Decision 02-09-056 September 19, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion into Monitoring Performance of Operations Support Systems.	Rulemaking 97-10-016 (Filed October 9, 1997)
Order Instituting Investigation on the Commission's Own Motion into Monitoring Performance of Operations Support Systems.	Investigation 97-10-017 (Filed October 9, 1997)

ORDER CORRECTING CLERICAL ERROR IN DECISION 02-03-023 AND DENYING REHEARING OF DECISION

I. SUMMARY

WorldCom, Inc., on behalf of itself and AT&T Communications of California, New Edge Networks, Inc., PacWest Telecomm, Inc., and XO California, Inc. (collectively "participating competitive local exchange carriers," or "CLECs") filed an application for rehearing of D.02-03-023 on April 8, 2002. For the reasons set forth below, we deny the application for rehearing. However, we take this opportunity to correct a clerical error on page 104 of D.02-03-023, in Finding of Fact No. 70. The word "one" in the second part of the sentence, following the word "a" is a typographical error and should be replaced by the word "zero," so that the reference is to "zero to five percent," and the finding should provide as follows:

> 70. Establishing a curvilinear payment guide that starts with a payment of from zero to one percent of the payment cap for service with a zero to five percent

failure rate adjusts for the ambiguity of lower failure rates.

II. BACKGROUND

The proceeding at issue concerns the Commission's rulemaking (R.97-10-016) and investigation (I.97-10-017) into monitoring the performance of operations support systems (OSS) of incumbent local exchange carriers (ILECs) SBC Pacific Bell (Pacific) and Verizon. Performance measures and performance assessment methods have already been established in an earlier phase of this proceeding. (See D.01-05-087 and D.01-01-037.) The challenged decision pertains only to Pacific and was issued in the "performance incentives" phase of the proceeding, as a complete performance assessment plan. It establishes the third critical step of a performance incentives plan: "the corrective actions necessary if performance is deemed harmful to competition." (D.02-03-023 at 4.) The goal of the plan is to ensure that Pacific is in compliance with the direction of the Federal Communication Commission (FCC) that OSS performance shall provide competitors with a true opportunity to compete.[1]

Workshops were held in this phase of the proceeding in February 2001 to develop a payment structure that would determine the recipients and the amounts of payments (i.e., performance incentives) by the ILECs for deficient OSS performance. Following the workshops various plans concerning incentive payment structures were submitted by Pacific, Verizon, the Commission's Office of Ratepayer Advocates (ORA), and the CLECs. Each group requested the establishment of fairly widely varying incentive payments by Pacific in the event of deficient performance, with the CLECs requesting the most payments, and

[1] D.02-03-023 at 4. The FCC's directive stems from the Telecommunications Act of 1996 (TA96). Applications of Regional Bell Operating Companies (RBOC) to provide in-region interLATA service pursuant to section 271 of TA96 are subject to FCC approval. Part of that approval process may require an evaluation of whether the application is in the public interest and a RBOC may use performance monitoring and enforcement mechanisms it is subject to as proof the RBOC would continue to meet its section 271 obligations and that its entry would be consistent with the public interest. (See *id.*, at 3.)

Pacific indicating the least. The differences between the plans are set forth in the Findings of Fact section of D.02-03-023.

We adopted a plan based on Pacific's plan, with the modifications set forth in Appendix J to the decision. (D.02-03-023 at 94, Conclusion of Law No. 17.) The decision concludes that the performance incentive plan payments should not be the exclusive remedy for deficient OSS performance. (*Id*., Conclusion of Law No. 21.) In addition, Pacific and any CLEC may agree to use a different performance incentives plan, subject to our approval. (*Id*., at 97, Ordering Paragraph No. 3.) The adopted plan is subject to our review, adjustment and modifications following the initial six-month period and at that time resolution of any remaining issues from D.01-01-037 should be addressed as well. (*Id*., at 98, Ordering Paragraph No. 6.)

The CLECs allege the challenged decision errs on the grounds that : 1) it is not supported by the findings; 2) the findings made are not supported by substantial evidence; and 3) the Commission abused its discretion in adopting the incentive payments policy it adopted. For the reasons set forth below, the CLECs have failed to establish any legal error and therefore we shall deny the application for rehearing.

III. DISCUSSION

A. The Challenged Decision Is Supported By The Findings

The CLECs argue that the challenged decision is not supported by the findings because the adopted plan: a) does not provide any incentive for Pacific to provide and maintain nondiscriminatory OSS for its competitors, b) adjusts payment amounts at certain performance levels so that noncompliance is essentially "forgiven," and, c) the Commission errs in directing the parties to amend Performance Measure 16.

