Decision 02-02-027 February 7, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

The Utility Consumers' Action Network, Complainant, vs. Pacific Bell (U 1001 C), Defendant.	Case 98-04-004 (Filed April 6, 1998)
And Related Matters.	Case 98-06-003 (Filed June 1, 1998) Case 98-06-027 (Filed June 8, 1998) Case 98-06-049 (Filed June 24, 1998) Investigation 90-02-047 (Filed February 23, 1990)

ORDER GRANTING LIMITED REHEARING AND MODIFYING DECISION 01-09-058

I. INTRODUCTION

Decision (D.) 01-09-058 is a final decision in a complaint proceeding against Pacific Bell (Pacific) regarding its practices for marketing optional services to residential customers. The proceeding consolidated complaints brought by the Utility Consumers' Action Network (UCAN), the Greenlining

Institute and the Latino Issues Forum (Greenlining), and the Telecommunications Union, California Local 103, International Federation of Professional and Technical Engineers, AFL-CIO (TIU).

Applications for rehearing of D.01-09-058 were filed by the Communication Workers of America (CWA) (October 26, 2001), Greenlining (November 2, 2001), and Pacific Bell (November 5, 2001). CWA asserts that the 5% limit on sales-volume incentive compensation is preempted by federal law. Greenlining contends that the Commission abused its discretion in declining to adjudicate Greenlining's Business and Professions Code claims and in setting the fine too low.

Pacific Bell challenges all aspects of the decision, including the remedial measures ordered, the conclusions that Pacific Bell violated various laws, and the imposition of penalties. Pacific argues that many of the factual findings are not supported by the evidence and that the legal conclusions are in error. Pacific also contends that its First Amendment rights are violated by the decision's limitations on Pacific's commercial speech. Finally, Pacific requests that the Commission allow oral argument on rehearing pursuant to Rule 86.3 of the Commission's Rules of Practice and Procedure.

We have reviewed each and every allegation of error raised in the applications for rehearing and are of the opinion that limited rehearing should be granted on (1) the penalty period and (2) the 5% limit on sales-volume incentive compensation. We will modify the decision to end the penalty period when the record in this case closed, which was March 11, 1999.[1] We will eliminate the incentive compensation cap, but will hold further proceedings to implement substitute methods for ensuring compliance with our decision. We will leave it up to the ALJ to decide the most appropriate procedural mechanism for accomplishing this, e.g., hearings, workshops, or written comments from parties.

[1] This is the last date that late-filed exhibits were accepted into the record.

We will also modify the decision to make a number of corrections and additions as set forth in this order. Finally, we will deny Pacific's request for oral argument. We do not believe that Pacific has demonstrated that oral argument is warranted pursuant to Rule 86.3 of the Commission's Rules of Practice and Procedure.

II. PROCEDURAL HISTORY

D.01-09-058 concludes that Pacific Bell violated statutory and decisional law in its failure to adequately disclose information related to Caller ID blocking options, in its marketing of inside wire maintenance plans, and in its sequential marketing (starting with the highest priced package) of optional services. The decision orders a number of remedial measures, including notification of customers who may have been affected by Pacific Bell's misleading sales strategies, revisions to Pacific Bell's Tariff Rule 12, and internal changes designed to emphasize service over sales or marketing. Among other things, the decision limits Pacific's sales-volume based incentive compensation for service representatives and their immediate supervisors to 5% of the employees' monthly compensation. Finally, the decision imposes $25.55 million in penalties on Pacific.

On September 24, 2001, shortly after the Commission approved D.01-09-058,[2] Pacific filed a complaint in federal district court challenging the decision. (Pacific Bell Telephone Co. v. Richard A. Bilas, et al., C01-03610 (N.D. Cal.).) On October 10, 2001, the district court issued a temporary retraining order (TRO) enjoining the Commission from enforcing the cap on incentive compensation as it relates to employees covered by the NLRA.[3]

On October 19, 2001, Pacific filed an Emergency Motion for Stay Pending Rehearing and Judicial Review of D.01-09-058, along with a Motion to

[2] The decision was voted on at the September 20, 2001 Commission meeting, but was not mailed until October 5, 2001.

[3] On January 25, 2001, a hearing was held in federal district court on a motion to dismiss filed by the Commission. The court has not yet ruled on that motion.

Shorten Time. On October 25, 2001, the Commission issued an order on its own motion in response to the federal district court's TRO. That order stayed the cap on incentive compensation, without distinguishing between employees covered by the NLRA and their immediate supervisors, until further order of the Commission. (See D.01-10-045, Order Staying Ordering Paragraph 12 of Decision 01-09-058.) That order also denied Pacific's Motion to Shorten Time.

As stated above, applications for rehearing of D.01-09-058 were filed by CWA on October 26, 2001, Greenlining on November 2, 2001, and Pacific on November 5, 2001. On November 5, 2001, Pacific also submitted a request to the Executive Director for an extension of the effective date of the decision pending the Commission's ruling on Pacific's Emergency Motion for Stay. On November 29, 2001, the Commission denied Pacific's Emergency Motion for Stay without prejudice. On December 5, 2001, the Executive Director, after initially denying Pacific's extension request, granted an extension of time for Pacific to comply with Ordering Paragraphs 3, 4, and 5 until 45 days after the effective date of the Commission's order on rehearing.

On November 15, 2001, Pacific filed a Petition for Stay, or in the Alternative, for a Writ of Mandate and/or Review in the First District Court of Appeal in an attempt to have the court stay D.01-09-058. On November 19, 2001, prior to the Commission filing its response, the court issued an order stating that it would be premature for the court to entertain Pacific's stay request because two requests were pending before the Commission. The court deferred Pacific's request for a stay pending action by the Commission and Executive Director. (Pacific Bell Telephone Co. v. Public Utilities Commission, A096828.) On December 6, 2001, the Court of Appeal denied Pacific's Petition for Stay, and denied Pacific's Petition for Writ of Mandate without prejudice.

III. DISCUSSION

A. Pacific's Application for Rehearing

1. Whether the Decision Properly Interprets and Applies the Applicable Legal Standards

Pacific contends that the decision misinterprets and misapplies the legal standards used to order various remedies and to impose penalties. At the outset, the decision discusses the legal standards applicable to Pacific Bell's duty to inform customers: Public Utilities Code sections 451 and 2896, and Pacific's Tariff Rule No. 12.

a) Public Utilities Code Section 451

Public Utilities Code section 451 requires that all charges demanded or received by any public utility for any product furnished or any service rendered shall be just and reasonable. Section 451 further provides that every unjust or unreasonable charge demanded or received is unlawful. Finally, section 451 states:

> Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities, including telephone facilities, . . . as are necessary to promote the safety, health, comfort and convenience of its patrons, employees and the public.

As stated in the decision, the Commission has previously determined that section 451 requires Pacific to disclose to its business customers all service options that may meet the customers' needs:

> In the complex field of communications, no layman can be expected to understand the innumerable offerings under defendant's filed tariffs. When defendant sends out one of its communications consultants to a customer's place of business for the explicit purpose of discussing telephone service, the consultant should point out all the alternative

> communications systems available to meet the customer's needs. This duty is owed by defendant to its customers.

(First Financial Network v. Pacific Bell, D.98-06-014, (1998) 80 Cal.P.U.C.2d 407, 411, quoting H.V. Welker, Inc. v. P.T.&T. Co. (1969) 69 Cal.P.U.C. 579.)

The decision then concludes that, pursuant to section 451, Pacific Bell has the same duty to its residential customers. (D.01-09-058 at p. 14.) Pacific Bell argues that this is a new requirement and a misapplication of section 451.

As stated in First Financial Network v. Pacific Bell, supra, section 451 itself requires that all services provided by a public utility be such to promote the convenience of its customers. However, although we believe that the standards articulated in First Financial Network v. Pacific Bell can used as guidance in determining Pacific's prospective duty to residential customers, we will modify the decision to indicate that we are not applying the specific requirements outlined in First Financial Network v. Pacific Bell to residential customers for the purposes of finding violations or assessing penalties. Because section 451 itself and other applicable law provide sufficient grounds for the decision's conclusions regarding fines and penalties, this modification does not impact those conclusions.

b) Public Utilities Code Section 2896

Public Utilities Code section 2896 provides, in part:

> The commission shall require telephone corporations to provide customer service to telecommunications customers that includes, but is not limited to, all of the following:
>
> (a) Sufficient information upon which to make informed choices among telecommunications services and providers. This includes, but is not limited to, information regarding the provider's identify, service options, pricing, and terms and conditions of service.

> A provider need only provide information to its customers on the services which it offers.[4]

Pacific contends that the plain language of section 2896 directs the Commission to require telephone corporations to provide customers with sufficient information upon which to make informed choices, but does not impose requirements on Pacific Bell or any other telephone service provider. ORA responds that section 2896 codifies a minimum consumer protection standard that telephone corporations must meet, and that section 2897 gives the Commission the authority to enforce and supplement those standards.[5]

The issue raised by Pacific is whether or not the statute is self-executing; that is, whether or not the statute may only be implemented through rules adopted by the Commission. The decision cites legislative history indicating that the statute, introduced as Assembly Bill (AB) 726, sets forth "minimum customer service standards for telecommunications corporations." (D.01-09-058 at p. 15, quoting Letter from Assemblyperson Gwen Moore, author of AB 726, to Governor Pete Wilson, September 8, 1993.) In addition, a report of the Senate Committee on Energy and Public Utilities states:

> The author believes that the customer service practices discussed in the bill -- many of which are currently required by the PUC -- should be codified because they represent basic consumer protection policies of the state and should not be subject to change by regulation.

(D.01-09-058 at pp. 15-16, quoting Senate Committee on Energy and Public Utilities, Hearing Report on AB 726, June 22, 1993.)

