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Decision 01-04-037 April 19, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

The Greenlining Institute, Latino Issues Forum, Complainants, vs. Pacific Bell, Pacific Bell Information Services, Defendants.	Case 99-01-039 (Filed January 27, 1999)

OPINION DENYING COMPLAINT BUT ORDERING REVISIONS TO TARIFFS AND BILL FORMAT

Robert Gnaizda and Christopher P. Witteman, for The Greenlining Institute and Susan E. Brown, for Latino Issues Forum, complainants.
David Discher and Nicola Erbe, for Pacific Bell and Pacific Bell Information Services, defendants.

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Summary

We deny the complaint filed by Greenlining Institute and Latino Issues Forum (collectively Greenlining or complainants) against Pacific Bell and Pacific Bell Information Services (Pacific and PBIS, respectively, or collectively, defendants). We conclude, among other things, that the preponderance of the evidence does not establish that defendants deceptively marketed and sold voicemail and associated services to business customers. Because we are troubled by some of the evidence in the record, however, we direct defendants to revise their tariffs and bill format to create clearer references and cross-references to call forwarding and the business line usage charges associated with voicemail.

Procedural Background

Greenlining filed this complaint on January 27, 1999; defendants filed a timely answer on March 25. On April 13, Administrative Law Judge (ALJ) Jean Vieth and the assigned commissioner, Commissioner Josiah L. Neeper, held a prehearing conference. As required by Pub. Util. Code § 1702.1, Commissioner Neeper's scoping memo, issued April 16, identified issues for hearing, set a procedural schedule, and designated ALJ Vieth as the presiding officer.[1]

Thereafter, on April 23, defendants filed a motion to dismiss the claims pursuant to Business & Professions Code § 17200 & 17500 and for summary judgment. Greenlining filed an opposition to the motion on May 10 and defendants filed a reply on May 17. In addition, defendants on April 23 and Greenlining on May 10, respectively, filed motions to file certain supporting

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[1] Unless otherwise indicated, all subsequent citations to sections refer to the Public Utilities Code, and all subsequent citations to rules refer to the Rules of Practice and Procedure, which are codified at Chapter 1, Division 1 of Title 20 of the California Code of Regulations.

materials under seal. By ruling dated June 4, the ALJ granted the motions to file the documents under seal but denied the motion to dismiss and for summary judgment.

This case went to evidentiary hearing on August 27 and 31 and on September 1 and 2. Commissioner Neeper attended much of the latter three days of the four-day hearing. On August 30, Greenlining filed a first amended complaint after the ALJ ruled, on August 27, that it might do so for the limited purpose of adding 25 signatures though she continued to believe the signatures were not required by § 1702.[2] Defendants indicated they would not oppose the request or require additional discovery. In an oral ruling on September 2 (confirmed in a written ruling September 9), the ALJ struck modifying clauses added as additional text in the first amended complaint.

The parties filed concurrent opening briefs on September 22 and concurrent reply briefs on October 4, whereupon this case was submitted for decision. The presiding officer's decision (POD) was mailed on December 22, 1999. On January 20, 2000, Commissioner Bilas filed a request for review and on January 21, Greenlining filed an appeal of the POD. On February 7, defendants filed a response to Greenlining's appeal and Greenlining filed a response to

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[2] In seeking to add 25 signatures to its complaint, Greenlining explained it wished to buttress the cause of action alleged under § 451 against any further, potential procedural challenge by defendants. Section 451 requires that a public utility's rates, charges, and rules affecting those rates and charges, be just and reasonable. Defendants' motion to dismiss and for summary judgment argued that the procedural requirements of § 1702, which govern filing of complaints, bar Greenlining from challenging a tariffed rate under § 451 unless at least 25 customers signed the complaint. The ALJ's June 4 ruling had rejected this argument on the basis that Greenlining's complaint did not challenge the reasonableness of any rates, per se, but rather defendants' disclosure practices. This decision does not change the June 4 ruling; the 25 signatures simply have no bearing on the adjudication of any issue in this case.

Commissioner Bilas' request for review. The Commission held oral argument on February 23, 2000. This decision on appeal differs from the Presiding Officer's MOD-POD in that it declines to adjudicate the claims brought pursuant to the California Unfair Competition Law (Bus. & Prof. Code § 17200 et seq.). The MOD-POD was not mailed for an additional round of comments because the appeal warranted consideration in closed session Pursuant to P.U. Code § 1701.2(c).

Discussion

The essence of this dispute is Greenlining's assertion, and defendants' denial, that defendants have engaged in deception in the marketing and sale of voicemail to business customers. Among other things, Greenlining alleges defendants have filed ambiguous tariffs and failed to disclose either the role call forwarding plays in the use of most of the business voicemail products at issue or the charges incurred each time a call is forwarded to a voice mailbox associated with the customer's business telephone line. Similarly, according to Greenlining, defendants have failed to disclose the costs assessed each time a customer uses a business telephone line to retrieve messages from the customer's voicemail box.

In his scoping memo, Commissioner Neeper noted that relatively few material facts appeared to be in dispute from the outset. He identified three primary issues for evidentiary hearing: 1) defendants' intent to deceive customers about the total costs of business voicemail; 2) whether or not deception occurred; and 3) the scope of any remedies, as appropriate.

The parties' briefs argue markedly different interpretations of a record that encompasses over 80 separate documentary exhibits, including the prepared testimony of 25 witnesses. To provide context for our examination of the parties' positions, we begin by reviewing the different business voicemail products at issue, how they work, and how defendants charge for using them. We then consider the merits of each cause of action in light of the evidentiary record.

1. Voicemail for Business Customers – the PBIS Products

First we note that the voicemail products at issue are among the "enhanced services" collectively known as the "Category III Services" offered by Pacific's affiliate, PBIS, an enhanced services provider (ESP). These voicemail products are tariffed in Pacific's Schedule Cal. P.U.C. No. D3.2 under the title "Pacific Bell Voice Mail."[3]

PBIS offers a number of voicemail products to business customers. All of them allow a telephone caller to leave a voice message in the customer's voice "mailbox" and allow the customer to retrieve the message from the mailbox by telephone at some subsequent time. At evidentiary hearing, the parties focussed primarily on four voicemail offerings: Pacific Bell Voice Mail Series 50, Series 50 Plus, Series 100, and Series 100 Plus. The parties do not dispute the way these products work but they disagree on whether a full disclosure of the costs of using these products has been made to business customers (including potential customers) in the tariffs, in descriptions of the products by defendants' customer service representatives and in direct mail advertising sent by PBIS. The tariffs

3 The Commission authorized Pacific to transfer its Information Services Group (ISG) to a new affiliate, PBIS, in 1992. (Decision (D.) 92-07-072 (1992), 45 CPUC 2d 109.) The Commission deferred for future consideration the question of whether PBIS is subject to regulation as a public utility but conditioned approval of the spin-off, requiring among other things, that Pacific and PBIS consent to tariff the enhanced services (like voicemail) which PBIS offers. (45 CPUC2d at 139-140 [Ordering Paragraphs 6, 13, 14].) In 1993 in Resolution T-15139, the Commission authorized the creation of Pacific's Tariff Schedule Cal. PUC No. D, "Category III Services."

and the testimony of defendants' witnesses Carrisalez and Jones establish the following operational facts.

