Decision **DRAFT DECISION OF ALJ MCVICAR** **(Mailed 2/4/02)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Sprint Communications Company L.P. (U-5112-C) to Withdraw the Provision of Sprint ION® Services and to Transfer California Sprint ION Customers' Local Service	Application 01-10-040 (Filed October 29, 2001)

O P I N I O N

Summary

This decision authorizes Sprint Communications Company L.P. (Sprint) to withdraw its Sprint ION (Integrated On-demand Network) services in California, and to transfer the local voice service components of Sprint ION customers' service to other local service providers. Three protests were filed; all are denied.

Sprint's Application

Sprint is a Delaware limited partnership authorized to provide competitive local and interexchange services in California.[1]

Sprint has provided ION service, which it describes as bundled offerings including local, long distance and high-speed data, to residence and business customers since 2000. It now wishes to withdraw them. The specific offerings

[1] The Commission granted Sprint its certificate of public convenience and necessity as a telecommunications provider (U-5112-C) by Decision (D.) 84-01-037, and by D.97-08-045 expanded Sprint's certificate to include both resale and facilities-based competitive local exchange services.

Sprint would withdraw are provided out of its current Cal. P.U.C. Tariff No. 2-T: Residential Sprint ION xt[4], Residential Sprint ION xt[2], Residential Sprint ION xt[1], Sprint ION Business Service Option A; and Sprint ION Business Service Option B. At the time the application was filed, Sprint had less than 1,000 residential and 75 business ION customers in California.

Sprint cites at least four reasons for its decision to withdraw for now from the integrated local, long distance, voice and data service market: capital constraints, network limitations, increased high-speed competition, and continuing problems with obtaining unbundled network elements. First, full deployment of ION to a broad consumer market would require not only that Sprint make significant, ongoing capital investments, but also that it bear continuing financial losses for several years during that deployment. With the industry's current revenue and earnings pressure, a faltering national economy, and intense competition in its traditional market segments, Sprint has limited financial ability to do so. Second, in order to offer ION to the mass market, Sprint needs high-speed capable network access to end user locations. Pacific Bell Telephone (Pacific Bell) and Verizon California Inc. (Verizon) are the underlying incumbent local exchange carriers (ILEC) in the areas where Sprint offers ION service. The incumbent local exchange companies' DSL-capable copper loop facilities that Sprint depends on do not reach a majority of Sprint's potential ION customers, thus it lacks market scope to reach much of the public. Third, customer acquisition costs and market penetration have proven to be significant problems limiting ION's profitability. Sprint's new customer acquisition costs are very high compared with the ILECs'. Sprint has found building a customer base further complicated by the dramatic changes in the marketplace since it first envisioned ION service. While once very few

consumers enjoyed access to high-speed Internet services, the cable companies and the ILECs have now captured many of those customers Sprint was targeting for its ION service offerings. Fourth, Sprint decries continuing problems with obtaining unbundled network elements from the ILECs:

> Finally, in addition to the already formidable business risks associated with local voice entry, there remains a fundamental uncertainty as to the ground rules for competitive entry. Although Sprint once believed that the Telecommunications Act of 1996 ("Act") spelled out those ground rules for local competitive entry, litigation and court appeals have kept Sprint and all other potential competitors in a constant state of uncertainty as to the rates, terms and conditions, and even the availability of unbundled network elements critical to Sprint's business plan. Even now, over five years after the passage of the Act, important elements of the Federal Communications Commission's rules implementing the Act (e.g., combination of elements by the ILECs) are before the U.S. Supreme Court.

Sprint's last point regarding the ILECs' business practices struck a chord that resonated with two of the three protesting parties, as explained later.

Sprint has developed a comprehensive customer notice and local exchange transfer plan intended to provide ION customers with clear information about its withdrawal. A copy of each notice was included in the application and is further described below.

Although Sprint wishes to withdraw its ION service, it plans to continue offering its core interLATA and intraLATA long distances services. It is still exploring product strategies for competing in the local market, and therefore requests its certificate not be modified.

By its letter of December 19, 2001, Sprint informed the assigned Administrative Law Judge and the protestants that its Application for Authority to Withdraw ION services was granted by operation of rule by the Federal

Communications Commission on December 17, 2001, despite the FCC's having received three consumer protest filings.

Protests

Three Sprint ION customers filed timely protests.

Alonzo Protest

Manuel J. Alonzo's protest may be summarized as follows:

> "The true reasons for the request should be investigated and remediated by the Commission." "...[U]nfair business practices by the Incumbent Local Exchange Carriers... have handicapped... Sprint's ability to expand its customer base and made [it] more difficult for Sprint to market its services. Those unfair ILECs business practices should be mitigated...."
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> "Sprint should be required to keep ION in-service until the CPUC is able to complete its investigation of the ILEC competitive issues."
>
> Alonzo and other customers were required to submit to a two-year commitment to obtain ION service. Discontinuing ION service is a breach of contract by Sprint. The compensation Sprint is offering is inadequate. Sprint should reimburse its customers at least two years' worth of the very significant cost increases they will incur to obtain equivalent replacement services elsewhere.
>
> The only purpose of Sprint's proposed ratesetting categorization is to avoid the need for hearing and public participation from its customers. Sprint's request for expedited treatment should be denied; the Commission should hold hearings in the Los Angeles area no earlier than January 2002.

Holt Protest

Larry Don Holt submitted a protest that was identically worded to most of Alonzo's, with some of Alonzo's material deleted. The only part of our summary of Alonzo's protest above that does not apply to Holt's is the single sentence referring to Sprint's ratesetting categorization.

Goldfarb Protest

Benjamin P. Goldfarb protests that he has been severely inconvenienced by the time and expense he has invested in having ION service installed, and subsequently arranging to have his service with Pacific Bell reinstalled. He estimates his lost earnings and out of pocket expense caused by Sprint to be more than $8,000, far in excess of the $400 compensation Sprint is offering him. He implies (but does not directly request) that Sprint should be required to reimburse him for those losses. Goldfarb's protest does not ask the Commission to deny Sprint's application.

Discussion

The Commission has in the recent past made clear that competitive carriers who are not carriers of last resort should generally be allowed to withdraw services or exit the market altogether once they have met the Commission's requirements and obtained its approval.[2] Thus, in examining Sprint's application here, we will describe the Commission's requirements, examine Sprint's request in light of those requirements, and then evaluate the protests to determine whether they raise any issues that would cause us to deny the application or attach any additional conditions to Sprint's withdrawal

The Commission's Requirements

The Requirement to Serve

Commission General Order 96-A, Section XV, provides, "No public utility of a class specified herein shall, unless authority has been obtained from

[2] See, e.g., Verizon Select Service, Inc., D.01-06-036; Cable & Wireless U.S.A., Inc., D.01-08-068; BroadBand Office Communications, D.01-10-063.

the Commission, either withdraw entirely from public service or withdraw from public service in any portion of the territory served." Thus, Sprint may not discontinue offering local exchange service to existing customers until the Commission authorizes it to do so. Each of the ION services Sprint proposes to withdraw is tariffed and includes local exchange service, so Sprint's reference in the application to seeking authority under G.O.96-A is appropriate here. Sprint will continue to provide intraLATA and interLATA long distance service to its former ION customers unless and until they choose otherwise.

We have discussed and explained in several recent decisions why some types of carriers may be allowed to withdraw from service while others have a higher obligation to serve, and what we require of those who do seek to withdraw.[3] Sprint refers to those decisions and acknowledges and relies on their applicability for its withdrawal of ION service. Rather than repeat our in-depth reasoning from those decisions, we provide here an abbreviated summary and restate our requirements.

