

Decision 01-09-058 September 20, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

The Utility Consumers' Action Network,

Complainant,

vs.

Pacific Bell (U 1001 C),

Defendant.

Case 98-04-004
(Filed April 6, 1998)

Case 98-06-003
(Filed June 1, 1998)

Case 98-06-027
(Filed June 8, 1998)

Case 98-06-049
(Filed June 24, 1998)

Investigation 90-02-047
(Filed February 23, 1990)

And Related Matters.

**FINAL OPINION ON PACIFIC BELL'S
MARKETING PRACTICES AND STRATEGIES**

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FINAL OPINION

1. Summary

In this decision we address a number of Pacific Bell's practices for marketing its optional services to residential customers. We find that some violate statutory and decisional law and some do not. Additionally, we find several practices, while not violating existing statutory or decisional standards, should be curbed in future marketing by the utility.

We find that Pacific Bell failed to inform customers adequately and thereby deprived them of meaningful choices in these areas:

1. The option relating to number blocking to prevent caller numbers from being displayed on a caller ID device.
2. The two inside wire maintenance plans it offers ("Wire Pro") in one case offering their most expensive plan first and in the other offering it to tenants without advising them that the landlord has the responsibility to maintain and repair inside wires.
3. The marketing of service packages through sequential offering in descending order of price without fully disclosing customer options.

We find in favor of Pacific Bell on several issues raised by complainants. First, no law or decision precludes customers who do not wish to receive calls from lines with numbers blocked from Caller ID from rejecting such calls and purchasing services from Pacific Bell to prevent such calls from being presented to their telephone. This service is called Anonymous Call Rejection.

Second, we find that where Pacific Bell's marketing practices failed to meet statutory and decisional standards, it did so for all customers. Therefore, we do not need to reach the question whether these were misleading to only certain customer groups (e.g. non-English speakers). We are unable to find on the evidence presented that Pacific Bell unfairly targeted minorities.

Third, although Pacific Bell is subject to federal and state regulations regarding the privacy of customers' information, currently federal standards do not prohibit Pacific Bell from providing customer information, subject to appropriate security measures and other restrictions to its agents and affiliates for Pacific Bell marketing purposes. In this decision, however, we do not reach the question whether state law requires a carrier to obtain the consent of individual subscribers before such disclosures. We intend to address this important question on an industry-wide basis in a rulemaking proceeding.

Remedying the violations in marketing Caller ID, packages of optional services and inside wire maintenance services, and preventing their recurrence, will require a major effort by Pacific Bell. We direct Pacific Bell to notify customers who were affected by Pacific Bell's violations and to take steps to ensure that customers are receiving the services they desire. Finally, to deter future violations, we impose a fine of \$25.55 million for Pacific Bell's violations of the Caller ID regulations and incomplete disclosure of price information in violation of §§ 451, 2896, and Tariff Rule 12. Further, we direct Pacific Bell to rewrite Tariff Rule 12 to ensure customer service requests are fulfilled prior to subjecting customers to marketing pitches.

2. Procedural History

This proceeding consolidates complaints against Pacific Bell by the Utility Consumers' Action Network (UCAN), the Greenlining Institute and the Latino Issues Forum (Greenlining), and the Telecommunications Union, California Local 103, International Federation of Professional and Technical Engineers, AFL-CIO (TIU). The Office of Ratepayer Advocates (ORA) intervened in the consolidated proceeding and presented its own evidence on a number of key issues. The complaints allege that Pacific Bell was:

- persuading customers to switch from complete Caller ID blocking to selective blocking by providing incomplete and misleading information about the service and the level of privacy protection it provided;
- marketing packages of services under the name “The Basics” and the “Basics Plus” which suggest that the services are basic telephone service rather than a package of optional features;
- offering the most expensive inside wire repair service first and only telling customers of a lower-priced option if they reject the first;
- unlawfully using and disclosing Customer Proprietary Network Information; and
- employing sales programs and practices which operated to the detriment of customer service and quality customer information.¹

On July 7, 1998, the Assigned Commissioner and Administrative Law Judge (ALJ) issued a ruling determining the scope of the proceeding and designating the ALJ as the presiding officer.

To address complainants’ allegations in an efficient manner, the Assigned Commissioner and ALJ directed the parties to participate in a collaborative process to discover and potentially agree upon the basic facts that underlie these complaints. To facilitate this effort, Pacific Bell agreed to produce testimony and produce witnesses for deposition on a list of subjects identified by complainants, rather than the usual course of complainants producing the first round of testimony. On August 21, 1998, Pacific Bell produced testimony of four witnesses. The parties continued discovery and negotiations regarding a

¹ Two other issues were eliminated from the proceeding. ORA decided not to pursue the issue it raised regarding screening for Universal Lifeline Service, and issues which arose under collective bargaining agreements were eliminated by earlier ruling.

potential factual stipulation, and on October 30, 1998, the parties filed a statement of undisputed facts.

ORA filed its statement of disputed facts, the declaration of its witness, Kelly Boyd, and its report on Pacific Bell's marketing practices. On November 23, 1998, Greenlining and UCAN submitted their direct testimony. Pacific Bell submitted rebuttal testimony on December 15, 1998, with surrebuttal testimony following on December 23, 1998. Cross-examination of witnesses occurred on January 21 through 27, 1999. Late-filed exhibits 90-102 were added to the evidentiary record by ALJ ruling on March 11, 1999. The statutory deadline to conclude the proceeding was extended by Decision (D.) 99-04-005. The proceeding was submitted with the filing of briefs on March 26, 1999.

The Presiding Officer mailed her Presiding Officer's Decision (POD) on December 22, 1999. Pacific Bell, Greenlining, and TIU submitted timely appeals of the POD. On January 21, 2000, The Utility Reform Network (TURN) and the Communications Workers of America filed motions to intervene and appeals of the POD. The Presiding Officer granted both motions by ruling on February 1, 2000.

On February 7, 2000, ORA submitted a request for official notice of the Veto Message of Governor Pete Wilson to Assembly Bill (AB) 1161. ORA's request is granted.

The Commission, en banc, held oral argument on February 23, 2000. The Presiding Officer issued a Modified POD on July 13, 2000. The Modified POD reflected only minor clarifications to the POD.

On October 25, 2000, Commissioner Neeper mailed his own proposed Modified Decision on Appeal, and on November 12, 2000, Commissioner Bilas mailed proposed alternate pages to Commissioner Neeper's Decision. On December 11, 2000, Commissioner Wood mailed his own proposed Modified

Decision on Appeal. On July 9, 2001, Commissioner Brown mailed his own proposed Modified Decision on Appeal.

2.1. Requests To Reopen the Record

2.1.1. Wallace Roberts

On July 22, 1999, Intervenor Wallace Roberts submitted a letter, copied to all parties, in which he alleged that Pacific Bell had transferred his local service from another provider back to Pacific Bell without his authorization. He submitted another letter on July 24, 1999, where he suggested that the unauthorized transfer was in retribution for his request that Pacific Bell not contact him about switching back. Roberts requested that his allegations be investigated as part of this case.

On July 30, 1999, Pacific Bell provided a letter in which it explained that Roberts' unauthorized transfer had been caused by clerical error and that steps had been taken to ensure that no further such errors occur. Pacific Bell opposed reopening the record.

2.1.2. TIU

On September 9, 1999, TIU filed its Petition to Set Aside Submission and Reopen the Proceeding for the Taking of Additional Evidence. TIU stated that Pacific Bell had unilaterally canceled agreements with TIU that eliminated the requirement to offer certain services on every call and to limit supervisory monitoring. The agreements are included in the evidentiary record as Exhibits 44 and 45.

On October 1, 1999, Pacific Bell filed its response in which it stated that the petition lacked merit because the record shows that the agreement could be canceled at any time, and any questions regarding the legality of the cancellation would be better addressed in the collective bargaining process

demonstrating a change in law or fact since submission which would justify re-opening the record. Here, Roberts alleges that Pacific Bell has violated the anti-slamming statute, § 2889.5.² This issue is unrelated to the facts and law currently at issue in this proceeding. Should Roberts wish to pursue this issue, he may do so through the Commission's complaint process.

TIU claims that Pacific Bell's cancellation of a particular agreement with TIU affects the facts in this case. Subsequent cancellation does not affect the fact that the agreements were in place during a portion of the time relevant to this proceeding. Should TIU wish to challenge Pacific Bell's right to cancel the agreements, TIU may do so through the collective bargaining process or other appropriate means.

For the reasons stated above, the Roberts request and TIU's petition are denied.

2.2. Changes from the Presiding Officer's Modified Decision

This Decision differs from the Revised Presiding Officer's Decision (mailed November 11, 2000) in the following ways:

- Like the POD, this Decision declines to adjudicate claims that Pacific Bell violated the California Unfair Competition Law (Business and Professions Code §17200 et seq. and § 17500 et seq.), and notes that remedies available under that law are cumulative and in addition to remedies that may be imposed under other laws.

² Unless otherwise noted, all citations are to the California Public Utilities Code.

- The amount of the fine is changed to \$25.55 million, with the Decision explaining how the fine was calculated and what criteria were considered (See section 9.4.)
- Contrary to the Revised POD, we do not order refunds for those customers who were sold services for “The Basics” and “The Works” through sequential offering techniques (“offer high, watch them buy, offer low, nowhere to go”). Rather we order notifications by Pacific Bell of those customers of their service options, and provide for them an opportunity to cancel unwanted services.
- Contrary to the Revised POD, we find fault with Pacific Bell’s lack of disclosure to tenants that it is the landlord’s responsibility to maintain inside wire.
- With the respect to the claim that Pacific Bell improperly released confidential subscriber information without subscribers’ consent, in violation of §2891, this Decision clarifies that we do not reach the issue whether, as Pacific Bell contends, there is an implied exception to §2891 based on agency law principles.

The Findings of Fact, Conclusions of Law and Ordering Paragraphs have been revised consistent with these substantive changes.

2.2.1. Business and Professions Code

On appeal of the POD, Greenlining contends that the decision should contain findings that Pacific Bell has violated Business and Professions Code §§ 17200 and 17500.

The California Unfair Competition Law, Business and Professions Code § 17200 et seq. and § 17500 et seq. (UCL) prohibits “any unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue or misleading

advertising.” (Business and Professions Code § 17200.) The UCL “borrows” violations of other laws and treats them as unlawful business acts independently actionable under the UCL. Cel-Tech Communications v. LA Cellular (1999) 20 Cal.4th 163, 180; Quelimane Co., Inc. v. Stewart Title Guar. Co. (1998) 19 Cal. 4th 26. Practices may be “unfair” even if not proscribed by some other law. Cel-Tech, 20 Cal.4th at 180.

Courts may enjoin unfair or unlawful business practices and grant other relief “as may be necessary to restore to any person . . . any money or property . . . which may have been acquired by means of such unfair competition.” (Business and Professions Code § 17203; see also § 17535.) A violation of the advertising provisions of the UCL (Business and Professions Code § 17500, which prohibits “deceptive, false, and misleading” advertising) constitutes a misdemeanor punishable by a civil penalty of up to \$2,500 per violation and six months in jail. (Business and Professions Code §§ 17500, 17534, 17536.)

All of the remedies for violations of the UCL are “cumulative to each other and to the remedies or penalties available under all other laws of this state.” (§§ 17205, 17534.5.) Thus, in a UCL action, a court may order remedies in addition to sanctions that have been or may be imposed under other laws and/or by other courts or agencies, based on the same conduct. (People v. Damon (1996) 51 Cal.App.4th 958, 969.)

While this proceeding was pending at the Commission, the District Attorneys for Alameda, Monterey, and San Mateo Counties filed a complaint on behalf of the People of the State of California against Pacific Bell and its corporate affiliates based on **factual** allegations essentially identical to those at **alleged** in this proceeding. The DAs alleged that Pacific Bell’s **marketing practices were misleading, in violation of** §§ 17200 and 17500 of the Business and Professions Code. On December 6, 1999, the Superior Court of Alameda County sustained

Pacific Bell's demurrer to the complaint on the grounds that the CPUC has exclusive jurisdiction over the subject matter of the complaint. People v. Pacific Bell, et al, No.816635-9, (Dec. 6, 1999); [aff'd, 89 Cal. App. 4th 844 \(Cal.App. 1st Dist., as modified on denial of rehearing July 5, 2001\)](#); [petition for review filed July 17, 2001](#).

The Commission's regulatory authority stems from the California Constitution and the Public Utilities Code, and gives this Commission broad regulatory power over Pacific Bell. The Commission's remedial powers are extensive. (See San Diego Gas & Elec. Co. v. Superior Court (Covalt) (1996) 13 Cal. 4th 893, 914-915; Wise v. PG&E (1999) 77 Cal.App.4th 287, 299; Public Utilities Code § 701.) Our disposition of the instant complaint rests on Public Utility Code issues, and we do not adjudicate the Unfair Competition Law claims. (See Business and Profession Code §17204.)

2.2.2. Customer Complaints

Complainants' allegations are based, in large part, on Pacific Bell failing to inform customers of less-expensive or different options. Customers who later became aware of these options could reasonably be expected to contact Pacific Bell seeking an option about which they were not informed. The record reveals that Pacific Bell's usual response was to transfer the customer to the other service option, and refund any disputed amount. Pacific Bell, however, did not track these service changes. In this way, Greenlining, TURN, and ORA allege that Pacific Bell can successfully evade a comprehensive understanding by the Commission of the effect on customers of Pacific Bell's marketing abuses.

Because Pacific Bell did not keep records of actual customer complaints,³ there is no way of knowing exactly how many customers have been affected by the marketing abuses found in today's decision. Sufficient evidence of such abuse is present in the record, however, in the form of customer and service representative testimony, ORA's monitoring of actual service representatives, and Pacific Bell's admissions regarding its policies and procedures. (See *Turn v. Pacific Bell*, 49 CPUC 2d 299, 305 (D.93-05-062) (1993).)

3. Disputed Material Facts

Despite the volume of testimony, few disputed issues of material fact exist in this record. This is not surprising as Pacific Bell's marketing and customer service efforts are large-scale public activities that are readily observable and thus difficult to call into dispute. Instead, the focus of the proceeding is the legal effect of Pacific Bell's largely undisputed actions. The parties' jointly filed statement of undisputed facts covers many, but not all, of the circumstances in this proceeding. Consequently, much of the prepared written testimony consists of legal and policy argument.

Rather than reciting a detailed summary of the evidence presented by each party, the following sections of this decision rely as much as possible on the agreed-upon statement of undisputed facts as well as facts which are not contested in the record. Thus, where factual assertions are made without attribution, these facts are considered undisputed. Where conflicting assertions are made, they are attributed to the sponsoring parties.

³ Customers who remain unaware of service options that better meet their needs, of course, would not possess enough information to submit a complaint.

4. Witnesses Presented

4.1. UCAN

UCAN's executive director, Michael Shames, testified regarding the consumer impact of Pacific Bell's sales and marketing plans. UCAN witnesses Charles Carbone and Danial Saban testified about contacts with Pacific Bell's customer service representatives. UCAN witnesses Patricia Greenan and Janet Spector provided their observations from their jobs as Pacific Bell employees. UCAN's final witness was Beth Givens, founder and director of the Privacy Rights Clearinghouse.

4.2. Greenlining

Guillermo Rodriguez, Latino Issues Forum board member, testified on Latino customers' reaction to Pacific Bell's marketing. Michael Phillips, former banking executive and author of numerous books on finance, economics, business development, and marketing, analyzed Pacific Bell's marketing and outreach programs with respect to optional products, such as Caller ID and Anonymous Call Rejection, and packages of enhanced services known as "The Basics," "The Basics Plus," and "The Essentials." Roxanne Figueroa, Paul Correa, and Jose Gutierrez testified on their respective phone service orders. Greenlining's executive director, John Gamboa, testified that "high-pressure sales tactics exploit the fact that limited English speaking customers are eager to please and complain far less frequently than fluent English speakers."