- Series 50: Described in the tariff as a "direct-dial message line," this product does not require call forwarding. The voice mailbox is connected to a unique telephone number (a number different from the telephone number for the customer's business line, if the customer has one). All calls to the unique number are answered by voicemail. However, a customer can combine the product with call forwarding (offered by Pacific or a competitive local exchange carrier (CLC)) so that when the customer's business line is busy or unanswered, calls are transferred and callers may leave a message in the voice mailbox. The tariff terms this roll-over function an "overflow line" option.

- Series 50 Plus: This product is not only a direct-dial message line with a unique number but, because the voice mailbox is linked by Pacific's call forwarding service to the customer's business telephone line, it also serves as an "overflow line."

- Series 100: This product is not a stand alone message line but must be used with call forwarding (either Pacific's or a CLC's). The number for the voice mailbox is the same as the number for the customer's business telephone line; when the business line is busy or unanswered, calls are transferred to the voice mailbox.

- Series 100 Plus: Like Series 100, this product uses the same number as the customer's business line and requires call forwarding. This product includes Pacific's call forwarding service as well as another service, a stutter dial tone which indicates a message is waiting.

Message retrieval is the same for all products. The business customer calls a seven-digit number to gain access to the voice mailbox.

2. Using Business Voicemail

Call forwarding is integral to the use of three of these voicemail products (Series 50 Plus, Series 100, and Series 100 Plus), and it can be used to expand the function of the fourth (Series 50). Defendants' witness Jones explained that a business customer who ordered Series 50 or Series 100 from PBIS could obtain call forwarding by ordering it either from Pacific or a CLC. The call forwarding services Pacific offers to end users (residential and business customers) are tariffed in its Schedule Cal. P.U.C. No. A5.4, entitled ”Premium Exchange Services”; the description of the call forwarding services available to business customers begins at A5.4.11 under the heading “Custom Calling Services – Business.”

Pacific also offers call forwarding services to ESPs, such as PBIS, for inclusion with products like voicemail Series 50 Plus and Series 100 Plus. Such call forwarding services are among the “complementary network services” tariffed in Pacific’s Schedule Cal. P.U.C. No. A5.11, titled “Enhanced Service Provider Services.”

Whether a business customer has obtained call forwarding directly from Pacific (as a “custom calling service”) or through an ESP (as a “complementary network service”), the service functions in the same way – it transfers an incoming call from the customer’s business telephone line to the associated voice mailbox. As defendants’ witness Carrisalez explained, each time an incoming call is transferred from a customer’s business telephone line to a voice mailbox, Pacific bills the transfer itself as an outgoing call on the customer’s business line. Message retrieval incurs the same charges – a call from the customer’s business line to the associated voice mailbox for the purpose of retrieving any messages is an outgoing business call. Under Pacific’s Schedule Cal. P.U.C. No. A5.2, “Local Exchange Service,” business telephone service is a measured rate service which means, basically, that the business customer is billed for all outgoing calls to the local exchange and Zone Usage Measurement (ZUM) service zones 1, 2, and 3. The per-minute business rate for local calls is approximately three cents for the first minute and one cent for each additional minute. Lower rates apply to calls made in the evening, at night, or on weekends.

3. Violation of § 451

Greenlining takes issue with the way Pacific's tariffs are drafted, alleging that defendants have made "rules pertaining to charges and service to the public that are unjust and unreasonable because they are deceptive," in violation of the duty to the public owed under § 451.[4] (Complaint, ¶ 18.) The problem with the tariffs, according to Greenlining, is two-fold: they provide no notice of the business line usage charges that Pacific assesses when a business customer uses voicemail and they are internally ambiguous.

In our discussion, above, of the various voicemail products and how each one functions, we refer generally to portions of two Pacific tariff schedules. The D3 tariff governs voicemail and the rates for the voicemail box. The A5 tariff governs the optional and necessary services (depending upon the voicemail product) required to use the voice mailbox. The A5 tariffs also contains the rates for those services. Greenlining's point is that a business customer who actually reviews the D3 voicemail tariff is not advised of the business line usage charges incurred when call forwarding transfers a call to the voice mailbox or when a message is retrieved. It is undisputed that the D3 tariff does not list those rates

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[4] The complete text of the statute provides:

All charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful. Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities, including telephone facilities, as defined in Section 54.1 of the Civil Code, as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public. *All rules made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable.* (Section 451, emphasis added.)

themselves; nor does it contain direct references to any part of the A5 tariff, where such rates are listed. In Greenlining's view, this means that all business line usage charges associated with voicemail are untariffed charges. Since a utility may not collect unauthorized charges, these voicemail-related business line usage charges are illegal, Greenlining reasons, and must be refunded to customers.

In prepared testimony, defendants' witness Jones explained: "There are no usage charges for Voice Mail; there are charges associated with the Call Forwarding functionality of Pacific Bell's tariffed Call Forwarding service." (Ex. 500.) Defendants claim the A5 tariff call forwarding charges are not included or cross-referenced in the D3 tariff because defendants want to minimize the administrative burden associated with updating interrelated tariff sheets. Defendants' position is stated in Jones' prepared testimony, as follows.

> 17Q. Would it be appropriate to include a reference to the Call Forwarding tariffs in the D3 tariff?
>
> A: No. There are frequently changes being made to tariffs. It would be extremely difficult to ensure that reference to Pacific Bell's Call Forwarding schedule numbers and subsections were always kept up-to-date. In addition, it would require that references also be made to cites in any CLC's tariff that provide their own call forwarding service. It is much simpler to keep the tariffs accurate *by providing a reference to the name of the service so that customers can refer to the index of the appropriate tariffs* to determine the operation and cost of that service.
>
> 18Q. Would it make sense to state the usage charges incurred in conjunction with Call Forwarding associated with Pacific Bell Voice Mail in the D3 tariff itself?
>
> A. No. For the same reasons cited above. Not only can the rates and charges change, but so can the schedule and subsection

> numbers. It is much more sensible to keep these rates in one location, rather than multiple locations, and *provide references to those tariffs by using the names of those products and services necessary to be used in conjunction with the Pacific Bell Voice Mail service.* Moreover, it would be wrong to state the usage charges in PBIS' tariff because they are not PBIS' charges. PBIS has no control over them. PBIS' tariff describes PBIS's [sic] charges, not Pacific Bell's, not AT&T's not MCI's or any other provider of telecommunications services. (Ex. 500, emphasis added.)

Accordingly, in defendants' view, a business customer who turns to the voicemail descriptions on Sheet 5 of the D3 tariff, should find a "reference" to the products / services which must be used in conjunction with voicemail.

Sheet 5 of the D3 tariff has an introductory paragraph which states that in addition to "basic" and "deluxe" voice messaging services, "options" such as "call transfer" are available. Call transfer is not defined but note 1, which follows the term "call transfer", states that "[a]ll Call Forwarding features are not available in every area." The paragraph further explains that voicemail "[p]rovides the ability for customers to receive and store, record and send voice messages. The customer needs no additional equipment other than a touchtone phone." (Schedule Cal. P.U.C. No. D3.2.A.)

