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Decision 99-08-026 August 5, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

California Telecommunications Coalition, First World Communications, Inc., The Utility Reform Network, and AT&T Communications of California, Inc., for rehearing of Resolution T-16191 granting Request of Pacific Bell to introduce a new product, asymmetrical digital subscriber line (ADSL) service.	A.98-10-024 (Filed October 19, 1998)

ORDER GRANTING LIMITED REHEARING OF RESOLUTION T-16191, MODIFYING THE RESOLUTION AND DENYING REHEARING OF THE RESOLUTION AS MODIFIED

I. SUMMARY

In Resolution T-16191, the Commission granted provisional approval to Pacific to provide Asymmetrical Digital Subscriber Line Service (ADSL) as a Category III service, subject to intrastate tariffs. The service is an access data technology that permits simultaneous data and voice transmission using the same local exchange service loop. This is done by placing an ADSL modem at each end of the customer's local exchange loop. One modem or Digital Subscriber Line Access Multiplexer (DSLAM) is located in the local exchange customer's serving wire center and the other is located at the customer's premises. The ADSL modem located at the local exchange customer's location is provided by the customer and must be compatible with the DSLAM located in the central office. The combined ADSL modem creates three information channels. One channel is used for traditional voice-grade, circuit-switched application while the

other two channels are used for high-speed data communications. ADSL supports data rates of from 384 Kbps to 1.544 Mbps when receiving data (downstream rate) and from 128 Kbps to 384 Kbps when sending data (upstream rate). In order to subscribe to this service, customers must also have Pacific Bell as their underlying carrier for basic phone service. ADSL arrangements are available in three options and are based on "downstream" and "upstream" speed combinations chosen by the customer.

The Resolution specifically provided that the ADSL service would remain provisional until such time as all issues raised by the protests were resolved and any changes deemed appropriate by the Commission were reflected. The Resolution noted that most of the issues raised in the protests were currently under review in various other proceedings, and directed Pacific to file another application to request to change its ADSL provisional offering to a permanent offering. The Commission further invited protestants to the present Advice Letter to file protests and comments to the subsequent application to address their respective concerns.

II. DISCUSSION

The protests to the Advice Letter and the Application for Rehearing have a common theme: the Commission erred in approving the Advice Letter and granting Category III treatment to the proposed service without first granting protestants' discovery requests. The protestants sought (and Pacific refused) information relating to cost data in support of Pacific's assertion that the proposed service met the requirements for Category III treatment. Pacific is correct that it is not required to provide cost data to its competitors for a Category III service because of its highly competitive nature. However, the question here is whether Pacific should be required to provide cost and other data to support its assertion that a service should be accorded Category III service in the first instance.

This issue is settled here by holding that discovery will not be permitted to determine Category III status in an advice letter filing. The principle function of the advice letter procedure is to provide speed and efficiency in processing ordinarily routine tariff filings by the utilities, in contrast to the sometimes cumbersome formal application procedure, which can take months or years to complete. This is one of the reasons why the discovery procedures allowed in formal procedures are not normally permitted in advice letter filings. Here, Pacific has filed a request to offer a new service, which is already being offered by its competitors, some of which are not subject to the type of regulation that is imposed on Pacific. The record indicates that the competition to offer the service is sufficient to justify its placement in Category III. Further, the parties, including Pacific, have the option of offering an identical interstate service under a similar tariff through the FCC. Finally, on the matter of competition, the files and records of the Commission indicate that Pacific has not signed up a single customer for this service since its Advice Letter was approved on September 17, 1998. Pacific has therefore apparently not used its dominant position in the California telecommunications industry to stifle competition for ADSL service by means of this tariff offering.

The Coalition argues generally that its due process rights were violated by the lack of discovery availability. However, the Coalition cites no authority for the proposition that a party has a constitutional right to discovery in an administrative proceeding. In fact, the opposite would appear to be the case. In a long line of cases set out in 2 Am. Jur. 2d, Administrative Law § 327 et seq., mainly involving the N.L.R.B., the Federal Courts have held that there is no constitutional right to discovery in administrative proceedings. See Kenrich v N.L.R.B. (1990) 893 F.2d 1468, cert. den., 498 U.S. 981 and Frilette v. Kimberlin (1975) 508 F.2d 205, cert. den., 421 U.S. 980. Further, any right to discovery is

grounded in the rules of the particular agency. N.L.R.B. v. Interboro (1970) 432 F.2d 854, cert. den., 402 U.S. 915.