With respect to the first issue, the CLECs argue that the plan must be improved. Pursuant to D.02-03-023, the plan is subject to Commission review, adjustment and modifications as set forth in Ordering Paragraph No. 6. Thus, the CLECs are afforded an opportunity to timely raise their concerns and the facts supporting them at that time. Presentation of them at this time is premature. The CLECs argue that unless Pacific faces greater liability for discriminatory conduct there will be no viable competition offered by CLECs and telephone customers will be subject to a monopoly. Yet the CLECs offer no proof to support their supposition. The CLECs' argument is premised on the theory that the incentives plan is nothing more to Pacific than the cost of doing business, but they do not provide any factual support of their contention. Without factual support, the CLECs' theories of what Pacific might do in the future do not provide a basis for a finding that our decision is legally erroneous. The issue is without merit.

The CLECs next argue that "[e]ven though the Commission did not adopt a plan to 'mitigate' the effect of random variation by excusing a certain number of violations linked to the adopted confidence level as urged by Pacific, the lower payment-per-miss results in reduced financial liability to Pacific, just as if instances of noncompliance had been 'forgiven' under a mitigation plan." The CLECs admit that we "correctly denied Pacific's attempts to have failures below the confidence level 'forgiven' because they were due to random variation," but take issue with Finding of Fact No. 70, arguing that by adopting "sub-nominal payments" for failures below the confidence level the Commission will effectively be forgiving those failures.[2] The essence of the CLECs' argument here, as elsewhere, is that the adopted plan does not provide for a higher level of payments that the CLECs believe should apply. The CLECs are using their application as a means to request us to change our policy decision and increase the incentive

[2] As set forth above, Finding of Fact No. 70 contains a typographical error that we shall correct by this decision.

payment amounts to a higher level. Again, this argument appears to be a rehash of the CLECs' comments and arguments made during the proceeding, and does not establish legal error.[3]

Thirdly, the CLECs take issue with Ordering Paragraph No. 4, claiming the decision lacks any finding of a need to revise the performance measure. The CLECs would have us order Pacific to implement Performance Measure 16 as written and not devise ways to change it. While it is true that we adopted the performance measures arrived at by the parties after collaboration, the CLECs have not accurately portrayed our findings on this issue. We explicitly stated in our findings that "[m]oving Performance Measure 16 into Category B (ex-Category 3) assessments improve[s] the plan and is reasonable only as a temporary solution;" and that "[m]oving Performance Measure 16 into Category B (ex-Category 3) assessments still does not capture the ideal data." (D.02-03-023 at 92, Findings of Fact Nos. 141 and 142, emphasis added.) The CLECs argue that the parties negotiated the performance measure, but they have not established how we committed legal error by requiring the parties to again "collaborate to review and recommend any appropriate revisions for the definition and/or use of Performance Measure 16." Our order logically (and legally) follows from the findings on this issue. The allegation is without merit.

B. The Findings Are Supported By Substantial Evidence.

The CLECs next argue that the findings are not supported by substantial evidence and that we have abused our discretion in choosing the Pacific proposal for a curvilinear approach. The CLECs argue that the curvilinear relationship between the likely percentage of nonperformance and the

[3] The CLECs are incorrect in arguing that we found that "no mitigation of potential 'false positive' or 'Type I' error is needed." (Application for rehearing at 1-2.) To the contrary, we declined to adopt any of the parties' "forgiveness" mitigation proposals and instead adopted a "curvilinear" payment schedule that mitigated Type I error at the better performance levels. In contrast to the parties' proposals, our mitigation provisions do not "forgive" identified failures as if they did not exist. (D.02-03-023 at 38; see also, *id.*, 28-38 and 41-49.)

consequential payment amount adopted by the challenged decision is not supported by the evidence gathered in the proceeding and is arbitrary. The CLECs take issue with the term "ambiguous" in Findings of Fact Nos. 68 and 69, stating that it is being used in a vague, enigmatic or equivocal manner that fails to shed light on what outcomes are being interpreted; and further that the purpose and method of "interpretation" is not explained. To the contrary, numerous findings explain the rationale for the plan we adopted. We note that we also found that "Pacific's performance is likely to remain at levels where our plan accurately follows the curvilinear target," and that "Pacific is unlikely to deteriorate to levels where the plan payments miss the target." (*Id*., Findings of Fact Nos. 77 and 78.) These findings follow logically from our discussion in the text of the challenged decision of the curvilinear payment structure as a method of reducing payment rates for lower failure rates. Further, we detailed the reasons why we preferred Pacific's proposed curvilinear relationship between payment amounts and performance, stating among other things that:

> [t]he meaning of smaller percentages of deficient performance is ambiguous relative to larger percentages… considerable analysis must be performed to understand the actual impact of 10 percent missed performance measures, whereas with levels of 20 percent, 30 percent, and 40 percent missed measures it becomes increasingly clear that parity is not being provided. Additionally, we suspect that after additional evidence is provided and analyzed, that some mitigation may be warranted. (*Id*., at 43-44.)

