STATE OF CALIFORNIA GRAY DAVIS, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

September 30, 2002

TO: ALL PARTIES OF RECORD IN RULEMAKING 93-04-003 et al.

Decision 02-09-050 was mailed without the concurrence of Commissioner Michael Peevey. Attached herewith is the concurrence.

Very truly yours,

/s/ CAROL A. BROWN
CAROL A. BROWN, Interim Chief
Administrative Law Judge

CAB/tcg

Commissioner Peevey, concurring opinion with partial dissent:

I concur with almost the entirety of today's historic decision. The decision finds that Pacific Bell has fully complied with 12 of the 14 checklist items of the Telecommunications Act of 1996. The remaining two items have partial compliance. Additionally, one of the items, mechanization of the Number Portability Administration Center, is expected to be in compliance in a few weeks. The decision also finds that Pacific Bell has passed a third-party test of its Operations Support System and that a strong Performance Incentives Plan is in place.

The California Commission is justifiably proud of the quality that is exhibited by the decision. Each item that will be considered by the Federal Communications Commission (FCC) has been thoughtfully analyzed and clearly explained. California has done a responsible job in opening up the competitive market. The decision's findings indicate our readiness to provide a recommendation to the Federal Communications Commission that Pacific Bell should be allowed into the long distance market.

However, I must dissent in part. My disagreement focuses on one issue: the interpretation of California Public Utilities Code Section 709.2. Subsection "c" states in full,
"No commission order authorizing or directing competition in intrastate interexchange telecommunications shall be implemented until the commission has done all of the following, pursuant to the public hearing process:

(1) Determined that all competitors have fair, nondiscriminatory, and mutually open access to exchanges currently subject to the modified final judgment and interexchange facilities, including fair unbundling of exchange facilities, as prescribed in the commission's Open Access and Network Architecture Development Proceeding (I.93-04-003 and R.93-04-003).
(2) Determined that there is no anticompetitive behavior by the local exchange telephone corporation, including unfair use of subscriber information or unfair use of customer contacts generated by the local exchange telephone corporation's provision of local exchange telephone service.
(3) Determined that there is no improper cross-subsidization of intrastate interexchange telecommunications service by requiring separate accounting records to allocate costs for the provision of intrastate interexchange telecommunications service and examining the methodology of allocating those costs.
(4) Determined that there is no substantial possibility of harm to the competitive intrastate interexchange telecommunications markets."

The decision finds that Pacific Bell has satisfied only the first criterion and that it has failed the remaining three criteria.

I disagree with the decision for three reasons. First, Public Utilities Code Section 709.2 does not control our decision because the Commission did not provide authorization to Pacific Bell to provide intrastate, interexchange service. Second, the clear intent of Section 709.2 is to open the interexchange market, not to restrict entry. Third, even if Section 709.2 is applicable, the fact is that Pacific has met all four criteria. To expand on each of these points:

- Regarding my first point, that Public Utilities Code Section 709.2 is not controlling, the code suggests that this Commission may be required to issue a separate order "authorizing or directing competition in intrastate interexchange telecommunications". Without intending any disrespect to the hard work put in by

our employees, the decision's review of the FCC's checklist is analogous to a pilot's review of a pre-flight checklist. Continuing this analogy, the decision does not authorize any flight. Ending the analogy and to be as clear as possible, today's decision does not authorize or direct competition. The FCC is the regulatory agency that has the discretion to authorize Pacific Bell's entry into the long distance market.

- Regarding my second point, the intent behind Section 709.2 is to open the interexchange market, not to restrict competition. This intent is quite clear from a plain reading of the code and the bill that created the code, AB 3720 (Costa). Providing further clarification, former Assemblymember Costa, now Senator Costa, sent a letter dated March 21, 2001, that states "if the Commission determines that the local exchange company has complied with the requirements of the Telecommunications Act and the FCC, it would likewise satisfy the letter and spirit of my bill." From a policy point of view, it is at least inconsistent, and at worst arrogant, for a state agency to interpret a code in such a way as to be exactly the opposite of the clear intent. This Commission should avoid such a stance.
- Regarding my third point, there is ample evidence that Pacific Bell has satisfied the four criteria of Section 709.2. Assuming arguendo that the first two points are not valid, the decision comes to an incorrect finding that Pacific Bell has satisfied only criterion (1).