Nor is there any authority in California granting a right to discovery in this kind of administrative proceeding. California Government Code Sections 11,500, et seq., which apply to numerous administrative agencies, but not this Commission, do provide for limited discovery rights related to disciplinary proceedings. However, Section 11,507.6 limits those rights to proceedings "in which a respondent or other party is entitled to a hearing on the merits..." (Emphasis added). So even if the statute were applicable to this Commission, it would not apply to an advice letter filing, where there is no right to a traditional hearing on the merits.

The Coalition next argues that the Commission erred in granting Category III treatment to Pacific's proposed offering without the requisite findings of fact and conclusions of law to support Category III treatment. We agree that the Coalition has identified legal error with respect to the issue of adequacy of findings of fact. We also find that the record in this proceeding is sufficient to supply the necessary factual findings. The Resolution is therefore modified by adding findings of fact at the end of this decision.

The Coalition's core argument appears to be that, in the absence of the requested cost information sought by Applicants, the Resolution may allow Pacific to stifle competition for the service by offering it below cost through cross-subsidization by other bundled services, and by failing to impute certain costs to the offering of the service. (Application, Page 8.)

It is well-settled that the Commission is required to address the issue of industry competition in its decisions. Northern California Power Agency v. Public Utilities Com. (1971) 5 Cal.3d 370. The issue of competition is squarely addressed in the Resolution itself. In the first paragraph the Resolution states:

> "Pacific is reminded that it should not price its service in an anti-competitive manner. We will monitor Pacific's prices to detect any anti-competitive below cost pricing."

The Resolution goes on to point out the ADSL service will remain provisional until such time as all issues raised by protestants are resolved, which include those related to competition. The Resolution further specifically invites protestants to renew their objections to the tariff when Pacific files its formal application to provide this service at a later date. As pointed out above, there is no evidence before the Commission at this time that Pacific is attempting to stifle competition. However, should applicants find themselves the victims of unfair competition, they have the remedy of protesting Pacific's G.O. 96-A filing as ordered by the Resolution. Rehearing should therefore be denied on the issue of competition.

The Coalition further argues, beginning at page 5 of their Application, that Pacific has not complied with the imputation, bundling, and discriminatory access provisions of D.89-10-031 and that the Resolution did not contain the requisite findings of fact on these issues.

Specifically, the Coalition argues that its members face a price squeeze because the cost of loops, collocation and transport charged them by Pacific almost equal the provisionally adopted Pacific rate of $59.00 before taking into account the xDSL provider's own costs that must be added into the charge for their own customers. (Application, page 7). They urge that a proper application of the imputation rule requires that "at least a part of the price", including a portion of the cost of the underlying loop and any "contribution" above Pacific's cost of an unbundled loop, be imputed into Pacific's retail price for retail service.

With regard to price, it is important to note that Pacific's California tariffed intrastate ADSL service price of $59.00 is approximately $20.00 per

month more than an almost identical interstate service offered through the FCC. We also note that no customers have signed up for the intrastate service.

The Resolution specifically addressed the Applicant's concerns at page 7, quoting from Pacific's response to the protests:

> "3. Pacific appropriately calculated its ADSL costs based on TSLRIC, has properly applied imputation requirements and appropriately priced its ADSL service. Pacific states that it in fact has calculated the contribution attributable to the copper loop and other elements over which the ADSL service rides, and priced our ADSL product to ensure that we recover any contribution attributable to such elements.
>
> 4. There is no improper cross subsidization with Pacific's ADSL service and there is no subsidization of ADSL by USF. Pacific contends that "USF" is designed to cover local exchange costs in rural areas. If funding is provided on a line that also carries ADSL service, the ADSL service is not subsidized, in the same way that toll or vertical services carried on that line are not being subsidized by USF funding.
>
> 5. Pacific is not improperly bundling the voice loop with ADSL service. Citing D.96-03-020, Pacific argues that the Commission has expressly permitted bundling of Category II and Category III services. Further, since basic exchange service is available separately and distinctly from a subscription to ADSL and the two services are separately priced, they are not improperly bundled.
>
> 6. The protests inappropriately attempt to raise allocation in the context of Pacific's ADSL filing. Pacific states in its response that "collocation is already being addressed by the Commission in other forums, including Pacific's 271 Application and the attendant workshops and two arbitration demands made pursuant to interconnection agreements". Pacific also clarifies that physical collocation is available in all but 4 of the

> offices where Pacific is deploying ADSL and virtual collocation is available in all Pacific's central offices."
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> 7. The issues of jurisdiction over Internet related communications is under consideration in two CPUC complaint cases, in the CPUC's local competition proceeding, and at the FCC. Pacific indicates that these issues are being addressed in other forums in which all interested parties are allowed to participate. Pacific states that its ADSL tariff is drafted to neutrally apply to any intrastate applications and the proposed tariff will support whichever interpretation of Internet jurisdiction prevails in the respective proceedings."

