

Decision 00-07-019 July 6, 2000

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
(Filed April 26, 1995)

Order Instituting Investigation on the
Commission's Own Motion into Competition for
Local Exchange Service.

Investigation 95-04-044
(Filed April 26, 1995)

O P I N I O N

By Decision (D.) 99-04-072, the Commission granted rehearing for the purpose of developing an additional record for the retention of certain resale restrictions imposed by Pacific Bell (Pacific) and GTE California Incorporated (GTEC), the two major incumbent local exchange carriers (ILECs) in California. Specifically, we granted rehearing of D.97-08-059 concerning restrictions on the resale of Centrex and CentraNet services, as well as restrictions prohibiting competitive local carriers (CLCs) from aggregating end-user toll usage in order to qualify for volume discounts.

By this decision, we resolve the issues for which rehearing was granted based upon review of the subsequently filed comments as prescribed in D.99-04-072. We conclude that the ILECs have failed to overcome the rebuttable presumption that their end-user toll aggregation restrictions are unreasonable under the standard set forth in D.99-04-072. Similarly, we conclude that the ILECs have failed to rebut the presumption that the resale restrictions on Centrex and Centranet service are unreasonable. Accordingly, we direct the ILECs to file

amended wholesale tariffs removing these restrictions on the resale of the applicable services under the schedule adopted in the ordering paragraphs of this decision.

Background

In D.96-03-020, we authorized the resale of various local exchange carriers' (LEC) services as part of our mandate to open local exchange market to competition. Public Utilities Code Section 709(e) mandates that the Commission "remove the barriers to open and competitive markets and promote fair product and price competition in a way that encourages greater efficiency, lower prices, and more consumer choice." We are also bound by the federal mandate to promote telecommunications competition as provided under the 1996 Telecommunications Act (Act).

Although ILEC local exchange services were made subject to resale by D.96-03-020, the ILECs imposed certain restrictions under which the services could be resold. The Act, however, obligates LECs "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." (47 USC Sec. 251(c)(4)(A), (emphasis added.) In addition, under the Act, Pacific and GTEC have an affirmative duty "not to prohibit, and not to impose unreasonable or discriminatory conditions on, the resale of...telecommunications service..." (47 USC Sec. 251(c)(4).) The Act does not permit the ILECs to withhold particular retail telecommunications services from wholesale offerings, nor to impose restrictions on resale except in cases where such restrictions are shown to be both reasonable and nondiscriminatory.

Accordingly, we undertook a review of the reasonableness of the restrictions imposed by the ILECs on the resale of their services, and issued our

conclusions in D.97-08-059. Among other things, we permitted the ILECs to continue the retention of resale restrictions relating to end-user aggregation of toll volumes and certain restrictions relating to the resale of Centrex/Centranet service.

Various parties subsequently filed applications for rehearing of D.97-08-059. In response to those applications, we issued D.99-04-072, granting limited rehearing, and concluding that the ILECs had not met their burden of overcoming the presumption that the resale restrictions on toll aggregation and on Centrex/Centranet services were unreasonable.

In evaluating whether the Commission had appropriately applied the required standard in evaluating resale restrictions, we considered the analysis of the U.S. District Court, Northern District of California in its decision (District Court Decision) on the appeal of D.96-12-034. In D.96-12-034, the Commission adopted an interconnection agreement between AT&T Communications of California, Inc. (AT&T) and Pacific through an arbitration proceeding. As one element of the adopted agreement, the Commission reversed the holding of the arbitrator by imposing resale restrictions prohibiting toll aggregation for purposes of qualifying for volume discount plans. In response to AT&T's appeal of D.96-12-034 to the U.S. District Court, the Court vacated the Commission's decision and reinstated the arbitrator's report. The Court found that the Commission had not correctly applied the "presumptively unreasonable" standard set forth in Section 953 of the Federal Communication Commission

(FCC) Local Competition Order.¹ The FCC order elaborated on the presumption of unreasonableness in Paragraph 953 as follows:

“[I]t is presumptively unreasonable for incumbent LECs to require individual reseller and users to comply with incumbent LEC high-volume discount minimum usage requirements, so long as the reseller, in aggregate, under the relevant tariff, meets the minimum level of demand. The Commission traditionally has not permitted such restrictions on the resale of volume discount offers. We believe restrictions on resale of volume discounts will frequently produce anticompetitive results without sufficient justification. We, therefore, conclude that such restrictions should be considered presumptively unreasonable. We note, however, that in calculating the proper wholesale rate, incumbent LECs may prove that their avoided costs differ when selling in large volumes.”