[4] The statute also requires telecommunications carriers to provide (1) the ability to access a live operator by dialing "0" as a free option; (2) reasonable statewide service quality standards; and (3) information concerning the regulatory process and how customers can particulate in that process.

[5] Public Utilities Code section 2897 states, in part: "[T]he commission shall apply these policies to all providers of telecommunications services in California. These policies are not exclusive and may be supplemented by the commission."

Upon further review of our decision, we wish to clarify that the penalties imposed on Pacific for violations relating to Caller ID, inside wire maintenance programs, and sequential offerings are based on our conclusion that Pacific's failure to give complete information resulted in misleading or potentially misleading marketing tactics. While section 2896 provides a statutory basis for the Commission's requirements regarding the prospective remedies imposed by the decision, we need not rely on section 2896 alone to impose penalties. When misleading or potentially misleading information is provided to customers regarding optional services, such practices clearly violate section 451's mandate that telecommunication carriers provide reasonable service.

Furthermore, we do not see how Pacific can contend that it did not have proper notice that misleading sale tactics are a violation of that law, particularly in light of the 1986 marketing abuse case. Finally, as discussed herein, the Caller ID statute and decision and Pacific's Tariff Rule No. 12 provide additional support for the specific violations found. We will modify the decision where appropriate to clarify the basis for the violations and penalties consistent with this discussion.

c) Pacific's Tariff Rule No. 12

Pacific's Tariff Rule No. 12 provides, in part:

> Where there are additional residence optional services (other than exchange access service) available, the Utility, or its authorized employees, may call applicant's attention, at the time application is made, to the availability of such optional services and the customer may designate which optional services they desire. The Utility shall provide a quotation of the applicable recurring rates and nonrecurring charges applicable to each service designated by the customer. The quotation of applicable rates and charges shall be stated separately for each optional service designated by the customer.

(Rule No. 12 – Disclosure of Rates and Charges and Information to be Provided to the Public, effective May 15, 1995.)

In addition to the tariff language itself, the decision bases its interpretation of Tariff Rule 12 on General Order 96-A and the series of decision issued by the Commission in the 1986 Pacific Bell marketing abuse case (A.85-01-034). Thus, the decision concludes that Tariff Rule 12 and the 1986 marketing case decisions require Pacific Bell to (1) offer basic exchange service apart from packages of optional services, (2) disclose that package components can be purchased separately, and (3) quote rates for optional services separately, for those services in which the customers have expressed interest. (D.01-09-058 at p. 21.)

Pacific challenges the decision's conclusion that Tariff Rule 12 requires Pacific to quote rates for optional services separately. Pacific contends that when a customer selects a package, the package is the service referred to in Rule 12; the customer has not designated any individual services. Pacific points out that the packages, and corresponding prices, are all tariffed and approved by the Commission. Thus, according to Pacific, all that Tariff Rule 12 requires is for Pacific to disclose the tariffed price of any package designated by the customer.

Pacific ignores the decision's discussion of the 1986 marketing case decisions. In that case, the Commission found Pacific violated former Tariff Rule 12, which required "a quotation and full itemization of recurring and nonrecurring charges applicable to the service the customer seeks." (Re Pacific Bell, D.86-05-072 (1986) 21 Cal.P.U.C.2d 182, 184, 190, Conclusion of Law 1.) The Commission subsequently ordered revisions to Tariff Rule 12 to provide for (a) full disclosure of available residence exchange services and the associated tariffed rates and charges and (b) full explanation of residential optional services requested by the customer and a quotation of the associated tariffed rates and charges. (Re Pacific Bell, D.87-12-067 (1987) 27 Cal.P.U.C.2d 1, 52.) Read in the light of the 1986 marketing case, it is reasonable to interpret Tariff Rule 12 to require Pacific to disclose to customers that package components can be purchased separately and to disclose the prices of the individual services.

2. Whether the Decision Violates Pacific Bell's First Amendment Rights

Pacific contends that the decision violates Pacific's First Amendment rights by restricting its right to engage in commercial speech. The gist of Pacific's argument is that the decision restricts accurate speech concerning lawful commercial activities.

In Central Hudson Gas & Electric Corp. v. Public Service Commission of New York (1980) 447 U.S. 557, the United States Supreme Court discussed criteria for determining whether state regulation of commercial speech is constitutional. The Court stated: "The government may ban forms of communication more likely to deceive the public than inform it." (Central Hudson, supra, at p. 563.)

However, if the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by the regulation in question. Moreover, the regulation must be in proportion to that interest; it must be designed to carefully achieve the State's goal. Two criteria are used to determine compliance with this requirement. First, the restriction must directly advance the state interest involved. The regulation may not be upheld if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served by a more limited restriction on commercial speech, the excessive restriction cannot survive. (Central Hudson, supra, at p. 564.)

Thus, a four-part analysis has developed in commercial speech cases. First, the court determines whether the speech is protected by the First Amendment. In order to be protected, the speech must "concern a lawful activity" and "not be misleading." (Central Hudson, supra, at p. 566.) Second, the court determines whether the asserted governmental interest is "substantial." Third, if the speech is protected and the governmental interest is substantial, the court determines whether the regulation "directly advances" the governmental interest asserted. Fourth, the court determines whether the regulation "is not more extensive than is necessary" to serve that interest. (Central Hudson, supra, at p. 566.)

Pacific asserts that the decision fails to find that any of the marketing information offered by Pacific is false or misleading about the particular package of services being promoted. Rather, the decision concludes that Pacific should have offered information about other packages of services or individual services that were not being promoted. Thus, according to Pacific, the decision restricts speech that concerns lawful activity and is not misleading. Pacific also makes much of the fact that the decision states: "The sequence that Pacific Bell has chosen [in marketing optional services] and has mandated that service representatives use, however, is the sequence that most encourages sales." (D.01-09-058 at p. 55.) Pacific points out that encouraging sales does not, in and of itself, render speech misleading. Pacific further contends that the decision does not assert a substantial interest in support of the restrictions, that the restrictions do not directly advance the asserted interests, and that the remedies are more extensive than necessary to achieve the asserted State interests.

In particular, Pacific argues that the decision's remedies on separation of customer service and marketing violate Pacific's right to engage in commercial speech. Those remedies include: (1) seeking customer permission to offer information about additional services and ceasing to offer such services if the customer declines permission (D.01-09-058 at p. 79); (2) offering the least-expensive option first (D.01-09-058 at pp. 78-79); and (3) addressing customer services prior to engaging in marketing efforts (D.01-09-058 at p. 78).

The decision concludes that Pacific's incomplete disclosure of information when marketing optional services in general, and inside wire maintenance plans in particular, violated Tariff Rule 12 and Public Utilities Code sections 2896 and 451. (See D.01-09-058 at pp. 32-34, 53-59.) The decision also finds that Pacific Bell's marketing of selective blocking for Caller ID violated Public Utilities Code section 2893 and D.92-06-065 (the Caller ID decision) because Pacific failed to give customers information necessary to make a fully informed waiver of privacy rights. (D.01-09-058 at pp. 23-27.) The decision further concludes that information Pacific provided in marketing optional services was misleading or potentially misleading, confusing, and/or otherwise failed to sufficiently inform customers of various available options. (See, e.g., D.01-09-058 at pp. 23-27, 32-34, 42-45, 48-53, 53-59.)

Where Pacific's marketing strategies have been found to be misleading or potentially misleading, the speech is not protected by the First Amendment. In the case of the restrictions designed to separate customer service and marketing functions sales, the Commission has demonstrated a substantial interest under Central Hudson. Pacific Bell compares its practices to those of other businesses, such as Best Buy and Nordstrom. (Pacific's Application at p. 18.) This analogy is misplaced. Pacific has a virtual monopoly on local residential telephone service. In addition, local telephone service is a necessity, not an optional or luxury service. Finally, customers who call Pacific for services are in a sense a captive audience to Pacific's sales strategies. While customers can simply hang up when other marketers call them, customers do not have this choice when the person doing the marketing is also the service representative that the customer is relying on to provide local telephone service. Contrary to Pacific's arguments, the State has a substantial interest in ensuring that customers receive local telephone service without being pressured into ordering unwanted or unneeded optional services.

Finally, Pacific's arguments that the restrictions on speech do not directly advance the State's interest and that they are not narrowly drawn are wholly unpersuasive. The restrictions on speech are designed to directly change the marketing tactics found to be misleading or confusing. Furthermore, they are narrowly tailored to allow the marketing of services while eliminating as much as possible the misleading aspects of Pacific's marketing tactics. Thus, the cases cited by Pacific that completely ban advertising or solicitation are clearly distinguishable. (See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. (1976) 425 U.S. 748 [Court held that law which prohibited licensed pharmacists from advertising prices of prescription drugs violated First Amendment]; Edenfield v. Fane (1993) 507 U.S. 761 [Court held that law which prohibited in-person solicitation by Certified Public Accountants violated First Amendment].)

We will change the language in the decision that suggests that it is improper to use a marketing sequence "that most encourages sales." The Commission is not basing its restrictions on the fact that Pacific's speech may encourage sales. Rather, the restrictions are necessary because Pacific's practice of emphasizing sales over service has led to many of the marketing practices complained of in this case. We will modify the decision accordingly.

3. Whether the Imposition of Penalties Is Unlawful

In D.01-09-058, the Commission found two separate violations. First, the Commission concluded that Pacific Bell's marketing practices relating to Caller ID violated Public Utilities Code section 4896 and the Commission's Caller ID decision (Re Pacific Bell, D.92-06-065 (1992) 44 Cal.P.U.C.2d 694). Second, the Commission concluded that Pacific violated Public Utilities Code section 451, Public Utilities Code section 2896, and Pacific's Tariff Rule 12 by providing incomplete information when marketing optional services. (D.01-09-058 at p. 83.)

The decision imposes penalties based on continuing violations for a two-year period, from January 1, 1998 to December 31, 1999.