The product-specific descriptions listed after the introductory paragraph on Sheet 5 state:

> <u>Voice Mail Series 50</u>
>
> Provides a separate mailbox number that is different from the subscriber's regular telephone number. This number gives subscribers the capability to use their mailbox either as a direct-dial message line, or, when combined with Call Forwarding [note 1], as an overflow line to take calls when the subscriber's regular line is busy or unanswered. A white page directory listing is available for an extra charge. Available in both standard and deluxe versions.

> Voice Mail Series 50 PLUS
>
> In addition to providing the same service as Series 50, Series 50 Plus includes Pacific Bell Call Forwarding which allows subscribers to have their calls directly forwarded to Pacific Bell Voice Mail on busy / don't answer conditions. Available in both standard and deluxe versions.
>
> Voice Mail Series 100
>
> Provides voice messaging services on the subscribers' [sic] current phone number. The subscriber's mailbox number is the same as their [sic] telephone number. This allows subscribers to have their calls directly forwarded to Pacific Bell Voice Mail on busy / don't answer or whenever they choose. Available in both standard and deluxe versions.
>
> Voice Mail Series 100 PLUS
>
> In addition to providing the same service as Series 100, Series 100 Plus includes Pacific Bell Call Forwarding and Message Waiting Indicator Features, a specific stutter dial tone that tells the subscriber whenever they [sic] have a message. Available in both standard and deluxe versions. (*Ibid.*)

What, then, are the products / services which *must* be used in conjunction with voicemail? The business customer who reads (and rereads) the introductory paragraph and all the product descriptions and makes a careful comparison of them, will reach the conclusion that only Series 50 describes a voicemail product which can function as a stand-alone mailbox. Though it can be used with call forwarding, Series 50 alone neither includes nor requires call forwarding.

Is call forwarding - and the cost of using it - included in the monthly charge for PBIS' voicemail products? Is message retrieval from the mailbox included in that monthly charge? To answer these questions, we follow the progress through the tariffs of the business customer who understands the D3 tariff is not meant to be read in isolation. Such a customer, who also recognizes Call Forwarding (capitalized) as a Pacific Bell service, locates it in the A5 tariff index, and turns to the A5.4 and A5.11 call forwarding tariffs, will then read that:

> The Call Forwarding, Busy and Delayed Call Forwarding and Select Call Forwarding Service customer is responsible for the payment of applicable charges for each completed call between their call forwarding equipped line and the number to which the call is forwarded. This charge for local, message unit, zone calling units or dial station toll, applies to all forwarded calls that are answered at the number to which the calls are forwarded. …. (Schedule Cal. P.U.C. No. A5.4.11C.3)
>
> and:
>
> Charges between the originating location and the call forwarding equipped line are applicable in accordance with regularly filed tariffs, local message units, zone calling units, dial station, operator station or person toll. (Schedule Cal. P.U.C. No. A5.4.11C.4)
>
> and:
>
> The subscriber to the line with Call Forwarding Busy Line and/or Don't Answer is responsible for the payment of applicable charges for each complete call between their call forwarding equipped line and the number to which the call is forwarded. This charge for local, or message unit service, applies to all forwarded calls that are answered at the number to which the calls are forwarded. (Schedule Cal. P.U.C. No. A.5.11.1C.3.a.(1))

If the customer also reviews the business rate provisions in the A5.2 local exchange tariff, he or she will read that for business service: "*All* calls to a local exchange, or ZUM Zones 1, 2, and 3 are measured." (Schedule Cal. P.U.C. No. A5.2.1.B.2.b, emphasis added)

Having closely examined the text of the relevant sections of the A5 and D3 tariffs, we conclude that a business customer who labored through Pacific's tariffs could piece together the total package of costs for ordering a voice mailbox from PBIS and using it. While the tariffs are not user friendly, we conclude they are neither unjust and unreasonable, within the meaning of § 451, nor ambiguous as a matter of law. The tariffs meet a bare minimum level of drafting competency. We think a business customer making choices among technologically sophisticated telecommunications services can expect to review and compare tariffs which contain somewhat abbreviated product descriptions utilizing terms of art and to demand more information, as necessary.

However, the cumbersome effort to trace the references and cross-references between these portions of Pacific's A5 and D3 tariffs, underscores that they are not as clear as defendants argue. We return to the questions we posed above and make several observations.

First, while the D3 tariff clearly states that a touchtone phone is the only additional "equipment" needed for voicemail to function, the tariff does not expressly state whether any other services are needed for the business customer to make use of the voice mailbox. This information is important for the tariff to communicate more clearly the differences between Series 50 and the other three voicemail products. Second, the D3 tariff does not expressly advise the reader that capitalized terms such as "Call Forwarding" are the names of products or services which Pacific or PBIS offer, and that descriptions and rates for them are listed in other Pacific tariffs. Third, the D3 tariff does not readily distinguish between "generic" call forwarding available from CLCs and Pacific's call forwarding service. Fourth, the D3 tariff makes no express mention of the message retrieval process; consequently, any intended cross-reference to the business line usage rates in the A5.2 tariff is obscure.

The fact that we previously approved the filing of these tariffs does not preclude us from requiring revisions now. Moreover, the clarifications are warranted whether the customers who actually read the tariffs are many or few. (Once the tariffs become electronically available, customer access will increase). We reject defendants' argument that correcting the tariffs and then keeping them current will result in an undue administrative burden. We are not requiring Pacific to rewrite all of its thousands of pages of tariffs or to provide cross-references to the tariffs of others. And as a business customer searching Pacific's voluminous tariff books would discover, those tariffs already contain numerous specific, internal, cross-references. For example, the D2 tariff sheets (Attachment 2 to Jones' prepared testimony), which set out the "General Regulations" applicable to Category III services, direct the reader to multiple sections within the A2 tariffs. (See Schedule Cal. P.U.C. No. D2, Sheets 1, 3, 3.1, 4, and 4.1)

Therefore, we direct defendants to revise the D3 tariff as described in greater detail in the ordering paragraphs attached to this decision, and to file the revisions by advice letter within 60 days of the effective date of this decision.

4. Violation of § 2896(a)

Under § 2896(a) telephone corporations must provide customers with customer service that includes "[s]ufficient information upon which to make informed choices among telecommunications services and providers. This includes … information regarding the provider's … service options, pricing, and terms and conditions of service. A provider need only provide information to its customers on the services it offers."

We have already addressed Greenlining's argument that the tariffs are deficient. We turn now to Greenlining's two additional claims under § 2896(a). Have defendants, knowingly or otherwise, used direct mail marketing materials which failed to accurately state the cost of voicemail? And have defendants' sales representatives failed to inform customers about the call forwarding costs and message retrieval costs associated with using business voicemail?

4.1. PBIS' Print Advertising

Greenlining points to print advertising, in English, Spanish, and several Asian languages, which PBIS used to market voicemail between 1995 and 1998. (Ex. 9.) The record does not identify clearly which documents represent direct mailings and which represent advertisements distributed in other ways, but defendants' witnesses Lowry and Topol both testified that most of PBIS' voicemail advertising was direct mail (though only a small portion of voicemail sales can be attributed to direct mail advertising, according to defendants).

In any event, the text of the various pieces of print advertising is relatively consistent. Letters signed "Robert Lowry, Business Development Manager" and addressed "Dear Business Customer" or "Dear Business Manager" predominate. These offer "Pacific Bell Voice Mail" for "just $19.95 a month" (Series 50 and Series 100) and for "only $21.95 per box per month—just 73¢ a day" (Series 50 Plus and Series 100 Plus). Some of the letters explain the $21.95 includes a $2.00 per month charge for Call Forwarding and disclose an additional installation fee, which some of the promotions waive. Certain other letters advertise an earlier Series 50 promotion priced at "only $10.95 a month—only 37 cents a day."

While some of the earlier advertising pieces (from as early as 1995) state "additional fees may apply", defendants admit that, prior to the fall of 1998, they did not routinely include more specific disclosures that usage charges apply for call forwarding or for message retrieval from a business line.[5] These disclosures, subsequently added as standard footnotes to the other text, appear in two main forms:

> Call Forwarding is an additional monthly fee. All Call Forwarding features are not available in some areas. Additional usage fees may apply. (Ex. 9.)
>
> or:
>
> Current business line usage charges will apply to calls forwarded to Pacific Bell Voice Mail or when accessing the mailbox from your business. *(Ibid.)*

According to Lowry, PBIS' print advertising is not deceptive because, literally, PBIS' voicemail (i.e., the voice mailbox which PBIS sells) has no usage fees and is not usage sensitive. The usage charges associated with call forwarding (and likewise with message retrieval from a business line) are "business network access charges" which Pacific, or another local service provider, assesses. This contention – that the statements are technically and therefore factually accurate - is central to defendants' case. Defendants also argue that disclosures by sales representatives at the time of sale, followed by written post-sale materials, cure any notice defect.

Defendants claim that they were always concerned that associated business line usage fees be disclosed. Defendants' witness Camp, president of Pacific's ISG when voicemail was first offered in 1988, and until recently president of PBIS, testified that among the options defendants considered early

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[5] The record reflects defendants' concern heightened in 1998 after a civil lawsuit was filed against them and after we ordered penalties against Pacific Gas and Electric Company for abuse of our affiliate transaction rules. (Ex. 49, C53.)

on was having customers sign a written disclosure. The record does not reveal why this option was discarded or whether other options, besides those implemented, were considered. Camp stated he knew that customer service representatives were instructed to make the disclosure to customers and that a second disclosure was provided after the sale.

As discussed above, PBIS added routine disclosures to pre-sale print advertising in 1998. Greenlining disputes defendants' motives in choosing how and when to disclose the call forwarding and message retrieval charges, arguing in essence that any disclosure not made in print advertising is worthless. Greenlining points to the "The Value Study" commissioned by Camp in 1995 which concluded that "Sales of PBIS Voice Mail products result in significant incremental revenue and margin to the regulated side of Pacific Bell." [6] (Ex. C20.) While the study clearly shows voicemail is lucrative for Pacific, and arguably suggests a motive to defer full disclosure of business line usage charges, the study does not demonstrate defendants launched a deceptive print advertising campaign. To the contrary, the record includes a 1995 direct mail example which contains a general disclosure that "additional fees may apply."

Greenlining also points to the "PBIS Market Research Memorandum" from December 1996, which reports on consumer reactions to five enhanced

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[6] The revenue, in the millions of dollars, is attributed to five factors: calls completed (answered) that would not have been completed if the customer had not been a voicemail subscriber; calls the customer makes to retrieve messages from a voice mailbox; usage revenue from the forwarding of a received call to the mailbox (business customers only); reduction in the total number of uncompleted calls on the network; PBIS network purchases and referral fees. The incremental and total dollar values reported were provided under the confidentiality protections of § 583 and General Order 66-C, and subject to a confidentiality agreement between the parties.

voicemail features: Direct Messaging, Pager Notification, Extension Mailbox, Message-Alert, and Audio Call Screening. The study found consumers valued core voicemail over these “add on” features. With respect to pricing, the study concluded:

> Although a particular feature may be considered valuable (i.e. Audio Call Screening), it is important to recognize that this value does not necessarily translate into a willingness to pay incremental fees. Instead, it appears that consumers expect these features to be included as a part of the core voice mail offering. (Ex. C56.)

The study goes on to examine each of the five features and what additional, flat, monthly fee that feature might bear. Greenlining relies on the study as proof that defendants’ knowingly undertook to market voicemail to business customers in a deceptive fashion. In fact, the study was commissioned a number of years after “core” voicemail was in the market and it does not address marketing or pricing strategies for core voicemail. Thus, the study has no relevance to the issues in this proceeding.

Greenlining conducted a survey of customer understanding by showing the Series 50 “$10.95 a month” promotion (which does not include a disclosure) to 52 individuals at a reception of the Asian Business Association in San Francisco in 1999. Greenlining reports that 44 individuals (85%) understood the total cost of voicemail and any usage to be $10.95. We need not review at length the conflicting testimony of parties’ experts on correct sampling methodology and the weight to be accorded this survey. We conclude the survey is of limited value as proof. We question the effort to impose a subjective test upon what ultimately must be an objective assessment. And we question the survey’s usefulness as a subjective measure of the target audience. Not only were the respondents not qualified in any way (we do not even know if they actually purchase business telecommunication services, for example) but they were only asked to review material which contains no disclosures and there was none of the follow-up which we discuss below.

4.2. Sales Disclosure

According to defendants, customers cannot order PBIS' voicemail over the internet or by returning the tear-off portion of any direct mail advertisement, for example, but only by talking with a Pacific or PBIS customer service representative. (Pacific calls its employees "Service Representatives"; PBIS uses the term "Customer Care Advisors.") Defendants put forward credible evidence that it is their standard business practice to train all customer service representatives to disclose the usage charges associated with call forwarding or with voicemail message retrieval. Defendants produced various witnesses (for Pacific, witnesses Coleman and Dickey; for PBIS, witnesses Dwinell, Evans, Hawkins, and Martinez) to explain the training customer service representatives receive about business services and enhanced service offerings, the specific training techniques and materials used, how these have been revised within the timeframe at issue, and the job performance monitoring employed after training. We conclude this is competent evidence of defendants' customary business practice. (See Evid. Code § 1105, *Baron v Sanger Motor Sales* (1967) 249 Cal App 2nd 846, 855.)

We are not persuaded by Greenlining's arguments that the training materials devote too few pages to usage disclosures or that the pressure to make sales discourages employees from making the disclosures. The primary support for the latter contention is testimony of Greenlining's witness Gamboa regarding his residential sales experience as a Pacific employee more than 20 years ago. Defendants' evidence on their current practices for business sales is more relevant and adequately refutes Greenlining's suggestion that a strong incentive exists for customer service representatives to ignore their training.

Defendants argue that after a voicemail sale is made any residual customer confusion is further mitigated because defendants provide "sales collateral" in the form of a confirmation letter, a "Welcome Letter" (which includes business disclosures among the general terms and conditions), and a User Guide. Though defendants admit the User Guide has not always included business line usage disclosures, they state the Welcome Letter has. The disclosure terminology in the record actually appears in an attachment to the Welcome Letter entitled "General Terms and Conditions." (Ex. 9, 68, C518.) This attachment, which resembles somewhat the kind sent to a new credit card subscriber, includes a disclosure under the subtitle "Other Charges." The disclosure is the same one used in some of the print advertising: "Current business line rate usage rates will apply to calls forwarded to Pacific Bell Voice Mail and when accessing the voice mailbox from your business."

4.3. Customers' Testimony

Though defendants made an extensive showing that it was their standard business practice to disclose business line usage charges orally at the time of sale and in written material provided afterwards, five business voicemail customers testified they were unaware of the usage charges. None of these customers testified he or she had received PBIS' direct mail solicitations or subscribed to voicemail on the basis of those advertisements, however.

The most emphatic statement, in the prepared testimony of Greenlining's witness De Vries, includes the following:

> Q. Do you remember being told by Pacific Bell, at the time you became a Voice Mail customer, that you would incur extra charges for each message forwarded to your Voice Mail box?

> A. *No, I am absolutely certain that I was not told that*. I do not remember being told anything related to usage or per-call charges. (Ex. 212, emphasis added.)

De Vries, a lawyer and self-described "sophisticated telecommunications consumer" who subscribed to voicemail in 1998, could not recall receiving any written disclosures, either. As for message retrieval costs, he stated he was "not sure" whether business line usage costs were assessed, but implicitly recognized they might be, since:

> I knew I was dialing a seven-digit number. On the other hand, I knew that calls to Pacific Bell telephone numbers – like the Pacific Bell business office – have always been without charge (first as seven-digit numbers, now as 800 numbers). Further, calls to Pacific Bell's repair service (611) are also still free.[7] (*Ibid.*)

Greenlining's witness Rodriguez, the former director of Latino Issues Forum, testified he ordered voicemail in 1994 for both that organization and Greenlining (PBIS records indicate 1996), but could recall neither oral nor written disclosures of associated business line usage charges. Rodriguez explained he had numerous conversations with Pacific Bell sales representatives as well as with an account executive working with him, because he was comparing

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[7] De Vries also took exception to the prepared testimony of defendants' witness Hawkins, a PBIS employee, because that testimony not only described De Vries' business services but also disclosed information pertinent to his status as a residential subscriber, which should have been known only to Pacific, he said. De Vries said since he had never consented to release of the information, he believed those disclosures violated § 2891, which requires a residential subscriber's written authorization before a telephone corporation may share certain kinds of personal information with others. Defendants' counsel thereafter asked the ALJ to redact the specified information from both the public and sealed copies of Hawkins' prepared testimony. (Ex. C504.)

"multiple vendors" and "multiple options" and needed to understand what the total cost would be.

The testimony of three other customers (Greenlining's witnesses Redburn, Cañas, and Mitchell) is somewhat less compelling. Redburn, who has been a business voicemail subscriber since 1995, simply testified he did not recall receiving any disclosures, oral or written. He produced a brochure entitled "Know How Now, Easy To Use Instructions for Pacific Bell Voice Mail," which contains no disclosures but is not part of the post-sales collateral, according to defendants. (Ex. 211.) Though Cañas testified she did not remember any disclosures when she arranged for voicemail service for Latino Issues Forum in Los Angeles in 1999, she was not a new customer but had prior experience with the use and operation of the product at the organization's San Francisco main offices. Her bill for the Los Angeles service identifies the San Francisco office as the mailing address. Mitchell also could not recall any disclosures but testified she engaged in management oversight and did not have direct responsibility for purchasing telecommunications services for her company, including the voicemail added in 1996.

4.4. Defendants' Adjustment Policy

Defendants' witness Dickey described the adjustment policy defendants follow when a customer contacts them complaining that he or she did not order a service after receipt of the sales collateral: "If the customer does not want the service, the Representatives are trained to remove the service from the customer's account and adjust all monthly recurring and non-recurring charges from the customer's account." (Ex. C511.) Other evidence, introduced by Greenlining, includes utility records of two such complaints by voicemail customers who alleged usage charges had not been disclosed to them. (Ex. C26.)

The records reflect that the usage charges were credited from one customer's account; the redress sought by the other customer is unclear from the records, as is the actual resolution.

4.5. Conclusion

On balance, we determine the evidence does not establish that defendants have violated § 2896(a). We conclude that defendants' evidence on training and monitoring of its customer service representatives establishes a business practice which the Evidence Code permits us to infer is followed routinely, barring proof to the contrary. Such proof is absent here. Accordingly, because defendants' print advertisements are technically accurate and because defendants' business practices require additional disclosures, we conclude defendants have minimally complied with the statutory requirements.

Nonetheless, we are troubled by the specter of opportunistic marketing suggested by the lack of business line usage disclosures in some pre-1998 print advertising even though it was defendants' practice to make disclosures both at the time of sale and post-sale. It is undisputed that business voicemail provides significant financial benefit to Pacific, as well as PBIS, and whether or not Pacific authorized the direct mail campaign discussed above, Pacific stood to benefit from increased sales of its affiliate's product. We caution defendants to ensure up-front disclosure of all call forwarding and business line usage charges is made in all further voicemail promotions – written or otherwise - as well as in all sales contacts with customers.

We are also troubled that five customers testified that they could not remember hearing oral disclosures or receiving written disclosures and we think defendants should be also. Though such testimony does not prove defendants failed to make the disclosures, we conclude that each of those customers testified truthfully. Other evidence suggests that several customers may not have been in the position to receive one or both disclosures, however, and we also recognize that post-sale collateral may have been misplaced or discarded unread, and that memories may fade with time. Nonetheless, the possibility remains that defendants did not make the disclosures. The evidence merely indicates that it is more likely than not that defendants followed their customary business practice.

In their briefs, defendants emphasize that their disclosure practices are at issue in this proceeding, not what customers understand about voicemail. With respect to the causes of action at issue, that is correct. The fact remains that five business customers testified credibly they did not know that business line usage charges are incurred for voicemail-associated call forwarding or for message retrieval. We remind defendants that in enacting § 2896(a), the Legislature determined telecommunications customers are entitled to information *sufficient* to permit them to make *informed* choices. We caution defendants to ensure their future training on voicemail disclosures is not only consistently comprehensive, but uniformly followed. And consistent with our directive to defendants to clarify their tariffs, we caution them to make these disclosures in clear, unambiguous language, and to avoid explanations which use technical jargon or unexplained technical names.

5. Violation of Pacific's Tariff Rule 12

Greenlining charges that Pacific has violated its Tariff Rule 12 because it has not provided business customers with a quotation of the applicable recurring rate for call forwarding when call forwarding is used in conjunction with business voicemail. Pacific's Tariff Rule 12 requires, in relevant part:

> At the time of application for business service, or for moves, changes or additions to existing business services, the Utility or its authorized employees shall provide a full itemization of the

recurring rates and nonrecurring charges applicable to the services applied for.

Defendants focus on the first words of this rule, "[a]t the time of application" and allege they have complied. We review the evidence on defendants' disclosures above and need not repeat it here. Suffice it to say that while we conclude, on balance, that Greenlining has not made a case for violation of Tariff Rule 12 in this proceeding, we caution defendants not to read Tariff Rule 12 too narrowly. We construe Tariff Rule 12 to require a clear, complete disclosure of all applicable charges, such as the call forwarding and message retrieval business line charges assessed for using voicemail, not only when a customer first applies for the product or service, but also each and every time a customer moves, changes, or adds to it.

6. Violation of § 2890

Greenlining argues that the per-minute charges Pacific assesses for call forwarding and message retrieval are improperly hidden in the aggregate "local direct dialed" business calls on a customer's bill, in contravention of § 2890(e)(2)(A). It is undisputed that there is no reference, or cross-reference, to business line usage charges on the portion of the bill which contains PBIS' monthly voicemail charge. Likewise, there is no reference to the inclusion of call forwarding charges or mailbox retrieval charges in Pacific's direct-dialed call summary.

Section 2890(e), in relevant part, provides that a telephone bill must include "… the amount being charged for each product or service, including any taxes or surcharges, and a clear and concise description of the service, product, or other offering for which a charge has been imposed." (§ 2890(e)(2)(A).)

In fact, as the record shows, both call forwarding from a customer's business telephone line to a voice mailbox and message retrieval from the voice mailbox using the business line are treated as local direct-dialed calls. Business customers have measured rate service and Pacific's A5.2 local exchange tariff provides that local direct-dialed charges (i.e., for local, extended area, and Zones 1 and 2 calls) are summarized on the bill. (Schedule Cal. P.U.C. No. A5.2.1.B.2.c.)

Therefore while we conclude that defendants' billing format does not violate § 2890(e), we are concerned that other evidence in the record suggests more explicit disclosure of the actual costs of business voicemail use is warranted. Greenlining's witness Rodriguez testified that he understood the charge for business voicemail was a flat rate, and that was what he saw when he reviewed the bill. When asked if, upon review of the bill, he concluded he was being billed differently, he answered: "No." (Tr. 287.) But Rodriguez' prepared testimony also states he was "completely unaware that there [sic] additional per-minute or per-message charges which attached to every message left in a Pacific Bell business voicemail box, or for the retrieval of messages." (Ex. 213.) If he did not know that, regardless of whether defendants disclosed it, he would not know the amount of the local direct-dialed charges on his bill reflected voicemail use.

True, Rodriguez also testified that the only queries he made to Pacific about charges on his bill were with respect to individual calls. Presumably, the total monthly charges for local direct-dialed calls never appeared unreasonably large to him. Defendants make much of the fact that the per-minute charge for such calls is only three cents for the first minute and less for each additional minute. They comment that neither De Vries, Redburn, nor Mitchell cancelled PBIS business voicemail after learning about the business line usage charges (though Greenlining and Latino Issues Forum did). Defendants suggest that for the customers who have continued their business voicemail subscriptions, these charges must be immaterial. We will not begin to presume what costs are or are not material for California business customers. We think they should decide that question for themselves. But to decide that, they need to be informed.

In amending other portions of § 2890 in 1998 to address the problem of "cramming" (the inclusion of unauthorized charges on a telephone subscriber's bill), the Legislature stated its intent, among other things, "to encourage the verification of telephone charges." (Stats. 98-1041, Section 1(d) [SB 378, Peace].) Though cramming is not the issue before us here, we think that legislative policy is also important with respect to authorized services and products. Technological advances are rapidly increasing the array of telecommunications services and products offered by an increasing number of competitors. Customers need information. Therefore, similar to our direction to defendants to revise and clarify their tariffs, we direct them to improve the quality of the information provided on their bills.

Greenlining would have us order defendants to separate out those local direct-dialed charges attributable to call forwarding and mailbox message retrieval from other local direct-dialed charges. Testimony from defendants' witnesses Grewen, Godfrey, and Rodgers about defendants' switches and billing systems indicates defendants do not have the capability to do this for all calls. Without determining whether or not such detail is desirable, we conclude defendants' current technology does not permit that breakout. We require defendants to include two references in their bill, however. First, at the place where the local direct-dialed summary appears, Pacific shall include a statement that, for call forwarding and voicemail subscribers, the total shown reflects any business line usage charges incurred during the billing period for call forwarding and mailbox message retrieval. Second, at the place where the monthly voicemail charge appears, defendants shall specify whether or not the monthly charge includes call forwarding.

Accordingly, defendants shall submit bill format revisions responsive to this directive to the Director of the Telecommunications Division within 30 days of the effective date of this decision, for compliance review and approval. Upon approval, defendants shall use the revised bill format for all billings, beginning with the first billing cycle practicable.

7. Violation of Business and Professions Code § 17200 et seq. ("Unfair Competition Law")

In its complaint, Greenlining asserted two causes of action under the California Unfair Competition Law: unfair business practices in violation of Business and Professions Code §§ 17200-17208, and false and misleading advertising in violation of Business and Professions Code §§ 17500 et seq. Greenlining has abandoned its separate cause of action under §17500 (see Greenlining's opening brief, p. 27, fn. 19), but continues to assert that the defendants' conduct violates § 17200. That statute defines unfair competition to include business acts or practices that are unlawful, unfair, or fraudulent, including "unfair, deceptive, untrue or misleading advertising" and "false or misleading advertising" as defined by § 17500. (Bus. & Prof. Code § 17200.) Greenlining asks us to enjoin defendants' actions and seeks restitution, retroactive for four years from the date of the complaint, of business line usage charges which voicemail subscribers paid Pacific for call forwarding to and message retrieval from the voice mailbox.

We decline to adjudicate the Unfair Competition Law claim in this proceeding. This decision is not intended to preclude court actions by public prosecutors under the California Unfair Competition Law. (See Bus. & Prof. Code § 17204.) Such actions may be an appropriate means of enforcement in some cases involving utilities regulated by this Commission. (See Bus. & Prof. Code §§ 17205, 17534.5.)[8]

8. Conclusion

After carefully weighing the evidence introduced by both parties in this proceeding, we deny the complaint. We conclude the preponderance of the evidence does not establish the alleged violations of statute or defendants' Tariff Rule 12. Accordingly, we deny Greenlining's request that we order approximately $72 million in refunds and ten times more in penalties. We need not review the methodology or figures used in Greenlining's reparation and penalty calculations or defendants' challenge of them. However, we are sufficiently troubled by some of the evidence in the record that we direct defendants' to revise their tariffs and bill format to create clearer references and cross-references to call forwarding and the business line usage charges associated with the use of voicemail.

9. Request for Review and Appeal of Presiding Officer's Decision

1. § 451

The request for review focuses on the tariffs and asks two questions: (1) whether deception or intent to deceive are necessary elements of a violation of § 451; and (2) if violation of § 451 requires only unreasonable conduct, does defendants' action rise to that level.

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[8] We do not decide, in this decision, whether the Commission, in its own proceedings, has concurrent jurisdiction to adjudicate claims that conduct by a public utility violates Business and Professions Code § 17200.

In construing the requirements of § 451, the Commission has required, consistent with a large body of case law, that utility behavior be reasonable, that a utility charge rates that are just and not unreasonably discriminatory, and that those charges be consistent with its tariffs. Deception is not a necessary element of a cause of action for violation of § 451; neither is intent to deceive. The POD concludes that defendants' A5 and D3 tariffs are not user friendly but that they do contain the charges complainants argue are unauthorized and illegal – the business line usage charges assessed when call forwarding routes an incoming business call to a voice mailbox or when a customer uses a business line to retrieve a message from the mailbox. The POD finds no violation of § 451. We have revised the POD's summary and further explain our rationale here to remove any unintended impression that the lack of deception or intent to deceive forms the basis for our determination on this issue.