The District Court found that the Commission did not apply Section 953 of the FCC Order correctly because it failed to make findings that Pacific had rebutted the presumption of unreasonableness as set forth in Section 953 of the FCC Order. Additionally, the District Court found that the Commission misapplied the standard as two of the arguments relied on by the Commission to support its position were considered by the FCC in its Local Competition proceeding and rejected.

We took the District Court Decision into account in granting limited rehearing of D.97-08-059. In light of the District Court Decision, we concluded that D.97-08-059 did not make appropriate findings concerning whether the ILECs had overcome the rebuttable presumption of unreasonableness in

¹ Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Interconnection between Local Exchange Carriers and Commercial Radio Service Providers, CC Docket No. 95-185, First Report and Order, FCC 96-235 (rel. August 8, 1996).

accordance with Section 953 of the FCC Local Competition Order. D.97-08-059 notes generally that resale restrictions are presumptively unreasonable under Section 939 of the FCC's Local Competition Order, but never addressed the specific language of Section 953 of the FCC Order concerning restrictions on end-user toll aggregation. Likewise, the Decision contained no specific findings that the ILECs had rebutted the presumption of unreasonableness pursuant to Section 953 of the FCC Order. Such findings are required as a basis to retain the resale restrictions.

We also found that the reasons relied upon in D.97-08-059 were insufficient to meet the standard for retaining the toll aggregation restriction as set forth in the Act and in the FCC's Local Competition Order. In order to retain this restriction, the ILECs must overcome a presumption of unreasonableness, and demonstrate that the restriction is both reasonable and nondiscriminatory. The FCC concluded that the term "nondiscriminatory" as applied in the 1996 Act must be interpreted to have a more stringent standard than merely "unjust and unreasonable discrimination." (Section 859.)

In granting rehearing of D.97-08-059, we provided the opportunity for parties to file further comments, addressing whether there were any cost-based or economic justifications for retaining these resale restrictions in accordance with federal law and Commission rules. Opening comments were filed on September 20, 1999, and reply comments were filed on October 4, 1999. Comments were filed by Pacific, GTEC, jointly by AT&T and MCI WorldCom, Inc. (AT&T/MCI), and jointly by the Telecommunications Resellers Association

(TRA) and Frontier Telemangement, Inc.² Comments were also filed by the Office of Ratepayer Advocates (ORA). We address the issue based upon parties' comments.

End-User Toll Aggregation Resale Restriction

Parties' Positions

Pacific and GTEC offer volume-based discounts to their retail customers of toll service. To qualify for the discount, the retail toll customer must purchase a certain minimum volume of toll service. In offering its toll service for resale, the ILECs restrict CLCs from aggregating the toll volume of individual end-users as a basis to meet the volume requirement for the purchase of the discounted toll service for purposes of resale. The ILECs do not permit resellers to qualify for volume-discounted toll services offered to retail customers unless the underlying retail customers of the resellers, meet the volume aggregation requirements.

Parties representing resellers object to the restriction imposed by Pacific and GTEC on the resale of their volume-discounted toll service. The resellers, together with ORA, argue that the ILECs have failed to justify retention of the toll aggregation restrictions. Pacific and GTEC deny that their restriction on the aggregation of toll volumes is unreasonable, and argue that they have properly rebutted the presumption of unreasonableness as required by the Act. The ILECs thus ask the Commission to make a finding to that effect.

Pacific argues that the Commission's rehearing order (D.99-04-072) misapplies the District Court's findings in the AT&T Arbitration Decision to the

² TRA is a national organization representing more than 700 telecommunications service providers and their suppliers, including 65 California-based members. Frontier Telemangement, Inc., a member of TRA, holds authority pursuant to D.96-08-020 to resell local exchange service throughout the service territories of Pacific and GTEC.

generic resale policies adopted in D.97-08-059. In response to a summary judgment motion filed by AT&T in reference to the Commission's Arbitration Decision, the District Court found that the Commission had failed to apply the correct legal standard in deciding the toll aggregation issue, and reinstated the portion of the Arbitrator's report on this issue. By contrast, Pacific claims that the "presumptively unreasonable" standard articulated by the FCC Local Competition Order was properly applied in the Commission's generic consideration of this issue upholding the toll aggregation restrictions in D.97-08-059.

Pacific also argues that the factual grounds relied upon by the Commission in sustaining the toll aggregation restrictions in the AT&T Arbitration Decision are different from the grounds relied upon in upholding the toll aggregation restrictions generically in the Local Competition proceeding in D.97-08-059. In the AT&T Arbitration Decision, the District Court rejected the following grounds relied on by the Commission to sustain the toll aggregation restrictions:

“(1) aggregation would jeopardize Pacific Bell’s financial stability and cause substantial revenue loss; (2) aggregation would remove any incentive by Pacific Bell to offer discounts to large volume customers, therefore producing an anti-competitive result; and (3) additional resale requirements are inconsistent with a recent decision by the CPUC [D.96-03-020].” (Order, p. 23.)

By contrast, Pacific argues D.97-08-059 based its rationale for the restriction on the argument of Pacific that if resellers were granted volume discounts based on aggregation of the usage of multiple end-users, it would in effect change the terms and conditions of Pacific’s retail service. The Act does not require an ILEC to offer for resale a service which it does not offer for retail. The FCC First Report and Order, Paragraph 33 states “carriers reselling incumbent LEC services are limited to offering the same service an incumbent offers at retail.

This means that resellers cannot offer services or products that incumbents do not offer.” Accordingly, Pacific argues that D.97-08-059 was correct in finding that a retail restriction applicable to end-users of both the retailer and the reseller is not presumptively unreasonable where voiding the requirement would create an entirely new wholesale product, rather than the resale of existing retail service. Section 251(c)(4)(A) of the Act only places on ILECs the duty “to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers.”

Pacific thus argues that the District Court's rejection of the toll aggregation restriction in the AT&T Arbitration Decision does not form a proper basis to negate the Commission's findings in D.97-08-059 since the analysis of resale restrictions in D.97-08-059 involved a different rationale.

Pacific also seeks to justify the toll aggregation restriction on the basis that its removal would inflate the authorized wholesale discount above a reasonable level. In support of this argument, Pacific attached to its comments the "Declaration of Judith A. Timmermans," an employee of Pacific. Timmermans presents calculations of the resulting wholesale rates that would be available to resellers if the restriction on toll aggregation of unaffiliated end-users were removed. Based on these calculations, Pacific argues that resellers would be able to qualify for unreasonably large discounts and to resell the toll service at retail prices so low that Pacific would be precluded from competing due to the current constraints of its price floors. Pacific thus argues that its toll aggregation restriction is reasonable as a means of promoting a level competitive playing field and preventing resellers from gaining an unjustified wholesale discount having nothing to do with competitive merit or avoided costs.

AT&T/MCI argue that the proper legal standard to determine whether Pacific may impose toll aggregation restriction is that set forth by the District

Court in its remand of the Arbitration Decision. The controlling legal precedent cited by the Federal District Court was the FCC's *Local Competition Order*. The FCC declared "presumptively unreasonable" any attempt by ILECs, like Pacific, "to require individual reseller end-users to comply with [ILEC] high-volume discount minimum usage requirements..."³ The only basis on which the FCC permitted ILECs to justify any restrictions on the availability of volume-discount plans was to charge a different wholesale price than is available to end-users if ILECs "prove that their avoided costs differ when selling in large volumes." *Ibid.*

AT&T/MCI argue that the avoided cost standard can refer only to an alleged *higher* cost to the ILEC of selling volume-discounted services to resellers than to individual end-users. AT&T/MCI argue that Pacific's and GTEC's comments do not present any cost-based economic justification to sustain the resale restriction on toll volume aggregation, as required by both the FCC and the Commission. AT&T/MCI claim the resale toll aggregation restriction must be removed because it is unlawful, unreasonable and discriminatory.

Discussion

Consistent with the mandates prescribed by the Act, we granted limited rehearing of the toll aggregation resale restriction issue in D.99-04-072, and directed the Administrative Law Judge (ALJ) to take comments "containing specific allegations of cost-based or economic justifications for the retention of resale restrictions for these services." The only basis for permitting the ILECs to retain this resale restriction is if we find that the ILECs have provided such

³ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15499, ¶1953 (1996) ("*Local Competition Order*").

justifications sufficient to overcome the presumption that such restrictions are unreasonable in accordance with the standard set forth in Section 953 of the FCC Order.

Our original intent in authorizing the resale of the ILECs' local exchange services was to promote a competitive market and maximize the choices available to retail customers. We have sought to carry out the mandate of the 1996 Act that calls for the removal of all restrictions on resale of telecommunications services unless the ILECs can justify that specific, narrowly tailored restrictions are necessary and nondiscriminatory.

We conclude that Pacific has failed to rebut the presumption that its resale restriction on aggregated toll volumes is unreasonable as called for in D.99-04-072 and as required by Section 953. D.99-04-072 set forth the nature of the showing that would be required by Pacific and GTEC to overcome the rebuttable presumption that these resale restrictions are unreasonable. Pacific has not provided evidence of cost-based justifications sufficient to sustain the retention of the toll aggregation resale restrictions. Instead, Pacific's arguments focus on rearguing the merits of D.97-08-059, and challenging the rationale underlying D.99-04-072 where we found D.97-08-059 legally deficient in its basis for retaining the toll aggregation restrictions. In its Local Competition Order, the FCC stated that "state regulations permitting non-cost-based discriminatory treatment are prohibited by the 1996 Act." (Section 862.)

We find Pacific's claim unpersuasive that it has met the standard in Section 953 by arguing that removal of the resale restriction would create an excessive wholesale discount thereby impeding Pacific's ability to compete. Pacific did not present any avoided cost studies or other cost-based economic evidence that would justify specific narrowly-tailored restrictions on resellers' ability to aggregate toll volumes. Pacific failed to show that its costs of selling

discounted toll service to resellers based on aggregated toll volumes is materially different (other than the standard 17% wholesale discount) from its costs of selling the same service to its own retail customers. As guidance concerning economic justification that might justify certain narrowly tailored volume aggregation restrictions, the FCC gave the example of geographic limitations on the location of lines, when economically relevant. Pacific failed to provide any evidence of geographic limitations on the location of lines or other logistical or operational constraints that might justify certain narrowly tailored resale restrictions on toll aggregation.

GTEC, on the other hand, argues that additional costs incurred in providing toll aggregation of single customers at multiple locations must be taken into consideration, but has not quantified what those additional costs would be. GTEC claims that its billing system is not presently designed to accommodate the automatic aggregation of multiple unrelated end-users, and that the lifting of the toll aggregation restriction on a generic basis would result in an unknown additional cost associated with such billing. GTEC claims that the aggregation of multiple unrelated end-users will require a manual process or modifications to the billing system which will result in a greater expense than automatic aggregation for the same customer at the same location, and may present a significant implementation issue should aggregation be authorized. GTEC proposes that CLC resellers be required to perform their own automatic toll routing, aggregation, and tracking functions, and be required to verify on a periodic basis that the claimed volume discounts are justified. In any event, GTEC recommends that before the Commission determines whether the existing resale restrictions should be retained, evidentiary hearings be held to develop a record concerning pricing, competitive issues, and comparable practices in the interexchange industry.

We find no basis to delay lifting the toll aggregation restriction for either Pacific or GTEC pending further hearings. An adequate opportunity has been provided to GTEC to rebut the presumption of unreasonableness, first through the original proceedings leading up to the issuance of D.97-08-059, and now through the additional proceedings as directed through the rehearing order. There is no basis to permit unjustified resale restrictions to continue to remain in place until or unless GTEC chooses to present some definitive evidence of cost-based differences of providing wholesale toll aggregation to resellers. The Act requires ILECs to provide unbundled access to their operations and supports, including billing systems to support resale. GTEC is directed to undertake whatever remedial actions are necessary to enable its billing and other support systems to accommodate toll aggregation on a wholesale basis.

Given the complexity of the conversion process and the need to accommodate competing governmentally mandated changes to GTEC's billing and ordering systems, GTEC claims that it would not be possible to develop, test, and implement the required modifications in a period of less than eight months. GTEC proposes that it be allowed 60 days from the effective date of this decision to develop and propose an interim solution that could be used to allow immediate implementation of the decision during the eight-month implementation period. Although it has already begun the process of developing potential interim solutions, GTEC argues that the 60-day period is necessary in order to ensure that any proposal is well-considered and workable.

In view of the constraints noted by GTEC, we shall allow a period of 60 days from the effective date of this decision for GTEC to file a compliance tariff implementing its proposed interim solution to lift the resale restrictions, as ordered by this decision.

No later than eight months following the effective date of this decision, GTEC shall be required to complete the permanent mechanized conversion of all necessary systems to accommodate resale as ordered by this decision.

To the extent GTEC believes that unresolved issues remain concerning incremental costs associated with revamping its systems to accommodate the wholesale offering of the toll aggregation, those costs are more appropriately addressed as part of the review of local competition implementation costs. GTEC is authorized to amend its previous proposal for implementation cost recovery within 60 days of this order to include its request for implementing the directing of this decision. Such costs do not affect the applicability of the volume-based toll discount to resellers. In any event, whatever incremental implementation costs may be incurred by GTEC to make its systems capable to accommodate CLC resellers, those costs provide no reason to retain the toll aggregation resale restrictions any longer.

We likewise find unpersuasive Pacific's argument that we misapplied the District Court Decision in reviewing the justification for resale restrictions underlying D.97-08-059. The filing of comments in response to the directives in our rehearing order, D.99-04-072, is not the proper forum to seek to relitigate the legal reasoning underlying the rehearing order. Our purpose in soliciting those comments was to provide the ILECs an opportunity to rebut the presumption of unreasonableness based upon the sorts of evidence permitted under the Act and the FCC Order.

Pacific argues that the District Court's rejection of the toll aggregation restriction in the AT&T Arbitration Decision was based on different grounds than those relied upon in D.97-08-059. The "different grounds" Pacific has in mind relate to the argument that the removal of the toll aggregation restriction would create an entirely new wholesale service that is not offered at the retail

level. GTEC supports Pacific in this claim, citing Section 251 of the Act that a state commission "may...prohibit a reseller that obtains at wholesale rates a telecommunications service that is available only to a category of subscribers from offering such service to a different category of subscribers." 47

USC 251(c)(4)(B). GTEC interprets the "category of subscribers" in this instance to be related end-users that must use prescribed minimum toll volumes to qualify for volume discounts under applicable retail tariffs. GTEC thus argues that the wholesale tariff may be similarly restricted based on the volumes purchased by retail customers of the reseller.

We have already determined in D.99-04-072 that this rationale for retaining the restriction is not sufficient to overcome the rebuttable presumption of unreasonableness as required under the Act. By simply repeating an argument that has previously been rejected by the Commission's rehearing decision, the ILECs fail to rebut the presumption of unreasonableness under the standard. Moreover, in rejecting this rationale, we did not simply rely on the analysis of the District Court in the AT&T Arbitration Decision. We independently reached this conclusion by reference to the standards required in the Act and the FCC's Local Competition Order. (D.99-04-072 at 7.)

Merely by lifting the toll aggregation resale restriction, Pacific and GTEC are not being required to offer a service at wholesale that they do not offer at the retail level. At the retail level, the service at issue provides the purchaser with the capability to make or receive toll calls beyond the local calling area. With the toll aggregation resale restriction lifted, the ILECs would still be selling that same toll-calling capability to CLCs. It would not become a different service. Whatever particular rates may be charged by the ILEC to its end-users do not affect the nature of the underlying service. With the toll aggregation restriction

lifted, the CLC will still have to meet the same volume commitments that an end-user of the ILEC must meet to qualify for the volume discount.

In D.99-04-072, we concluded that the justifications offered by Pacific and GTEC that formed the basis of D.97-08-059 focused on the claimed adverse competitive impacts that could result if the resale restrictions were removed. Yet, as noted in the FCC Local Competition Order, “conditions or limitations placed on resale...based not on cost differences but on ‘such considerations as competitive relationships...or other factors not reflecting costs...would be discriminatory and not permissible under the new standard.”⁴ Pacific’s claimed justifications, based not on cost, but on its competitive relationship with resellers, are precisely the sort of argument rejected by the FCC and by our own determination in D.99-04-072. The alleged loss of revenue resulting from removal of the resale restriction was also precisely the same defense offered by Pacific in the AT&T Arbitration that was rejected by the US District Court in remanding D.96-12-034.

Pacific has not provided evidence of differences in providing toll aggregation service to resellers as compared to its own retail customers that would cause a difference in costs justifying retention of the end-user toll aggregation restriction. As long as the reseller satisfies the same requisite volume level as is required of the ILEC’s end-user customers to qualify for the toll discount, there is no basis to restrict the reseller from purchasing the discounted toll service for resale.

Moreover, we disagree with Pacific’s claim that the removal of the toll aggregation resale restriction will result in an unreasonably large wholesale

⁴ Id., citing FCC Local Competition Order at Section 861.

discount. The determination of the proper wholesale discount as defined by the 1996 Act is a function of costs avoided when selling at the wholesale level in comparison to the retail level. The issue of the appropriate wholesale discount is being addressed in the Open Access and Network Architectural Development proceeding, and is not the basis for the toll aggregation discount before us in this proceeding. The toll aggregation discount at issue here is not based upon avoided retail costs, but is merely a function of volume sales. The removal of the resale restriction merely permits the reseller to purchase the toll service at the same discounted rate available to qualifying retail customers of Pacific, less the standard avoided cost discount of 17%. It is therefore not valid to compare the *volume-related* discount for sale of toll service with the *wholesale* discount for avoided retail costs in evaluating the reasonableness of the toll aggregation restriction; these discounts are not analogous.

The reseller would still need to add its own retail markup in selling the volume-discounted toll services to retail customers to recover any administrative and marketing costs and to earn a profit margin. Depending on how much of a markup is imposed by the reseller to recover its own overhead, individual resellers may or may not be able to offer a price below that which the ILEC charges its own end-users for such service.

In any event, even if resellers are able to price their retail service below that of the ILECs, the end result will help to prevent anticompetitive price discrimination. If some ILEC prices are currently discounted without regard to cost, the availability of volume discounts to resellers will give the ILECs the incentive to realign their prices to their true cost.

Centrex and CentraNet Resale Restrictions

Pacific's Centrex and GTEC's CentraNet serve businesses with multiple telephone stations. The services permit station-to-station dialing within the business, and outside callers may also dial a particular station directly. Optional features like Call Forwarding and uniform call distribution are also available. Centrex competes with Private Branch Exchange (PBX) equipment available from many suppliers. PBX equipment offers a variety of optional features, but access to the public switched network can be obtained only through a trunk line purchased from the LEC.

In D.96-03-020, we authorized certain interim restrictions on the resale of Centrex and CentraNet, with the proviso that the ILECs would be required to provide justification that such restrictions were necessary and nondiscriminatory. In that decision, we determined that Centrex and CentraNet should be resold only as a business system to a single business and not as a network infrastructure toll aggregation tool. The concern was not with the aggregation of toll traffic, as an end in itself. Rather, these restrictions were established due to the concern that allowing the aggregation of toll traffic through Centrex would undermine the federal law on presubscription timing.⁵

In D.97-08-059, we concluded that Centrex toll aggregation at the retail level did not constitute presubscription, and that the removal of the Centrex restriction on the use of Flexible Route Selection (FRS) for toll aggregation would

⁵ Section 271(e)(2)(B) prohibits states from ordering a Bell operating company to implement intraLocal Access Transport Area (LATA) toll dialing parity before it has been granted authority to provide interLATA services. In D.95-05-020, the Commission defined presubscription "as a process which allows an end-user served by a central office to select an interexchange carrier (IXC) to automatically provide interLATA or intraLATA communications."

not amount to the premature implementation of presubscription. As such, we found no basis to continue the Centrex/CentraNet toll aggregation restriction for resellers based on this claim. Nonetheless, we retained the restriction which limits Centrex resale to single businesses, and further declared our “intent that CLCs, themselves, not use the Centrex or CentraNet toll aggregation feature to qualify for volume discounts which are only available to end-user customers.” (D.97-08-059, p. 64.)

Parties’ Positions

Applications for rehearing were subsequently filed by MFS Intelnet of California (MFS) and Business Telemanagement, Inc. (BTI)/Frontier arguing that limiting the resale of Centrex as a business system to single businesses is unjustified and discriminatory. Both MFS and BTI/Frontier specifically argued that there is nothing in the decision that explains the reason for allowing such a restriction, nor is there any basis in the record supporting the Commission’s determination to retain this restriction.

In D.99-04-072, we found that the applications had merit and granted rehearing on this issue. Pacific argues that if the Commission reaffirms the end-user toll aggregation restriction, then it must also affirm the single business rule for Centrex because the anticompetitive impact of removing the rule exceeds that which would occur if toll aggregation were permitted. If resellers are permitted to aggregate multiple end-user customers in a single Centrex system, Pacific argues, Centrex can be used not only to aggregate toll, but also local usage, Zone Usage Measurement (ZUM) usage, and long distance service, completely avoiding switched access charges that facilities-based IXCs would have to pay. Using the Centrex FRS feature, a reseller could aggregate the local, ZUM toll, and long distance usage of small customers into a single Centrex system and use

special access to transport the usage to the reseller's switch, thus avoiding the switched access charges that IXCs currently pay and that are incorporated into Pacific's price floors for toll service.

AT&T/MCI argue that neither Pacific nor GTEC provide a cost-based justification for maintaining the single business restriction on Centrex or CentraNet service. AT&T/MCI argue that competitive loss is a risk in a competitive marketplace and not an adequate basis for maintaining resale restrictions.

Frontier and TRA state that Pacific's single business restriction is inconsistent with its practice of permitting shared service providers to offer Centrex services to unaffiliated end-users and, in turn, aggregate their traffic. As such, they argue, Pacific's limitation discriminates against resellers without any basis therefor, serves no legitimate purpose, is discriminatory, and artificially impairs competitive market forces.

Frontier and TRA also argue that the restriction on Centrex resale has impaired the ability of resellers to compete for customers in the small and mid-size business market. While retail joint user customers have been permitted by the incumbents to "share" Centrex-type services with unaffiliated end-users in geographically disparate locations, resellers are not permitted that same opportunity. Instead, they are restricted to selling Centrex-type service as a business system to single businesses. This restriction limits resellers to marketing Centrex services to larger customers and places them at a disadvantage to unregulated shared service providers who not only can resell Centrex-type service to small and mid-size businesses, but can also use automatic call routing functions to aggregate toll usage in order to obtain higher discounts than would be available to their customers on an individual basis.

Discussion

For similar reasons to those outlined above with respect to the toll aggregation restriction, we conclude that the ILECs have failed to rebut the presumption of unreasonableness with respect to its resale restrictions on Centrex/Centranet service. Pacific's defense of the resale restriction on Centrex focuses on the alleged revenue losses that it could incur as a result of removing the restriction by permitting resellers to avoid the switched access charges that IXCs currently pay. Pacific's arguments thus focus on how the removal of the restriction would adversely affect its competitive relationship with other carriers. GTEC likewise states that the same concern underlies its policy restricting the definition of end-users to the same business or legal owner, and restricting resale of CentraNet accordingly. Yet, as we have noted above, the effects on competitive relationships is not an acceptable basis to rebut a presumption of unreasonableness.

Pacific and GTEC have failed to present evidence relating to any avoidable economic costs which would be incurred as a result of removing the Centrex/Centranet resale restrictions. GTEC argues that aggregation of CentraNet service by related end-use customers beyond the limits prescribed in its retail CentraNet tariff is not cost-justified for its small-to-medium CentraNet users, but failed to quantify any cost differential due to the CentraNet resale restriction. Accordingly, since the ILECs have failed to overcome the presumption of unreasonableness, we find the Centrex/Centranet resale restrictions to be unreasonable, and hereby direct that they be lifted.

Comments on Draft Decision

The draft decision of ALJ Pulsifer in this matter was mailed to the parties in accordance with Section 311(g) of the Public Utilities Code and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on April 20, 2000, and

reply comments were filed on April 25, 2000. We have taken the comments into account, as appropriate in finalizing this order.

Findings of Fact

1. By D.99-04-072, the Commission granted limited rehearing on the issue of whether the toll aggregation and Centrex/CentraNet restrictions imposed by the ILECs on the resellers is reasonable.

2. In its Local Competition Order, the FCC stated that “state regulations permitting non-cost-based discriminatory treatment are prohibited by the 1996 Act.” (Section 862.)

3. Pacific and GTEC offer volume-based discounts to retail customers of toll service whereby the retail toll customer must purchase a certain minimum volume of toll service to qualify for the discount.

4. In offering its toll service for resale, the ILECs restrict CLCs from aggregating the toll volume of individual end-users as a basis to meet the volume requirement for the purchase of the discounted toll service for purposes of resale.