In its Opposition to the Application for Rehearing, Pacific points out that the Commission has previously recognized that with regard to new services "Pacific has no inherent market dominance stemming from past monopoly status." D.89-10-031 (1989) 33 CPUC 2d 145. In fact, Pacific faces competition in the ADSL market from "Cable Modem Service Providers, Interexchange Carriers, Fiber-Based CLEC's, ISPs, On-Line Service Providers and other CLECs. Competing technologies include ISDN, DSL, wireless data and cable modems." (Opposition, page 9.)

Pacific concedes that it is required by D.89-10-031 to comply with the principles of unbundling, nondiscriminatory access and imputation, pending termination of the OANAD proceeding, D.94-09-065, which will establish principles for all imputation and costing. Pacific argues that it has complied with the imputation requirements of IRD, D.94-09-065, mimeo, at pp. 212-220, which, according to Pacific, is "derived by accounting for the contribution from the elements the competitor buys, plus the costs of the LEC's offering." (Opposition, page 11).

With regard to the allegation that Pacific has failed to impute the cost of "bottleneck inputs", Pacific states:

> "we do not believe there is a requirement for imputation of the copper voice loop costs over which ADSL is provided. We do not believe there is a requirement to impute the unbundled loop because, in our proposed ADSL offering, the customer purchases the basic exchange service, of which the loop is a component pursuant to Commission – approved pricing. Even though we are under no requirement to do so, in an attempt to avoid delay Pacific Bell in fact has calculated the contribution attributable to the cooper loop and other elements over which the ADSL service rides, and priced our ADSL product to ensure that we recover any contribution attributable to such elements." (Opposition, page 11)

Pacific further points out that the whole subject of bottleneck unbundled network elements is already the subject of other pending Commission proceedings, principally the 271 proceeding. (R.93-04-003, I.93-04-002, R.95-04-043, I.95-04-044).

Pacific therefore concludes that it has complied with the imputation requirements to prevent a "price squeeze" pursuant to Commission requirements as set out in D.94-09-065, mimeo, page 205, and that the Coalition has disregarded the Commission admonition that:

> "The responsibility for applying these [imputation] tests rests primarily with the LEC, when it ... requests pricing flexibility, and secondarily with CACD, which has the duty of reviewing the LEC's filing. We will attempt to be clear and thorough in our discussion of these tests, so that the LECs will understand how to present their imputation analyses, and CACD will understand how to apply these tests.
>
> If both LECs and CACD clearly understand the imputation tests and how they will be applied, the advice letter review should go smoothly and quickly. The filings that are subject to the imputation review are by definition the LEC's attempt to respond to competitive pressures. We want to complete our

> review as quickly as possible, so that the utility does not suffer a competitive disadvantage because of unnecessary delay or uncertainty created by the Commission. We will not tolerate competitors' misusing our processes to delay the LECs' competitive response to market conditions or opportunities." (D.94-09-065, mimeo, page 207)"

With regard to the argument that the ADSL service constitutes a wrongful bundling, Pacific responded that the Commission has expressly permitted the bundling of Category II and III services in D.96-03-020 and that because the basic exchange service is available separately and distinctly priced from ADSL they are not improperly bundled. Further, the Coalition has offered no evidence that the bundling of services has in any way affected competition in the ADSL market.

The Coalition has not demonstrated any legal or factual error in the Resolution with regard to imputation, bundling, and discriminatory access. Rather, the Telecommunications Division, which was given the responsibility to review and evaluate advice letter filings such as this one pursuant to D.94-09-065, correctly interpreted and applied the previous decisions to Pacific's filing.

Moreover, as discussed further below, the OANAD and 271 Proceedings are the appropriate places to address such issues as nondiscriminatory access to individual bottleneck services. The Resolution itself made it clear that the advice letter process should not be used to prejudge or otherwise derail the orderly deregulation of the telecommunications industry, which has now been underway for ten years. It is simply not possible to reevaluate every aspect of deregulation with each advice letter filing. Rather, such determinations should be left to the appropriate generic proceedings. Finally, as previously pointed out, the Commission's goal is to encourage competition in the industry. The Coalition has

not shown that the approval of this Resolution is in any way antithetical to that goal.