Criterion (2) deals with anticompetitive behavior. The decision looks at Pacific Bell and its parent, SBC, in California and elsewhere in the nation. For support that Pacific is acting in an anticompetitive manner, the decision finds two federal court cases. Both court cases were settled and are old. One was filed in 1996 while the other was filed in 1997. One wonders how much time must pass before the decision would consider a more contemporary review. The decision also looks at actions taken by SBC outside of California as potentially indicative of what Pacific Bell may do in terms of anticompetitive activity. The decision tries to rely on such facts as SBC's filing of inaccurate information in the 271 applications of Missouri, Oklahoma, and Kansas. (Note: In all three states SBC has been authorized by the FCC to provide long distance service.) Similarly, the decision raises as relevant the fines that SBC has had to pay in regard to the Ameritech Merger Conditions. The benefit of comparing California's Pacific Bell against other states is marginal at best. The decision also criticizes the plans of Pacific Bell to jointly market services. This argument should be moot due to the fact that the majority voted upon alternate pages that put in place restrictive terms on joint marketing. All of the findings, after being looked at closely, lead to a conclusion that Pacific Bell has acted "aggressively competitive". Indeed, this term is used by the decision itself regarding other allegations of anticompetitive behavior.

Criterion (3) covers the issue of cross-subsidization. Specifically, the criterion requires separate accounting records and an examination of the cost allocation methodology. In line with the thoughts of Senator Costa that meeting the Telecommunications Act's requirements would satisfy his bill, Section 272(b) of the Telecommunications Act sets forth rules requiring separate accounting. Parties do not appear to take issue with Pacific Bell's claims that it will have separate accounting records nor with the cost allocation methodology. Instead, parties suggest that Pacific Bell plans to joint market services that will not account for all appropriate costs. Again, the majority adopted alternate pages that put in place restrictions on joint marketing. Also, the decision finds that the Commission can audit Pacific Bell on several grounds, such as the Telecommunications Act's requirement for a joint federal/state audit, an audit as ordered in PB Com, and an audit to check on compliance with affiliate transaction and cost accounting rules. The decision's finding that these mandated audits have not been performed are not a failure of Pacific

Bell. Criterion (3)'s requirement for separate accounting records and an examination of cost allocation have been satisfied.

Criterion (4) deals with a substantial possibility of harm to the competitive intrastate interexchange market. The decision appears to make a critical mistake. It employed a different standard. In the discussion section of this issue, the decision finds that "we cannot state *unequivocally* that we find Pacific's imminent entry into the long distance market in California *will primarily enhance the public interest*." (emphasis added) First, the standard in the Public Utilities Code is to find that it will not harm the interexchange market. Second, the Code specifically states that the Commission's duty is to find that there is no "substantial" possibility of harm as opposed to the decision's benchmark which would have us state "unequivocally" that Pacific Bell's entry is in the public interest. This error is repeated as Finding of Fact 336. Even if the words were changed, the error suggests the benchmark that the decision employed. Indeed, a public interest test is a part of the review that will be undertaken by the FCC. This test is contrasted against the requirement in the Public Utilities Code which requires a look at potential harm to the interexchange market.

An overview of the current interexchange market can put this all in perspective. California has certificated several hundred long distance companies ranging in size from the large carriers (AT&T, Worldcom/MCI, Sprint) to very small niche companies. At the present time, Pacific Bell has a zero market share. The question is, "Is there a substantial possibility that Pacific Bell can harm the competitive interexchange market?" The answer hinges on whether Pacific Bell is able to use its market power as a local exchange carrier. Some factors that would work against this possibility is that many interexchange carriers also offer local service and have been offering bundled service, that this Commission has in place accounting oversight, and that the Commission employs a more rigorous regulatory environment for Incumbent Local Exchange Carriers (such as Pacific Bell) than on any other type of telecommunications provider. Actually, common sense dictates that an additional entrant will *improve* the competitive market. Customers will have another provider offering more choices.

In summary, I find that the decision makes a major error on the issue of Section 709.2. On a legal basis, the Code is not applicable. On a policy basis, the outcome is contradictory to the clear intent of the section. And, if one were to presume, for the moment, that Section 709.2 was applicable, then Pacific Bell meets all four of the criteria contained within it. It is vital that the 709.2 issues be clarified. I strongly encourage the assigned commissioner to immediately act in order to resolve this issue.

/s/ MICHAEL R. PEEVEY
MICHAEL R. PEEVEY
Commissioner

San Francisco, California
September 19, 2002