Henry Der testified on the effect of Pacific Bell's marketing practices on the Chinese community. Nghia Tran testified on the effect of Pacific Bell's marketing practices on the Vietnamese community. Bill Ong Hing, professor of immigration law, explained immigrant communities' vulnerability to high-pressure sales techniques.

4.3. ORA

Kelly Boyd, a public utilities regulatory analyst employed by ORA, testified that she participated in monitoring of customer telephone calls to Pacific Bell. Based on these phone calls, she concluded that the pressure Pacific Bell has put on its service representatives to sell products puts the customers' privacy, and potentially, safety, at risk, and significantly interferes with providing customer service.

4.4. TIU

TIU's president, Alicia Ribeiro, testified that after Pacific Bell merged with SBC, the company began implementing a new sales policy and program which emphasizes sales over service and fundamentally changes the essential function of the service representative position from customer service to sales. Sharon Bogisich, Pacific Bell service representative, testified about the new requirements for her job. Specifically, she must now offer certain services on every call, regardless of customer need, the highest cost packages of services first; overcome customer objections to those offers; fall back to lower cost packages only after customer rejection; and observe prohibitions and restrictions on disclosure of relevant and complete information. Bogisich believes these job requirements place the service representative in an adversary role to the customer. Carrie Pelinka and Rose De Trinidad, Pacific Bell service representatives, provided testimony that echoed Bogisich's. Diane Greene, Pacific Bell service representative currently assigned to the Bay Customer Appeals Team, concluded that the package sales complaints she handles are not the result of mistakes by the customers, but are due to customers simply not knowing that their account has been charged for several services.

4.5. Pacific Bell

Jewell Stoddard, director of Pacific Bell's Consumer Markets Group, presented testimony on service representative practices and procedures. Mark Pitchford, vice president of marketing for SBC Services, Inc., offered testimony to rebut complainants' concerns regarding marketing practices for Caller ID, Blocking, and the use of customer information. Michael P. Grasso, director of market management for SBC Operations, Inc., addressed marketing to ethnic communities. Carol A. Scott, professor of marketing, testified about Pacific Bell's marketing efforts and customer satisfaction ratings. Denise M. Gilley, Pacific Bell consumer markets group vice president, explained that Pacific Bell employees are subject to a code of business conduct which requires all managers and service representatives to deal with customers courteously, accurately, and truthfully.

4.6. Wallace Roberts

Roberts intervened in the proceeding as a party and stated that he is a subscriber to both Caller ID and Anonymous Call Rejection. He has found these services to be invaluable in protecting and enhancing his and his family's privacy.

5. Statutory and Decisional Standards Applicable to Pacific Bell's Duty to Inform Customers

Specific statutory and decisional standards apply to Pacific Bell's marketing activities. The most pertinent series of decisions were issued in 1986 and arose from Pacific Bell marketing programs then in place. We discuss that series of decisions in some detail. We then discuss Pacific Bell's marketing of specific services, its marketing programs and tactics, and finally its marketing to certain customer groups.

5.1. General Standard

As a public utility, Pacific Bell has a duty to “furnish and maintain such adequate, efficient, just and reasonable service, . . . including telephone facilities . . . as are necessary to promote the safety, health, comfort and convenience of its patrons, employees, and the public.” (Public Utilities Code § 451.)

All charges “demanded or received” by a public utility such as Pacific Bell must be “just and reasonable,” and all Pacific Bell’s rules pertaining to or affecting Pacific Bell’s charges or service to the public must also be just and reasonable. (*Id.*)

“Every unjust or unreasonable charge demanded or received . . . is unlawful.” (*Id.*) Unauthorized charges (“cramming”) are unjust and unreasonable. (See Order Instituting Investigation into Accutel Communications, Inc., I.99-04-023 (filed April 22, 1999), __CPUC2d ____. Charges obtained by means of misleading or confusing sales likewise are unjust and unreasonable and therefore unlawful under § 451.

5.2. Sufficient Information To Make Informed Choices

The Commission has previously determined that § 451 requires Pacific Bell to disclose to its business customers all service options that may meet the customers’ needs:

“In the complex field of communications, no layman can be expected to understand the innumerable offerings under defendant’s filed tariffs. When defendant sends out one of its communications consultants to a customer’s place of business for the explicit purpose of discussing telephone service, the consultant should point out all the alternative communications systems available to meet the customer’s needs. This is

duty owed by defendant to its customers.” (First Financial Network v. Pacific Bell, D.98-06-014, June 4, 1998, quoting H.V. Welker v. P.T.&T Co., (1969) 69 CPUC 579).

Pursuant to § 451, Pacific Bell has the same duty to its residential customers.

In addition, the more recently enacted Public Utilities Code § 2896 specifically requires telecommunications corporations to provide their customers “sufficient information upon which to make informed choices among telecommunications services and providers. This includes, but is not limited to, information regarding the provider’s identity, service options, pricing, and terms and conditions of service.” Section 2896 also requires telephone corporations to meet “reasonable statewide service quality standards,” including standards of customer service. (§ 2896(c).)⁴

⁴ Section 2896 provides:

§ 2896. Minimum required customer service

The commission shall require telephone corporations to provide customer service to telecommunication customers that includes, but is not limited to, all the following:

- (a) Sufficient information upon which to make informed choices among telecommunications services and providers. This includes, but is not limited to, information regarding the provider's identity, service options, pricing, and terms and conditions of service. A provider need only provide information to its customers on the services which it offers.
- (b) Ability to access a live operator by dialing the numeral "0" as an available, free option. The commission may authorize rates and charges for any operator assistance service provided subsequent to access.
- (c) Reasonable statewide service quality standards, including, but not limited to, standards regarding network technical quality, customer service, installation, repair, and billing.
- (d) Information concerning the regulatory process and how customers can participate in that process, including the process of resolving complaints.

Footnote continued on next page

The Legislature passed this statute in 1993 to ensure that telecommunications corporations provide basic information to consumers:

“Assembly Bill 726 [codified as § 2896] sets forth **minimum customer service standards for telecommunications corporations.** These standards are very basic, including requiring the provision of information to consumers so that they may wisely shop among competing telecommunications providers.”

(Letter from Assembly Majority Whip Gwen Moore to Governor Pete Wilson (September 8, 1993) (urging the governor to sign the bill) (emphasis added)).

The reports from Senate and Assembly hearings similarly reflect an intention to protect consumers by requiring telecommunications corporations to provide consumers with a minimum level of information:

“The author believes that the customer service practices discussed in this bill – many of which are currently required by the PUC – should be codified because they represent basic consumer protection policies of the state and should not be subject to change by regulation. Both ongoing and future regulatory changes have and will inevitably continue to cause additional customer confusion. This bill is intended to address information requirements to alleviate such regulatory and marketplace confusion. Further, these policies are intended to help establish a level playing field among competing telecommunications providers.”

Some utilities have argued that a utility cannot be sanctioned for failing to meet the requirements of this statute because it places obligations on the Commission, not on utilities. We decline to read the statute in this manner. Section 2896 sets a minimum disclosure standard that utilities must meet and that the Commission must enforce.

(Senate Committee on Energy and Public Utilities, Hearing Report on AB 726 (Moore), June 22, 1993; see also Assembly Committee on Utilities and Commerce, Hearing Report on AB 726 (Moore), April 19, 1993.)

Thus, in order to protect consumers, the Legislature codified a minimum regulatory standard requiring telecommunications corporations to provide consumers with the information necessary to make informed choices among services and service providers. This minimum standard reflects traditional regulatory concerns for consumer protection and also emerging concerns about fair competition.

We turn now to the disclosure standards that apply specifically to the marketing of optional services.

5.3. Tariff Rule 12 and Information Regarding “Packages”

Pacific Bell’s Tariff Rule 12 governs the offering of optional services to a customer. It states that Pacific Bell may call a customer’s attention to the fact that optional services are available, and that the customer may designate which services are desired. Tariff Rule 12 also requires that Pacific Bell disclose all applicable recurring rates and nonrecurring charges:

“Where there are additional residence optional services (other than exchange access service) available, the Utility, or its authorized employees, may call applicant’s attention, at the time application is made, to the availability of such optional services *and the customer may designate which optional services they desire*. The Utility shall provide a quotation of the applicable recurring rates and non recurring charges applicable to each service designated by the customer. The quotation of applicable rates and charges shall be stated separately for each optional service *designated by the customer*.”

(Rule No. 12 – Disclosure of Rates and Charges and Information to be Provided to the Public, effective May 15, 1995 (emphasis added)). Implicit in the language of Tariff Rule 12 is the assumption that the customer may accept or decline further information about specific options available.

5.3.1. Basis of Tariff Rule 12

The Commission’s GO 96-A, originally adopted in 1962, requires among other things, that each public utility’s tariffs contain rules covering certain subjects. These subjects are enumerated in Section II. C. (4) of GO 96-A, and one of the subjects, “Optional Rates and Information to be Provided to the Public,” is the basis of Tariff Rule 12. We must construe Tariff Rule 12 in light of this antecedent. A duty of the utility, according to directions given in GO 96-A, is “to promptly advise customers of new, revised, or optional rates applicable to their service.” Also included under this subject are directions requiring that “customers [are] to exercise option,” and that the public may inspect “information regarding service.” Taken together, these directions impose on each utility a duty, to be reflected in the utility’s own tariffs, to (1) provide customers with up-to-date information regarding the utility’s service, and (2) allow customers to choose from among any service options available to them.

5.3.2. Application of Tariff Rule 12 to Service “Packages”

The Commission has previously addressed the requirements of Tariff Rule 12, and other marketing issues, in a series of decisions stemming from Pacific Bell’s general rate case filed in 1985 (Application (A.) 85-01-034). As part of the rate case investigation, Commission staff members uncovered a number of marketing actions which staff believed violated provisions of the Public Utilities Code and Pacific Bell’s tariffs. Staff reported these potential violations to the Commission. After a hearing, the Commission issued a decision directing Pacific

Bell to cease and desist from: conducting an unauthorized trial program for enhanced services, engaging in “package selling abuses,” violating Tariff Rule 6 in establishing credit, renaming basic service, and improperly administering the Universal Service Program. The Commission also ordered Pacific Bell to refrain from any cold selling telemarketing and from implementing any sales quota systems. (D. 86-05-072, 21 CPUC2d 182.) In a series of decisions issued over several years, the Commission subsequently ordered Pacific Bell to refund over \$62 million to customers (as of November 1988) and to contribute \$16.5 million to the Ratepayer Education Trust Fund. Pacific Bell’s marketing practices were also placed under the guidance of the Customer Marketing Oversight Committee. (D.90-02-043, 35 CPUC2d 488, 500.) The entire series of decisions is known colloquially as the “Pacific Bell marketing abuse case” or the “cease and desist order.” To distinguish this earlier proceeding from the current one, we will refer to the entire matter as the 1986 marketing case, although the decisions spanned a period of time well after 1986. When referring to a specific decision, we will provide a citation.

The decisions in the 1986 marketing case discussed Tariff Rule 12’s requirement to disclose all recurring rates and nonrecurring charges in the context of selling packages of services. In the “cease and desist” decision (D.86-05-072, 21 CPUC2d 182, 188), the Commission found that Pacific Bell’s “package selling abuses” had violated Tariff Rule 12 in two respects. First, basic local exchange service was packaged with expensive optional services in such a way as to “mask[] the basic rate, thereby causing ratepayers to unwittingly pay more for telephone service than they otherwise would, or worse, to go without such service at all.” (Id.) The Commission staff witness described this as

“representing to applicants for service that a loaded service is the basic service.”
(Affidavit of Karen Miller in Support of Order to Show Cause, May 7, 1986.)

Second, the Commission found that “in its ‘package selling’ efforts, Pacific Bell violated Tariff Rule 12, which requires a quotation and full itemization of recurring and nonrecurring charges *applicable to the service and equipment a customer seeks.*” (*Id.* at 190.) This finding was based on evidence that Pacific Bell was misrepresenting to its customers that local service could only be purchased as part of a package that included every available optional service Pacific Bell then offered. These packages increased the price of measured local service from \$4.45/month to \$28.15/month. (See Exhibit 511, A.85-01-034.) The Commission found that Tariff Rule 12 required Pacific Bell to disclose the option to purchase services separately and to itemize the price for each service in the package.

At the hearing that led to the 1986 “cease and desist” decision, Pacific Bell acknowledged its obligations to disclose and itemize the prices for component parts of its tariffed packages of services:

“Q. (by Pacific Bell attorney)

In addition, I want to be clear that yes, we do have tariffed packages, but also elements of those packages can be acquired individually. Do you consider it, since you have responsibility for developing and ensuring compliance, that the customer must understand that when we’re talking about a package, to the extent that individual parts can be obtained individually at different rates, that the customer must, we must do what we can to ensure that the customer understands them?

“A. (by Pacific Bell witness Haight) Yes.”

Transcript of May 16, 1986 hearing, 7949:19-7950:1.

Pacific Bell's witness, Vice President Haight, further testified that customer service representatives would be making disclosures about the availability of optional services on an individual basis and in discounted packages. Specifically, each customer service representative would make the following statement after basic service had been discussed and ordered:

Most of our optional services are available individually. Many are also available in a package with a discounted rate. I am going to recommend a set of services which will best suit your needs. I will also offer to break down all charges later for you.

Id. at 7950:8-16.

The Pacific Bell Vice President summarized the duties of the service representatives to their customers: “[t]he important part is that the service rep is responsible for clearly explaining options available to the customers and giving the customer the ability to make an informed choice, that the choice is the customer’s. Id. at 7948:9-13.

The Commission subsequently ordered Pacific Bell to make revisions to its Tariff Rule 12 (D.87-12-067, 27 CPUC2d 1, 52.) The objective of those revisions was to provide “full explanation of residence optional services requested by the customer and a quotation of the associated tariffed rates and charges.” (Id.)

Currently applicable Tariff Rule 12 requires that Pacific Bell provide a quotation of all “recurring rates and nonrecurring charges” that apply to each service a customer selects. The quotation must be “stated separately for each optional service designated by the customer.” (Emphasis added).

Thus, Tariff Rule 12 and the Commission decisions require that when offering packages of services, Pacific Bell must (1) offer basic exchange service apart from packages of optional services, (2) disclose that package components can be purchased separately, and (3) quote rates for optional services separately, for those services in which the customer has expressed interest. Unfortunately, as we discuss later in today's decision, Pacific Bell's practices at issue in this proceeding do not satisfy these requirements.

5.4. Information Regarding Caller ID Blocking

Section 2893 applies to providing Caller ID "blocking," i.e., withholding the display of the caller's telephone number. That section requires Pacific Bell to comply with the Commission's rules on blocking services which the Commission adopted in conjunction with its authorization of Caller ID service. Consistent with § 2893, the Commission directed that service providers enable callers to withhold display of the caller's telephone number, on an individual basis, from the telephone instrument of the called party. The Commission explained the linkage between Caller ID and blocking services in terms of the right to privacy of telephone subscribers:

"Our goal must be to ensure, to the greatest extent possible, that the decision to allow a calling party's number to be displayed is the result of informed consent and a knowing and intelligent waiver of the right to privacy. To this end, we will seek to maximize the ease and freedom with which a caller may choose not to disclose the telephone number from which he or she is calling."

* * *

"So long as telephone subscribers are fully informed of the nature of the service and the nature of their blocking

options, disclosure will be consensual and will manifest a waiver of the calling party's privacy rights.”

(D.92-06-065, 44 CPUC2d 694, 713-4.)