Rehearing should also be denied with respect to the Coalition's argument that the Commission erred in not providing for a wholesale discount rate of 17% for resellers of ADSL service. The Resolution specifically found ADSL is not subject to a wholesale discount because it is a form of special access which the Commission previously determined in D.97-08-076 is not subject to a wholesale discount. (Resolution, Page 9.) Applicants argue that this is inconsistent with a recent FCC ruling (FCC 98-188, released August 7, 1998) which held that ADSL services are "advanced services" which must be offered to carriers at wholesale rates. (Application, Page 12.) However, as the Commission pointed out in D.97-08-076, while FCC rulings provide "useful guidance" in interpreting intrastate tariffs, they are not controlling. Nor is failure by this Commission to follow those rulings error in authorizing an intrastate service. Moreover, as Pacific points out in its Opposition at page 15, the most recent FCC pronouncement on this issue agrees with the Commission's position that ADSL is a special access service, stating that "We agree that GTE's ADSL is a special access service and like the point-to-point private line service high volume telephone customers purchase for direct access to InterExchange Carriers (IXC's) networks, GTE's ADSL service provides end users with direct access to IXC's to their selected [Internet Service Provider], over a connection that is dedicated to ISP access."[1]

Applicants argue that the Commission erred in failing to provide bottleneck unbundled network elements to the CLECs. These elements include access to copper loops, collocation and Operations Support Systems services, which are necessary to provide competing ADSL service. The Resolution acknowledged this issue, and dealt with it, as with other issues, by deferring its

[1] C. C. Docket No. 98-79, paragraph 25, issued October 30, 1998.

determination to the Section 271 proceeding, while making the present resolution provisional pending the outcome of that proceeding. The Coalition takes the position that the Section 271 proceeding is inadequate to address its issues, pointing out that the Final Staff Report (FSR) found numerous failings in Pacific's provision of collocation, and a number of deficiencies with respect to Pacific's loop provisioning and OSS practices. (Application, Page 15) However, this argument supports the Commission's conclusion that this issue is being considered in the Section 271 proceeding, contrary to one of the Coalition's arguments, and furthermore we believe that the Coalition's concerns can be fully addressed in that proceeding.

Finally, the Coalition alleges that Pacific's failure to provide to the CLECs adequate access to its Spectrum Management Database provides Pacific with an anticompetitive advantage in providing ADSL service. Spectrum Management is the management of loops within bundles or binder groups. Certain services can cause interference with adjacent loops within a bundle. For example, ADSL, a version of xDSL, and xDSL services in general will cause interference with each other if placed adjacent to each other within a bundle or binder group. Pacific possesses the Spectrum Database which provides the inventory of loops and each loop location within these binder groups and can therefore determine where ADSL or xDSL loops can be provided without interference. (Application, page 17.) CLECs do not have access to this database and can only access it though orders from Pacific.

Again, the Section 271 proceeding and formal industry standards committees are currently dealing with this issue. In fact, a member of the Coalition, Northpoint Communications, Inc., has raised this problem in its Comments to the FSR filed in response to the 271 proceedings. (Opposition by Pacific, page 16.) As in the case of the bottleneck issue, above, competition issues

arising from lack of access to Pacific's Spectrum Management Database will be properly dealt with in that proceeding, not here.

III. CONCLUSION

Limited rehearing should be granted to correct the legal error as to the adequacy of the findings, the Resolution should be modified, and rehearing of the Resolution as modified should be denied.

IT IS THEREFORE ORDERED that:

1. Limited rehearing of Resolution T-16191 is granted.

2. The Resolution is modified by adding the following findings of fact:

"5. Pacific is not presently offering ADSL service.

6. The ADSL market is presently being served by other providers.

7. The level of competition in the ADSL market justifies Category III treatment.

8. The Commission's Rules of Practice and Procedure have no provision for discovery in advice letter filings.

9. The parties to Pacific's advice letter filing are not entitled to discovery."

3. Rehearing of Resolution T-16191, as modified, is denied.

4. This proceeding is closed.

This order is effective today.

Dated August 5, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
JOEL Z. HYATT
CARL W. WOOD
Commissioners