Moreover, we "acknowledge[d] and address[ed] the ambiguity inherent in the performance measures, benchmarks, and statistical tests by requiring lower relative penalty amounts for lower failure rates and by increasing the penalty rates as performance worsens." (*Id*., at 45.) Based on the evidence presented, we were "persuaded that Pacific's increasingly higher penalty rates (curvilinear) are more appropriate for an incentive plan than the CLECs' more uniformly increasing rates (linear)." (*Id*.) We included a graph that is set forth at

page 46 of our decision (figure 5) and the calculations upon which we relied are set forth in Appendixes E, F, and G.

It is clear that the CLECs do not agree with the curvilinear approach, believing that Pacific will not pay as much in penalties as it would under the approach preferred by the CLECs. However, this argument raises policy rather than legal issues. We are fully aware of the CLECs' position but based on the evidence as we discussed in D.02-03-023, we chose the Pacific proposal after reviewing all of the other proposals. The CLECs have not established how our determination violates any specific law, nor have they established that substantial evidence does not support the determination.

C. The CLECs Have Failed To Establish That The Commission Abused Its Discretion.

The next issue raised by the CLECs is that our decision constitutes an abuse of discretion because the plan provides "practically no incentive for Pacific to comply with performance standards for up to 10% of the performance submeasures used by a CLEC in one month." The CLECs' allegation is entirely speculative and theoretical at this point in time. The CLECs also argue that we abused our discretion by permitting certain Tier II payments to be distributed to Pacific's ratepayers (rather than entirely to the CLECs) because to do so will create goodwill for Pacific when in fact Pacific is paying the amounts because it discriminated against its competitors.[4] Further, the CLECs take issue with the billing cap. These arguments were presented by the CLECs during the proceeding. We fully explained our rationale for Tier II payments in the challenged decision, including the reasons why those billing credits termed Tier I payments will be adjustments to the rates that each CLEC pays to Pacific for OSS services and for local exchange wholesale services, and why those billing credits

[4] Additionally, we think the CLECs' argument at page 3 of their application for rehearing, "In directing that the incentive payments not payable to CLECs should be rebated to Pacific's ratepayers, those payments create an undeserved windfall of goodwill for Pacific, is to a certain extent, misleading. Contrary to the CLECs' proposition, incentive payments are credited equally to all ratepayers, including both ILEC and CLEC customers. (D.02-03-023 at 64-68.)

termed Tier II payments, which "exceed the measure of CLEC economic harm," appropriately go to the ratepayers as credits. (D.02-03-023, at 63-64; see also, *id.*, 65-68.) The CLECs take issue with our statement, and in particular that portion of it set forth above, demanding that it be stricken because "[t]here is no reliable factual basis for any assertion about the amount of economic harm suffered by a CLEC as the result of poor OSS performance." Yet one goal of the adopted plan is that "incentive payments [are] based on overall industry effects. (*Id.*, at 63-64.) As the decision provides, "[I]ndividual CLEC results are aggregated into one performance result for each sub-measure. Payments are generated from each sub-measure with failing performance." (*Id.*) The focus here is not on any individual CLEC but on the industry as a whole. The CLECs are using the rehearing process to impermissibly rehash old arguments. The CLECs have failed to establish that we abused our discretion on this point.[5]

D. The CLECs Have Not Shown That The Decision Errs By Requiring Proceedings To Modify The Joint Partial Settlement Agreement And D.01-05-087 To Be Completed Before Any New Payment Measure Can Be Implemented.