Before local telecommunications markets were opened to competitive entry, each monopoly provider generally had an obligation to serve in its exclusive service territory. Local exchange service is now open to competition, however, and Sprint is not a monopoly provider but a carrier competing with the ILEC and any other CLCs (competitive local carriers) offering service in a given region. In order to ensure that a certain minimum level of affordable telecommunications service is made available to everyone in the state ("universal service"), each ILEC has been designated as a "carrier of

[3] Id.

last resort" in its service area, obliged to serve all who request service. CLCs are eligible, but not required, to become carriers of last resort. (D.96-10-066, App. B, Rule 6.D)[4] Commission rules permit greater flexibility to CLCs than to ILECs in the interest of fostering a competitive market. Sprint has neither sought, nor obtained status as a carrier of last resort.

Because Sprint is not a carrier of last resort, it is not obliged to continue indefinitely in a market sector it does not wish to serve.

To ensure that current CLC customers continue to have uninterrupted local service, our recent decisions approving CLCs' withdrawal of service have required them to transfer to a carrier of last resort any customers who have not chosen new local service providers within 30 days of receiving notification from a CLC that it is withdrawing service. Likewise, we have directed the carriers of last resort, who thus far have been ILECs, to accept all such customers transferred to them, subject to the ILECs' existing rights to terminate customers after proper notice if they do not meet the ILECs' standards to receive service.

Even if the ILECs' services cost customers more than they currently pay for the local service component of their ION bundled offerings, ILEC services are still subject to the Commission's price-cap and service quality regulations. Thus, customers switched from Sprint ION service to an ILEC remain protected against unreasonably high rates or inadequate service quality by our rules applicable to ILECs.

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[4] Carrier of last resort status is a prerequisite for access to funds from the California High Cost Fund B. (Id.)

The Requirement to Notice

Customers are entitled to be fully informed of their options when their carriers seek to exit from a market. We have previously found that the notice requirements of D.97-06-096 apply when a carrier withdraws and transfers any remaining customers to the ILECs.[5]

1. The notice must be in writing;
2. The carrier must provide it to customers no later than 30 days before the proposed transfer;
3. The notice must contain a straightforward description of the upcoming transfer, any fees the customer will be expected to pay, a statement of the customer's right to switch to another carrier, and a toll-free phone number for questions; and,
4. The notice and the carrier's description of service to customers must be included in the advice letter.

These notice requirements are essentially the same as those Public Utilities Code Section 2889.3[6] requires telephone corporations to follow when they exit the business of providing interexchange services and propose to transfer their customers to another provider. Our previous decisions have in some cases also required a final customer notice 10 days before the actual termination date, particularly where the initial 30-day notice was, for whatever reason, not provided.

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[5] D.01-06-036, Conclusion of Law #3.

[6] Statutory references are to the Public Utilities Code.

The Commission has also reviewed the applicability of Section 2889.5[7] to customer base transfers, and has determined that "Section 2889.5 was not specifically written nor intended to impose its rigorous requirement on customer base transfers."[8] Thus, Section 2889.5 does not apply here.

Each notice sent to customers before the Commission has approved the withdrawal request must state that Commission authorization is required before service may be discontinued. Notices sent after Commission approval must state that the Commission has authorized the withdrawal, and make clear that if the customer does not choose a new local exchange service provider, the customer will be transferred to the applicable carrier of last resort for that geographic area, typically the ILEC, for local service.

Sprint's Compliance with Requirements

The application describes Sprint's customer notice and local exchange transfer plan. Concurrent with the application filing, Sprint sent initial notices (included as Exhibit A-1 to the application for residence customers and A-2 for business) informing customers of the application and how they would be affected should it be approved by the Commission and the FCC. Sprint plans to deliver two additional notices after Commission approval, one no later than

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[7] Section 2889.5(a): "No telephone corporation, or any person, firm, or corporation representing a telephone corporation, shall make any change or authorize a different telephone corporation to make any change in the provider of any telephone service for which competition has been authorized of a telephone subscriber until all of the following steps have been completed...."

[8] D.97-12-119.