Answering the second question, whether the cumbersome nature of the tariff drafting rises to the level of a violation of § 451, requires reexamination of the record in this proceeding and our precedents. Greenlining's first ground for appeal – does the POD misapply the drafting standard applicable to tariffs -- requires a similar review, so we address these questions together. The POD concludes that though the tariffs meet "a bare minimum level of drafting competency", certain revisions, including better cross-referencing between the A5 and D3 tariffs, would be helpful to the reader.

In essence, both questions come down to this: do defendants' tariffs violate § 451 because the business line usage charges associated with voicemail are located in the A5 tariff and not repeated in the D3 tariff? The POD concludes that failure to restate the business line usage charges in the D3 tariff or provide an express cross-reference to them does not rise to the level of a violation of statute – the business line usage charges *are* authorized charges.

Greenlining's appeal argues that the POD is inconsistent with the principle that tariff ambiguity is construed against the drafter. Since the A5 tariff's business line usage charges are not repeated in the D3 tariff, Greenlining reiterates, we necessarily must conclude that the D3 tariff is ambiguous and that the business line usage charges have been illegally assessed and collected.

We disagree. The POD demonstrates that the tariffs, read together, are not ambiguous. As one of the cases Greenlining relies upon illustrates, the POD does not follow an unusual practice in reading several tariffs together. In *Z.I.P., Inc. v. Pacific Bell* the Commission examined three different Pacific tariffs (A2, A7 and A9) and concluded, in that case, that an ambiguity did exist. (See D.92-07-019, (1992) 45 CPUC2d 40, 1992 Cal. PUC LEXIS 611.) Complaint cases, however, are highly fact-dependent and review of *Z.I.P* does not reveal an inconsistency with the POD. In *Z.I.P*, the tariff ambiguity turned on the meaning ascribed to different words in the different tariffs used to describe the point at which a customer is assessed charges for incoming "800" service calls routed through its Centrex system by means of a uniform call distributor (or UCD) purchased from Pacific. The Commission construed a result favorable to customers.

Likewise distinguishable on its facts, is *MCI v. Pacific Bell,* where the Commission examined the impact of Pacific's Centrex tariffs on the ability of customers who have certain optional services (flexible route selection [FRS] or automatic route selection [ARS]) to have Pacific direct toll calls to competing intraLATA carriers without dialing a ten–digit access code. The tariffs did not expressly exempt this more favorable treatment, and the Commission construed the tariffs' silence against the utility. (See D.95-05-020, (1995) 59 CPUC 2d 665.)

In both decisions the Commission recognized the need customers have for accurate information about rapidly changing telecommunications offerings and stated "telephone utilities must be vigilant to insure that their tariffs are comprehensive and clear, so that customers are unquestionably placed on notice of the charges for which they will be held responsible after they order a new service. (*Z.I.P*, supra, see also *MCI*, supra at p. 683, citing *Z.I.P.*) The POD does not abandon this standard.

Absent a violation of § 451, may we nonetheless order revisions of defendants' tariffs? The answer is quite clear: yes. Section § 490(a) specifically authorizes us to order any tariff change that we determine "expedient". We need not find, before doing so, that the existing tariff is ambiguous or otherwise violative of law. In this case, the POD concludes that the existing tariffs can be made more "user friendly" and we agree.

2. § 2890

As a second ground for appeal, Greenlining argues the POD improperly construes the bill disclosure requirements of § 2890(e). Greenlining's argument focuses in part on Pacific's practice, consistent with its tariff, of aggregating charges for all local, direct-dialed business line calls. Such calls include business line usage charges for forwarding a call from a business line to the voice mailbox and for retrieving voice mailbox messages from a business line. Greenlining ignores Pacific's uncontroverted testimony that most of its switches cannot distinguish among the various reasons for business line usage. For example, whether a business customer calls another party, calls a voice mailbox, or uses call forwarding to transfer an incoming call from a business line to a voice mailbox, the calls are indistinguishable and are measured the same way.

Greenlining also inserts a new argument – that defendants are improperly “bundling” or “packaging" voicemail with call forwarding on their bills. We must disregard this argument since it rests on allegations Greenlining did not plead and which neither party addressed on the record in this proceeding. The record focuses on business line usage charges, not on the monthly charges for voicemail or call forwarding.

3. Print Advertising

Greenlining’s third ground for appeal largely reiterates positions asserted in its opening and reply briefs and asks the Commission to reweigh the evidentiary record. For reasons explained above, we disregard Greenlining’s new arguments about defendants’ alleged bundling and packaging practices, as these issues are outside the scope of the complaint. We have, however, revised the POD’s discussion of the Business and Professions Code allegations to more completely address those issues.

4. Consistency with the POD in C.98-04-004 et al.

Greenlining’s fourth ground for appeal is that the POD in this proceeding is inconsistent with the POD in C.98-04-004 et al, the complaints of Utility Consumers Action Network (UCAN) and others against Pacific for abusive marketing and improper sales practices in connection with a number of residential services. Greenlining’s appeal fails to recognize marked differences in the facts of each case as well as the different causes of action which frame them. Greenlining reiterates its new bundling theory in an attempt to infuse greater similarity between the two proceedings and then argues, moreover, that the facts are more egregious in this case. As we have already noted, there is no record on this issue in this case; Greenlining’s post-submission appeal raises the issue for the first time.

5. Denial of the Complaint

Greenlining's fifth ground for appeal asserts that "the presiding officer erred in denying the complaint simply to avoid restitution to consumers when her underlying findings showed a violation of law and substantial monetary [damages] to consumers." (Appeal, p. 29.) Our independent review is that the POD denied the complaint because no violation of law had been shown. Having reviewed the record, including the appeal and request for review, we conclude that the denial was proper.

Findings of Fact

1. PBIS' voicemail products are among the "Category III Services" tariffed in Pacific's D3 Tariff, specifically Schedule D3.2.

2. PBIS' "Series 50" voicemail is a "direct-dial message line," with a number different from the customer's business telephone line, and does not require call forwarding. However, a customer can combine call forwarding with Series 50 voicemail to transfer calls to the voice "mailbox" when the customer's business line is busy or unanswered.

3. PBIS' "Series 50 Plus" voicemail is not only a direct-dial message line, but because it includes Pacific's call forwarding service, it also transfers calls from the business line to the voice mailbox.

4. PBIS' "Series 100" voicemail must be used with call forwarding since it has the same number as the customer's business line. When the business line is busy or unanswered, calls are forwarded to the voice mailbox.

5. PBIS' "Series 100 Plus" voicemail includes Pacific's call forwarding service as well as a service called "Message Waiting Indicator."

6. Message retrieval is the same for each of these voicemail products: the customer calls a seven-digit number to gain access to the mailbox.

7. Customers can obtain a call forwarding service for use with Series 50 or Series 100 from Pacific or another "competitive local exchange carrier" (CLC).

8. The call forwarding included with Series 50 Plus or Series 100 Plus is a "complementary network service" which Pacific offers to enhanced service providers (ESPs), like PBIS.

9. Each time an incoming call is transferred from a customer's business telephone line to an associated voice mailbox, Pacific bills the transfer itself as an outgoing call on the customer's business line (a "business line usage" charge).

10. Pacific bills a call from the customer's business line to the associated voice mailbox for the purpose of retrieving any messages as an outgoing business call (a "business line usage" charge).