In approving the requested privacy related custom calling features (Call Return, Call Block, Cal Trace and Caller ID), the Commission ordered the applicants (Pacific included) to provide each telephone subscriber with a clear and easily understandable notice⁵. To implement this notification of customers, the Commission directed Pacific Bell to undertake a substantial customer education effort, under the supervision of the Commission's staff, prior to offering the services. The details of that effort, the Consumer Notification and Education Plan, were revised in accordance with D.92-06-065 and approved by the Commission in Resolution No. T-15827 (December 20, 1995.) Pacific Bell has completed the customer education effort in compliance with T-15827. The customer education effort imposed on Pacific was ordered to be most intensive in the first six months and then ongoing for as long as the custom calling service were being offered. However, the Commission did not proscribe Pacific's efforts to persuade customers to switch to selective blocking.

6. Marketing Specific Services

Below, we address each Pacific Bell service whose marketing is alleged by complainants to have violated one or more of the standards discussed above.

⁵ In Ordering Paragraph 2 of D.92-06-065, the Commission stated: “Prior to offering Call Return, Call Block, Call Trace, and Caller ID service, applicants shall provide each telephone subscriber with a clear and easily understandable notice informing the subscriber (1) of the blocking option applicable to that party's telephone service, (2) whether that option was determined by choice or by default, (3) of the right of the subscriber to change the blocking option applicable to that subscriber's service one time free of charge, and (4) of the nature of the available blocking options to which the subscriber might wish to change.” (44 CPUC2d 731)

6.1. Caller ID and Blocking Service

Pacific Bell sells the Caller ID service as a tariffed service. This service provides the name and telephone number on a special box, screen phone, or audio box, that announces the caller. Pacific Bell has offered this service in California since July 1996. It costs \$6.50/month for residences and \$7.50/month for businesses when purchased separately. Approximately one million residential and 51,000 business customers subscribe to the Caller ID service.

As a prerequisite to authorizing Pacific Bell to offer Caller ID service, the Commission required Pacific Bell to enable callers to withhold (“block”) the display of their name and telephone number. Pacific Bell has two Caller ID blocking options: Complete Blocking and Selective Blocking. Complete Blocking prevents a caller’s name and number from appearing on the receiving party’s Caller ID display unless the caller chooses to unblock the number on a per call basis by dialing *82. Selective Blocking displays the caller’s name and number to the receiving party unless the caller chooses to block the number on a per call basis by dialing *67. Every telephone line has either Complete Blocking or Selective Blocking, and both options are free of charge. If a customer does not choose Complete Blocking, the default is Selective Blocking. If a customer has elected Complete Blocking, it is so indicated on the monthly telephone bill. The default, Selective Blocking, is not indicated on the customer’s bill.

To educate consumers about these new options, the Commission ordered all California local exchange carriers to implement a ratepayer-funded Customer Notification and Education Plan. (See D.92-06-065, 44 CPUC2d 694, 716-9.) The purpose of that plan was to ensure that all Californians were aware of the Caller ID services and their implications, including understanding their options for maintaining their privacy as a calling party. The plan included

individual letters to each customer; TV, newspaper, and radio advertisements; and community outreach to over 500 organizations. The campaign cost over \$30 million and concluded in mid-1998.

Pacific Bell's marketing plan and scripts for service representatives set out its subsequent approach to offering Caller ID blocking options. In its Residence Caller ID Marketing Plan, developed in October 1977, SBC⁶ noted that Pacific Bell's 1996 sales rate for Caller ID was 2% and set a goal of 30% for 1999.⁷ Among the means for increasing the value of this product to customers was decreasing the number of lines that have Complete Blocking so that a greater share of numbers would be displayed. In other words, with a greater share of lines having Selective Blocking, Caller ID customer would see fewer calls marked "private" or "anonymous." The specific plan to accomplish this included:

- "attempt to convert customers to Selective Blocking on all customer contacts associated with Caller ID (included telemarketing, sales agency, business office, ERIC, etc);
- "implement sales incentive program (prizes) to reward net increase in Selective Blocking and track on a monthly basis;
- "change positioning of Complete Blocking prompt on Starwriter and establish policy for Service Representatives to address service only at customer

⁶ In 1997, SBC merged with Pacific Bell's holding company, Pacific Telesis. The Commission approved SBC's control of Pacific Bell in D.97-03-067.

⁷ As a result of increased sales of Caller ID as forecast in its Residence Caller ID Marketing Plan, SBC forecast that Pacific Bell would increase its revenues by \$2 billion over a 10-year period. The Plan is Hearing Exhibit 4 in the hearing record.

prompting or when addressing removal of existing Complete Blocking; and

- “train service representatives to provide customers a balanced perspective of Complete Blocking and a bias towards Selective Blocking.”

(Exhibit 4.)

Pacific Bell also provided its service representatives with suggested language to use when talking with customers on this topic:

- “I noticed that you have Caller ID Complete Blocking. What are you using it for? I find that Selective Call Blocking gives me greater control over my privacy. Since it’s free, shall I go ahead and change that for you?”

* * *

- “I see you have complete blocking for Caller ID. Do you know what that is? I’m concerned that your calls may go unanswered. Many of our customers don’t answer calls that are marked private and may even block them from coming through. I recommend switching to Selective Blocking. Then you can just dial *67 when you really need to block your calls. Can I go ahead and take care of this for you? There is no charge.”

(Exhibit 2, Attachments 66 and 67.)

After examining Pacific Bell’s marketing plan and scripts for service representatives in light of the applicable statutory and regulatory disclosure standards, we conclude that Pacific’s marketing scripts do not provide the customer with sufficient information on the full range of blocking options available. But we should note that Pacific’s marketing efforts for Caller ID are

not a part of the customer education requirements as defined by D.92-06-065 or a subsequent resolution that adopted the CNEP. The Commission ordered that the consumer education program should be most intense in the first six months and then ongoing for as long as the customer calling features were being offered. (See Ordering Paragraph 6(c) of D.92-06-065). However, the Commission did not establish specific requirements to dictate Pacific's marketing of Caller ID or what script it should follow to persuade customers to switch from Complete Blocking to Selective Blocking after the completion of the customer education program. Indeed, as Pacific Bell correctly points out, legislation was vetoed which would have required all telephone companies to include in Caller ID notification of all the options for blocking the caller's telephone number. (Pacific Bell Appeal of ALJ Opinion, dated January 21, 2000, p. 26.) We recognize that Pacific Bell is free to encourage customers to choose Selective Blocking as long as it continues to provide balanced information on Complete Blocking and, at minimum, refrain from undermining the public's ability to make informed choices regarding their privacy.

We note that Pacific's objectives to increase the penetration rate for Caller ID service is neither prohibited nor necessarily inimical to consumers' interest. We did not bar Pacific from persuading customers to switch from complete blocking to selective blocking. As we noted in D.92-06-065, it would be the "applicants' (Pacific, GTE California and Contel of California in Application 90-11-011) challenge to persuade the public not to block by providing cogent reasons why it is not in their interest to do so." (See D.92-06-065, 44CPUC2d713)

However, we find that Pacific's marketing of Caller ID does not give the customer a complete picture of the options available. This is particularly important for those customers who received Complete Blocking by default

because their address and telephone number were unpublished. The information Pacific provides on Complete Blocking to these and other customers is deficient of important information about Complete Blocking. Although Pacific's marketing strategy for Caller ID states that it would provide a balanced perspective on Complete Blocking, the suggested talking points to customer representatives leave out a key aspect of Complete Blocking that allows the customer to unblock the display of telephone number on a per call basis by dialing *82, a technique to avoid call rejection from customers who have ACR. In contrast, in describing Selective Blocking, Pacific's suggested script informs that the customer can dial *67 on per call basis and selectively block the display of telephone number at the customer's choice. By doing this Pacific's marketing scripts are not only biased as Pacific planned them but unbalanced and incomplete. Pacific has not shown in this record that the customer that its CSRs solicit to switch to Selective Blocking is offered more information on his or her blocking options other than what is contained in the scripts. A customer's decision to switch from Complete Blocking to Selective Blocking based on the marketing script Pacific provides to its CSRs do not constitute a fully informed waiver of a customer's privacy rights, a precondition the Commission laid out for carriers to follow in selling Caller ID services. Thus we find Pacific has violated Section 2896 and D.92-06-065. We will address what remedies and sanctions to apply in a later section.

6.1.1. Pacific Bell's Contract With BRI

In 1998, Pacific Bell contracted with Business Response, Inc. (BRI) to do outbound telemarketing to "downgrade nearly 2 million customers from Complete Call Blocking to Selective Call Blocking," and BRI stated that it "understands the urgency involved in removing Complete Call Blocking from as

many lines as possible during the fourth quarter of 1998 and the first quarter of 1999.” BRI promised to use its experience to implement a campaign that “not only meets but exceeds desired results.” BRI was compensated on an hourly basis, with incentive compensation to be considered after a test period. (See Exhibits 101, 102.)

Pursuant to the contract, Pacific Bell supplied BRI with a list of customers whose telephone numbers were published and who had Complete Blocking. Using Pacific Bell - approved scripts, BRI’s telemarketers were instructed to call the customers and inform them of new services like Anonymous Call Rejection which could interfere with their calls being completed and to recommend switching to Selective Blocking. The approved scripts specifically provided that the telemarketer was to acknowledge that the customer could choose between the two blocking options, and that *82 would unblock any call that was not being completed. A Pacific Bell manager trained BRI’s agents and observed live calls in St. Louis on the first day of calling. That day, all observed agents used the approved scripts. BRI conducted its own subsequent monitoring.

After a few weeks and in response to customer complaints, Pacific Bell suspended this contract and initiated an investigation. The investigation revealed that BRI had used unapproved scripts in its calls; the unapproved scripts used the word “upgrade” several times and included other unapproved information as well:

“The special needs of our senior customers were considered during the development of this service upgrade. Many Californians are getting Anonymous Call Rejection and if you call anyone with that service, then your call will not ring

through. With Selective Blocking your call will go through automatically, yet if you choose to block your number, then you can – to anyone, anytime, anywhere. That’s the great idea of Selective Blocking. It gives you the choice of when to block your number. So, why don’t we go ahead and get you started on this free upgrade?”

BRI Script, Hearing Exhibit 101.

Pacific Bell determined that BRI had contacted 278,010 customers and that approximately 107,000 customers had been switched from Complete to Selective Blocking as a result of those calls. Pacific Bell contacted each switched customer to confirm the choice.

In terminating the contract with BRI, Pacific Bell was acting on complaints from its customers that these calls were “deceitful and dishonest.” We agree. These calls violate the disclosure requirements because consumers were not presented information upon which to make a knowing waiver of the right to privacy, and further the consumers also received misrepresentations of fact. For example, Pacific Bell does not charge for either blocking option; both services are “free,” not just Selective Blocking as the script implies. Selective Blocking was not developed as a “service upgrade” to Complete Blocking. Both types of blocking allow customers to decide on a call-by-call basis whether to block or unblock the number. We also contrast BRI’s description of the blocking service change as an “upgrade” in the statements to customers, to its description of the same service change as a “downgrade” in its contacts with Pacific Bell.

In its report on its investigation, Pacific Bell notes that the BRI scripts were not the approved scripts. Although the exact scripts were unapproved, Pacific Bell hired BRI based on BRI’s representations that it would “enter into a partnership with Pacific Bell in an attempt to downgrade nearly two million

customers from Complete Blocking to Selective Call Blocking” by means of a campaign “that not only meets, but exceeds the desired results.” (BRI Proposal, Hearing Exhibit 101.) Based on these representations, Pacific Bell should have done more than one day of monitoring to ensure that BRI’s contacts with Pacific Bell customers did not deviate from the requisite disclosures.⁸

In mitigation of the failure to undertake adequate monitoring, we note that Pacific Bell took prompt action to terminate BRI’s contract after discovering that BRI was not adhering to the approved scripts. Pacific Bell subsequently contacted consumers and confirmed their blocking choice. Thus, Pacific Bell corrected any wrong committed by BRI.

On balance, then, we compare Pacific Bell’s conduct in contracting with BRI to “downgrade” subscribers to its remedial efforts. Pacific Bell apparently agrees that BRI’s statements failed to meet the disclosure standards and that any blocking change authorization obtained by BRI is untrustworthy. Pacific Bell comprehensively addressed BRI’s conduct, without action by this Commission. Self-enforcement of the disclosure standards is the best enforcement mechanism, and one that we wish to encourage. Therefore, while we find that BRI’s actions violated the disclosure standards, BRI’s actions have been adequately mitigated by Pacific Bell’s remedial actions.

6.2. Anonymous Call Rejection

Anonymous Call Rejection is a service offered by Pacific Bell that allows called parties to refuse to receive calls from telephones that have the

⁸ Our disclosure analysis focuses on BRI’s contacts with customers. BRI’s representations to Pacific Bell, standing alone, do not implicate the standards but the representations are evidence of the likelihood that BRI would resort to unapproved tactics of the type that BRI rapidly implemented.

number blocked. This service terminates such calls at the central office such that no toll charge is assessed. The rejected caller instead hears a recording stating that the called party does not accept anonymous calls, and if the caller wishes to complete the call, the caller's line must first be unblocked by using the *82 code, and then redialing the number.

Greenlining's witness testified that the purpose of this product was to "punish consumers who have chosen to keep their numbers private – whether they use Selective or Complete Blocking," and that it invades rather than protects the caller's privacy. Rather than contending that this service violates the disclosure standards found in Tariff Rule 12 and the statute, Greenlining contends that this service violates § 2893. That statute requires that no charge be imposed for withholding a number. Greenlining reasons that to complete a call where the called party subscribes to Anonymous Call Rejection, the caller must incur the cost (and inconvenience) of calling from a pay phone to withhold the telephone number, thus incurring a charge to withhold the number in violation of the statute. In contrast, Intervenor Roberts states that he has found Anonymous Call Rejection to be invaluable in protecting and enhancing his and his family's privacy, and that the Commission should fairly balance both the calling and called parties' privacy interests.

On this issue, Greenlining has overlooked the privacy of the called party in its privacy balance. The Commission has previously determined that "Anonymous Call Rejection vindicates an important privacy interest of the called party, the interest in undisturbed solitude. [T]his feature merely automates a self-selected vindication of a privacy concern which might otherwise be defended on a call by call basis." (D.92-06-065, 44 CPUC2d 694, 719.) In short, the called party has every right not to answer the phone and to secure services

from Pacific Bell to prevent certain calls from being presented to the phone. While the calling party who wishes to complete the call must unblock the number or use a pay phone, that decision is for the calling party to make. Greenlining has presented no legal or policy basis for an absolute right to place anonymous calls to a phone customer who does not wish to receive such calls. Section 2893 places no burden on called parties to receive anonymous calls. That statute only requires that telephone corporations provide a blocking service at no charge to the caller. Here, Pacific Bell has met that requirement of the statute.

6.3. Inside Wire Maintenance Plans

Pacific Bell is responsible for maintaining the wires that enter a customer's home up to the line of demarcation, usually a box on the outside of the structure. Wires inside the home are the responsibility of the customer, or the landlord, in the case of an apartment. Pacific Bell provides Inside Wire Service where, for a monthly fee, Pacific Bell maintains the customer's inside wire. Absent this service, the customer is responsible for any needed repairs to the inside wire.

6.3.1. Disclosure of Different Maintenance Plans

Pacific Bell offers two types of inside wire maintenance plans. For 60 cents/month, Wire Pro covers the repair of phone wiring and jacks on the customer's side of the demarcation point. For \$2.25/month, Wire Pro Plus adds a 60-day use of a loaner telephone to the services covered by Wire Pro.⁹ Pacific Bell instructs its service representatives to offer Wire Pro Plus, and to explain Wire Pro only if the customer is not interested Wire Pro Plus. Pacific Bell also

⁹ These rates were applicable during the time relevant to the complaint. The rates have since increased.

does not inform apartment dwellers of the landlord's statutory duty to maintain inside wire and one jack.