30 days before it withdraws service (Exhibit B) and one no later than seven days (Exhibit C) prior to withdrawal.

Each notice contains a straightforward description of the upcoming withdrawal, a statement of the customer's need to select a new local exchange service provider, a statement that the customer will be transferred to the applicable ILEC for that geographic area if the customer does not choose a new local service provider, and a toll-free telephone number for questions.

Sprint's 30-day and 7-day notice letters list either Pacific Bell's or Verizon's monthly rate for basic local service, as appropriate, and direct customers to those ILECs' customer service centers for additional details. The application says that Sprint will also provide additional information regarding the underlying ILEC's rates, terms and conditions to customers who do not select a new service provider and are to be transferred automatically.

Sprint will credit each customer's account with a standard amount "intended to offset the cost of any service charges and fees paid to Sprint for the service set-up, ION equipment purchased (if any), and the service change charges the customer may be required to pay." According to the application and notices, residential customers will receive either $400 or $600 compensation and business customers $500, $600, or $750, depending in each case on the Sprint ION service and/or term plan they currently subscribe to. Any resulting credit balances will be paid to customers upon disconnection.

Sprint's request to transfer its customers to the applicable carrier of last resort applies only to customers' local exchange service. Sprint's notices also inform customers of their right to select a different long distance carrier of their choice, and that it will continue to provide intraLATA and interLATA long

distance service to them at rates specified in the notice unless and until they choose otherwise.

After reviewing each notice filed with the application, we find each meets our requirements. We are puzzled, however, by the fact that Sprint's proposed 30-day and 7-day notices in the application pertain to residential customers only, whereas the notices it distributed when the application was filed were residence-specific (Exhibit A-1) and business-specific (Exhibit A-2). The application carries a strong implication that all customers, both residence and business, will be receiving 30-day and 7-day notices. Since we have no reason to believe Sprint's omission was intentional, we consider it sufficient to include in our order below a requirement that 30-day and 7-day business customer notices be sent, and that they be consistent in form and content with the Exhibit A-1, A-2, B and C proposed notices.

The Protests

We set forth above the main points of each of the three protests customers filed against Sprint's application. In the aggregate, the points on which they request the Commission act can be summarized as:

> The Commission should investigate and mitigate the ILECs' unfair business practices, practices which have led to Sprint's request to withdraw (Alonzo and Holt).
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> Sprint should be required to continue to provide ION service until the Commission completes that investigation (Alonzo & Holt).
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> Withdrawal of ION service would constitute breach of Sprint's contracts with customers, for which customers should be reimbursed: (a) their increased costs to obtain equivalent replacement services elsewhere (Alonzo & Holt); and (b) lost wages and out of pocket expenses to set up, and later to replace, ION services (Goldfarb).

> Sprint's proposed ratesetting categorization is improper if it leads to expedited treatment without hearing (Alonzo).

We will address each of these points in turn.

An investigation of the ILECs' business practices would be beyond the scope of this application proceeding. If we were to undertake such an investigation as protestants Alonzo and Holt suggest, we would do so in a separate investigatory proceeding. And, even if such an investigation were to lead to a conclusion blaming the ILECs as protestants allege, it would be unfair to require Sprint to continue its unprofitable ION services for the considerable length of time that would be required. As we noted earlier, we cannot obligate a CLC such as Sprint that is not a carrier of last resort to continue indefinitely in a market sector it does not wish to serve. Since we are not going to undertake an investigation of the ILECs' business practices as part of this application proceeding, we will not order Sprint to continue to provide ION services pending the outcome of such an investigation.