11. Charges for call forwarding and for message retrieval from a business telephone line are assessed at the rates in Pacific's A5 Tariff, specifically Schedule A5.2.

12. Call forwarding usage charges are described in Pacific's A5 Tariff, specifically Schedules A5.4 and A5.11.

13. A business customer who labored thorough Pacific's A5 and D3 tariffs could piece together the total package of costs for ordering a voice mailbox from PBIS and using it.

14. The relevant portions of the A5 and D3 tariffs are not user friendly in several respects:

a. While the D3 tariff discussion of necessary equipment is very clear, the discussion of necessary and optional call forwarding services is less explicit.

b. The D3 tariff does not expressly advise that capitalized terms such as "Call Forwarding" are the names of products or services that PBIS and Pacific offer, and that descriptions and rates for them are listed in other Pacific tariffs.

c. The D3 tariff does not readily distinguish between "generic" call forwarding available from CLCs and Pacific's call forwarding service.

d. The D3 tariff makes no express mention of the message retrieval process; consequently any intended cross-reference to the business line usage rates in the A5 tariff (Schedule A5.2) is obscure.

15. Direct mail predominated among the print advertising PBIS used to market voicemail between 1995 and 1998, but only a small portion of sales is attributable to direct mail.

16. Prior to 1998, PBIS did not routinely include business line usage disclosures in its direct mail.

17. Defendants' claim that voicemail (i.e., the voice mailbox) is not usage sensitive is technically accurate.

18. Customers can only subscribe to voicemail by talking with a Pacific or PBIS customer service representative.

19. Defendants' customer service representatives are trained to make disclosures of business line usage charges at the time of sale, and their performance is monitored.

20. Greenlining's witness Gamboa relied upon his residential sales experience as a Pacific employee more than 20 years ago when he testified that pressure to make sales discourages customer sales representatives from making disclosures.

21. Following a voicemail sale, defendants' customer service representatives are trained to send the customer "sales collateral" which include disclosures of business line usage charges.

22. Greenlining's survey attempts to impose a subjective test upon what ultimately must be an objective assessment.

23. Greenlining's survey respondents were not qualified in any way and we do not know if they actually purchase business telecommunications services.

24. The print advertising shown to Greenlining's survey respondents contains no disclosures.

25. Five business voicemail customer witnesses were unaware that any business line usage charges are associated with voicemail and could not remember any oral or written disclosures.

26. None of the customers stated they had received PBIS' direct mail solicitations or subscribed to voicemail on the basis of those advertisements.

27. Several of the customers were not in the position to receive one or both of the disclosures.

28. If after receipt of the sales collateral a customer does not want a service or product like voicemail, defendants' customer service representatives are trained to remove it from the customer's account and adjust all recurring and non-recurring charges.

29. There is no reference, or cross-reference, to business line usage charges on the portion of the bill which contains PBIS' monthly voicemail charge.

30. There is no reference to the inclusion of call forwarding charges or mailbox retrieval charges in Pacific's direct-dialed call summary.

31. Business customers have measured rate service, and Pacific's A5.2 local exchange tariff provides that local direct-dialed charges (i.e., for local, extended area, and Zones 1 and 2 calls) are summarized on the bill.

32. Under defendants' current billing format, a customer who is unaware of the business line usage charges associated with voicemail would not be apprised they exist when he or she reviews the bill.

33. At present, defendants do not have the capability to separate out those local direct-dialed charges attributable to call forwarding and mailbox message retrieval from other local direct-dialed charges.

Conclusions of Law

1. The relevant portions of Pacific's A5 and D3 tariffs are neither unjust and unreasonable, within the meaning of § 451, nor ambiguous as a matter of law. The tariffs meet a bare minimum level of drafting competency.

2. Revision of the relevant portions of defendants' A5 and D3 tariffs is warranted, nonetheless, to make them clearer and less cumbersome.

3. Revision of the relevant portions of defendants' A5 and D3 tariffs, and keeping them current, will not result in undue administrative burden.

4. It is defendants' business practice to make disclosures of business line usage charges associated with voicemail orally at the time of sale and in writing via the sales collateral sent afterwards.

5. It is defendants' business practice to monitor their sales representatives' performance.

6. In reliance upon Evidence Code § 1105, we infer defendants routinely follow these business practices. It is not certain, but merely more likely than not, that defendants followed their business practices.

7. Greenlining's survey is of limited value as proof.

8. The testimony of the five customers is credible but is insufficient to rebut evidence that defendants routinely follow their business practices.

9. Because defendants' print advertisements are technically accurate and because defendants' business practices require additional disclosures, we conclude defendants have minimally complied with § 2896(a).

10. Greenlining has not established a violation of Pacific's Tariff Rule 12 in this proceeding.

11. Defendants' billing format does not violate § 2890(e).

12. Revisions of defendants' billing format is warranted, nonetheless, to improve the quality of the information provided to customers.

13. Greenlining abandons its separate cause of action under §17500 and relies on § 17200, which defines unfair competition to include deceptive, untrue, or misleading advertising under Bus. & Prof. Code § 17500.

14. We do not, in this proceeding, adjudicate Greenlining's claim under Bus. & Prof. Code § 17200.

15. In order to ensure expeditious compliance with the ordering paragraphs, this decision should be effective immediately.

O R D E R

IT IS ORDERED that:

1. Pacific Bell and Pacific Bell Information Services (Defendants) shall prepare revisions of their A5 and D3 tariffs to provide greater clarity on the points identified in Finding of Fact 14. Defendants shall submit their proposed revisions by advice letter within 60 days of the effective date of this decision.

2. Defendants shall ensure up-front disclosure of all business line usage charges associated with voicemail is made in all further voicemail promotions, written or otherwise, as well as in all sales contacts with customers.

3. Defendants shall ensure all disclosures of business line usage charges associated with voicemail are made in clear, unambiguous language and shall avoid explanations which use technical jargon or unexplained technical names.

4. Defendants shall ensure that their future training of customer service representatives on the business line usage charges associated with voicemail is consistently comprehensive and uniformly followed.

5. Defendants shall ensure that disclosure of all business line usage charges associated with voicemail is made not only at the time a customer first applies for voicemail but also every time a customer moves, changes, or adds to the voicemail and the services associated with it.

6. Defendants shall revise their bill format, as follows:

   a. At the place where the local direct-dialed summary appears, they shall include a statement that, for call forwarding and voicemail subscribers, the total shown reflects any business line usage charges incurred during the billing period for call forwarding and mailbox message retrieval.

   b. At the place where the monthly voicemail charge appears, they shall specify whether or not the monthly charge includes call forwarding.

7. Defendants shall submit revisions responsive to Ordering Paragraph 6 to the Director of the Telecommunications Division, within 30 days of the effective date of this decision, for compliance review and approval. Upon approval, defendants shall use the revised bill format for all billings, beginning with the first billing cycle practicable.

8. The claims based on alleged violation of Public Utilities Code and Tariff rule 12 are denied. The Commission declines to adjudicate the claim brought pursuant to Business & Professions. Code § 17200.

9. This proceeding is closed.

This order is effective today.

Dated April 19, 2001, at San Francisco, California.

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

Commissioner Henry M. Duque, being necessarily absent, did not participate.