Complainants contend that this marketing approach violates § 451 and § 2896 because Pacific Bell fails to provide customers sufficient information upon which to make an informed choice among inside wire plans. Complainants state that by only offering the two service options in sequence (higher priced option first), customers who order Wire Pro Plus are unaware of the lower-priced option.

Pacific Bell states that both services are authorized by tariffs and that complainants fail to point to any legal prohibition against offering one service plan before the other.

We agree with complainants. In the 1986 "cease and desist" decision, we found that Tariff Rule 12 prohibits Pacific Bell from selling packages of services in a way that "masks" the basic rate such that customers may unwittingly pay more for a service, and from selling a "loaded service" as basic service. (D.86-05-072, 21 CPUC2d 182.) Tariff Rule 12 requires Pacific Bell to separately state the charges for each optional service, including each service that may be included in a package. By offering Wire Pro Plus first and only discussing the alternative of Wire Pro upon the customer's rejection of Wire Pro Plus, Pacific Bell effectively "masks" the lower-priced alternative of Wire Pro. This tactic may cause customers unwittingly to pay more for inside wire service than they otherwise would have. This sales tactic violates Tariff Rule 12. Pacific Bell has also violated Tariff Rule 12 by failing to state that components of the Wire Pro Plus package may be purchased separately at a lower price.

Making an informed decision requires knowing about the alternatives. Unless customers are informed of the other inside wire plan,

customers cannot choose between the two options. Pacific Bell's sequential offering does not provide customers with this information. As the Commission found in the 1986 marketing case decisions, such information is particularly relevant where the available options include the same core service, but at a substantially different price. In addition to being lower priced, Wire Pro would cover repairs for the more expensive components of the telephone facilities - the inside wire and jacks - all for 60 cents/month. In contrast, Wire Pro Plus costs \$1.65/month more than Wire Pro, and the only additional benefit is the use of a loaner phone for up to two months. Some customers may see value in paying \$1.65/month to insure the availability of a loaner phone for two months, but unless the alternatives are presented, Pacific Bell has not met the statutory standard of providing customers "sufficient information upon which to make informed choices among telecommunications services." Therefore, Pacific Bell's sequential presentation of inside wire maintenance options fails to meet the disclosure standards.

This conclusion is consistent with a recent decision in which we addressed Pacific Bell's service representatives' presentation to customers of inside wire service options. In D.99-06-053, we authorized Pacific Bell to re-categorize its inside wire services from Category II to Category III. We also noted that Pacific Bell's service representatives only present customers with the option of Wire Pro as a "fallback" when the customer rejects Wire Pro Plus. We found that this sequence "may be misleading to residential customers" and ordered Pacific Bell to clearly explain both options to residential customers. (D.99-06-053 at Ordering Paragraph 8.)

6.3.2. Landlord's Responsibility

ORA takes up the related issue of disclosing the landlord's responsibility to maintain inside wire and one working jack. ORA notes that the Commission previously required Pacific Bell to make a specific disclosure, including the "following statement, which shall be in bold print and shall be underlined: You should be aware that, under state law, landlords, and not tenants, are responsible for repairs to and maintenance of inside telephone wire." (Revision of the Accounting for Stations Connections and Related Ratemaking Effects and the Economic Consequences of Customer-Owned Premise Wiring (D.92-09-024, 45 CPUC2d 411 (headnote reported only).) The requirement that Pacific Bell make this specific disclosure expired on September 1, 1994.

Pacific Bell contends that the specific disclosure requirement having expired, it is no longer under any obligation to disclose that landlords and not tenants are responsible for inside wire repair.

While Pacific Bell is correct insofar as this specific disclosure is concerned, the expiration of a Commission dictate as to the exact words, and whether those words need to be in bold print and underlined, does not leave Pacific Bell free to selectively release information in a manner which is most advantageous to its revenue goals. The statutory requirement for "sufficient information upon which to make informed choices" remains applicable to all telecommunications services provided by Pacific Bell, and all other telephone corporations in California. Pacific Bell has an affirmative duty, created by § 451 and § 2896, to disclose to customers including inside wire service to renters, those facts that are necessary to reaching informed decisions on services Pacific Bell offers. To accept Pacific Bell's contention that the expiration of a specific disclosure requirement means that no disclosure at all is required would put this

Commission in the position of mandating each and every disclosure that each public utility must make. Such an outcome is not consistent with the law nor does it represent a workable policy.

Although Pacific Bell may now determine exact wording and whether printed materials will be in bold print or not, renters still have the right to be informed that landlords have a statutory duty to maintain the inside wire and a usable jack. Notwithstanding this duty on the part of the landlord, renters may still elect to purchase inside wire service from Pacific Bell for convenience and reliability reasons. To make an informed decision, however, the renter must be presented with all facts, known to Pacific Bell, which have a significant bearing on the decision. Here, the fact that the landlord, and not the tenant, is legally responsible for the inside wire and jack is a significant fact that may affect a tenant's decision to purchase inside wire maintenance services from Pacific Bell. In fact, customers may have in many, if not most, instances purchased a superfluous service. Accordingly, Pacific Bell shall resume disclosing to its customers who are tenants that the landlord is responsible for inside wire maintenance. We will not specify the precise details of the disclosure statement but will require that it be substantially similar to the one we previously imposed. This disclosure requirement shall not expire, absent further order of the Commission. Furthermore, Pacific Bell is ordered to notify all customers who are tenants who have purchased Wire Pro that the landlord is responsible for inside wire maintenance.

6.3.3. Disclosure of Competing Maintenance Providers

Complainants also raised the issue of Pacific Bell disclosing that other vendors, or the customer, may repair inside wire. When discussing inside wire repair plans with a customer, service representatives may state that Pacific

Bell charges \$90/hour for its repair technicians. Complainants contend that Pacific Bell is violating the statutory standard by not disclosing that vendors other than Pacific Bell may provide inside wire repair services. Pacific Bell responds that it does make such disclosures when a customer calls to order repair service, and that it only quotes its hourly repair rate to provide the customer some sense of what a repair visit might cost.

In a recent decision, we addressed the interrelationship of Pacific Bell's inside wire services and the use of other vendors to perform the actual repair of faulty wires. (D.99-06-053.) That decision also addressed and resolved the disclosure issue that complainants raise.

The decision began by determining that residential inside wire repair is one "market" with two payment options – either on a per-month basis or on a per-visit basis because both payment options are designed to solve the same problem, faulty inside wire. (D.99-06-053, mimeo., at 54.) Thus, Pacific Bell inside wire service is related to the repair service that other vendors may supply. To inform customers of these service options, we clarified on rehearing the disclosure requirements by adopting the following revised Ordering Paragraph:

"Pacific Bell's service representatives must clearly explain to its residential customers that they have options for the repair and maintenance of inside wire, including Pacific's Wire Pro plan which covers repair of the customer's inside wire and jacks, and Pacific's Wire Pro Plus plan that covers the use of a loaner telephone instrument for up to 60 days. Customers may also use outside vendors to perform inside wire repair maintenance or may make repairs themselves."

Application of Pacific Bell For Authority to Categorize Residential Inside Wire Repair as a Category III Service, D.99-09-036, mimeo., at 17.)

Our results in today's decision comports with the language quoted above. We see no reason to disturb our previous decision.

6.4. "The Basics" and "The Essentials" Packages of Optional Services

6.4.1. Background

The Commission has approved Pacific Bell's tariff for Saver Packs of optional services.¹⁰ The tariff lists the name of the different Saver Packs, the monthly charge for each package, and the actual products included in each package. The names of the various Saver Packs are:

- Classic - 2 custom calling services and calling card, \$6.30
- Caller ID - 2 custom calling services, Caller ID and calling card, \$12.
- The Essentials - 3 to 11 custom calling services and calling card, \$ 9.50 to \$24.95
- The Basics - 3 to 11 custom calling services, Caller ID, and calling card, \$12.95 to \$24.95
- The Works - 11 custom calling services, Caller ID, and calling card, \$24.95

¹⁰ These services include but are not limited to: call forwarding, call return, call screen, call waiting, priority ringing, repeat dialing, select call forwarding, speed calling - 8, and three way calling.

To display the myriad of service and pricing options which result from the five different packages with up to 11 services, Pacific Bell prepared a table with five lines corresponding to the five packages and 11 columns for the number of custom calling features. The boxes where the columns and lines intersect contained the price for that particular service offering. The table dated May 1, 1998, contained in Hearing Exhibit 57, showed 28 different packages and prices.

On June 16, 1998, Pacific Bell introduced a tariffed 90-day Basics Saver Pack promotion that offered nine custom calling features and The Message Center for \$19.95/month.

The special promotion expired and the price for the Basics Saver Pack with nine custom calling features and The Message Center returned to \$32.50/month. Pacific Bell also refers to The Basic Saver Pack (with any number of custom calling features) combined with The Message Center as The Basics Plus. Effective September 14, 1998, Pacific Bell changed the tariffed name of the Basics Saver Pack with nine custom calling features to The Works Saver Pack. Pacific Bell also lowered the price to \$16.95/month. The Basics Saver Pack with three to eight custom calling features remained unchanged.¹¹ Service representatives are now trained to first offer customers the Works Saver Pack and if rejected to then offer the Basics Saver Pack.

Pacific Bell served copies of its tariff filings on complainants UCAN and Greenlining. No complainant, nor any other entity, protested the filings.

¹¹ As a practical matter, however, the reduced price for the Basics Saver Pack with nine custom calling features (\$16.95) became equivalent to the price for the Basic Saver Pack with five such features. Thus, the price for five to nine features became \$16.95/month. Although the record is not clear on this point, the price for 10 and 11 custom calling features apparently remained at \$24.95/month.

Complainants now object to the names of “The Basics” and “The Essentials” Saver Packs. They contend that these names mislead customers into believing that these packages of optional features are standard telephone service. They further contend that Pacific Bell knew that the name “The Basics” was misleading because its own market research showed that focus group participants found it to be so:

“The fit between the name and package is the key issue with The Basics and is the primary reason it received a large number of last-place votes. Several respondents said the name implies plain old telephone service (‘a phone that works’) whereas the package includes bells and whistles they believe they can get along without:

- “It’s misleading. ‘The Basics’ is a phone, period. There’s too many choices there to be ‘The Basics.’
- “It doesn’t fit that package at all.
- “To me, that just represents the bottom-of-the-line package. ‘Premium Package’ or ‘Best Sellers Pack’ might get my attention.”

(Nehring Marketing, Summary Report, Package Name Validation Study Qualitative Research, page 3 (Attachment MS-12 to Hearing Exhibit 2)).

Complainants state that § 17200 and § 17500 of the Business and Professions Code prohibit the use, in selling services, of names that are unlawful, unfair, and misleading. Complainants argue that the names “The Basics” and

“The Essentials” violate these statutes. Pacific Bell responds that complainants have not shown that the names were likely to mislead a reasonable consumer.¹²

6.4.2. State Law on Basic Service

In the first of the series of decisions in the “1986 Marketing Case” (see § 5.3.2 above), we found that Pacific Bell was marketing its basic local exchange service in a package with expensive optional services. (D.86-05-072, 21 CPUC2d 182, 188.) Such marketing, we determined, contravened the Legislature’s and this Commission’s universal service directives because it masked the basic rate. The statutes and our decisions all focused on reducing the basic rate as the means of ensuring universal service.

The Legislature has declared that “the offering of high quality basic telephone service at affordable rates to the greatest number of citizens has been a longstanding goal of the state” and that “the Moore Universal Service Act has been, and continues to be, an important means for achieving universal service by making basic residential telephone service affordable to low-income citizens through the creation of a lifeline class of service.” (§ 871.5) (emphasis added; see also § 709(a).)

¹² Pacific Bell also argues that the claims arising under the California Unfair Competition Law (Business and Professions Code §§ 17200 et seq. and 17500 et seq.) should be dismissed because that law does not apply to services provided by a regulated public utility such as Pacific Bell, citing § 17024. We disagree. The exemption contained in Business and Professions Code § 17024 applies only to Chapter 4 of Part 2 of Division 7. Section 17500 is included in Chapter 1 (“Representations to the Public”) of Part 3 of Division 7, and § 17200 expressly applies to “any act prohibited by Chapter 1 (commencing with § 17500) of Part 3 of Division 7 of the Business and Professions Code.” Accordingly, the exemption is inapplicable to the alleged violations.

The Commission has adopted rules that govern the provision of universal service to California telecommunications users. (Universal Service, D.96-10-066, 68 CPUC2d 524, 671-82.) These rules include the following policies:

- “That high quality basic telecommunications services remain available and affordable to all California regardless of linguistic, cultural, ethnic, physical, geographic, or income considerations;
- “That customers have access to information needed to make timely and informed choices about basic service and [universal service].”

Id. at 672.

The rules also require that all carriers provide all the elements of basic service. The 17 elements of basic service are specifically defined and include, among other things: access to single party local exchange service, ability to place calls, one directory listing, free white pages telephone book, and access to operator services.

In sum, Commission precedent: (1) requires Pacific Bell to state its charge for basic service apart from any charges for optional services, and (2) relies on and defines “basic service” as the focus of the statutory universal service program.

6.4.3. The Basics Saver Pack and Commission Precedent

In choosing to name a package of optional features “The Basics,” Pacific Bell selected a word that is commonly associated with local exchange service and, at least in the context of universal service, is a term of art meaning local exchange service. By using the term “basics,” Pacific Bell created an

association between this particular group of optional features and basic service, an association that is not accurate.

Creating an association between local exchange service and packages of optional services was squarely at issue in 1986, when the Commission found that these “package selling abuses” violated Tariff Rule 12. (21 CPUC2d 182, Finding of Fact 2, Conclusion of Law 2.) The Commission also found that such an association “masks” the basic rate, which is the focus of the universal service subsidy program. (Id. at 188.)

Tariff Rule 12 requires that Pacific Bell offer local exchange service, which is more commonly referred to as “basic service,” as a separate service from optional services. Selecting “The Basics” as a name for a package of optional services violates Tariff Rule 12 because it fails to maintain separation between local service and optional services. Applying a name that connotes local exchange service to a package of optional services intermingles local exchange service with optional services. It also creates the misleading impression that “basic service” is included in the monthly price. Customers who purchase “The Basics” pay \$16.95 plus the monthly charge for local residential service of \$11.25/month for flat rate service, \$6.00/month for measured service, or \$5.62/month for Universal Lifeline Flat Rate Service.

Pacific Bell’s own customer research demonstrated the confusion this name causes. The quoted reaction to the name “The Basics” from the focus group sums it up nicely: “It’s misleading.” We agree.

The word “basic” is routinely used, even by Pacific Bell, to describe local exchange telephone service. Adding the additional words “Saver Pack” suggests a discount on basic services. Absent further explanation, no one would

realize that this “Saver Pack” is a package of optional services that can triple a customer’s monthly service charges.

The translation of “The Basics” to other languages carried through and in some cases accentuated the erroneous impressions created by the name. Nghia Tran testified for Greenlining on the effect of Pacific Bell’s marketing practices on the Vietnamese community. He explained that Pacific Bell’s translation of “The Basics” to “Chuong Trinh Can Ban” is misleading because “can ban” means fundamental phone service, even bare minimum, not a package of optional services. Similarly, Greenlining’s witness Rodriguez pointed out that the name – “The Basics” - is particularly misleading when translated to Spanish because the translation of “Basics” and “basic” is the same - “basico” - not the plural as in English.