Pacific argues that the decision's imposition of $25.55 million in penalties violates Article I, Section 17, of the California Constitution and the Eighth and Fourteenth Amendments to the United States Constitution, which prohibit excessive fines. Pacific also contends that the penalties violate due process. Pacific asserts that the decision penalizes Pacific for violating "requirements" that do not exist under statutes, tariffs, rules, or prior decisions. According to Pacific, because Pacific had no notice that its conduct was unlawful, it is a violation of due process to impose any fines. Finally, Pacific contends that the evidence in the record does not support the conclusion that Pacific violated any law.

a) Whether the Calculation of the Penalty Is Proper

As stated above, the decision imposes penalties for "two distinct offenses which occurred daily over a period of two years." (D.01-09-058 at p. 83.) Public Utilities Code section 2107 allows the Commission to impose penalties of $500 to $20,000 for each offense. Public Utilities Code section 2108 provides: "Every violation . . . is a separate and distinct offense, and in the case of a continuing violation each day's continuance thereof shall be a separate and distinct offense."

The Commission computed the amount of the penalty based on its conclusion that two offenses took place daily for two years (730 days), from January 1, 1998 through December 31, 1999. The Commission imposed penalties of $17,500 per day for each offense, or a total of $35,000 per day. This results in total penalties of $25,550,000 ($35,000 per day x 730 days). (D.01-09-058 at p. 104, Ordering Paragraph 15.)

Pacific contends that there is no evidence or findings that Pacific committed either or both violations on any of the 730 days (including those after the close of evidence), let alone on each of those days. Hearings in the case ended on January 27, 1999 and late-filed exhibits (Ex. 90 to Ex. 102) were added to the evidentiary record by an ALJ ruling on March 11, 1999. The proceeding was submitted with the filing of briefs on March 26, 1999.

ORA agrees with the assertion made by Greenlining (see below) that penalties should be recalculated to include the period through October 19, 2001. This argument is based on Pacific's filing of its Emergency Motion for Stay Pending Rehearing and Judicial Review of D.01-09-058 and Declaration of Michele Gomez (filed under seal) on October 19, 2001. The intent of the declaration was to demonstrate the high cost of making the changes ordered in the decision. ORA and Greenlining argue that the Gomez declaration proves that Pacific continued to violate the law at least until October 19, 2001.

Even if the information in the declaration supports a finding that Pacific has continued to violate the law through October 19, 2001, which is not clear, the declaration is not a part of the evidentiary record in this case because it was filed well after the record closed and after the Commission issued its decision on October 5, 2001.

Upon further review, we have determined that penalties may not be assessed for the period after the close of the record without further proceedings. Therefore, we will modify the decision to calculate the penalties through March 11, 1999, the last date that exhibits were filed in the case. This will reduce the penalties from $25,550,000 to $15,225,000. This is based on a fine of $17,500 per day for each of two offenses, or a total of $35,000 per day, from January 1, 1998 through March 11, 1999 ($35,000 per day x 435 days = $15, 225, 000).

In future cases such as this, where it appears that violations are ongoing even after the close of hearings, one method of addressing this would be to announce our intent to continue penalties until the utility demonstrates that the violations have ceased. Requiring such a compliance filing would permit the

Commission to assess ongoing fines, and yet would still provide sufficient due process to the utility being fined.

We also recognize that the discussion, findings and conclusions regarding violations and penalties are incomplete, even where the evidence clearly supports the requisite findings. Therefore, we will modify the decision to explain that (1) the penalties are based on continuing violations pursuant to Public Utilities Code section 2108, (2) the violations occurred on a daily basis, and (3) the record supports a finding that violations occurred from January 1, 1998 to March 11, 2001.

The record indicates that the sales tactics that are the focus of the complaints were put into effect by the beginning of 1998, after the 1997 merger of SBC Communications, Inc. and Pacific Bell. In addition, the record shows that the marketing scripts and other marketing tactics complained of were in effect continuously. Moreover, the record demonstrates that Pacific service representatives received over 100,000 phone calls per day (see Joint Stipulation of Undisputed Facts) and that it was Pacific's policy to market optional services on every call ("offer on every call"). Thus, it is reasonable to find that each of the two offenses occurred on a daily basis. Although Pacific may complain about the method of determining the number of violations, we suspect that if we were to attempt to determine the number of times customers were given potentially misleading information, the number of violations would be far greater than two per day.

b) Whether the Grounds for Imposing Penalties are Proper

In addition to the issues dealing with the penalties in general, Pacific raises various issues about the following specific violations.

(1) Caller ID

The decision concludes that Pacific's marketing of selective blocking violated the Caller ID decision, D.92-06-065, and Public Utilities Code section 2893. Public Utilities Code section 2893 provides, in part:

> The commission shall, by rule or order, require that every telephone call identification service offered in this state by a telephone corporation . . . shall allow a caller to withhold display of the caller's telephone number, on an individual basis, from the telephone instrument of the individual receiving the telephone call placed by the caller.

(Pub. Util. Code § 2893(a).) Section 2893 also states that the Commission shall direct every telephone corporation, prior to offering Caller ID, to notify customers that their numbers may be disclosed to called parties. (Pub. Util. Code § 2893(c).)

In the Caller ID decision, the Commission interpreted section 2893(a) to allow the Commission to require telephone corporations to offer both selective blocking and complete blocking. (Re Pacific Bell, D.92-06-065 (1992) 44 Cal.P.U.C.2d 694, 713, as modified by Re Pacific Bell, D.92-11-062 (1992) 46 Cal.P.U.C.2d 482, 484, 489, Ordering Paragraph 6.) The Commission also required telephone corporations to provide an extensive customer notification and education program (CNEP) before offering Caller ID. (Re Pacific Bell, D.92-06-065 (1992) 44 Cal.P.U.C.2d 694, 716-718.)

The decision finds that Pacific violated the Caller ID requirements by failing to fully inform customers about the selective and complete blocking options. The factual bases for the Commission's conclusions include: (1) Pacific's 1997 plan to convert customers to selective blocking and (2) scripted language provided to service representatives regarding Caller ID. (D.01-09-058 at pp. 24-25.) These documents indicate that Pacific explained the two options with a bias towards selective blocking and without explaining a key aspect of complete blocking, i.e., that complete blocking allows customers to unblock calls on a per-call basis. (D.01-09-058 at pp. 24-25.) The decision concludes that Pacific's marketing of the selective blocking option failed to allow customers to make a fully-informed waiver of their right to privacy as required by the Caller ID decision. (See Re Pacific Bell, supra, 44 Cal.P.U.C.2d at pp. 713, 718.)

Pacific contends that the Caller ID decision did not impose any requirements on Pacific to explain how complete blocking works when marketing selective blocking. Pacific also argues that the decision errs in assuming that customers with unpublished numbers received complete blocking by default.[6]

The Caller ID decision requires the customer education campaign to be most intensive in the first six months "and then ongoing for as long as the services are being offered." (Re Pacific Bell, supra, 44 Cal.P.U.C.2d at p. 731, Ordering Paragraph 6.c.) However, as acknowledged in the decision, the Commission did not proscribe or address future efforts to persuade customers to switch from complete to selective blocking. (D.01-09-058 at p. 26.) Indeed, in responding to applicants' argument that complete blocking will devalue the service, the Commission stated: "It will be the applicants' challenge to persuade members of the public not to block by providing cogent reasons why it is not in their interest to do so." (Re Pacific Bell, supra, 44 Cal.P.U.C.2d at p. 713.)

Whether or not Pacific is correct that it does not have any particular duty to explain complete blocking when marketing selective blocking, Pacific does have a continuing duty not to mislead customers. The suggested language provided by Pacific to its service representatives uses two approaches to market selective blocking. (See D.01-09-058 at p. 25.) First, after the representative acknowledges that the customer has complete blocking, the representative may

[6] The decision states that Pacific's marketing of Caller ID does not give a complete picture of the options available. "This is particularly important for those customers who received Complete Blocking by default because their address and telephone number were unpublished." (D.01-09-058 at p. 27.) The "default" blocking option refers to the blocking option given to those customers who fail to affirmatively choose a blocking option.

state: "I find that Selective Call Blocking gives me greater control over my privacy." In the other suggested approach, the representative may state: "I'm concerned that your calls may go unanswered. Many of our customers don't answer calls that are marked private." The scripts tend to be misleading because they imply that complete blocking does not allow customers the choice to unblock their numbers.

Although this appears to be the essence of the Pacific's offense, the decision fails to make an explicit conclusion that Pacific's Caller ID marketing practices were misleading.[7] The decision only finds that Pacific failed to disclose sufficient information on the two options. (D.01-09-058 at pp. 23-27, 95-96, Conclusions of Law 13, 14, 15.) We will modify the decision to state that Pacific's marketing of selective blocking was misleading or potentially misleading. Pacific is also correct that the decision inaccurately indicates that customers with unpublished numbers received complete blocking by default. (D.01-09-058 at p. 27.) The Commission initially chose complete blocking as the default option for unlisted customers. (Re Pacific Bell, supra, 44 Cal.P.U.C.2d at p. 714.) However, the Federal Communications Commission (FCC) subsequently preempted the Commission and concluded that the default blocking option for all customers would be selective blocking. Thus, we will modify the decision to delete this language.

The decision also fails to discuss section 451 in connection with the Caller ID violations. Marketing tactics that are misleading or potentially misleading are clearly not reasonable under section 451. Thus, we will modify the decision to include section 451 as a basis for the Caller ID violations. Finally, we note that the text of the decision concludes the Pacific violated "Section 2896 and D.92-6-065." (D.01-09-058 at p. 27.) The corresponding Conclusion of Law states that Pacific violated section 2893 and the Caller ID decisions. (D.01-09-058

[7] The decision does state that Pacific "must give customers sufficient non-misleading information to enable customers to make an informed decision." (D.01-09-058 at p. 96, Conclusion of Law 15.)

at p. 96, Conclusion of Law 14.) Therefore, we will correct the text of the decision to state that we find that Pacific's marketing of selective blocking violates section 2893 and the Caller ID decision.

In reviewing the decision, we also discovered that it does not explicitly address Pacific's failure to explain blocking options on new service orders. Pacific itself states in its application for rehearing: "Pacific does not initiate discussion of blocking options on calls for new orders. If residential customers have Complete Blocking, they have it because they specifically requested it." (Pacific's Application at pp. 27-28, fn. 9.) Thus, if a customer signing up for service does not ask about Caller ID and/or blocking, the customer is not informed about the blocking options and receives selective blocking by default.

In the case of trying to switch customers from complete to selective blocking, the customer at least knows that he or she has a choice of options, even if not fully informed about how those options work. On the other hand, if a customer is initiating new service, he or she is not even told that there is a choice of options. This marketing practice clearly violates the Caller ID decision and section 2893. We will modify the decision to include this as a basis for the Caller ID penalties. We will also modify the decision to direct Pacific to notify new customers of the selective and complete blocking options, and to give them a choice of which option best suits their needs. However, rather than change the amount of the penalty, this failure to disclose information about blocking options will be included as a basis for the penalties already imposed.

(2) Inside Wire Maintenance Plans

Three issues were raised in the proceeding regarding Pacific's marketing of inside wire maintenance plans: (1) whether Pacific's practice of offering its more expensive plan first, without informing customers of the lower priced plan, violates Tariff Rule 12 and Public Utilities Code section 2896 (section

6.3.1 of decision); (2) whether Pacific's practice of marketing of its inside wire plans to tenants, without disclosing the landlord's responsibility to maintain inside wire and one working jack, violates Public Utilities Code section 451 and 2896 (section 6.3.2 of decision); and (3) whether Pacific failed to disclose that vendors other than Pacific could provide inside wire repair services, in violation of applicable law (section 6.3.3 of decision).

The decision finds that Pacific Bell violated Tariff Rule 12 and Public Utilities Code section 451 and 2896 (1) in failing to disclose its less expensive inside wire maintenance plan and (2) in failing to disclose the landlord's responsibility for maintaining inside wire. The decision imposes fines for those violations. The decision does not make any findings or conclusions about whether Pacific failed to disclose the fact that outside vendors may be used for inside wire repair. Instead, the decision merely directs Pacific to disclose such information. (D.01-09-058 at pp. 35-36.)

Disclosure of Different Maintenance Plans

Pacific offers two types of inside wire maintenance plans: WirePro for $.60 per month and WirePro Plus for $2.25 per month. The only difference in the plans is that WirePro Plus includes a loaner telephone for 60 days. As stated above, the decision finds that Pacific Bell violated Tariff Rule 12 and Public Utilities Code sections 451 and 2896 in failing to disclose its less expensive inside wire maintenance plan. The decision also concludes that Pacific violated Tariff Rule 12 by failing to state that components of the more expensive package may be purchased separately at a lower price. (D.01-09-058 at pp. 32-34.)

Pacific argues that the decision's finding that it failed to disclose the less expensive plan is contrary to the undisputed facts in the case. Pacific points out that parties stipulated that service representatives are instructed to advise customers that there are two inside wire repair plans, Wire Pro Plus and Wire Pro. (Joint Stipulation of Undisputed Facts.) ORA counters that even though Pacific may first advise customers that there are two options for inside wire repair, Pacific also stipulated that its service representatives are instructed to first offer WirePro Plus and then to offer WirePro if a customer indicates that her does not want the more expensive plan.

The decision's conclusion that Pacific's marketing of its inside wire repair plans violates Public Utilities Code section 451 and Tariff Rule 12 is reasonable and supported by the record. The record contains sufficient evidence to demonstrate that Pacific's marketing tactics did not fully inform customers of the two inside wire repair plans. Thus, the marketing tactics were potentially misleading and were likely to result in customers paying for services they did not want or need. Section 451 imposes an affirmative duty upon Pacific to ensure that services are provided in a manner that promotes the convenience of its customers. Furthermore, any marketing practice that is potentially misleading violates the "reasonable service" requirement of section 451. Therefore, Pacific has not shown legal error.[8]

Landlord's Responsibility for Inside Wire

The decision also penalizes Pacific for failing to disclose that the landlord is responsible for maintaining inside wire when Pacific markets the inside wire maintenance plans. As discussed in the decision, the Commission previously had in place a specific disclosure requirement regarding landlord responsibility that has since expired. In Re Accounting for Station Connections and Related Rate-making Effects and the Economic Consequences of Customer-owned Premise Wiring, D. 92-09-024 (1992) 1992 Cal. PUC LEXIS 749, local exchange companies offering inside wire insurance plans were required to disclose the

[8] Pacific also points to a June 1999 decision that specifically required Pacific to clearly explain both the WirePro and WirePro Plus maintenance plans. (Re Application of Pacific Bell for Authority to Categorize Business Inside Wire Repair as a Category III Service, D. 99-06-053, 1999 Cal PUC LEXIS 309, **113 -*114, Ordering Paragraph 8.) Pacific argues although there is no evidence that Pacific failed to comply with the specific remedial measures ordered in that decision, the decision fines Pacific through the end of 1999. Because this order only imposes penalties through March 11, 1999, we need not address this issue.

following: "You should be aware that, under state law, landlords, and not tenants, are responsible for repairs to and maintenance of inside telephone wire." However, the ordering paragraph requiring this disclosure inexplicably adds: "This provision shall be effective until September 1, 1994." (Id. at p. *12.)

Pacific argues that it is a violation of due process to penalize Pacific for failing to comply with a requirement that is no longer effective. Moreover, Pacific contends that the decision fails to discuss a specific disclosure requirement with which Pacific has complied. Public Utilities Code section 788(b)(1) requires that on or before March 1, 1992, and annually thereafter, local exchange carriers must issue a notice to each of its residential customers containing the following information: An explanation of inside wire responsibilities of the subscriber and the telephone corporation, "including an explanation of lessor and tenant obligations."

The ALJ proposed decision did not penalize Pacific for failure to disclose the landlord's responsibility for inside wire. In issuing our final decision, we stated: "Contrary to the revised POD, we find fault with Pacific Bell's lack of disclosure to tenants that it is the landlord's responsibility to maintain inside wire." (D.01-09-058 at p. 7.) We continue to believe that it is potentially misleading to market inside wire repair plans to tenants without making such a disclosure regardless of the expiration of the specific disclosure requirement contained in D.92-09-024. We also are not persuaded by Pacific's argument that Public Utilities Code section 788 somehow negates its responsibilities to make such a disclosure when marketing inside wire repair plans. Section 788 was enacted in 1991. Thus, even though the statute was effective in 1992, the Commission nevertheless imposed the more specific disclosure requirement in D.92-09-024. In addition, although the D.92-09-024 disclosure requirement expired in September of 1994, Pacific apparently did not immediately take this as a green light to do away with the disclosure.

Nevertheless, we recognize that by allowing the specific notice requirement to expire, the Commission may not have sufficiently put Pacific on notice that failure to disclose landlord responsibility could be a violation of law. Therefore, we have determined to base the inside wire penalties only on Pacific's failure to disclose different maintenance plans (section 6.3.1) and not Pacific's failure to disclose the landlord's responsibility (section 6.3.2). We will modify the decision accordingly. Because we counted Pacific's failure to disclose different maintenance plans and its failure to disclose the landlord's responsibility for inside wire as one violation, we will not change the amount of the penalty. In addition, we will not change the decision's requirement that Pacific make this specific disclosure on a prospective basis. (See D.01-09-058 at p. 102, Ordering Paragraph 4.)

(3) Sequential Offerings

We also imposed penalties on Pacific for its practice of making sequential offerings; that is, marketing the highest-priced package of optional services first, then the next highest, and so on. We found that this practice fails to inform customers of the availability of individual calling services until after all of the saver packs have been rejected. We concluded that this practice violates Tariff Rule 12 and Public Utilities Code sections 451 and 2896. (D.01-09-058 at pp. 53-58 and p. 98, Conclusions of Law 34, 35, and 36.)

Pacific first contends that the decision's findings on sequential offerings are unclear. According to Pacific, the decision sets out the competing versions of the facts presented by TIU and Pacific, but fails to make specific findings. Pacific states that the decision apparently views Pacific as having violated the Public Utilities Code by (1) not making customers aware that optional features could be purchased individually; (2) responding to inquiries with a package offer; (3) not itemizing the options and individual prices for each service in a package; and (4) directing sales representatives to "feign an interest" in the customer's usage before recommending a package. Pacific further argues that the first two assertions have no evidentiary support in the record and that the third and fourth assertions do not demonstrate any violation of law. ORA argues that Pacific is merely repeating arguments made earlier in its application for rehearing.

Pacific has failed to demonstrate that there is insufficient evidence to support the findings or that the findings do not indicate any violation of law. First, although TIU's witness testified that Pacific's scripts did contain a statement that optional features could be purchased individually, that same witness stated that this information was de-emphasized to the point that few customers were likely to hear or understand it. (See Ex. 47 at pp. 5-7, Bogisich/TIU.) Second, the record clearly supports a finding that Pacific's strategy was to offer multiple packages of optional services prior to explaining individual services.

Third, Pacific again argues that Tariff Rule 12 does not require disclosure of the prices of individual services, only of the package ordered by the customer. As stated above, the decision finds that Tariff Rule 12 requires the disclosure that package components can be purchased separately and the disclosure of the prices of the individual services. Finally, Pacific is correct that "feigning interest" in itself may not violate any law. However, in the context of this case, feigning interest is one of the ways that Pacific misleads customers into purchasing optional services that they may not need nor want. Looking at the combined practices of Pacific, there is both factual and legal support for the conclusion that those practices violate Tariff Rule 12 and Public Utilities Code sections 451 and 2896.

(4) Offer on Every Call

The decision also states that penalties are imposed on the basis of Pacific's practice of offering optional services every time a customer calls ("offer on every call"). (D.01-09-058 at pp. 83, 98, Conclusion of Law 33.) Pacific argues that the record does not support the findings related to this practice. We did not intend to impose penalties on Pacific for violations relating to "offer on every call" (section 7.1 of the decision). This was an inadvertent error. Therefore, we will modify the decision to eliminate "offer on every call" as a ground for penalties. This modification does not affect the remedial measures associated with offer on every call and does not affect the amount of the penalty.

4. Whether the Notification Requirements Are Supported by the Record

Pacific contends that the notification requirements regarding Caller ID blocking, inside wire, and custom calling packages are not supported by the record. Pacific essentially argues that that Pacific's conduct did not violate any standard and that, absent a violation, there is no support for requiring such notification. Pacific cites no authority to support this contention.

Pacific's argument is without merit. First, the Commission is not required to find a violation of an existing law in order to require a utility to make certain disclosures to customers. Moreover, whether or not penalties are imposed for certain for Pacific's marketing practices, the Commission has the authority to set standards for reasonable practices and service. In addition to Public Utilities Code section 451, discussed above, Public Utilities Code section 761 provides that whenever the Commission, after a hearing, finds that the practices or service of any public utility are "unjust, unreasonable, unsafe, improper, inadequate, or insufficient," the Commission shall determine and fix the rules, practices, service, or methods to be observed or employed. The record contains substantial evidence to support the conclusion that Pacific's marketing practices were unreasonable, improper, or inadequate.

B. Whether Federal Law Preempts Limitations on Sales-Volume-Based Incentive Compensation

Pacific Bell and CWA contend that the 5% limit on sales-volume-based incentive compensation unlawfully interferes with the rights of Pacific and its union employees under the federal National Labor Relations Act (NLRA) and is thus preempted. Pacific and CWA also argue that the 5% cap is unsupported by the record. ORA did not address the incentive compensation cap in its response. Therefore, there is no opposition to the applications for rehearing of Pacific and CWA on this issue.

1. Background

The decision explains that in 1998, pursuant to agreements with the unions representing Pacific Bell's service representatives, Pacific began paying service representative monetary rewards for exceeding sale revenue targets. Service representative receive up to $150 per month for meeting their sales revenue targets, and a 25% commission on all sales above the target. There is no upper limit on the amount a representative can earn on commission. Testimony of Pacific Bell employees indicates that the implementation of incentives for customer service employees based on sales volume resulted in overly aggressive sale efforts. The decision also states that sales incentives and sales quotas played a significant role in the earlier Pacific Bell abusive marketing case, citing Re Pacific Bell, D.86-05-072 (1986) 21 Cal.P.U.C.2d 182, 191, Conclusion of Law 9 and Ordering Paragraph 2. (D.01-09-058 at pp. 59-60.) The decision concludes that incentive compensation based on sales volume for service representatives and their direct supervisors is limited to 5% of monthly compensation. (D.01-09-058 at p. 64.)

On October 25, 2001, the Commission issued an order on its own motion staying the cap on incentive compensation until further order of the Commission. (See D.01-10-045, Order Staying Ordering Paragraph 12 of Decision 01-09-058.) This was in response to a federal district court ruling that temporarily enjoined the Commission from enforcing the cap on incentive compensation as it relates to employees covered by the NLRA.[9]

2. Analysis

In Local 23, International Brotherhood of Teamsters v. Oliver (1959) 358 U.S. 283, relied upon by both Pacific and CWA, the United States Supreme Court addressed the issue of whether a state court was precluded from applying antitrust law to prohibit parties from carrying out the terms of a collective bargaining agreement. That case involved a collective bargaining agreement entered into by local labor unions and interstate motor carriers. Article XXXII of the agreement prescribed the terms and conditions which regulate the minimum rental and certain other terms of lease when a motor vehicle is leased to a carrier by an owner who drives the vehicle in the carrier's service. The Article was justified by the union as necessary to prevent the undermining of the negotiated drivers' wage scale, which resulted from a practice of carriers leasing a vehicle from an owner-driver at a rental that returned to the owner-driver less that his actual costs of operation. Thus, although the driver nominally received the negotiated wage, the wage was actually reduced by expenses of operation. The Ohio state courts held that the Article violated the Ohio antitrust law.

As stated by the Court:

> The question is whether the fact that the Article was contained in an agreement which was the fruit of the exercise of collective bargaining rights under the National Labor Relations Act precluded the Ohio courts from applying the Ohio antitrust law to prohibit parties form carrying out the terms of the Article they had agreed upon in bargaining.

(Id. at pp. 285-286.)[10]

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[9] Other than issuing the temporary restraining order the court has not yet ruled on any of the substantive issues in the case.

[10] As the Court noted, no claim was made that Article XXXII violated any provision of federal law.

First, the Court found that the purpose of the Article was not price-fixing, as the Ohio courts had concluded, but maintaining wages achieved through collective bargaining. Second, the Court determined that Ohio's antitrust law could not be applied to prevent the contracting parties "from carrying out their agreement upon a subject matter as to which federal law directs them to bargain." (Id. at p. 295.) The Court pointed out the goal of federal labor policy is to encourage collective bargaining; Congress was not concerned with the substantive terms of the agreements reached by collective bargaining. (Ibid.)

The Court concluded that to allow the application of the Ohio antitrust law in this case would defeat the full realization of the congressional purpose. "The application would frustrate the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving, and in the solution of which it imposed no limitations." (Id. at pp. 295-296.) Finally, the Court distinguished cases in which collective bargaining agreements conflict with local health or safety regulations; "the conflict here is between the federally sanctioned agreement and state policy which seeks to specifically adjust relationships in the world of commerce." (Id. at p. 297.)

Although Teamsters v. Oliver holds that the application of state law to prohibit carrying out a term of a collective bargaining agreement that is focused on wages is preempted, other cases have limited the potentially broad sweep of that case. As pointed out in the Commission's federal court briefs, the NRLA does not contain an express preemption provision. The Supreme Court has recognized that Congress has not preempted all state regulation "that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously, much of this is left to the States." (Metropolitan Life Ins. Co. v. Massachusetts (1985) 471 U.S. 724, 757, quoting Motor Coach Employees v. Lockridge (1971) 403 U.S. 274, 289.)

In Metropolitan Life Ins. Co. v. Massachusetts (1985) 471 U.S. 724, the Court ruled on the validity of a state law mandating that minimum health benefits be provided to a Massachusetts resident who is insured under a general health insurance policy or an employee health-care plan. Appellant insurers contended that because the state law essentially mandated terms of collective bargaining agreements, the state law was preempted by the NLRA.[11] The Court noted that there was a "surface plausibility to appellants' argument, which finds support in dicta in some prior Court decisions," such as Teamsters v. Oliver. (Metropolitan Life, supra, at p. 752-753.) Nevertheless, the Court rejected the argument as incompatible with the purpose and operation of the NLRA, which was to equalize the bargaining process between employer and employee, not to address the substantive terms of the bargain that is struck. (Metropolitan Life, supra at p. 753.)

In addition, the Court found that Congress did not consider the question of whether "state laws of general application" affecting terms of collective-bargaining agreements subject to mandatory bargaining were to be preempted. (Ibid.) Furthermore, according to the Court, one of the ultimate goals of the NLRA was the resolution of the problem of depressed wages and purchasing power of wage earners in industry and the widening gap between wages and profits during the 1930's depression. The Court concluded that the evil Congress was addressing was entirely unrelated to local or federal regulation establishing minimum terms of employment. (Id. at p. 754.)

[11] The NLRA contains no express preemption provision. (Metropolitan Life, supra, 471 U.S. 724.) However, the Court has articulated two distinct NLRA preemption principles. The so-called Garmon rule (see San Diego Building Trades Council v. Garmon (1959) 359 U.S. 236) protects the primary jurisdiction of the National Labor Relations Board (NLRB) to determine in the first instance what kind of conduct is either prohibited or protected by the NLRA. The second preemption doctrine, Machinists preemption (see Machinists v. Wisconsin Employment Relations Comm'n (1976) 427 U.S. 132) "protects against state interference with policies implicated by the structure of the Act itself, by pre-empting state laws and state causes of action concerning conduct that Congress intended to be unregulated." That doctrine was designed to govern preemption questions that arose concerning activity that was neither protected against employer interference, nor prohibited as an unfair labor practice. (Metropolitan Life, supra, at pp. 748-749.) Metropolitan Life involved Machinists preemption.

The Court pointed out that there was no suggestion in the legislative history of the Act that Congress intended to disturb the numerous state laws then in existence that set minimum labor standards, but were unrelated to the processes of collective bargaining or self-organization. (Metropolitan Life, supra, at p. 756.)

> To the contrary, we believe that that Congress developed the framework for self-organization and collective bargaining of the NRLA within the larger body of state law promoting public health and safety. The States traditionally have had great latitude under their police powers to legislate as "to the protection of the lives, limbs, health, comfort, and quiet of all persons." [Citation omitted.]

(Ibid.)

The Court concluded: "When a state law establishes a minimal employment standard not inconsistent with the general legislative goals of the NRLA, it conflicts with none of the purposes of the Act." (Id. at p. 757.) Similarly, in Fort Halifax Packing Co. v. Coyne (1987) 482 U.S. 1, the Court held that the NLRA did not preempt a state statute requiring employers, in the event of a plant closing, to provide a one-time severance payment to employees not covered by an express contract providing for severance pay. "Thus, the mere fact that a state statute pertains to matters over which the parties are free to bargain cannot support a claim of pre-emption, for 'there is nothing in the NLRA . . . which expressly forecloses all state regulatory powers with respect to those issues . . . that may be the subject of collective bargaining.' [Citation omitted.]" (Id. at pp. 21-22.)

CWA argues that the Metropolitan Life case is not applicable in the instant case for two reasons. First, Metropolitan Life established an exception to Teamsters v. Oliver for minimum employment standards. "[T]he exception applies only when the substantive standard at issue provides a minimum level of protection for workers." (CWA's Application at p. 9.) (See also Fort Halifax Packing Co. v. Coyne, supra, 482 U.S. 1; Viceroy Gold Corp. v. Aubry (9th Cir.

1996) 75 F.3d 482 [court held the NRLA did not preempt a California labor law that limited work hours for employees engaged in mining to eight hours within any 24-hour period].) CWA contends that here, rather than adopting a general policy that guarantees a minimum labor standard, the Commission has effectively ordered the reduction of wages by invalidating a contract provision that granted Pacific employees additional compensation based on sale volume. (CWA's Application at p. 10.)

Second, CWA contends that the Metropolitan Life exception applies when the policy at issue is a generally applicable standard the crosses job classifications and employers. CWA relies on Chamber of Commerce v. Bragdon (1995) 64 F.3d 497, in which the Ninth Circuit Court of Appeals held that an ordinance requiring employers to pay prevailing wages to their employees on wholly private construction projects was preempted by the NLRA. CWA also cites Bechtel Construction, Inc. v. United Brotherhood of Carpenters (9th Cir. 1987) 812 F.2d 1220, in which the Ninth Circuit held that certain state minimum wage standards for apprentice workers on specified construction were preempted.

Finally, CWA and Pacific also argue that this case does not fit the exception applied in rate-setting cases. Courts have generally held that the setting of rates is not preempted, even if the rates have an indirect affect on wages. (See Washington State Nurses Ass'n v. Washington State Hosp. Comm'n (9th Cir. 1985) 773 F.2d 1044 [setting of hospital rates] and Southwestern Bell Tel. Co. v. Arkansas Public Serv. Comm'n (8th Cir. 1987) 824 F.2d 672 [setting of utility rates].) According to Pacific and CWA, those cases are not applicable here because the Commission's order directly affects a wage provision in a specific collective bargaining agreement.

Contrary to applicants' assertions, we find that whether the NLRA preempts the incentive compensation cap is an open question. The cases relied upon by Pacific and CWA to support preemption are not necessarily applicable to this case. For example, in Teamsters v. Oliver, the Court expressly distinguished that case, in which the state policy sought to "specifically adjust relationships in the world of commerce," from those cases in which collective bargaining agreement would be in conflict with local health or safety regulations. (Teamsters v. Oliver, supra, 358 U.S. at p. 297.) Here, the Commission is seeking to protect captive customers of the utility by discouraging deceptive marketing practices; practices that violate the reasonable service standard of Public Utilities Code section 451, and is not attempting to adjust the relationship between union employees and Pacific.

CWA also misconstrues case law that upholds state regulation that is generally applicable to all workers. In Livadas v. Bradshaw (1994) 512 U.S. 107, the Court explained that the issue is whether state regulation is applicable to both union and non-union workers. In that case, California law required employers to pay all wages due immediately upon an employee's discharge and imposed a penalty for failing to do so. However, the State Labor Commissioner construed another state law as barring enforcement of the penalty claim on behalf of individuals whose terms and conditions of employment are governed by a collective bargaining agreement containing an arbitration clause. The Labor Commissioner argued that the non-enforcement policy is compelled by federal law because disposition of the penalty claim would entail interpretation or application of a collective bargaining agreement.

The Court disagreed, holding that a state rule predicating benefits on refraining from conduct protected by the federal law (i.e. entering into a collective bargaining agreement with an arbitration clause) was preempted by the NRLA. The Court distinguished state laws that treat all employees equally, whether or not represented by a labor organization, but allow union employees to opt out of the benefit provided. (Livadas v. Bradshaw, supra, at pp. 130-131.) In the instant case, the Commission's decision applies equally to both union employees and non-union supervisors. (See D.01-09-058 at p. 104, Ordering Paragraph 12.)

Furthermore, CWA overstates the significance of Chamber of Commerce v. Bragdon (1995) 64 F.3d 497 and Bechtel Construction, Inc. v. United Brotherhood of Carpenters (9th Cir. 1987) 812 F.2d 1220. In Chamber of Commerce v. Bragdon (1995) 64 F.3d 497, the court's holding was based on the fact that the prevailing wage ordinance affected the bargaining process in a much more invasive and detailed fashion than the statutes of general applicability approved in Metropolitan Life and Fort Halifax. The court found that the prevailing wage ordinance, which affected the entire wage and benefit package and was developed and revised from the bargaining of others, effectively negated the collective bargaining process altogether. (Id. at p. 504.) Similarly, in Bechtel Construction, Inc. v. United Brotherhood of Carpenters (9th Cir. 1987) 812 F.2d 1220, the wage standard was preempted because it did not apply generally to all similarly-situated employees. Rather, it singled out one class of wage earners from another even though the wage schedules for the two classes of workers were directly tied to one another. In addition, the court found that California's apprentice wage standard was not a minimum labor requirement because, under California law, the apprentice wage schedules yielded to rates established in collective bargaining.

Although we continue to believe that this is a case of first impression, we have decided to eliminate the 5% cap on incentive compensation. We believe that we can institute other measures to ensure compliance with the decision. These may include monitoring Pacific's practices or setting up a marketing oversight board as we did in the 1986 marketing abuse case. Therefore, we will grant rehearing in order to implement substitute compliance measures. We will leave it up to the ALJ to determine the appropriate procedural means (e.g., comments, workshops, hearings, etc.) to accomplish this.

C. Greenlining's Application for Rehearing

Greenlining asserts that the Commission committed reversible error by declining to adjudicate Greenlining's claims under Business and Professions Code sections 17200 and 17500 (Unfair Competition Law or UCL). According to Greenlining, these claims are within the Commission's jurisdiction, and the Commission has a mandatory duty to adjudicate claims within its jurisdiction. Greenlining alternatively argues that even if the Commission had discretion on this issue, it has abused its discretion in declining to adjudicate the UCL claims.

Greenlining claims that the Commission has jurisdiction to adjudicate the merits of its UCL claims because Public Utilities Code section 1702 gives the Commission jurisdiction over complaints made by any person "setting forth any act or thing done or omitted to be done by any public utility . . . in violation or claimed to be in violation, of any provision of law . . . ." According to Greenlining, since Pacific is a public utility, and Business and Professions Code sections 17200 and 17500 are provisions of law, it follows that the Commission has jurisdiction over Greenlining's claims under those provisions.

However, contrary to Greenlining's arguments, the Commission has discretion to leave enforcement of certain claims to the courts. In Robert A. and Lorecia Brown v. Southern California Gas Company, D.96-07-022 (1996) 66 Cal.P.U.C.2d 764, 768, for example, the Commission declined to exercise jurisdiction for the purpose of assessing fines against a utility for discriminatory employment practices, noting that those claims are subject to adequate redress in state and federal courts. Greenlining insists that it has a "right to file a complaint" and the Commission is "required to hold a hearing [and] make an order which resolves the issues presented to it." (Greenlining's Application at p. 2, citing Cal. Portland Cement Co. v. Public Util. Comm. (1957) 49 Cal.2d 171, 176.) However, the Commission has resolved the issues presented in this case. The complaints alleged that Pacific's marketing practices were unlawful. The Commission held hearings and issued a decision disposing of the issues. The

Commission did not have to rely on Business and Professions Code sections to fashion a remedy to dispose of the complaints.

Greenlining argues in the alternative that the Commission abused its discretion in declining to adjudicate the UCL claims and imposed a procedural obstacle for Greenlining by forcing it to wait until this proceeding terminated before it could bring its UCL claims in court. Greenlining claims that due to the primary jurisdiction doctrine, Greenlining could not have asserted its UCL claims in court while this proceeding was pending before the Commission because these claims challenge the same conduct by Pacific as do Greenlining's claims under the Public Utilities Code. However, Greenlining continues to argue that "if the Commission had dismissed Greenlining's §§ 17200 and 17500 claims at the beginning of this lawsuit, as Pacific urged, it is unlikely that Greenlining could have pursued those claims in court, as they were premised on the same conduct that was the subject of this proceeding." (Greenlining's Application for Rehearing at p. 11.) According to Greenlining's own argument, even if the Commission had dismissed the UCL claims, Greenlining would still be facing the same procedural burden of having to wait to litigate its UCL claims in court.

This argument simply fails to demonstrate that the Commission abused its discretion in declining to adjudicate its UCL claims. Moreover, whether Greenlining would have been precluded from bringing its UCL claims in court where there is a related matter pending before the Commission is a matter for the courts to decide. Any potential procedural burden that arises from the application of the primary jurisdiction doctrine by the courts does not demonstrate abuse of discretion by the Commission.

Greenlining presents numerous arguments as to how Pacific has violated Business and Professions Code sections 17200 and 17500. However, since the Commission did not commit legal error by declining to adjudicate those claims, there is no need to reach these arguments.

Greenlining also argues that the Commission abused its discretion by setting the fine too low. However, the Commission has substantial discretion in determining the amount of a fine for violations of law or regulations. As discussed in the decision, the Commission has established guidelines for its consideration of factors in setting fines. (See D.01-09-058 at p. 80.) In 1998, the Commission determined that the severity of the offense, precedent, any mitigating factors, and financial resources are the primary factors to consider in setting a fine. (See Order Instituting Rulemaking to Establish Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates, D.98-12-075, 1998 Cal. PUC LEXIS 1017.) The Commission relied heavily on these factors in setting the fine imposed on Pacific in D.01-09-058. None of Greenlining's arguments demonstrates that the Commission abused its discretion in setting the fine.