Protestants' requests that customers be reimbursed for their increased costs to obtain equivalent replacement services elsewhere and for lost wages and out of pocket expenses constitute claims for damages. Faced with cases involving breach of contract and claims for damages in the past, the Commission has stated,

> The Commission has consistently dismissed actions where the complainant has prayed for damages for tortious conduct (Townsley v PT&T (1972) 74 CPUC 341), damages for breach of contract (Mak v

> PT&T (1971) 72 CPUC 735), and consequential damages (Horwitz v PT&T (1971) 72 CPUC 505).[9]

And,

> There are limits, however, to the Commission's ability to adjudicate disputes between utilities and their customers. In particular, neither the State Constitution nor the PU Code grants the Commission jurisdiction to award consequential or punitive damages against a utility. The Commission has held consistently that it can not award damages on the basis either of tort or contract. (See, e.g., Schumacher v. Pacific Tel. & Tel. Co., 64 CPUC2d 295 (1965), and cases there cited.)
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> Instead, under Section 2106, ratepayers may pursue in court their damage claims against utilities. That section provides in pertinent part that a utility is liable to any person or corporation affected by the utility's wrongdoing *"for all loss, damages, or injury caused thereby or resulting therefrom. If the court finds that the act or omission was willful, it may, in addition to the actual damages, award exemplary damages. An action to recover for such loss, damage, or injury may be brought in any court of competent jurisdiction . . . ."* (Id., emphasis added.) As stated in Vila v. Tahoe Southside Water Utility, Section 2106 is the only statutory authority, specific to public utilities, "for the recovery, by a person injured, of damages, compensatory and exemplary. *The commission has no authority to award damages*. (Id., 233 CA2d 469, 479 (1965), emphasis added.)[10]

Thus, the Commission lacks jurisdiction to award the relief all three protestants request in the third point above. We also note that Sprint's application characterizes the compensation it will pay to every ION customer, ranging from $400 to $750 per customer, as "more than [sufficient to] cover a

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[9] Wilner v PT&T (1978) 83 CPUC 484.

[10] Karrison v A&P Moving (1996) 69 CPUC2d 671, footnote omitted, emphasis in original.

customer's charges associated with obtaining services from other providers...." Even if protestants had included requests for reparations, any such reparations could have been offset in part or in whole by the payments Sprint has already committed to provide. To the extent the amounts Sprint will pay are insufficient, customers may seek to supplement them through the courts as the citations above point out.

Protestant Alonzo objects conditionally to Sprint's proposed ratesetting categorization. The requirement to categorize and determine the need for hearing arises under Section 1701.1. Our Rules of Practice and Procedure further define the three categories set forth in Section 1701.1: adjudicatory, ratesetting, or quasi-legislative. Under Rule 6.1(c), "When a proceeding does not clearly fit into any of the categories as defined in Rules 5(b), 5(c), and 5(d), the proceeding will be conducted under the rules applicable to the ratesetting category unless and until the Commission determines that the rules applicable to one of the other categories, or some hybrid of the rules, are best suited to the proceeding." In Resolution ALJ 176-3076, the Commission preliminarily determined this to be a ratesetting proceeding not requiring a hearing. That determination was confirmed by the Assigned Commissioner's Scoping Memo and Ruling on January 4, 2002 (Rules 6(a)(3) and 6.1(a)), and that ruling as to category was appealable within 10 days thereafter (Rule 6.4(a)). No party appealed, and our ratesetting categorization became final.

Both Alonzo and Holt ask for hearings. However, to the extent that they raise factual issues, those issues are either outside the scope of this proceeding or relate to claims for damages, which the Commission lacks jurisdiction to award. We see no reason based on the facts before us to reverse our earlier

determination and the assigned Commissioner's ruling that no hearing is required.

We conclude that the protests should be denied, and Sprint's application to discontinue its ION service should be granted as set forth in the order that follows.

Comments on Draft Decision

The draft decision of the presiding officer was mailed to the parties in accordance with Section 311(g)(1) and Rule 77.7.

Findings of Fact

1. Sprint's ION service consists of bundled offerings including local service, intraLATA and interLATA long distance service, and high-speed data service.

2. Although Sprint wishes to withdraw its ION service, it plans to continue offering its core intraLATA and interLATA long distance services. Sprint's notices inform customers of their right to select a different long distance carrier of their choice, and that it will continue to provide intraLATA and interLATA long distance service to them at rates specified unless and until they choose otherwise.