Pacific Bell states that the order in which customers are presented with the service choices obviates any confusion. It points out that customers first select their local service (flat rate or measured rate), and then discuss optional services. Under these circumstances however, Pacific Bell’s selection of The Basics as the fallback to The Works exacerbates rather than mitigates any customer confusion.¹³

Pacific Bell should have known that transplanting the term “basic” from local service to what could be the most expensive group of optional services

¹³ Pacific Bell also argues that it has a right to market its lawfully tariffed products. While we agree with this proposition, Pacific Bell fails to acknowledge that its marketing must comply with the statutory and regulatory disclosure standards. Pacific Bell also contends that other providers of local exchange service also offer packages of optional services with the word “basic” in their name. Pacific Bell offered samples of such tariffs and requested that we take official notice of the tariffs. Pursuant to Rule 73, we grant Pacific Bell’s request. The tariffs of other utilities, however, absent any context of how the services are marketed, have little bearing on Pacific Bell’s marketing of its services.

available created a potential for customer confusion that needed to be addressed through careful marketing to maintain compliance with the statutes, Tariff Rule 12, and Commission decisions. Pacific Bell has not demonstrated that its marketing practices dispel the potential for customer confusion caused by the package name “The Basics.” Accordingly, we find that The Basics Saver Pack creates an association between local exchange service and optional services in violation of Tariff Rule 12, and that it also undermines our universal service goals.

We have refrained from including the use of the term “Basics” in our calculation of the fine, because the Commission approved Pacific Bell’s tariff marking its option packages under that name. The remedial action must necessarily be prospective. Pacific Bell should file tariffs under less misleading and confusing titles.

The complainants included the package named The Essentials in their arguments, but the evidence presented was only directed at The Basics. We observe, however, that “essential” is virtually a synonym for “basic” and that the services included in The Essentials are not at all essential for telephone service. Neither name connotes an extensive and expensive package of optional features, although the term “basic” has been more closely associated with local exchange service. Accordingly, we find that the package named “The Essentials” suffers from a potential to mislead customers in a manner similar to The Basics. Thus, Pacific Bell shall include The Essentials in the remedial efforts set out elsewhere in this decision.

6.5. The Basics Plus Saver Pack

In addition to the tariffed Basics Saver Pack discussed above, Pacific Bell also offered customers a package of services named “The Basics Plus Saver

Pack.” This package included The Basics Saver Pack and The Message Center.¹⁴ The Message Center is a voice mail service provided by Pacific Bell Information Services (PBIS), a Pacific Bell affiliate. This service is tariffed with the Commission by Pacific Bell.¹⁵

In response to ORA’s allegation that “The Basics Plus” is not a name of a Pacific Bell tariffed package, Pacific Bell stated that it has a tariff which allows it to group services together by distinctive phrases. Pursuant to this tariff, Pacific Bell stated that it trained its service representatives to inform customers that The Basics Plus Saver Pack is composed of The Basics plus The Message Center.

The tariff to which Pacific Bell referred provides:

“The Utility may refer to groups of products and/or services by distinctive, collective phrase(s). These phrases will be used when discussing the Utility’s product line with customers and in advertisements. The Utility shall make available each product and/or service that make up these groups along with the rate and charge information for each individual product and/or service. The Utility shall inform its customers that the components of a product/service grouping may be purchased individually. (Group names will not be included in individual product tariffs.)” (Schedule Cal. P.U.C. No. A2, Rule 2.1.2(K), effective March 1, 1996.)

This rule allows Pacific Bell to assemble groups of tariffed services and to assign a distinctive name to the group. It does not, however, authorize

¹⁴ Pacific Bell also apparently offered “Plus” versions of its other Saver Packs. These “Plus” Saver Packs were comprised of the named Saver Pack and The Message Center.

¹⁵ Tariff Schedule Cal. P.U.C. D3, effective September 10, 1997.

Pacific Bell to charge other than the tariffed price of each component of the package. To charge a discounted price for the components, Pacific Bell must file a new tariff. Pacific Bell did so when it created The Works Saver Pack with discounted prices for both the custom calling features and The Message Center in September 1998.

Prior to filing The Works Saver Pack tariff, however, Pacific Bell was offering customers The Basics Plus Saver Pack, which was comprised of The Basics and The Message Center. As required by the grouping tariff, although this service was part of a saver pack, the charge for The Message Center remained unchanged. Customers were charged the same price for The Message Center whether or not they purchased it as part of the saver pack.

The parties did not raise the issue of whether customers might be misled into believing that The Message Center was being provided at a discount by a combination of The Message Center, at regular price, with a saver pack.¹⁶ However, because we find so many other deficiencies with “The Basics Saver Pack” we need not reach the propriety of creating an association between local (or basic) service and an affiliate’s voice mail product in the name The Basics Plus Saver Pack.

It is obvious to us that Tariff 12 must be clarified and written in language that is unequivocal and gives the utility no excuse for obfuscation and deviation. Accordingly, we direct Pacific Bell to re-write Tariff 12 to provide:

¹⁶ The price charged is also limited by the federal antitrust laws, and the California statute (§ 2282.5) on cross-subsidization of enhanced services by noncompetitive services. Competition for Local Exchange Service, (D.96-03-020, 65 CPUC2d 156,193-4).

1. a quotation of applicable rates for each component of a package as well as the package as a whole;
2. a separate quotation for the basic service apart from the package;
3. a quotation spelling out the combined cost of basic service and the packaging;
4. information to the customer that each component can be purchased separately if the customer agrees to listen to the information.

7. Marketing Programs and Tactics

In this section we address several Pacific Bell marketing tactics not directed at a specific service. “Offer on every call” refers to Pacific Bell’s requirement that its service representatives offer customers additional services on every incoming call to Pacific Bell. Sequential offering is Pacific Bell’s policy of ordering service representatives to offer more expensive packages of services first and less expensive packages upon refusal of the larger one. Incentives refers to sales incentive programs for customer service representatives. In the last part of this section, we address Pacific Bell’s policy of releasing customer information to its affiliates and agents.

7.1. “Offer on Every Call”

In 1997, Pacific Bell instituted a policy of offering optional services, such as Call Waiting and Caller ID, every time a customer calls Pacific Bell, regardless of the customer’s purposes in calling. Pacific Bell implemented this “Offer on Every Call” policy by requiring its service representatives to offer optional services on every incoming call from a customer, unless a customer is

requesting disconnection or has been disconnected for non-payment. Service representatives may offer optional services in response to a customer's stated or implied needs, but are encouraged to offer services based simply on current sales promotions. (Ex. 1, Testimony of Michael Shames, p. 35, and Attachments MS-19 and MS-82 through 85.) Pacific Bell trained its service representatives to "overcome" customers' objections to ordering specific services or packages. (Ex. 1, p. 36, and Attachment MS-87.) Sales by service representatives who offer optional services to customers when they call Pacific Bell is Pacific Bell's primary means of selling optional services. (Joint Stipulation of Undisputed Facts, No. 24.)

UCAN and ORA contend that this "Offer on Every Call" policy (especially in combination with the Pacific Bell's practice of offering most expensive options first, discussed in the following section) elevates sales over service, and interferes with the delivery of customer service of a reasonable quality, in the following ways: it interferes with customers obtaining the information or service they called to request, and to which they are entitled; some sales pitches are misleading in that they create the unfounded impression that additional services are being offered based on an analysis of the particular customer's calling patterns; customers, including low-income customers and even customers eligible for Lifeline Service, are sometimes pressured to accept services they may not want and may not be able to afford; and it slows Pacific Bell's response time on customer calls so that it is falling below the response time standard set in G.O. 133-B. Consequently, they contend, the practice violates the disclosure and service standards required by Public Utilities Code §§ 451 and 2896, Tariff Rule 12, and previous Commission decisions, notably our previous decision in the 1986 Pacific Bell marketing abuse case.

The record supports these contentions. The director of Pacific Bell's Consumer Markets Group, Jewell Stoddard, testified that Pacific Bell instructs its representatives to ask each caller, at the beginning of every call, for permission to access the subscriber's proprietary network information so that Pacific Bell can offer Pacific Bell or Pacific Bell Affiliate products on every call. (RT 5, p. 787.) If customer answers "no" to this question, Pacific Bell instructs its representatives to rephrase the CPNI statement. (Id.) If the caller still responds "no" to the CPNI question, Pacific Bell instructs its representatives to proceed to offer Pacific Bell products: "It is expected that the rep will offer Pacific Bell products on every call and in this case [when customer has not given permission to disclose CPNI information to other entities] will not continue to offer Pacific Bell Affiliate products." (Ex. 57, Decl. Of Jewell Stoddard, Attachment G.) On miscellaneous calls, Pacific Bell instructs its representatives to get the caller's permission to access account information before answering the caller's inquiry. (RT 5, p. 791 (Stoddard)).

Pacific Bell representatives try to sell the customer additional products before answering their inquiries. (Ex. 1, Testimony of Michael Shames, Attachments MS-85, MS-94.) In monitoring Pacific Bell Service Center calls, ORA heard calls in which customers called to ask for bill copies, for directories, to change service to a new residence, to change a PIN number on a calling card, or for information about an inter exchange carrier, only to be marketed packages and features and/or solicited to change blocking status before their questions were answered. (Ex. 24, Declaration of Kelly Boyd, p.7; Attachment B.)

As a practical matter, in today's market, most Pacific Bell residential customers do not have the option of obtaining basic local exchange service from another provider. Pacific Bell estimates that it lost no more than 3% of its

residential lines to competitors through 1998. (Ex. 5.) This near-monopoly in the residential market imposes a heightened responsibility on Pacific Bell to provide residential customers service of reasonable quality. Forcing customers to listen to unwanted sales pitches when they call for information or service is not customer service of reasonable quality. As such, these practices disregard reasonable service standards set forth in Section 451 and 2896 (e) of the Public Utility Code.

Pacific Bell's practice of requiring its representatives to make sales offers on every call and evaluating them on the basis of their success in selling to callers has led to misleading, confusing, or inappropriate high-pressure sales pitches. Representatives are encouraged to promote products and to overcome customers' objections even in instances where customers have been suspended for non-payment. (Ex. 1, Testimony of Michael Shanes, p. 36-38 and Attachment MS-89.) In a document congratulating a team of service representatives for achieving 125% of its target and sharing the team's secrets of success, Pacific Bell commented: "Caller ID – Offer on Every Call – even those in treatment" (i.e. in danger of having service suspended for non-payment). (Ex. 1, Testimony of Michael Shanes, p. 36 and Attachment MS-90.) In an employee feedback exercise conducted for Pacific Bell, employees expressed concern that pressure to sell was leading to unethical sales tactics. One customer service representative commented: "How do you sell to a person who is in treatment?" (Attachment MS-95.)¹⁷

¹⁷ This document, among others, was submitted by Pacific Bell as confidential pursuant to Section 583. Because it constitutes probative evidence on this issue, we hereby order it made public.

These tactics have resulted in customers buying features they do not want or cannot afford, as in this example observed by ORA when it monitored a service center:

During the monitoring on April 2, 1998 at Pacific, I heard a new service order call initiated by someone who said she was on a very limited income, was disabled and had two grandchildren living with her. The caller said she had had her service disconnected in the past, but she had no outstanding bills and that she needed to keep her phone bill cost down. She also said she needed Call Waiting for emergencies because of the children. She was qualified for ULTS service during the call, and she asked how much her monthly service would cost. She was told it would cost \$5.62 a month. The service representative then went on to attempt to sell this caller a "Basics Plus" Package of custom calling services, including voice mail and Caller ID. The caller was told this would cost \$19.95, and the caller asked, "So my service will be \$19.95 a month?" The service representative quickly explained how some of the features in the package would work, but the caller voiced confusion. The caller was also sold the Caller ID box for \$9.95 plus approximately \$8 in shipping and handling costs. At the end of the call, when the service representative gave the caller her "new" telephone number, it was the same number the caller had given at the beginning of the call as a reference phone number. It was apparent to me, as I discussed with a Pacific Bell Regulatory staff person during the monitoring, that this caller had already ordered service and her order had been put on hold. Apparently, the customer had called back to finalize the order, at which time she was then sold additional packaged products and optional features to increase her monthly bill by \$23.20, and to apply additional one time charges of approximately \$18. (EX. 4, Declaration of Kelly Boyd, pp. 3-4.)

The available evidence of customers accepting services that they do not want or cannot afford is necessarily anecdotal because Pacific Bell does not track complaints of unwanted services or requests for removal of services.

Nevertheless, in addition to practices such as the one described above, which was observed by ORA when monitoring a service center, UCAN was able to document instances of customers objecting to unwanted services and requesting their removal. (See Ex. 1, Testimony of Michael Shames, p. 39.)

To make matters worse, customers report that it is much more difficult to cancel a feature than to add one. (Exs.3, 26, 87.) This complaint highlights another way that unbridled “Offer On Every Call” negatively affects consumers: It takes a toll on their time whenever they try to contact customer service, both directly (the time they spend listening to sales pitches) and indirectly (due to the lengthening of response time because each service call is turned into a sales effort). According to data provided by Pacific Bell, the length of time spent on each call increased between January and July of 1998. When ORA monitored calls at a Pacific Bell call center in September 1998, average time spent on each call that day was 13.9 minutes, compared with an average call handle time of over 8 minutes in May 1998. (Ex. 57, Declaration of Kelly Boyd, p. 7 and Attachment C.)¹⁸

Pacific Bell argues that it has a constitutional right to offer its products and services to residential customers in California. This decision does not preclude Pacific Bell from offering information about products and services on incoming calls to the customer service centers. As set out in detail below, Pacific Bell may offer information about additional services to its customers when they call, but in doing so, it must respect customers’ right to decline to hear about such services.

¹⁸ UCAN presented a tally of the delays experienced on calls by its representatives placed to Pacific Bell’s customer service lines and concluded that Pacific Bell was not in compliance with GO 133-B. The Commission is aware of Pacific Bell’s previous GO 133-B compliance failures and has imposed remedial measures. See Pacific Telesis and SBC Communications, Inc., D.97-03-067, mimeo., at 74-76.

Pacific Bell may not treat its customers as a captive audience and force them to endure unwanted sales pitches in order to obtain service or information to which they are entitled. While we do not prohibit Pacific Bell from offering services at every call, we will require them to respect customer's expressions declining such services, and we will require their representatives to give priority to their initial requests for service before subjecting the customer to any marketing of services or request for the release of CPNI. (See Section 9.3)

7.2. Sequential Offerings

When offering optional services, Pacific Bell's sales representatives were trained to offer first the Basics Plus Saver Pack with nine custom calling features, Caller ID, and The Message Center at a cost of \$32.90/month.¹⁹ If the customer was not interested in this package, the service representatives were trained to offer the Basics Saver Pack, which included all services except The Message Center, and costs \$24.95/month.

Effective September 14, 1998, Pacific Bell changed the name, contents, and price of certain saver packs. The Basics Saver Pack with nine custom calling features became The Works Saver Pack and cost \$16.95/month. Pacific Bell also created The Works Plus Saver Pack which included all the services contained in the Works Saver Pack along with The Message Center and cost \$24.90/month. (See Hearing Exhibit 57.) The Basics Saver Pack continued at a cost of \$14.95/month with four custom calling features or \$12.95 with three custom calling features. Subsequent to filing this tariff, Pacific Bell service

¹⁹ All referenced Saver Pack prices are in addition to the monthly price for local residential service of \$11.25/month for flat rate service, \$6.00/month for measured service, or \$5.62/month for Universal Lifeline Flat Rate Service.

representatives were instructed to offer The Works or The Works Plus Saver Pack first and, if rejected, to offer The Basics Saver Pack or The Basics Plus Saver Pack.

TIU alleges that service representatives are directed to inform the customer of the availability of individual custom calling services only after all saver packs have been rejected. Pacific Bell states that as of September 1998, only the Basics Saver Pack is offered as a fallback package. TIU provided documents which revealed Pacific Bell's sequential offering strategy to "offer high, watch them buy, offer low, nowhere to go." TIU also provided evidence that Pacific Bell requires service representatives to offer the packages of services on every call, establishes team and individual sales goals for such packages, and provides service representatives with financial incentives for these sales. TIU concludes that this system results in vital information regarding lower-cost options being withheld from customers.

