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MAIL DATE
10/22/99

Decision 99-10-070 October 21, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application for Rehearing of the California Cable Television Association, AT&T Communications of California, Inc., ICG Telecom Group, Inc. and Time Warner Telecom of California, L.P. Concerning Commission Resolution T-16302	A.99-09-046 (Filed August 30, 1999)

ORDER DENYING REHEARING OF RESOLUTION T-16302

I. SUMMARY

The Resolution approved Pacific's request to offer Integrated Pathway Service (IPS), which is a channelized high capacity service which delivers up to 24 channels of DS-O (64 Kbps) level data and/or exchange voice connecting service as a Category III Service. IPS is a business telecommunications service that provides both voice grade and high-speed data transmission services using a DS-1 digital loop. It provides the functionalities of two existing Category II services, namely Hi-Cap data service and 1-MB in a single high-speed digital facility. Using special equipment on the customer's premises, a DS-1 circuit's available 1.544 Mbps bandwidth is divided into 24 DS-O channels of 64 Kbps bandwidth each. IPS allows a customer to decide how many of the 24 DS-O channels will be utilized in total. The customer also is not required to use all of the bandwidth available on a DS-1 circuit, and may also decide how to divide the utilized DS-1 bandwidth between voice and/or data transmission by assigning each utilized DS-O channel for data or voice transmission.

Pacific filed its Advice Letter 19804 on November 3, 1998. Protests were received from The California Cable Television Association, Time Warner Telecom of California, L.P., AT&T Communications of California, Inc., and ICG Telecom Group, Inc. on November 30, 1998. Comments were also received from the parties on the two Draft Alternate Resolutions. In addition, on September 27, 1999, CCTA filed a motion to file a reply to Pacific's Opposition to the Application for Rehearing. There is no provision in the Commission's Rules of Practice and Procedure allowing or disallowing such a filing, although they are ordinarily rejected. The reason is that pleadings must be cut off at some point, or they may go on endlessly. Applicants cite no compelling reason for consideration of their additional filing, other than to reiterate the argument that Pacific failed to provide them with costing and related information. This matter has already been decided and the motion should therefore be denied.

II. DISCUSSION

The Applicants first argue that the Resolution mischaracterizes IPS as a new service, whereas Applicants contend it is merely a repackaging and repricing of several existing Category II services, in violation of D.89-10-031, which defines a new service at page 14 as follows:

> "...an offering which customers perceive as a new service and which has a combination of technology, access, features, or functions that distinguishes it from existing services. We note that both D.88-12-091 and D.87-07-017 specify that repricing or repackaging an existing service is not considered a new service."

Applicants made the identical argument in their Protests to the Advice Letter and in their Comments to the Draft Alternate Resolution, which the Commission squarely addressed in the adopted Resolution. At page 4, the Commission stated:

> "After considering the service description of the proposed IPS service, we do not believe as argued by

> Protestants that IPS is actually a bundling of Category II services. Although the proposed IPS provides simultaneous transmission of both voice and data, it is not a bundling of existing data and voice services. Rather, it is a new service that offers consumers the convenience and efficiency of using a single facility for both voice and data functions instead of ordering separate services for each function. More importantly, IPS provides consumers with an economic alternative to the existing services. For these reasons, we believe Category III treatment for Pacific's IPS service is appropriate and we shall authorize it."

Further, in responding to CCTA's Comments on the Alternate Resolution, the Commission stated, at page 5 of the Resolution:

> "With regard to CCTA's second argument, the Commission has already ruled previously in D.90-11-029. In that Decision, the Commission defines new service as 'an offering which customers perceive as a new service and which has a combination of technology, access, features, or functions that distinguishes it from any existing services.' Under this new service definition, Pacific's proposed IPS could certainly be considered as a new service since it uses new technology to allow the convenience and efficiency of using a single facility for both voice and data functions and provides an economic alternative to existing services."

The record in this proceeding demonstrates that the information provided to the Telecommunications Division (TD) by Pacific supports the Commission's conclusion that IPS is a Category III Service. The following is an excerpt:

> "Integrated pathway is a new and distinct service. It provides the end user with a digital signal between the central office and the demarcation point, with a DS1 handoff, that can be used for either voice or data. It is distinguished from existing Pacific Bell services in that it provides (1) a fully digital loop for voice service and (2) the end user with the ability and flexibility to configure the channels of that DS1 in a number of ways. These are capabilities currently offered by competitors.

> Integrated Pathway is not provisioned in the same manner as existing voice and data services. Current business voice grade service is handed off to the end user as an analog signal through a DSO interface on a dedicated pair of copper wire. Although the technology used for some portion of the loop may be digital, voice grade service is an analog service. Current data access requires a dedicated copper pair for services such as switched 56 and ISDN, a data over voice technology such as DSL that rides an existing copper pair, or a dedicated DS1." (Opposition of Pacific to Application for Rehearing at page 3).[1]

It is clear from the above that the record fully supports the Commission's conclusion that IPS is indeed a Category III Service using any of the previous Commission definitions of the term. Applicants' argument is therefore without merit.