3. Sprint's customer notice and local exchange transfer plan outlined in the application are consistent with the Commission's requirements of telecommunications carriers who wish to withdraw their services. To be fully compliant, Sprint would have to include 30-day and 7-day notices for business customers as well as residence customers.

4. Pacific Bell and Verizon are the ILECs in the areas where Sprint offers ION service.

5. An investigation of the ILECs' business practices would be beyond the scope of this proceeding.

6. Protestants did not avail themselves of their opportunity to appeal the Assigned Commissioner's Scoping Memo and Ruling that confirmed this as a ratesetting proceeding.

7. No hearing is needed.

Conclusions of Law

1. Sprint is required to obtain Commission approval before it may discontinue providing ION service.

2. The customer notice requirements of D.97-06-096 apply to requests to discontinue services such as this one. In addition, the Commission requires: that each notice sent to customers before the Commission has approved the withdrawal state that Commission authorization is required before service may be discontinued; that each notice sent after approval must state that the Commission has authorized the withdrawal; and that every notice make clear that if the customer does not choose a new local exchange service provider, the customer will be transferred to the applicable carrier of last resort for local service.

3. Section 2889.5 does not apply to the changes Sprint proposes in its application.

4. The reimbursements that Alonzo, Holt, and Goldfarb seek in their protests are damages, which the Commission lacks jurisdiction to award.

5. To the extent that the amounts Sprint will compensate ION customers are insufficient, customers may pursue claims for damages against Sprint in the courts under Section 2106.

6. This is properly categorized as a ratesetting proceeding.

7. The protests of Alonzo, Holt, and Goldfarb should be denied.

8. Sprint should be allowed to discontinue its ION service.

9. Sprint should be required to send to both residence and business customers 30-day and 7-day notices consistent in form and content with the notices it has included in the application as Exhibits A-1, A-2, B and C.

O R D E R

IT IS ORDERED that:

1. The application of Sprint Communications Company L.P. (Sprint) to withdraw its Sprint ION (Integrated On-demand Network) services in California, and to transfer the local exchange service component of ION customers' service to other local service providers, is granted subject to Sprint's compliance with its representations in the application and the conditions set forth in this order.

2. Sprint shall send not later than 30 days before it discontinues ION service, and again not later than 7 days nor earlier than 10 days before it discontinues ION service, written notices to its residence and business ION customers who have not by those dates discontinued ION service. Those notices shall be consistent in form and content with the proposed 30-day and 7-day notices Sprint included in the application as Exhibits A-1, A-2, B and C.

3. Sprint shall transfer to the applicable incumbent local exchange carriers any customers who do not choose a new local exchange service provider in response to its 30-day and 7-day notices.

4. Pacific Bell Telephone Company and Verizon California Inc. are directed to accept for the purpose of providing basic local exchange service all former customers transferred to them from Sprint, subject to their rights to terminate such customers after proper notice if prescribed standards of service are not met.

5. Sprint shall within 10 days after discontinuing ION service send to the Commission's Telecommunications Division a compliance letter: certifying that

it has given proper customer notification as directed in this order; certifying that any customers who did not choose a new local exchange service provider have been transferred to the applicable incumbent local exchange carrier; certifying that no former ION customers have involuntarily lost their basic local exchange service for failure to choose another provider; certifying that every former ION customer's account has been credited with the compensation amount set forth in the application for that type of customer; and attaching a sample copy of each type of notice sent.

6. The protests of Manuel J. Alonzo, Larry Don Holt, and Benjamin P. Goldfarb are denied.

7. A copy of this order shall be served on Pacific Bell Telephone Company and Verizon California Inc.

8. The authority granted in this order shall expire if not exercised within 12 months after the effective date of this order.

9. Application 01-10-040 is closed.

This order is effective today.

Dated _____, at San Francisco, California.