In response, Pacific Bell states that service representatives are trained (and are reminded with prompts) to advise customers that they may separately purchase services in a saver pack. Pacific Bell states that package offers occur "only" on 50% to 75% of all calls. Pacific Bell contends that it discloses "sufficient information" for customers to make an informed decision, and that it has no obligation to disclose all material facts.

In evaluating the opposing arguments, we recognize that some sort of sequence is inevitable whenever Pacific Bell presents customers with information on the multitude of custom calling services and packages. The sequence that Pacific Bell has chosen and has mandated that service representatives use, however, is the sequence that most encourages sales. This sequence is driven by Pacific Bell's interest in increasing revenue, not by providing the customer complete information on the options available and allowing the customer to

make an informed choice. This sequence starts with the highest-priced package and only goes as low as necessary to entice the customer to buy.

In the 1986 Pacific Bell marketing case,²⁰ the Commission reviewed Pacific Bell's sales strategies. The Commission concluded that Pacific Bell, by means of "an array of activities that have been referred to generically . . . as 'package selling,'" was causing customers to believe that local exchange service was part of a package of optional services. (D.86-05-072, 21 CPUC2d 182, 190.) The "array of activities" included the scripts for selling packages of services where the service representatives were instructed to recommend that a customer purchase a "full package" of telephone service which included all available custom calling features. This package increased the monthly price for unlimited local phone service from \$8.25 to \$31.95. If the customer objected, the script instructed the service representative to recommend a package with one less feature that costs 50 cents less per month. (Exhibit 511, A.85-01-034.) To remedy these "abusive marketing practices," the Commission ordered Pacific Bell to undertake a massive Customer Notification Plan to reach customers, to notify them of the services they currently have, and to afford them an opportunity to have unwanted services removed and obtain refunds.

Pacific Bell's 1986 script which was part of the package selling abuses (1) made service recommendations to customers which reflected Pacific Bell's objective to increase sales, not provide service recommendations to the customer tailored to meet the customer's needs, (2) had fallback positions which attempted to sell as many services as possible to the customer, again without

²⁰ The history of this case is discussed in detail in § 5.3.2 of today's decision.

regard to the customer's needs, and (3) did not offer optional services on an individual basis.

At hearing in the current proceeding, complainants introduced one of the 1998 scripts used by Pacific Bell in selling packages of optional services. (See Exhibit 23.) Entitled "Selling to Success with the New Connect Model Contacts!!!" the script has the service representative telling the customer "I'd like to ask you a few questions to help you select your services." The service representative then asks a series of questions about household composition, frequency of use of the phone, and whether the customer ever works at home or telecommutes.

Regardless of whether the customer is a frequent or infrequent user of the phone, the service representative is instructed to "recommend" to the customer "based on what you've told me about how you use the phone" that the customer purchase the Basics Saver Pack.²¹ The customer's answers to the questions are thus irrelevant to the service representative's recommendation. If the customer refuses to purchase the packages, the Model Contacts direct the service representative to attempt to overcome objections by explaining the benefits of all the included services or, for customers that object to the price, pointing out that the per day price is only 70 cents. In all cases where the customer continues to object, a fallback package of fewer services is offered. Only after the fallback package is rejected is the service representative instructed to attempt to sell individual services.

²¹ Or the Basics Plus Saver Pack, if the customer subscribes to The Message Center.

To remedy the abuses created by the 1986 script, Pacific Bell reformed its practices and developed a completely new set of requirements for handling residential customer contacts. (Exhibit 513, A.85-01-034; see also, Exhibit 515, pages 11-15.) In addition to clearly separating basic service from optional services, the new customer contact scripts abandoned directives to “recommend” extensive packages and instead implemented “personalized solutions” for each customer. The new scripts required that each customer service representative use “fact finding and verbal and record cues” to solicit information on how the customer uses telephone service, and to then develop a personalized recommendation for that customer. In stark contrast to the 1986 script, the new script does not require the customer service representative to make a specific sales recommendation but rather to make “personalized solutions for every individual situation.”

Comparing the 1986 script to the 1998 script reveals striking similarities. In both cases, the scripts require the service representative to feign an interest in how the customer actually uses the telephone and to make a pre-determined “recommendation” ostensibly based on the customer’s information. The recommendation, in both scripts, is one of Pacific Bell’s most expensive packages of optional features. Should the customer refuse to purchase the package, both scripts require the service representative to offer a fallback package that has fewer features and is less expensive. If the customer persists in refusing to purchase a package, the 1998 script then allows the service representative to attempt to sell individual services.

The 1998 script then, like the 1986 script, (1) reflects Pacific Bell’s objective to make service recommendations to customers to increase sales, not to tailor recommendations to meet the customer’s needs, (2) has fallback positions

which attempt to sell as many services as possible to the customer, again without regard to the customer's needs, and (3) offers optional services on an individual basis only after all packages had been refused.

We determined that Pacific Bell's 1986 sales strategies violated Tariff Rule 12 because the actions failed to separately quote the prices for each service.²² As discussed earlier in this decision, Tariff Rule 12 was subsequently modified to clarify that price quotations shall be "separately stated" for each service. A sales strategy which is designed to create the mistaken impression in a customer that a particular service package recommendation is based on the customer's needs, and which results in a quotation of individual services only if the customer persistently refuses the service packages, fails to meet the requirements of current Tariff Rule 12. Customers are not presented with a quotation for optional services and "allowed to designate which optional services they desire," as required by Tariff Rule 12.

While we recognize that Pacific Bell must present the many service and package options to customers in some sort of order, the 1998 script, like the 1986 script, falls far short of the standard set in Tariff Rule 12. The script that Pacific Bell developed and implemented in response to the 1986 proceeding illustrated that Pacific Bell understood the applicable standard and could translate it into specific directions to its staff. That standard, and the more

²² The 1986 marketing case is different from the present marketing case in this respect: in 1986, Pacific Bell offered customers packages of options in a manner that caused them to believe that the local exchange service was part of a package of optional services. In this case, the option packages were offered separate from the basic exchange rate (albeit in potentially confusing way). However, in both the present case and the 1986 case, sequential offering (starting with the most expensive package and offering the lower priced package as a fall back) deprived customers of an informed choice because information about less expensive choices was withheld.

general statement found in §2896, require Pacific Bell to provide information to customers and guidance based on the customers' needs, not its revenue goals. The law does not preclude sales efforts, but does require that sales efforts be consistent with the disclosure standards and informed choice requirements of Tariff Rule 12 and §2896.

7.3. Incentives and Sales Quotas

Pursuant to agreements with the unions representing Pacific Bell's service representatives, Pacific Bell began paying service representatives monetary rewards for exceeding sales revenue targets in 1998. In the first level of the incentive system, service representatives receive up to \$150/month for meeting their sales revenue targets. The second level of the incentive gives each service representative a 25% commission on all sales above the target. There is no upper bound to the amount of the commission: "[t]his plan is not capped." The example from the TIU agreement shows that on the first \$1,890 of sales in a given month, a service representative could earn up to \$150. On the second \$1,890, with a commission of 25%, the service representative could earn \$472.50, with no maximum. (See Hearing Exhibit 42.)

UCAN witnesses Patricia Greenan and Janet Spector, both Pacific Bell employees, testified that the implementation of incentives (money and prizes) for customer service employees had resulted in overly aggressive sales efforts: "everybody's so consumed about this – the money, that in a lot of cases ethics are thrown by the wayside." Low-income customers who are signed up for expensive optional services that exceed their ability to pay particularly troubled witness Spector. This witness recalled one customer, whose service was limited to local calls only, who was being charged \$100/month for optional services. Both witnesses stated that they have observed an increase in the

number of customer calls they receive requesting that optional services be discontinued.

Sales incentives and sales targets or quotas played a significant role in the earlier Pacific Bell marketing abuse case. In the initial 1986 “cease and desist” order, the Commission directed Pacific Bell to stop “cold selling telemarketing activities and [to] discontinue its sales quota program until further order of this Commission.” (D.86-05-072, 21 CPUC2d 182, 191.) In 1989, the Commission subsequently granted Pacific Bell a limited waiver of the prohibition against incentive compensation²³ for a certain classification of employees, but only after the incentive compensation plan had been reviewed and approved by the Customer Marketing Oversight Committee (Committee) then advising Pacific Bell on its marketing operations. (D.89-02-048, 31 CPUC2d 112 (headnote only).)

The Committee retained The Center for Ethics and Social Policy, Drs. Charles S. McCoy and Fred N. Twining, to evaluate whether the safeguards put into place by Pacific Bell were adequate to restore public trust and prevent a recurrence of the marketing abuses which led to the 1986 “cease and desist” order. In their report to the Committee, McCoy and Twining stated that Pacific Bell’s “practices and incentives used in residential marketing have changed from sales quotas, packaged selling and bonus/rewards based on sales volumes to evaluation of individual performance based primarily on customer service.”²⁴

²³ The decisions use the term “sales quotas” and “comparable incentives” to describe employee compensation which is based on the amount of sales made by the employee. For purposes of this decision, we use “incentive compensation” to mean a sales- performance-based compensation system, and “sales quota” to mean a numerical target, goal, or objective.

²⁴ C. McCoy & F.Twining, *Reviewing the Commitment to Customer Service: Managing Values to Redefine the Culture of Pacific Bell*, p.9.

Based on this report and other information, the Committee reported to the Commission that Pacific Bell was in compliance with its tariffs, the Commission's general orders, and statutes. Relying on the Committee's report, the Commission lifted its prohibition on cold-selling telemarketing and sales quota programs. (D.90-02-043, 35 CPUC2d 488, 491.)

According to TIU witness Ribeiro, the Pacific Bell sales strategy that emerged following the 1986 decision was focused on customer service and full and accurate disclosure of service information. To demonstrate this, the witness presented a copy of Pacific Bell's 1992 Sales Quota Policy, which prohibits establishing sales quotas for nonsalaried employees and their immediate supervisors. This witness also offered Pacific Bell's 1992 Business Office Sales Policy and Guidelines, which stated that service representatives are to engage in "consultative selling" by responding to verbal cues from the customer and to cues from the customer records in order to make personalized product and service recommendations in all appropriate contacts.

In contrast to the 1992 policies, Pacific Bell's current sales strategies, as reflected in the evidentiary record, rely on sales quotas, packaged selling and bonus/rewards based on sales volumes. Pacific Bell documents show that it established an Individual Incentive Plan that provided monetary compensation based on each service representative's sales of specific services. (See, e.g., Attachment A to Exhibit 58.) Pacific Bell also set revenue goals which were broken down into the number of Caller ID and custom calling features each service representative would need to sell each day to reach the overall total. The monthly goals also included numeric targets for Caller ID Complete Blocking removals, which were also broken down to a per representative daily goal. (Exhibit 8 to Hearing Exhibit 38.)

Pacific Bell's current reliance on "packaged selling" is well documented, as discussed in the section above (Sequential Offerings). Similarly, the incentive compensation plans discussed previously clearly establish bonus/rewards based on sales volumes.

We find that Pacific Bell has essentially changed course and reinstated certain abusive marketing practices that we enjoined in 1986. The contrast between the 1992 sales policy and the current directions to service representatives well illustrates Pacific Bell's regression. The 1992 policy requires service representatives to engage in consultative selling, which is defined as responding "to verbal cues and cues provided by customer records to make personalized product and service recommendations." In contrast, the current sales strategy requires service representatives to ask questions but regardless of the response to recommend an expensive package of services. Similarly, the 1992 policy requires service representatives to ask customers if they wish to hear about additional products and services, while Pacific Bell's current policy is to offer packages of services on every call irrespective of the customer's interest or the purpose of the customer's call.

In conclusion, Pacific Bell's current incentive compensation programs closely resemble the marketing programs that we found did not comply with statutes, orders, and tariffs, and which led to the prohibition on cold selling telemarketing and sales quotas in D.86-05-072. These current policies are starkly at odds with the policies in place in 1990 when we both lifted those prohibitions and praised Pacific Bell for its "responsiveness and creativity in developing a series of internal safeguards to confront directly the internal problems that fostered these marketing abuses." (D.90-02-043, 35 CPUC2d 488, 491.)

Thus, we find ourselves in a dilemma. We have no desire to insert the Commission in day-to-day management decisions. Nevertheless, the above history shows a disturbing inability or unwillingness among Pacific Bell management to consistently comply with law absent exacting and continuous oversight. We see today essentially the same wrongdoing that we enjoined 14 years ago. The recurrence of these marketing abuses shows that our previous response failed to obtain, on a long-term basis, the level of customer protection we desired.

We are also aware of the critical role that sales volume based incentive compensation plays in fostering overly intense sales efforts. Pacific Bell recognized this as well in the 1986 case. Pacific Bell's own Vice President initiated the 1986 prohibition on sales incentive compensation "because it would eliminate the opportunity to improve personal results at the expense of the customer," or to "encourage customers to buy services they really don't need." Exhibit 515, pages 6,8, A.85-01-034. We agree with Pacific Bell's 1986 assessment that removing sales incentive compensation is key to emphasizing customer service over sales.

TIU requests that we order Pacific Bell to immediately cease and desist from offering any individual monetary incentives to service representatives. TIU would allow Pacific Bell to implement such incentive plans but only with Commission authorization. TIU would require that Pacific Bell file an application, and the Commission to hold hearings and issue a decision, demonstrating with "clear and convincing evidence that the incentive plan proposed by Pacific . . . would not be likely to encourage service representatives to engage in unethical or deceptive sales practices." (TIU Post-Hearing Brief at 48.)

TIU's proposal calls for a substantial increase in this Commission's oversight of Pacific Bell's day-to-day operations and interjects this Commission squarely into the collective bargaining process. Increasing regulatory oversight is contrary to our goals. We believe that the collective bargaining process is best left to employees and Pacific Bell. Therefore, we reject TIU's proposal.

Nevertheless, Pacific Bell's history and number of customers require that we take steps to ensure that these marketing abuses do not occur a third time. Accordingly, rather than create a temporary oversight committee as the Commission did in 1986, or create an approval process as TIU recommends, we will set out permanent limitations upon Pacific Bell's incentive compensation programs. Pacific Bell's history and its nearly exclusive role as the provider of residential local exchange service for millions of California households warrants these limitations.

Therefore, we will limit sales-volume-based incentive compensation for service representatives and their direct supervisors to 5% of monthly compensation.²⁵ This applies only to compensation incentives which reward increased sales to customers, and does not extend to incentive compensation keyed to any other factors. One of our objectives in limiting sales volume incentives is to encourage Pacific Bell to re-focus its service representatives on meeting customers' true service needs, rather than increasing sales. We encourage Pacific Bell to develop innovative compensation plans that reward customer satisfaction or other factors that benefit customers. We envision broad

²⁵ The 5 % limitation is patterned on the first level of the incentive compensation plan currently in place.

policy-level changes in the values and traditions that guide Pacific Bell's service representatives.

The duration of this limitation shall be that which is necessary to achieve our goals. It will take some time for new values to take root, and Pacific Bell has shown a propensity for backsliding after several years of compliance. Thus, we conclude that the minimum duration of the 5 % limitation prohibition on sales-volume-based incentives for service representatives and their direct supervisors shall be 10 calendar years from the effective date of this decision. After that period, if Pacific Bell believes that such incentives are consistent with its new values, then Pacific Bell may file an application seeking Commission authorization to implement an expanded sales-volume-based incentive program as part of a comprehensive incentive program that also rewards customer satisfaction. In such application process, Pacific Bell shall bear the burden of proving that it has instilled within its management a commitment to putting customer service ahead of single-mindedly increasing sales. Ten years is a reasonable period of time for this prohibition because lasting change in values is required at the senior management level to ensure that this does not happen a third time.

Incentive compensation is at the core of many of the violations detailed in this decision. It has a direct effect on the persons with whom customers interact. Thus, this prohibition plays a large role in the remedies of this case. Ensuring that customers will not be subject to service representatives excessively enticed by money and prizes to sell services is an important part of the overall remedy package we adopt in this decision.

While the record in this case clearly shows the relationship between incentive compensation and marketing practices that violate § § 451 and 2896, we

believe the requirement for Pacific to complete a customer request prior to marketing its other services is also a necessary means to address the marketing abuses we have found in this proceeding. We will carefully monitor Pacific Bell's implementation and adherence to the incentive compensation directives set out above in addition to the directives that separate customer service provisioning from marketing, as described in section 9.3, below. Should these directives fail to adequately protect customers, we will not hesitate to take further remedial actions.

7.4. Improper Release of Customer Information

Complainants UCAN and ORA contend that Pacific Bell improperly divulged customer information to its unregulated affiliates and to non-affiliated, third-party vendors in violation of 47 U.S.C. § 222 and California Public Utilities Code § 2891. The complainants have failed to sustain their burden of establishing that Pacific Bell violated either statute.

47 U.S.C. § 222:

Complainants' contend that Pacific Bell violated its duty under 47 U.S.C. § 222 to "protect the confidentiality of the customer personal network information [CPNI] of its subscribers" when it shared such information with its affiliates and outside vendors such information about its residential subscribers without obtaining the subscribers' permission. The record supports complainants' assertion that Pacific Bell shared the names, telephone numbers, and product choice information of some of its customers with SBC Operations, Inc. (a subsidiary of Pacific Bell's parent, SBC Communications, Inc.), and with various third-party vendors. (Reporter's Transcript, vol. 5, at pp. 699-710; Exhibit 72 at 16-20; Exhibit 92, October 16, 1998.)

While the record supports these factual allegations, we conclude that as a matter of law, such release of information was permissible under Section 222. The Federal Communications Commission (FCC)'s implementing regulations, 47 C.F.R. §§ 64.2001-64.2009, specify the circumstances in which carriers may disclose CPNI for marketing purposes without the express consent of subscribers.²⁶ At the time UCAN's complaint was filed, 47 C.F.R. § 64.2005(b)(1) prohibited telecommunications carriers from using, disclosing, or permitting access to CPNI derived from its provision of local service without customer approval to provide information services such as call answering, voice mail, and voice storage and retrieval services. 47 C.F.R. § 64.2005(b)(1) (1998). However, under 47 C.F.R. 64.2005(c)(3), LECs may use CPNI without customer approval to "market services formerly known as adjunct-to-basic services, such as, but not limited to, speed dialing, computer-provided directory assistance, call monitoring, call tracing, call blocking call return, repeat dialing, call tracking, call waiting, caller ID, call forwarding, and certain centrex features."²⁷ Thus, Pacific Bell was permitted under federal law to use CPNI to market custom calling features without prior customer approval.

²⁶ Although the Tenth Circuit's opinion in U.S. West v. FCC, 182 F.3d 1224 (10th Cir. 1999), cert. denied, 530 U.S. 1213 (2000), struck down the "opt-in" provisions of the original regulations, the FCC considers all other provisions of its CPNI regulations, which were not discussed in U.S. West, to be in effect. See in re AT&T Corp. v. New York Tel. Co. (FCC Oct. 5, 2000), ¶17.

²⁷ After the complaints in this case were filed, the FCC amended its regulations governing CPNI information. The current, amended regulations allow wireline carriers to "use, disclose, or permit access to CPNI derived from its provision of local exchange service... without customer approval... for the provision of CPE and call answering, *voice mail or messaging*, voice storage and retrieval services, fax store and forward, and protocol conversions." 47 CFR § 64.2005(b)(1) (2000) (emphasis added). The FCC's amendments to 47 CFR § 64.2005 left unchanged the Subsection (c) provisions authorizing local exchange carriers to use CPNI without customer approval to market the "services formerly known as adjunct-to-basic" that make up the Basics and Savers Pack packages. See In the Matter of Implementation of the Telecommunications Act of 1996, FCC 99-223 (Aug. 16, 1999), Appendix B.

UCAN and ORA presented no evidence that Pacific Bell was using customer CPNI to market products outside those listed in § 64.2005(c)(3). Accordingly, they have failed to establish that, Pacific Bell violated § 222.²⁸

Public Utilities Code § 2891:

UCAN and ORA contend that Pacific Bell's practice of sharing sensitive subscriber information with affiliates and non-affiliate third-party vendors during marketing campaigns without subscribers' written consent also violates California Public Utilities Code § 2891. Section 2891 provides that telephone corporations must obtain a residential subscriber's written consent before sharing the subscriber's personal financial, purchasing, and calling pattern information with another person or corporation.²⁹ As noted above, Pacific Bell gave SBC Operations and various third-party vendors confidential subscriber information without obtaining prior subscriber consent. Based on the plain language of the statute, this release of residential subscribers' personal information appears to constitute a violation of § 2891.

Pacific Bell, however, contends that Section 2891 did not require it to obtain subscribers' consent before disclosing subscribers' confidential information to these other corporations because those other business entities acted as its agents. Because agents may "be authorized to do any acts which the principal might do," Pacific Bell argues (citing California Civil Code § 2304), that

²⁸ Complainants did not point to any specific evidence that Pacific had used CPNI to market voicemail in a manner prohibited by the version of 47 C.F.R § 64.2005(b)(1) in effect at the time of the allegedly improper disclosures of CPNI. (See C.F.R § 64.2005(b)(1) (1998).) Evidence in the record suggests that Pacific may have violated the former version of the regulations with respect to marketing voicemail, but the evidence is inconclusive.

²⁹ California Public Utilities Code § 2891(d) contains ten exceptions to this requirement, none of which are applicable here.

the other corporations in question are not “other persons or corporations” for the purposes of Section 2891. In effect, Pacific Bell argues that agency law creates an implied exception to Section 2891.

We cannot resolve this issue on the record of this case because it is insufficiently developed both on the law and on the facts. Although Pacific Bell asserts that this argument is based on “well-settled principles of agency law,” it failed to provide any legal support for it, other than the citation to Civil Code section 2304. (See Post-Hearing Brief of Pacific Bell, March 5, 1999, p. 30.) The complainants made little effort to rebut Pacific’s Bell agency law argument, other than to point out that Section 2891 contains no express exception for agency relationships. Should we conclude, based upon our own research, that Pacific Bell’s legal argument has merit, it would be necessary to determine whether Pacific Bell took adequate precautions to ensure that the confidential information it released to its “agents” was used only for purposes permissible to Pacific Bell (for example, through the use of contract provisions, security protocols, and appropriate staff training). While the record contains some evidence on these issues, it is insufficient to resolve them. Without resolution of these legal and factual issues, we cannot determine whether Pacific Bell’s treatment of confidential subscriber information violated § 2891. As the burden of demonstrating that a violation was committed lies with complainants, we decline to find Pacific Bell in violation of § 2891 in this proceeding. Our decision here, however, does not preclude our deciding, in another proceeding and on the basis of a more fully developed record, whether § 2891 is subject to an implied “agency law” exception, as Pacific Bell has argued here.

8. Marketing to Customer Groups

In this section, we address two issues regarding the particular marketing approaches Pacific Bell used with minorities or recent immigrants, and with universal service customers.

8.1. Marketing Targeted at Minorities or Recent Immigrants

Complainants contend that Pacific Bell has improperly targeted its marketing efforts at ethnic minorities and recent immigrants. Pacific Bell responds that it commits significant resources to its customers that prefer to do business in a language other than English. Over 20% of Pacific Bell's service representatives handle calls at its foreign language centers. These representatives speak Spanish, Cantonese, Mandarin, Japanese, Korean, Vietnamese and Tagalog. Pacific Bell engages in marketing efforts to build awareness of its products and services by using print advertising, newsletters, other media, and telemarketing, in addition to customer initiated contacts with service representatives, to explain the benefits of its products and services to these markets. Pacific Bell retains experts in each of the languages to translate and review marketing and service representative scripts, and it also works closely with groups that represent these customers.

Complainant Greenlining contends that immigrant and language minority groups are particularly vulnerable to high-pressure sales tactics and are less likely than other consumers to report abuse: For example,

“For cultural reasons, Latinos are reluctant to complain if they feel they are receiving poor service. There is a cultural tendency to be polite, if not fatalistic about consumer abuses. Latinos like to pay in cash; they like to pay in person; they want to be good customers. Where there are problems, the lack of English language fluency is a barrier to lodging complaints. And this reluctance is

increased by the fact that many Latinos come from countries where due process and consumer protections do not exist and where they may be persecuted for speaking out.”

* * *

“With respect to telephone service, there are several things that make it difficult for Latinos to complain about the quality of service that they receive. Because many Latinos come from countries where the telephone service is identified with the government, the telephone company is viewed as an extension of government. To the extent Latinos view the telephone company as an extension of the government, they are reluctant to complain because in many Latinos’ countries of origin, it may be a waste of time or even dangerous to complain about the government. Also, many Latinos come from countries where it takes a very long time to receive telephone service, and there is a fear that if they complain about their service, it may be disconnected and they must wait a long time to have it restored.”

Exhibit 13, pp. 3-4.

As discussed previously in this decision, Greenlining also analyzed the translations of Pacific Bell’s advertising of The Basics and The Essentials Saver Packs to Spanish and Vietnamese, and concluded that the translations tended to exacerbate rather than mitigate the misleading nature of those names.

In response to Greenlining’s allegations that it “targeted” ethnic minorities for sale of optional products and services, Pacific Bell pointed out that it had conducted studies of various market segments. In the research Pacific Bell presented, “struggling city dwellers” and “income limited” households were identified as high potential Caller ID customer segments. On an ethnic basis, Field Research Corporation market research yields these data:

<u>Ethnic Group</u>	<u>% Interested in Caller ID</u>
White	23
Hispanic	39
African-Americans	37
Asians	42

Based on this research, Pacific Bell set in place a marketing program that would better get information on Caller ID to those customers who were most likely to be interested in the product in the fastest possible manner. This included marketing and selling to customers in the language they speak or prefer.

Greenlining does not suggest that Pacific Bell used advertising or other marketing efforts for ethnic minorities that was different from that which was directed at other customers. Greenlining challenges the package names - The Basics and The Essentials - as misleading both in English and in the other languages. Greenlining also does not dispute Pacific Bell's marketing research, from other areas of the country, which tends to show that ethnic minorities are more likely to purchase certain services, nor does Greenlining suggest that Pacific Bell had any motive in targeting its marketing to this particular segment, other than to increase sales.

The statutory standards applicable to Pacific Bell's marketing to ethnic minority customers are the same standards applicable to its other customers. Pacific Bell must provide all customers sufficient information upon

which to make informed decisions. In this decision, we find that Pacific Bell's practices failed to meet this standard for all customers regardless of ethnicity.³⁰

The evidence shows that the market segment that Greenlining represents has a high interest in purchasing Caller ID. No evidence has been presented that Pacific Bell treated this market segment any differently from any other group of likely purchasers of Caller ID. Pacific Bell presented the same information, translated to the appropriate language, to each group of customers. To the extent that information fails to meet the statutory standards, as we find elsewhere in this decision, it does so in all languages.

8.2. Marketing to ULTS Customers

The Universal Lifeline Telephone Service (ULTS) is designed to promote the use of affordable, statewide, basic telephone service among low income households by providing a subsidy to low-income customers funded by a surcharge on all end-users' bills. (See generally Universal Service and Compliance with the Mandates of Assembly Bill 3643, D.96-10-066, 68 CPUC2d 524.) To accomplish this goal, all local exchange carriers charge qualified residential low-income customers a discounted installation charge of \$10, and a monthly fee of \$5.62 for flat rate service or \$3 for measured service.³¹ For each ULTS customer served, the local exchange carriers are reimbursed from the ULTS Fund for the difference between the ULTS rate and the respective local

³⁰ Consequently, we do not reach the question posed in Greenlining's appeal of a marketing practice that is misleading to certain customer groups, but not to others.

³¹ These rates were applicable during the time period relevant to the complaint. The rates have since increased.

exchange carrier's usual rate for residential basic service. The ULTS program is currently funded by a 3.2% surcharge on all end users' bills.

On new connects, Pacific Bell service representatives offer and explain ULTS. Eligibility is based on the number of persons in a household and income level, as well as residence and income tax dependency status. If the customer meets the eligibility criteria, the service representative explains the lower rates.

UCAN's witness contended that Pacific Bell used the lower rates provided to ULTS customers as a selling opportunity for optional features. UCAN provided a Pacific Bell document which appeared to be a Caller ID sales add and which stated: "when regarding a customer to Universal Lifeline, offer Caller ID and advise the customer that they will be paying roughly the same dollar amount they were paying before but enjoying the benefits of Caller ID." (Attachment MS-94 to Hearing Exhibit 2.) UCAN contended that such offers do not promote the purpose of ULTS service, that is, to provide access to low-cost telephone service.

Pacific Bell did not deny UCAN's factual allegations.

We find that the script Pacific Bell provided to its service representatives is sharply at odds with the purpose of the ULTS program. The purpose of the ULTS subsidy program is to provide affordable service to low-income consumers, not to provide Pacific Bell a cross-marketing sales opportunity. The Legislature established this program to achieve universal service by making basic residential service affordable to low-income citizens, see § 871.5. Attempting to undo the lower-priced service offering undermines the Legislature's, and this Commission's, universal service goals.

We do not go so far as to suggest that ULTS customers should not have the opportunity to purchase optional services. Nor do we forbid Pacific Bell representatives from offering optional services to individual ULTS customers. As with all customers, these individuals are best able to make their own purchasing decisions when presented with complete information. We will however, require Pacific Bell to drive home the difference between basic service and any particular option which might be offered in individual cases. Our required revision to Tariff Rule 12 will ensure that consumers are provided information identifying “basic telephone service” -- distinguished from optional telephone services. Further, our requirement that Tariff Rule 12 be rewritten such that Pacific Bell must complete a customer request transaction prior to marketing additional services will ensure that customers receive pricing information in relation to their initial request. Both Tariff Rule 12 revisions are integral to ensuring customers are informed clearly of service options.

9. Remedies

Pacific Bell’s violations implicate marketing of certain services as well as specific marketing programs and tactics. Our remedy plan addresses each violation.

9.1. Caller ID Blocking

Our objective is to ensure that all customers are fully informed of their service options and the privacy consequences of each option so that customers who choose to transmit their telephone number to called parties are knowingly waiving their privacy rights. On a prospective basis, we instruct Pacific Bell to comply with this decision, and our previous decisions, in making the required explanations.

On a retrospective basis, Pacific Bell's actions have called into question customers' transfers from Complete Blocking to Selective Blocking, beginning with the implementation of the practices discussed in this decision. The evidence does not clearly show when these practices began, but the Residence Caller ID Plan seems to contemplate changes occurring in 1998. Lacking a definitive date, we will use December 31, 1998, as the date the violations began, because the best reading of the evidence is that the campaign to switch customers began in the Fourth Quarter of 1998. (See Exhibit 101, 102).

The next question is how to best inform customers of their options and to allow them to make any needed changes. Our guide to the answer is found in Pacific Bell's reaction to the BRI incident. There, Pacific Bell first attempted to contact by telephone each customer who had switched from Complete Blocking to Selective Blocking. (Out of the 260,000 customers contacted by BRI, 107,000 switched from Complete to Selective Blocking, according to Pacific Bell witness Gilley.) As Pacific Bell stated in its investigation report, Hearing Exhibit 102, approximately 70% of the customers who switched were reached through this method.³² The remaining customers received a letter which contained an explanation as well as a dedicated 800 number to call with additional questions or to change blocking options. Thus, Pacific Bell employees directly contacted as many customers as possible and only used mailings after several failed personal attempts.