The CLECs next contend that we should not prohibit parties from implementing negotiated alternative payment measures for performance failures, citing the challenged decision at page 71, wherein we noted the rationale for the Joint Partial Settlement Agreement (JPSA) adopted in D.01-05-087 to be completed before any new measure can produce payment. We have previously stated our belief that the Pacific-CLEC agreement regarding new measure implementation be included in the JPSA modification proceedings and not be included in the incentives plan. The CLECs have not provided any legal argument

[5] The CLECs' statement that "…the Decision completely fails to create any incentive with respect to Pacific's provisioning of LNP-only service," is inaccurate. (Application for rehearing at 14.) Any Tier I amounts that cannot be credited to a CLEC because of the billing credit limit are added to Tier II and credited to the ratepayers instead. The total amount that Pacific must credit to others is the same regardless of any billing credit limit. (D.02-03-023 at 64, and Appendix J at 5, § 3.5.) Additionally, Tier II incentive amounts would also be generated by failing performance in LNP-only service at the industry-wide level. (*Id.*, at 64.)

in the application for rehearing on this issue but rather are using the rehearing process as a vehicle for their policy argument. An application for rehearing is properly used to inform the Commission of any perceived legal errors in a challenged decision. "Applications for rehearing shall set forth specifically the grounds on which applicant considers the order or decision of the Commission to be unlawful or erroneous. Applicants are cautioned that vague assertions as to the record or the law, without citation, may be accorded little attention. The purpose of an application for rehearing is to alert the Commission to an error, so that error may be corrected expeditiously by the Commission." (Commission Rules of Practice and Procedure, rule 86.1.) The CLECs have not complied with the Commission's Rules of Practice and Procedure regarding applications for rehearing and this argument is without merit.

E. The Commission's Taking Official Notice Of Staff Calculations Was, At Most, Harmless Error, And The CLECs Do Not Challenge The Information.

Finally, the CLECs argue that our taking "official notice" of theories and numbers compiled by Pacific's consultant at the request of our Telecommunications Division staff, for the staff's review, violates our Rules of Practice and Procedure, and that the numbers and theories were not subject to review and discussion by the parties.[6] The CLECs, however, do not challenge the information and seek for a modification of the decision removing the term "official notice" from the decision rather than a hearing on this issue.[7]

Rule 73 of the Commission's Rules of Practice and Procedure provides for the Commission's official notice of facts, and states: "Official notice

[6] In Footnote No. 104, we stated: "We take official notice of staff's calculation results. Using data and programs supplied by Pacific's consultant, staff calculated that the average number of CLECs touching Category B sub-measures is approximately ten." (D.02-03-023 at 76.)

[7] "… [T]he CLECs' request for rehearing on this issue is limited to the inappropriate use of the term, 'official notice,' and is not an objection to the Commission's reliance upon the work performed by the consultant at staff's direction, once the agency relationship, the subject matter, and the use of the material have been publicly disclosed so that any potential improprieties may be subject to public review." (CLECs' application for rehearing at 18-19.)

may be taken of such matters as may be judicially noticed by the courts of the State of California." Judicial notice by the California courts is established by Evidence Code section 450, et seq.

The calculations at issue were made by the staff—not a party to the proceeding—from information supplied by Pacific. In their application for rehearing the CLECs do not challenge the work performed by Pacific at the staff's direction. The CLECs request only that we modify the decision by deleting the term "official notice," and that the "source of the information," presumably Pacific's consultant, "be clearly identified." (*Id*., at 19.) Thus although the CLECs raise an issue of legal error, they appear to concede that the error, if any, is harmless.

Even if the information provided by Pacific is not information from which judicial notice can be properly taken, since the CLECs do not challenge the information, rehearing is not necessary (or even desired by the CLECs). With respect to their request that the source of the information be identified, D.02-03-023 clearly provides that the information was provided by Pacific's consultant. (D.02-03-023 at 76, fn. 104.) Further, with respect to the actual information, the CLECs in their application for rehearing state that "the Commission may properly rely upon and incorporate the work performed by a party's consultant the appropriate disclosure have been made and the factual matter is subject to public review in a subsequent phase of the proceeding. [sic]" Given that the CLECs do not seek rehearing on this issue, the matter is at most, one of harmless error. Rehearing therefore is denied.

IV. CONCLUSION

We have reviewed each and every allegation of legal error raised in the rehearing application and are of the opinion that legal error has not been demonstrated. Therefore we deny rehearing. However, in the interest of clarity, we shall use this opportunity to correct a clerical error in Finding of Fact No. 70.

Therefore, **IT IS ORDERED** that:

1. Finding of Fact No. 70 is corrected to delete the word "one" from the second portion of the sentence where it appears with the phrase "…one to five percent…", and replace it with the word "zero" so that the finding provides:

> 70. Establishing a curvilinear payment guide that starts with a payment of from zero to one percent of the payment cap for service with a zero to five percent failure rate adjusts for the ambiguity of lower failure rates.

2. The application for rehearing of Decision 02-03-023 filed by WorldCom, Inc., on behalf of itself and AT&T Communications of California, New Edge Networks, Inc., PacWest Telecomm, Inc., and XO California, Inc. is denied.

This Order is effective today.

Dated September 19, 2002, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
CARL W. WOOD
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners