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Decision 02-12-057 December 17, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service.	Rulemaking 95-04-043
Order Instituting Investigation on the Commission's Own Motion Into Competition for Local Exchange Service.	Investigation 95-04-044

ORDER MODIFYING AND DENYING REHEARING OF DECISION 02-02-025

I. BACKGROUND

On October 12, 1989, the Commission issued Decision 89-10-031, establishing a new regulatory framework for Pacific Bell Telephone Company ("Pacific") and GTE California, Inc. ("GTE"). By this decision, their services were divided into three categories:

- Category I consists of monopolistic services whose rates may be changed only with the Commission's approval.
- Category II consists of partially competitive services whose rates are subject to downward adjustment.
- Category III consists of fully competitive services whose rates are flexible to the maximum extent permitted by law.

33 CPUC 2d 43, 125-127. On April 11, 1990, the Commission issued Decision 90-04-031, adding Ordering Paragraph 30 to Decision 89-10-031, to require that

Pacific and GTE, whenever they request that a new or existing service be classified as Category III, address various, specified criteria regarding competitive control over the affected market. Mimeo at 25 to 26. On March 13, 1996, the Commission issued Decision 96-03-020, classifying the various services offered by Pacific and GTE as either Category I or Category II. Included within Category II are "directory listing services." 65 CPUC2d 156, 190.

On August 21, 1996, Pacific filed Advice Letter 18443 with the Commission, seeking authorization to provide Directory Assistance Listing Information Service "for the sale of customer records contained in Pacific's directory assistance database to third parties for their provisioning of directory assistance service." In addition, Pacific requested that this "be treated as an above-the-line, Category III Service." Along with the advice letter, Pacific briefly addressed the criteria set forth in Decision 90-04-031 concerning competitive power. On September 11, 1996, AT&T Communications of California, Inc., MCI Telecommunications Corp., California Cable Television Association, and Time Warner AxS of California collectively filed a protest to Advice Letter 18443 and Metrocall Corporation individually filed comments. On June 24, 1997, the Director of the Telecommunications Division sent a letter to the protestants of Advice Letter 19443 stating that it had been gone into effect on December 1, 1996.

On January 23, 1997, the Commission issued Decision 97-01-043, ordering that Pacific and GTE supply independent publishers and providers with nondiscriminatory access to listings for Directory Assistance. As noted in Conclusion of Law II,

> Consistent with the provisions of federal regulations, [Pacific and GTE] should provide competing service providers with nondiscriminatory access to their directory-listing databases, both those used for DA as well as for publishing of directories.

70 CPUC 2d 661, 678. At the same time, the Commission ordered that the price of such access be made subject to further review:

> The Administrative Law Judge is directed to issue a procedural ruling calling for comments on whether to make existing directory access rates provisional and to establish a memorandum account to keep track of billings for access to directory databases for the purpose of truing up the changes once final rates are determined in the OANAD proceeding.

Id. at 679.

On January 7, 1998, the Commission issued Decision 98-01-022, determining that those rates should be provisionally based, subject to refund, on Pacific's existing tariffs and ordering Pacific and GTE each to establish a memorandum account to track retroactively revenues received for that service since the date of its inception. In this way, as explained in Conclusion of Law 2, the concern could be addressed that "third party competitors might be subject to unfair discrimination or anticompetitive treatment with respect to directory assistance." 78 CPUC2d 266, 271. On June 4, 1998, the Commission issued Decision 98-06-027, modifying Decision 98-01-022 on rehearing to require that the memorandum accounts track those revenues since the date the Telecommunications Act of 1996 became effective and that the price of access be based on the costs incurred in its provision. As the Commission explained, "We find that Sections 153(29), 222(e), and 252(d)(l)(i) of the [Telecommunication Act of 1996] require that the rates for network elements, including directory publishing information, must be based on cost." 80 CPUC 2d 487, 488. No application was filed for rehearing of this decision.

On February 15, 2001, Metro One Telecommunications, Inc. ("Metro One") and InfoNXX, Inc. ("InfoNXX") - - collectively, "Petitioners" - - jointly filed a petition for modification of Decision 98-01-022. They seek an order requiring Pacific and Verizon California, Inc. ("Verizon"), GTE's successor, to recompute the rates they charged for access to listings for Directory Assistance based on lowest rate in effect each time such access was provided and to refund

the difference between the rate actually charged and the recomputed rate. In support of this request, they assert that the long passage of time since issuance of Decision 98-01-022 has caused them undue economic hardship and unfair disadvantage in the market place. Pacific and Verizon each filed a response to this petition, recommending its denial.

On February 7, 2002, the Commission issued Decision 02-02-025, denying in part and granting in part the relief requested by Petitioners. First, the Commission declined to set immediately the rate to be charged for access to listings for Directory Assistance, but reiterated that it should be based on the cost of providing such access. Next, the Commission ordered that Pacific and Verizon no longer be authorized to charge independent providers of Directory Assistance each time they provide a listing to the public. Relatedly, it determined that, once their costs of providing access to listings for Directory Assistance are computed, Pacific and Verizon will be required to refund to independent providers the difference between the rates they were charged since the effective date of the Telecommunication Act of 1996 and the new rates. In addition, the Commission clarified that access supplied independent providers to listings for Directory Assistance should be classified as Category II.

On March 11, 2002, Pacific filed an application for rehearing of Decision 02-02-025. In its view, Decision 02-02-025 "violates the well-established law against retroactive ratemaking; any true-up of DA Listing charged must . . . be limited to January 7, 1998, the date of the decision making those charges subject to refund." Application at 13. Also, according to Pacific, Decision 02-02-025 "recategorizes DA Listings in Category II without notice, evidence, or factual support." Id. at 13-14. By relief, Pacific "requests that the Commission modify Decision 02-02-025 to limit any true-up of DA Listing charges to January 7, 1998, and to delete the recategorization of the DA Listings

service." Id. at 14. Metro One, InfoNXX, and LSSi Corp. each filed a response to Pacific's application for rehearing, recommending its denial.

II. DISCUSSION

The Commission's review of a petition for modification is governed by Rule 47. Under Rule 47(a), relief is limited to "changes to the text of an issued decision." In general, as set forth in Rule 47(d), a petitioner has one year to seek such relief:

> Except as provided in this subsection, a petition for modification must be filed and served within one year of the effective date of the decision to be modified. If more than one year has elapsed, the petition must also explain why the petition could not have been presented within one year of the effective date of the decision. If the Commission determines that the late submission has not been justified, it may on that ground issue a summary denial of the petition.

Overall, "The Commission has broad discretion when considering a petition to modify a previous decision." Re MCI Telecommunications, Decision 98-10-032, 82 CPUC2d 413, 415. In this vein, Rule 47(h) provides,

> [T]he Commission may modify the decision as requested, modify the affected portion of the decision in some way consistent with the requested modification, set the matter for hearing or briefing, summarily deny the petition on the ground that the Commission is not persuaded to modify the decision, or take other appropriate action.

In sum, the Commission is free to correct erroneous decisions, however long ago made, as long as it does so on the basis of substantial evidence. See Trabue Pittman Corp. v. County of Los Angeles, 29 Cal.2d 385, 399 (1946).

A. The Memorandum Accounts Established By Decision 98-01-022 Track Revenues Received Since The Effective Date of The Telecommunications Act of 1996.

Pacific argues, "[B]y the Commission's own declaration, the issue regarding the actual beginning point for true-up has not been resolved." Application at 4. In support, it offers the following language from Decision 98-06-027, 80 CPUC 2d at 488:

> "At the present time we have simply ordered the establishment of memorandum accounts to record billings to third party vendors. [(D.98-01-022, Ordering Paragraph 1.)] We have not issued any order regarding rates or the disposition of the money tracked in the accounts."

Id. In fact, the Commission has not reached any decision regarding refunds, but it has set a date to begin recording revenues as a beginning point for true-up. Thus, Ordering Paragraph 4 of Decision 98-01-022 provides,

> The memorandum accounts shall retroactively reflect revenues which were previously billed since the effective date of the directory-access tariffs, and shall prospectively reflect revenues yet to be billed until a further order addressing the disposition of the balance in the memorandum accounts.

78 CPUC 2d at 271. (Later, on rehearing, the Commission modified this order expressly to require that the memorandum accounts track revenues since the effective date of the Telecommunications Act of 1996. 80 CPUC 2d at 489.) Even earlier, in Decision 97-01-043, the Commission directed Pacific to provide nondiscriminatory access to listings for Directory Assistance.

B. Requiring The Memorandum Accounts Established By Decision 98-01-022 To Track Revenues Received Since The Effective Date Of The Telecommunications Act Of 1996 Does Not Constitute Retroactive Ratemaking.

Pacific further argues, "[T]he Decision's holding that any true-up of DA Listing rates must extend back to any date prior to January 7, 1988 violates the

prohibition on retroactive ratemaking." Application at 6. So far, however, only provisional rates have been authorized. For now, as when observed by the Commission in Decision 98-06-27, memorandum accounts have been established to track revenues received for access supplied to listings for Directory Assistance. See 80 CPUC 2d at 488. Still, it has issued no order specifying the disposition of those revenues. Id. Decision 02-02-025 was intended to make clear that this matter remains subject to review:

> We recognize that some of the assumptions underlying the DA cost studies have no doubt grown inaccurate or outdated over the intervening period. Therefore, we shall make provision for parties to update those studies to reflect more contemporary conditions. We shall also make provision for parties to file comments in response to the update cost studies. We shall direct the ALJ to issue a procedural ruling scheduling a process for the updated studies to be filed and for comments thereon. We shall then be positioned to adopt cost-based prices for DA services after the filing of comments. We can then determine the need for any true ups of past charges and promote a more competitive marketplace for DA services on a prospective basis.

Mimeo at 16. Nonetheless, to remove any doubt, the presiding Administrative Law Judge will be directed to issue a procedural ruling, once the cost of providing access to listings for Directory Assistance has been determined, regarding the calculation and implementation of refunds, and Conclusion of Law 17 and Ordering Paragraph 6 of Decision 02-02-025 will be modified accordingly.

C. The Service Pacific Supplies Independent Providers To Listings Of Directory Assistance Should Not Be Presumed Fully Competitive And Thus Subject To Flexible Pricing.

Pacific also argues, "[T]he DA listings service at issue here is different than the Publishing Rights service addressed in Decision 96-03-029, and there is therefore no basis for recategorizing DA Listings to Category II." Application at 11. Indeed, although quite similar, each service is covered by a separate tariff. Since 1975, Pacific has provided independent publishers with access, under tariff, to listings for Directory Assistance. See Decision 98-06-027, 80 CPUC 2d at 488. And, under operation of Section 455 of the Public Utilities Code, its tariff regarding access supplied independent providers to listings for Directory Assistance went into effect on December 1, 1996. That is not to say, however, that this newer service should be presumed fully competitive and thus subject to flexible pricing. Rather, as the Commission has repeatedly emphasized, the price of this service should be based on the costs incurred in its provision.

D. Classification Of The Service Supplied Independent Providers Of Directory Assistance Has No Effect On The Ability Of Pacific To Recover Its Costs.

Pacific argues finally that "recategorizing DA Listings affects Pacific's ability to recover its costs for this service, a significant infringement on Pacific's property rights." Application at 13. Pacific overlooks, however, that the Commission conclusively determined in Decision 98-06-027 how rates for this service will be set. For this purpose, therefore, its classification is beside the point. Either way, whether classified as Category II or Category III, this service will be priced according to its costs, and their recovery by Pacific will be unaffected.

III. CONCLUSION

Pacific has failed to demonstrate that the Commission committed legal error.

THEREFORE, IT IS ORDERED that:

1. Decision 02-02-025 is modified by deleting at page 33 Conclusion of Law 17 and adding a new Conclusion of Law 17, as follows:

> Once the cost of providing access to listings for Directory Assistance has been determined, the assigned ALJ should issue a procedural ruling regarding the calculation and implementation of refunds.

2. Decision 02-02-025 is modified by deleting at page 35 Ordering Paragraph 6 and adding a new Ordering Paragraph 6, as follows:

> Once the cost of providing access to listing for Directory Assistance has been determined, the assigned ALJ shall issue a procedural ruling regarding the calculation and implementation of refunds.

3. Pacific's application for rehearing of Decision 02-02-025, as modified, is denied.

This order is effective today.

Dated December 17, 2002, at San Francisco, California.

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

I will file a written dissent

/s/ HENRY M. DUQUE
Commissioner

I will dissent because of concerns about retroactive ratemaking. As I understand the history of this case, I do not believe the Commission has resolved the central issue, that is, whether charges should be recoverable starting in 1996 (the effective date of the Telecommunications Act) prior to out decision.

The commission's previous orders in this particular case merely ordered carriers to track charges starting oddly from a time past, dating back to the effective date of the Telecommunications Act of 1996. But the decision to track these charges were made in 1998. This approach defies the purpose of memorandum accounts and violates retroactive ratemaking prohibitions. Circumventing retroactive ratemaking restrictions in this case by ordering retroactive tracking of charges and then ruling they are eligible for recovery undermines the basic tenets of the retroactive ratemaking prohibitions and exacerbates regulatory uncertainty.

I dissent for the above reason.

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

December 17, 2002

San Francisco, California