCI/AT&T's request that we modify Decision 97-08-059 to require promotional offerings of 90 days or less be available for resale at the promotional rate is denied.

4. Decision 97-08-059 shall be modified as followed:

   a. At the end of the paragraph which begins at page 21 and ends at page 22 of the decision, shall be inserted the following sentence: "Promotional offerings of 90 days or less shall be made available for resale at the ordinary (non-promotional) retail rate, less the prescribed wholesale discount."

b. The following Finding of Fact shall be inserted after Finding of Fact No. 10: "Under the Act, LEC promotional offerings of 90 days or less are to be offered for resale at the LEC ordinary retail (non-promotional) rate less the prescribed wholesale discount."

This order is effective today.

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

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