5. Neither Pacific nor GTEC have presented definite evidence that the costs of selling aggregated toll service to CLCs for resale purposes is greater than its costs of selling the same toll service to retail customers of the ILEC.

6. D.97-08-059 permitted Pacific and GTEC to retain the restriction on the resale of Centrex/Centranet service that limits resale to single businesses only.

7. Pacific's justification for retaining the Centrex restriction is that its removal would enable a reseller to aggregate several small customers' usage into a single Centrex system and use special access to transport the usage to the reseller's switch, thereby avoiding switched access charges to Pacific.

8. GTEC's billing and ordering systems, as presently configured, are not capable of tracking and aggregating end user volume across multiple locations, but will require a series of modifications to convert to a fully mechanized system.

Conclusions of Law

1. The only allowable basis under federal law and Commission rules for permitting the ILECs to retain narrowly-framed resale restrictions is if the ILECs provide cost-based or economic justifications sufficient to overcome the presumption that such restrictions are unreasonable.

2. Pacific and GTEC have failed to rebut the presumption that the resale restriction on aggregated toll volumes is unreasonable as required by Section 953, and have not provided evidence of cost-based justifications sufficient to sustain the retention of the toll aggregation resale restrictions as required by federal law and Commission rules.

3. The ILECs' claimed justification for the toll aggregation restrictions focuses not on differences in costs of the service to resellers compared to retail customers, but rather on the effects of removing the restriction on competitive relationships with resellers.

4. The removal of the toll aggregation resale restriction merely permits the reseller to purchase the toll service at the same discounted rate available to qualifying retail customers of Pacific, less the standard avoided cost wholesale discount of 17%.

5. It is not valid to compare the *volume-related* discount for sale of toll service with the *wholesale* discount for avoided retail costs in evaluating the reasonableness of the toll aggregation restriction, as those discounts are not analogous.

6. To the extent GTEC believes that unresolved issues may remain concerning incremental costs associated with revamping its systems to accommodate the wholesale offering of the toll aggregation, those costs should be addressed as part of the review of local competition implementation costs.

7. Whatever incremental implementation costs may be incurred by GTEC to make its systems capable to accommodate CLC resellers, those costs provide no reason to retain the toll aggregation resale restrictions any longer.

8. Pacific's claimed justification for retaining the restriction on resale of Centrex to single businesses does not focus on differences in its costs of the service to resellers compared to retail customers. Rather, it focuses on the effects of removing the restriction on its loss of revenue due to competitive bypass of switched access services.

9. As the Commission concluded in D.97-08-059, the protection of the incumbent LEC's market share against competition is not a proper justification for a resale restriction under the standards set in Section 953 of the FCC Local Competition Order.

O R D E R

IT IS ORDERED that:

1. Pacific Bell (Pacific) is directed to file amended tariffs within 40 days of the effective date of this order in accordance with General Order 96-A removing the end-user toll aggregation and Centrex restrictions for the applicable wholesale services currently containing such restrictions. The compliance filing shall highlight any additions or deletions to the tariff and shall also contain a copy of the utility's current tariffs with the relevant restrictive language underlined in red for easy reference.

2. GTE California, Incorporated (GTEC) is directed to file amended tariffs within 60 days of the effective date of this order in accordance with General Order 96-A removing the end-user toll aggregation and CentraNet restrictions for the applicable wholesale services currently containing such restrictions utilizing its proposed interim solution. The compliance filing shall highlight any additions or deletions to the tariff and shall also contain a copy of the utility's current tariffs with the relevant restrictive language underlined in red for easy reference.

3. The restrictions on the end-user toll aggregation currently contained in the respective tariffs of Pacific and GTEC shall be removed no later than 20 days from the filing date of the amended tariffs.

4. The restrictions on the resale of Pacific's Centrex and GTEC's CentraNet services only to single businesses shall be removed no later than 20 days from the filing date of the amended tariffs.

5. No later than eight months following the effective date of this decision, GTEC shall be required to complete the permanent mechanized conversion of all necessary systems to accommodate resale as ordered by this decision.

6. GTEC is authorized to amend its previously filed proposal within 60 days regarding implementation cost recovery to included its proposed recovery for the costs of implementing this order.

This order is effective today.

Dated July 6, 2000, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
CARL W. WOOD
Commissioners