The decision fined Pacific for offenses that occurred over a period of two years. (D.01-09-058 at p. 83.) Greenlining argues that Pacific's illegal marketing practices continued past September 2000,[12] and that the Commission committed reversible error because its assumption of a two-year period of violation is not supported by substantial evidence. Greenlining's argument that the period of violation should be longer is based on a declaration filed by Pacific after the decision was issued. (Declaration of Michelle Gomez in Support of Emergency Motion of Pacific Bell Telephone Company to Stay Decision Pending Rehearing and Judicial Review, filed October 19, 2001.) Even if this declaration supported Greenlining's assertion that Pacific's illegal practices continued past September 2000, as discussed above, it was not part of the record evidence at the time the decision was issued. It is therefore inappropriate for Greenlining to rely on this declaration to assert legal error in the decision.

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[12] Greenlining assumes that the Commission imposed fines for the period from September 1998 to September 2000. However, Ordering Paragraph 15 indicates that the penalty period was from January 1, 1998 to December 31, 1999. (D.01-09-058 at p. 104.)

Greenlining next claims that the Commission should have considered Pacific's deceptive marketing to Lifeline customers as a factor in calculating the fine. The Commission declined to impose a fine for Pacific's marketing of optional services to Lifeline customers. The Commission reasoned that D.01-09-058 explains for the first time how Pacific's marketing techniques were in conflict with the universal service goals of both the Legislature and the Commission. (D.01-09-058 at p. 83.) This explanation is in error, according to Greenlining, because the Commission first explained that Pacific's marketing techniques were in conflict with the goals of the ULTS program in Re Pacific Bell, D.86-05-072 (1986) 21 Cal.P.U.C.2d 182.

Greenlining cites the decision out of context. The decision speaks about Pacific's marketing practices undermining the Commission's efforts to focus on the basic rate as the method of ensuring universal service. It does not speak specifically about Pacific's marketing practices in the context of conflicting with the purpose of the ULTS program. Greenlining also mischaracterizes another decision, Re Pacific Bell, D.87-12-067 (1987) 27 Cal.P.U.C.2d 1, which referred to Pacific's "abuses associated with lifeline service." However, the abuses referred to concerned making lifeline service available to those customers who were eligible, not marketing abuses like in the present case. Accordingly, Greenlining has not demonstrated legal error in the decision.

Greenlining also argues that Commission must impose retroactive fines for Pacific's use of the term "The Basics." Because the name was approved in a tariff, the relief must necessarily be prospective. Thus, the Commission chose not to include the use of the term "Basics" in its calculation of the fine. However, the Commission determined that Pacific should file tariffs under less misleading and confusing titles. Greenlining argues that this is an abuse of discretion. First, Greenlining asserts that Public Utilities Code section 1702 allows a complaint signed by at least 25 customers to challenge the reasonableness of a tariff, and that since Greenlining's complaint was filed by 31 individual complainants, Pacific's tariff is not a defense. Greenlining further argues that section 1702 draws no distinction between prospective and retrospective remedies for an unreasonable tariff. Greenlining also contends that while retroactive ratemaking is not permitted under Public Utilities Code sections 728 and 734, those provisions are irrelevant to fines payable to the State treasury.

It is difficult to follow Greenlining's logic here, and it confuses the language of the statute. First, any one person can file a complaint under section 1702 against a utility alleging a violation of the law or a Commission order or rule, but 25 customers are required to file a complaint challenging the reasonableness of rates or charges. Section 1702 does not draw a distinction between prospective and retrospective remedies for an "unreasonable tariff" because it makes absolutely no mention of remedies.

Greenlining also cites Pink Dot, Inc. v. Teleport Communications Group (2001) 89 Cal.App.4th 407 in support of its argument that Pacific cannot escape a retrospective fine for its misleading use of the term "Basics" merely because that name is contained in a tariff. However, that case is distinguishable. There, the Commission had explicitly required utilities to file tariffs that provided expressly for liability for willful misconduct, fraudulent conduct or violation of law. Teleport filed a tariff which was silent as to the required liability, but which contained some other language intending to limit its liability to its customers for damages caused by its conduct. The Court of Appeal held that the utility could not eliminate its liability for willful misconduct, fraud or violations of law by merely omitting the acknowledgment of such liability from its tariff. Whether a utility can insulate itself from paying damages to its customers for its willful misconduct by omitting liability from its tariffs is a different scenario from imposing fines on a utility for something contained in its tariff, which was approved by the

Commission. Greenlining's arguments fail to demonstrate legal error in the decision.

Greenlining also asserts that the Commission misapplied the factors that provide guidance on the assessment of fines. Greenlining argues that the Commission failed to punish Pacific for its recidivism and failed to recognize the geographic scope of Pacific's wrongdoing. Notwithstanding the fact that imposing penalties is within the discretion of the Commission, Greenlining's arguments are without merit. The Commission did consider the repeat nature of Pacific's marketing practices. (D.01-09-058 at pp. 81-82.) The Commission relied heavily on the factors established in 1998 in assessing the fine against Pacific. Greenlining has not demonstrated that the Commission misapplied the factors in assessing the fines.

D. Other Modifications and Corrections

There are a number of other modifications that we will make to correct errors and to make additions to the text of the decision, the findings and conclusions, and the ordering paragraphs. These modifications are detailed in the ordering paragraphs below. Among other things, we will reset the deadlines for complying with the customer notifications in light of the extension of time granted by the Executive Director and will require that the customer notifications be sent by direct mail, rather than bill inserts.

E. Pacific Bell's Request for Oral Argument

Pacific requests oral argument on the issues raised in its application for rehearing, pursuant to Rule 86.3 of the Commission's Rules of Practice and Procedure. Pacific alleges that oral argument is appropriate because the issues raised by the decision implicate Pacific's constitutional rights and present questions of first impression. Pacific further contends that the decision departs from existing Commission standards, ignores specific regulatory requirements governing the conduct in controversy and imposes a landmark fine, despite the absence of any evidence of customer harm. Finally, Pacific asserts that the complexity of the case, evidenced by the two-year delay between the end of hearings and issuance of a decision, support Pacific's request.

ORA opposes oral argument. ORA points out that oral argument has already been held in this case. Parties addressed issues in the ALJ's proposed decision in oral argument before the full Commission on February 23, 2000. In addition, ORA assets that Pacific has failed to demonstrate that oral argument will materially assist the Commission in resolving the applications for rehearing or that the decision adopts new precedent. (See Rule 86.3.)

Although this is a complex case, the decision does not depart from existing precedent nor does it establish new precedent, with the exception of the incentive compensation cap, which we eliminate in this decision. The issues in this case have been thoroughly argued and briefed. We do not believe that oral argument would materially assist us in resolving the applications for rehearing, (See Rule 86.3 of the Commission's Rules of Practice and Procedure.) Therefore, Pacific's request for oral argument is denied.

Therefore **IT IS ORDERED** that:

1. Limited rehearing is granted for the purpose of recalculating the penalties, and for the purpose of eliminating the incentive compensation cap.

2. Those portions of the decision dealing with the 5% cap on incentive compensation are vacated. Further proceedings will be held to establish compliance measures to replace the incentive compensation cap. The assigned administrative law judge shall determine the appropriate procedural means (e.g., comments, workshops, hearings, etc.) to accomplish this.

3. The amount of the penalties is recalculated based on continuing violations from January 1, 1998 through March 11, 1999. Based on a fine of $17,500 per day for each of two offenses, or a total of $35,000 per day, we will assess a fine of $15,225,000 ($35,000 per day x 435 days = $15, 225, 000).

4. Pacific shall have 90 days from the effective date of this order to comply with Ordering Paragraphs 3, 4, and 5 of D.01-09-058. Those customer notifications shall be made by direct mail rather than by bill inserts.

5. Pacific's request for oral argument is denied.

6. D.01-09-058 is modified as follows:

a. On page 14, delete the sentence following the quotation from First Financial Network that reads "Pursuant to § 451, Pacific Bell has the same duty to its residential customers" and replace it with the following:

> Although these standards are applicable to business customers, there is a similar duty under § 451 to provide services in a manner that promotes the convenience of residential customers.

b. On page 24, in the second sentence of the second full paragraph, delete "October 1977" and replace it with "October 1997."

c. On page 27, in the first full paragraph, delete the second sentence that reads: "This is particularly important for those customers who received Complete Blocking by default because their address and telephone number were unpublished."

d. On page 27, delete the last three sentences on the page and replace them with the following new paragraph:

> A customer's decision to switch from Complete Blocking to Selective Blocking based on the marketing script Pacific provides to its CSRs does not constitute a fully informed waiver of the customer's privacy rights, a precondition for selling Caller ID services. In addition, we find that Pacific's marketing scripts are misleading or potentially misleading because they imply that Complete Blocking does not allow the customer to unblock his or her number. Furthermore, Pacific does not address the issue of blocking options unless a customer either already has completes blocking or the customer asks about blocking options. If a customer does not ask for complete blocking, the

> default blocking option is selective blocking. As a result of this practice, new customers are not given a choice of blocking options as required by the Caller ID decision, D.92-06-065, and Public Utilities Code section 2893. Based on the foregoing, we find that Pacific's Caller ID marketing plan and scripts violate D.92-06-065 and Public Utilities Code section 451 and 2893. We will address what remedies or sanctions are to be applied in a later section of this decision.

e. On page 36, at the end of the discussion entitled "6.3.2. Landlord Responsibility," add the following sentence:

> We will not assess penalties for Pacific's past failure to specifically disclose that the landlord is responsible for maintaining inside wire.

f. On page 37, replace the last two sentences with the following:

> Our result in today's decision comports with the language quoted above, and we see no reason to disturb our previous decision. Furthermore, it has not been shown that Pacific has violated the mandates of that decision.

g. On page 50, in the second full paragraph, replace the last sentence in the paragraph with the following:

> As such, these practices disregard the reasonable service standards set forth in Sections 451 and 2896 of the Public Utilities Code.