Applicants next argue that the Resolution is in error because Pacific failed to make an adequate market showing to warrant Category III treatment. Again, this precise issue was previously raised by Applicants and addressed in the Resolution at page 5:

> "As to CCTA's first argument that this alternate has committed material legal error by failing to provide proper market power analysis pursuant to the requirements of D.90-04-031, CCTA should be reminded of the fact that staff of the Telecommunications Division has performed extensive analysis of cost and market data submitted by Pacific for its proposed IPS. Based on TD's analysis, we conclude that, first, Pacific does not presently have any market share in the market for simultaneous voice and data transmission service that IPS will provide. As the Commission previously recognized in D.89-10-031 with regard to new services that "Pacific has no inherent market dominance stemming from past monopoly status." Second, there are presently a number of competitive IPS-type services provided by

[1] We grant Pacific's motion to file its Opposition to the Application for Rehearing one day late.

> AT&T, MCIWorldCom, and Sprint within Pacific's service areas. Third, under the definition of new service established by D.90-11-029, Pacific's IPS fully qualifies as a new service distinguishable from any one existing service. For all of the above reasons, Pacific's IPS should be granted Category III treatment as a new service."

The above quotation makes it clear that the data submitted to TD was sufficient for the Commission to conclude that Pacific currently has virtually no market share in IPS and that there are many alternate competitive offerings available to consumers. As Pacific points out in its Opposition at page 7, the evidence submitted included the lack of barriers to entry into the IPS market, such as facilities ownership and capital investment, as well as such matters as competitor earnings. Contrary to Applicant's allegation to the contrary, it is clear that the Commission did consider the antitrust implications of the Resolution pursuant to the requirements of Northern California Power Agency v. Public Utilities Commission (1971) 5 C.3d. In that case, the Court annulled a Commission decision approving a certificate of public convenience and necessity to construct a geothermal electric facility because of a lack of findings of fact regarding the competitive aspects of the Commission decision. There, the Commission had completely ignored the antitrust implications of its decision, which the Court found to constitute error. Here, the Resolution approving an Advice Letter filing to offer a technical telephone service contains a thorough discussion of the competitive aspects of the decision, as well as specific findings of fact on the issue. The argument is therefore without merit.

Applicants next argue that the Commission erred in failing to require Pacific to provide to Protestants cost support data for competitive services. The Commission recently ruled on this exact issue in D.99-08-026, which denied rehearing of a similar Resolution in which Applicants made the same argument as here. The Commission stated at page 3:

> "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.
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> 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 facts in this proceeding are practically identical to those in the prior decision and Applicants, who filed the Application for Rehearing resulting in that decision, must have been aware of it. They have raised no new arguments here that would convince us to overrule our prior decision and require Pacific to provide the cost support data requested. We further note that Applicants here did not appeal the prior decision. The argument is therefore without merit.

Applicants make the same argument that Pacific failed to make the required showing that IPS complies with the Commission's nondiscriminatory, unbundling and imputation requirements pursuant to D.89-10-031, because of the

company's failure to provide to Protestants cost support and imputation data. Applicants assert that this is contrary to Commission policy which "favors revelation of such supporting information to interested parties via standard nondisclosure agreements." (Application, page 7) This is exactly the same argument dealt with in D. 99-08-026, discussed above, which Applicants fail to address. For the same reasons as quoted above, the argument is without merit.

Finally, Applicants allege that IPS is a bundled offering that violates the imputation and price floor requirements in D.96-03-020, because a customer cannot order IPS without also ordering either a 1MB, PBX trunk or Centrex access line. (Application, page 8) Applicants reason that this "combined service" cannot be offered until Pacific makes a verified imputation showing of the price floors for each separately unbundled Category II Service pursuant to D.96-03-020 and D. 97-05-096. Because price floors are still pending in the OANAD proceeding, Applicants argue that TD could not have verified compliance with existing imputation safeguards as pointed out in the Resolution, because they are not finalized. We were aware that the OANAD proceeding had not been concluded when we adopted the Resolution and intended that TD use previously existing and currently effective imputation requirements. Further, to adopt Applicants' reasoning would require the Commission to deny all Pacific's similar advice letters pending a decision in OANAD. The argument is completely without merit.

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III. CONCLUSION

Applicants have alleged no legal or factual errors in the Resolution. Rehearing should therefore be denied.

IT IS THEREFORE ORDERED THAT:

1. The Motion of Pacific to file its Opposition to Application for Rehearing one day late is granted.
2. The Motion of CCTA to file a Reply to Pacific's Opposition to Application for Rehearing is denied.
3. Rehearing of Resolution T-16302 is denied.
4. This proceeding is closed.

This order is effective today.

Dated October 21, 1999, at San Francisco, California.

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