h. On page 55, at the end of the first full paragraph, add the following language:

> Although it is not unreasonable or unlawful to encourage sales, Pacific has done so at the expense of reasonable customer service standards.

i. On page 59, at the end of the first partial paragraph, delete the last sentence and replace it with the following:

> The law does not preclude sales efforts, but it does require that sales efforts comply with the standards set forth in Tariff Rule 12 and Public Utilities Code sections 2896 and 451. We find that Pacific's practice of sequential offerings does not meet these requirements.

j. On page 81, in the first partial paragraph, replace the first full sentence with the following:

> These practices have impacted untold numbers of captive residential customers, and in particular, immigrant and low income Lifeline customers who are most vulnerable to such marketing tactics.

k. On page 81, in the first partial paragraph, delete the final sentence that begins with "Examples in this proceeding" and replace it with the following:

> In this proceeding, we have found that the following practices constitute violations of the Public Utilities Code, Tariff Rule 12, and/or prior Commission orders: sequential marketing of optional service packages without disclosure of lower-priced plans, misleading marketing of Caller ID blocking options, and misleading marketing of inside wire maintenance plans.

l. Beginning on page 82 and continuing to page 83, delete the last two lines on page 82 and the first partial paragraph on page 83. Replace the deleted language with the following:

> Having considered all of these factors and the totality of the circumstances, particularly the scope, severity, and repeat nature of Pacific Bell's marketing abuses, but mitigated by the factors stated above, we conclude that fine should be set in the mid to upper range permitted by Public Utilities Code section 2107. We will impose a fine of $17,500 for each violation.
>
> For purposes of calculating the fine, we will treat Pacific Bell's actions as two distinct offenses: (1) violations of the Caller ID decision, D.92-06-065, and Public Utilities Code sections 451 and 2893 (as

> discussed in Section 6.1); and (2) incomplete disclosure of information when marketing optional services in violation of Tariff Rule 12 and Public Utilities Code sections 451 and 2896 (as discussed in Sections 6.3.1 and 7.2). We further conclude that because the marketing practices were in effect on a continuing basis during the relevant period, the fine should be calculated as a continuing fine under Public Utilities Code section 2108, with each day counting as a separate and distinct offense. Finally, the evidentiary record indicates that the practices complained of went on from January 1, 1998 through the close of the record in this case on March 11, 1999. Thus, we will impose a fine of $17,500 per day for each of the two offenses, or a total of $35,000 per day, from January 1, 1998 through March 11, 1999 (435 days). This results in a total fine of $15,225,000 ($35,000 per day x 435 days = $15, 225, 000).

m. On page 79, under the heading "d. If Customer Agrees, Present Marketing Information," delete the first two sentences and replace with the following:

> If the customer wants to receive marketing information, then Pacific Bell may present marketing information to the customer, and may ask the customer for permission to access CPNI. Marketing information need not be presented in any particular order but must include the prices for each service offered.

n. On page 95, delete Conclusion of Law 13 and replace it with the following:

> Pacific Bell's Caller ID marketing plan and scripts were deficient in that customers were neither fully informed of the two blocking options nor allowed to choose between them. In addition, Pacific's marketing scripts, as set forth in Finding of Fact 8, were misleading or potentially misleading because they imply that Complete Blocking does not allow the customer to unblock his or her number.

o. On page 96, delete Conclusion of Law 14 and replace it with the following:

> Pacific's Caller ID marketing plan and scripts violated D.92-06-065 and Public Utilities Code sections 451 and 2893.

p. On page 102, delete Ordering Paragraph 1 and replace it with the following:

> Pacific shall comply with this decision, D.92-06-065, and Public Utilities Code sections 451 and 2893 in making the required disclosures about Caller ID blocking options. This includes giving non-misleading information to customers regarding the Selective and Complete Blocking Options when Pacific is either attempting to switch customers from Complete to Selective Blocking or is signing up new customers who have not yet chosen a blocking option.

q. On pages 102-103, replace the last sentence of Ordering Paragraph 6 with the following:

> The descriptions of the services, including prices, shall be included in all telephone directories published more than 90 days after the effective date of this order. No later than 18 months after the effective date of this order, all current directories must include this information.

r. On page 102, add the following as Ordering Paragraph 5a:

> The customer notifications required by Ordering Paragraphs 3, 4, and 5 shall be made by direct mail rather than bill inserts.

s. On page 103, delete the last sentence of Ordering Paragraph 8 and replace it with the following:

> If the customer responds in the affirmative, only then may the service representative engage in unsolicited sales or marketing efforts, or request the release of CPNI.

t. On pages 103-104, add the following as Ordering Paragraph 11a:

> Within 45 days, Pacific Bell shall file advice letters for the purpose of renaming the optional service packages that include the names "The Basics" and/or "The Essentials," consistent with the standards discussed in this decision.

7. Except for the limited rehearing to address the issue of a substitute compliance mechanism, rehearing of D.01-09-058 as modified herein is denied.

This order is effective today.

Dated February 7, 2002, at San Francisco, California.

LORETTA M. LYNCH
President
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners

I will file a written dissent

/s/ HENRY M. DUQUE
Commissioner

I will file a written dissent

/s/ RICHARD A. BILAS
Commissioner

Commissioners Henry M. Duque and Richard A. Bilas, dissenting:

The application for rehearing process can serve as a means to correct legal errors. The majority has attempted used this opportunity to make one important correction by eliminating the restrictive cap on incentive compensation, although replacing it with yet another flawed process. But in all other respects the majority propagates the errors of Decision (D.) 01-09-058 by attempting to clean up the legal and factual errors strewn in that decision only to expose broken girders and rafters.

Contrary to the majority decision, we believe Pacific Bell (Pacific) has made a convincing showing in its rehearing application that D.01-09-058 is fundamentally flawed. In its application, Pacific establishes that the key legal and evidentiary premises of the fine were demonstrably erroneous.

As we stated in our dissents, Pacific was fined without notice, in the absence of evidence showing harm done to consumers and in the absence of any clear Commission or statutory requirement for the violations. The majority decision continues to have the panoply of violations for giving incomplete or misleading information when selling optional services and when promoting Caller ID; but it finds no specific or general requirement has been violated. It does not cure the absence of evidence that any individual consumer was misled by Pacific into buying a service that they did not want or could not afford. Nor could it defensibly show that the Caller ID marketing practices of Pacific are in violation of Section 4896 and the Caller ID decision (Re Pacific Bell, D.92-06-065 (1992) 44 Cal.P.U.C.2d 694).

In an effort to shore up the weaknesses exposed by Pacific's application for rehearing, the majority decision attempts to shift reliance from Public Utilities Code § 2896, a general directive, and Tariff Rule 12, which imposes no relevant obligation on Pacific to separately inform the customer of each optional service, to the more general Public Utilities Code § 451. In doing so, the decision misapplies § 451 and imposes an impossible duty on Pacific. To meet the 'just and reasonable' standard that § 451 would require, according to the majority's decision, Pacific would need to inform the customer of ***all*** alternative services to the optional service. If Pacific literally follows this order, the customer will be subjected to a barrage of information for which the customer may have neither the time nor the patience to receive. This narrow and customer-unfriendly interpretation of § 451 not only will cause much more grief to consumers than Pacific's 'incomplete information', but also overextends § 451's 'reasonableness' standard.

The essence of § 451 is to make 'unjust and unreasonable' prices unlawful, as the traditional purview of regulation applies it. The majority decision attempts to extend this public interest concept of *justum pretium* or 'just price' to a complex set of transactions involving provision of information when a carrier offers optional services. In doing this when no realistic and clear requirements exist that delineate reasonable service from unreasonable service, the majority exposes the commission's reasonableness standard to the vagaries of policy preferences, not to mention to the establishment of inoperative standards. We believe the majority's analysis lacks the necessary legal and policy premise to continue to uphold such drastic findings.

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We agree with the majority that the restrictive cap on incentive compensation needs to be removed because it is illegal. However, we disagree that some new mechanism needs to replace the incentive compensation cap. The majority's decision does not state what will replace the incentive compensation cap, but instead makes mention of "further proceedings to implement substitute methods for ensuring compliance with our decision." We see reasons in the decision to believe, and cringe at the idea, that the result may be monitoring of Pacific's practices or a marketing oversight board, similar to a board established by the Commission over 15 years ago. This is troubling in many respects.

First, by not providing finality to this three-year old complaint case, the federal court's review of this case is faced with further uncertainty.

Second, this Commission has a host of tools it can use to ensure compliance. It can require utilities to file monitoring reports. It can request any information and can inspect the procedures of service representatives. These methods alone would allow the Commission to review scripts and procedures and determine if it chooses to audit the utility to check compliance. The Commission could also monitor complaints at its offices and the company's, a sure way of finding harm done to consumers, to check if there is customer dissatisfaction or harm. We wish to think, against odds, that these more efficient and less interventionist options would be considered in lieu of an oversight board, whose function would be detrimental in an era of emerging competitive choice in the telecommunications market.

Third, there is no need for the Commission to police the sale of optional services when clear and direct requirements and the possibility of an investigation could serve as sufficient deterrents.

The decision of the majority to re-open the proceeding to find a substitute for the cap on incentive compensation is misguided. In the re-opened proceeding, there will be analogies drawn to the 1986 marketing abuse case and its associated Marketing Abuse Oversight Board. We have long held the position that there is little if any connection between the 1986 case and this complaint case. One glaring difference is that in 1986 there were many aggrieved customers. The other difference is that residential local service is unaffected by Pacific's marketing of optional service, unlike the 1986 case. Therefore, to treat Pacific's current marketing as 'recidivist' and seek a similar measure is misplaced.

For all the above reasons, we dissent.

/s/ HENRY M. DUQUE
Henry M. Duque
Commissioner

/s/ RICHARD A. BILAS
Richard A. Bilas
Commissioner

San Francisco, California
February 7, 2002