We direct Pacific Bell to use a similar plan to contact customers who were switched to Selective Blocking since January 1, 1998, excluding those customers

³² Pacific Bell stated that it reached 70% of the 107,000 customers, or about 75,000 customers, between January 22 and February 11, 1999.

whose choice has already been confirmed through the BRI remedial effort. Pacific Bell is directed to switch all customers that so request back to Complete Blocking without charge.

To provide customers regular reminders of their blocking status, we also require Pacific Bell to note on each bill the blocking status of the line. Currently only lines that have Complete Blocking are so noted. Pacific Bell shall also include on the bill (front or back) a brief description of the two blocking options and the codes used to block or unblock the number.

Because the choice of Complete Blocking or Selective Blocking has no financial impact (there is no charge for either service), we need not consider the issue of financial reparations.

9.2. Inside Wire, Packages Offered Sequentially, The Basics, and ULTS

Remedying Pacific Bell's actions on these issues will require that Pacific Bell notify customers of optional services of their service options, and provide for them an opportunity to cancel unwanted services.

Pacific Bell shall mail a notice to customers of optional services indicating their current service selections and associated prices, and confirm that the customer sought these services and wishes to continue purchasing these services. ULTS customers shall receive a specific explanation of the cost for ULTS service as clearly distinguished from optional services. Wire Pro customers shall be notified that landlords are responsible for inside wire. Pacific Bell shall discontinue optional services for those customers who indicate that they did not seek, or no longer wish to purchase these services, and shall inform customers of all lower-cost service options.

9.3. Separation of Customer Service and Marketing

Pacific Bell has a dual role in the provision of telecommunications services in California. For some services, most notably, basic residential exchange service, Pacific Bell enjoys a virtual monopoly in the market. As customers have little or no choice among service providers, they are essentially captive customers of Pacific Bell. When seeking these types of services, customers should not be subjected to unwanted marketing efforts.

In contrast, some services offered by Pacific Bell, such as local toll, are subject to actual competition. Pacific Bell needs to be free to market toll and other optional services in order to be on a level playing field with its competitors.

At the core of our objections to Pacific Bell's offer on every call policy, incentive compensation, and sequential sales methods is the commingling of marketing of optional services with Pacific Bell's customer service obligations that arise from its role as essentially the sole provider of basic residential service. To provide customers protection where warranted, while also allowing Pacific Bell to participate in the marketplace, we find that a clearer distinction is needed between Pacific Bell's customer service function and its marketing opportunities. This distinction will allow customers to receive the protections inherent in §§ 451 and 2896 for customer service, but will allow Pacific Bell the appropriate latitude when engaging in conventional marketing

As discussed in detail above, subjecting customers who call in seeking unrelated customer service to unwanted marketing efforts causes delays in obtaining the desired service and diminishes Pacific Bell's ability to respond to other customers. To ensure that Pacific Bell provides customer service as a priority, we direct Pacific Bell to address customer service requests prior to engaging in marketing efforts. We establish the four essential components to this

directive below. Pacific Bell shall modify Tariff Rule 12 to fully implement each of these components:

a. Resolve Customer's Request First

On incoming calls to a residential customer service center, Pacific Bell must first provide the service requested by the customer. In addition, Pacific Bell shall describe options for purchasing any requested service beginning with the least-expensive option. This ensures that the needs of the customer are first addressed by the utility prior to their being subjected to a sales pitch.

After completely addressing all the customer's requests, the service representative shall summarize the customer's order including itemized prices.

b. Indicate To Customer That Requested Order Is Complete

After summarizing the order, Pacific Bell shall inform the customer that the requested order is finished, and allow the customer an opportunity to terminate the call.

c. Seek Permission to Present Marketing Information On Other Services

Having completed the customer's request, and so informing the customer, Pacific Bell may then seek the customer's permission to offer information about additional services. Should the customer decline to grant such permission, Pacific Bell must cease offering such services and conclude the call.

d. If Customer Agrees, Present Marketing Information

If the customer desires to receive marketing information, then Pacific Bell may present marketing information to the customer. Such information need not be presented in any particular order but must include the prices for each service offered. For packages of services, Pacific Bell must inform the customer that the components are available separately. This requirement (d) shall apply to outbound marketing calls as well as inbound.

Implementing the revised Tariff Rule 12 will require that Pacific Bell train its customer service managers and representatives about the new responsibilities created by the revised rule. Continuing oversight and guidance will also be necessary to ensure consistent adherence to this rule.

Commission staff will also have an active role in ensuring that customers receive the protections created by these revisions to Tariff Rule 12. We expect our staff to actively monitor Pacific Bell's customer service function, and to take all appropriate steps to achieve compliance with these directives.

These reasonable restrictions allow Pacific Bell to accomplish the customer information and service requirements of §§ 451 and 2896, as well as Tariff Rule 12. This rule shall remain in effect so long as Pacific Bell serves 60% or more of residential access lines.

9.4. Fine

The Commission may impose fines payable to the State of California pursuant to § 2107. Such fines must be between \$500 and \$20,000 per offense. Each day of a continuing offense constitutes a separate and distinct offense. (§ 2108.)

The primary purpose of imposing fines is to prevent future violations by the wrongdoer and to deter others from engaging in similar violations. Fines should, therefore, be set at a level within the range permitted by § 2107 that is sufficient to achieve the objective of deterrence without being excessive in light of the offending utility's financial resources.

In determining an appropriate fine within the statutory range, we are guided by the factors set forth in our previous decisions. These factors include the severity of the offense, Commission precedent in comparable cases, the conduct of the utility in mitigating the offense, and the financial resources of the utility. (See D.00-11-017; D.98-12-075, Appendix B.)

The marketing practices in which Pacific Bell engaged constitute serious violations of the Public Utilities Code, Tariff Rule 12, and prior Commission orders. These practices unfold numbers of captive residential customers, and in particular, immigrant and low income Lifeline customers who are most vulnerable to such marketing tactics. The seriousness of Pacific Bell's wrongful conduct is compounded by the fact that Pacific Bell engaged in similar conduct that we declared unlawful in the 1986 marketing abuse case. Indeed, we are struck by what appears to be a disturbing pattern of compliance during periods of special oversight, only to be followed by noncompliance in furtherance of Pacific Bell's revenue goals when the special oversight ends. Examples in this proceeding include: sequential marketing of optional service packages without disclosure of lower priced plans, misleading attempts to change Caller ID-blocking options, misleading marketing of inside wire repair services, and mandatory sales offers on every call to the detriment of "offer on every call" customer service.

We had hoped that the sanctions imposed in the 1986 marketing case would have permanently deterred Pacific Bell's abusive marketing practices.

Sadly, they did not. Pacific Bell has chosen to resume unlawful practices to the detriment of its customers, both in terms of time and money. We are particularly disturbed that Pacific Bell included in its targeted customers those who can ill afford to pay any more than necessary for phone service, and customers whose primary language is not English. At the same time, we cannot help but note that the revenues Pacific Bell expected to gain as a result of its improper marketing tactics are substantial: \$312.9 million (net present value of \$1.2 billion over a 10-year period) for increased sales of vertical services.³³

As a counterbalance to the above, we also consider any mitigating factors that militate in favor of a reduced fine. In this case, Pacific Bell effectively monitored its contract with BRI, its sales marketer, and promptly terminated the contract when Pacific Bell learned that BRI had failed to abide by Pacific Bell's express instructions for marketing Caller ID service. In addition, Pacific Bell contacted customers to confirm their blocking choice in a timely manner. Pacific Bell's conduct demonstrates to us that Pacific Bell is capable of closely monitoring its sales practices and taking swift and appropriate corrective action when such practices deviate from legally-acceptable standards.

Lastly, we consider the financial resources of the offending utility in determining the appropriate fine. The level of the fine should be sufficient to deter similar conduct by the offending utility and others in the future. We note that Pacific Bell is a large corporation, which earned \$9.4 billion in revenue in 1998.³⁴ In this case, a fine of substantial proportion is necessary to achieve

³³ See Hearing Exhibit 80. Pacific Bell also forecast that Caller ID would add \$2 billion in additional revenue over the same period. Exhibit 100.

³⁴ Pacific Bell's Tracking Report # P.D.-01-27, Cumulative Through December 1998, Line 7.

deterrence. The most comparable precedent is the 1986 Pacific Bell penalty of \$16.5 million, discussed previously. In 1998, GTE California Incorporated paid \$13 million in settlement of marketing abuse allegations (See D.98-12-084.) Both cases involved widespread marketing abuses and charges for unauthorized services. We note that the GTE California Incorporated payment is a much larger proportion of its operating revenue. GTE California Incorporated's 1997 operating revenue was \$3.3 billion as stated in its FCC Report 43-02, at p. 40. Pacific Bell's 1998 revenue, as noted above, was \$9.4 billion.

Having considered all of these factors and the totality of the circumstances, particularly the scope, severity, and repeat nature of Pacific Bell's marketing abuses, but mitigated by the factors stated above, we conclude that the fine should be set near the middle of the range permitted by § 2107. While it is clear from the record that improper acts were committed, for purposes of calculating the fine, we will treat Pacific Bell's actions as two distinct offenses which occurred daily over a period of two years: (1) violations of the Caller ID decision D.92-06-065, and § 2896, following Pacific Bell's adoption of their Residence Caller ID Marketing Plan, and initiating their campaign to switch customers (Exhibits 4, 101 and 102); and (2) incomplete disclosure of information when marketing optional services (as described in Sections 6.3, 7.1 and 7.2 of this decision) in violation of §§ 451, 2896, and Tariff Rule 12. Thus, we will impose a fine of \$17,500 per day for each of two offenses over a period of two years, for a total of \$25.55 million. ($\$35,000 \times 730 = \25.55 million.) Pacific Bell shall pay \$25.55 million to the State General Fund within 180 days of the effective date of this order.

In addition, we are not imposing a fine for Pacific Bell's marketing of optional services to Lifeline customers. While we believe that the manner in which Pacific Bell marketed optional services to Lifeline customers was

inconsistent with the legislative intent of Section 871.5 (making residential service affordable to low-income customers), and undermined the universal service goals of both the Legislature and this Commission, in this decision we explain for the first time how Pacific Bell's marketing techniques were in conflict with these goals. However, we expect that henceforth Pacific Bell will modify the manner in which it sells optional services to Lifeline customers consistent with this decision and taking particular care to insure that Lifeline customers make an informed choice in accordance with Section 2896 and Tariff Rule 12.

Findings of Fact

1. On October 30, 1998, the parties filed a statement of undisputed facts that addressed some, but not all, facts in issue.

2. At the hearing which led to D.86-05-072, Pacific Bell acknowledged its obligations to disclose and itemize the prices for component parts of its tariffed packages of services.

3. Pacific Bell sells the Caller ID service as a tariffed service. This service provides the name and telephone number on a special box, screen phone, or audio box, that announces the caller. Offered in California since July 1996, this service costs \$6.50/month for residences and \$7.50/month for businesses when purchased separately. Approximately 1 million residential and 51,000 business customers subscribe to the Caller ID service.

4. The Commission required Pacific Bell to enable callers to block the display of their name and telephone number. Pacific Bell has two Caller ID blocking options: Complete Blocking and Selective Blocking. Complete Blocking prevents a caller's name and number from appearing on the receiving party's Caller ID display unless the caller chooses to unblock the number on a per call basis by

dialing *82. Selective Blocking displays the caller's name and number to the receiving party unless the caller chooses to block the number on a per call basis by dialing *67. Every telephone line has either Complete Blocking or Selective Blocking, and both options are free of charge. If a customer does not choose Complete Blocking, the default is Selective Blocking. If a customer has elected Complete Blocking, it is so indicated on the monthly telephone bill. The default, Selective Blocking, is not indicated on the customer's bill.

5. In D.92-06-065, the Commission ordered all California local exchange carriers to implement a ratepayer-funded Customer Notification and Education Plan to ensure that all Californians were aware of the Caller ID services and their implications, including understanding their options for maintaining their privacy as a calling party. The plan included individual letters to each customer; TV, newspaper, and radio advertisements; and community outreach to over 500 organizations. Pacific Bell's campaign cost over \$30 million and concluded in mid-1998.

6. In October 1997, SBC developed a new Residence Caller ID Marketing Plan for Pacific Bell. In that plan, SBC stated that among the means for increasing the value of Caller ID to customers was to reduce the number of lines that have Complete Blocking so that more numbers would be displayed. The specific plan to accomplish this included attempting to convert customers to Selective Blocking on all customer contacts associated with Caller ID, and implementing a sales incentive program to reward net increases in Selective Blocking Pacific Bell implemented this plan in 1998.

7. Pacific Bell provided its service representatives with the following suggested language to use when talking with customers about Caller ID Complete Blocking:

- “I noticed that you have Caller ID Complete Blocking. What are you using it for? I find that Selective Call Blocking gives me greater control over my privacy. Since it’s free, shall I go ahead and change that for you?”
- “I see you have complete blocking for Caller ID. Do you know what that is? I’m concerned that your calls may go unanswered. Many of our customers don’t answer calls that are marked private and may even block them from coming through. I recommend switching to Selective Blocking. Then you can just dial *67 when you really need to block your calls. Can I go ahead and take care of this for you? There is no charge.”

8. Pacific Bell changed customers’ blocking option from Complete Blocking to Selective Blocking based on the representations set out in Finding of Fact 7; no other information was provided to the customer at the time the change was made.

9. Pacific Bell contracted with BRI to do outbound telemarketing to “downgrade nearly 2 million customers from Complete Call Blocking to Selective Call Blocking,” and BRI stated that it “understands the urgency involved in removing Complete Call Blocking from as many lines as possible during the fourth quarter of 1998 and the first quarter of 1999.”

10. Pacific Bell compensated BRI on an hourly basis, with incentive compensation to be considered after a test period.

11. Pursuant to the contract, Pacific Bell supplied BRI with a list of customers whose telephone numbers were published and who had Complete Blocking. Using Pacific Bell approved scripts, BRI’s telemarketers called the customers and informed them of new services like Anonymous Call Rejection which could interfere with their calls being completed and recommend switching to Selective Blocking.

12. A Pacific Bell manager trained BRI's agents and observed live calls in St. Louis on the first day of calling during which all observed agents used the approved scripts. BRI conducted its own subsequent monitoring.

13. In response to customer complaints, Pacific Bell promptly suspended its contract with BRI, initiated an investigation, and determined that BRI had used unapproved scripts in its calls which used the word "upgrade" several times and included other unapproved information as well.

14. Pacific Bell determined that BRI had contacted 278,010 customers and that approximately 107,000 customers had been switched from Complete to Select Blocking as a result of those calls. Pacific Bell contacted each switched customer to confirm the choice.

15. Pacific Bell should have done more than one day of monitoring to ensure that BRI's contacts with Pacific Bell customers included the requisite disclosures.

16. Pacific Bell took prompt action to terminate BRI's contract when it became clear that BRI was not adhering to the approved scripts, and subsequently contacted consumers to confirm their blocking choice.

17. Pacific Bell corrected the lack of disclosures and misstatements of fact by BRI.

18. Anonymous Call Rejection allows called parties to refuse to receive calls from telephones that have the number blocked by terminating such calls at the central office so that no toll charge is assessed. The rejected caller instead hears a recording stating that the called party does not accept anonymous calls, and if the caller wishes to complete the call, the caller's line must first be unblocked by using the *82 code, and then redialing the number.

19. Greenlining's witness testified that the purpose of this product was to "punish consumers who have chosen to keep their numbers private – whether

they use Selective or Complete Blocking,” and that it invades rather than protects the caller’s privacy.

20. Greenlining contends that Anonymous Call Rejection violates § 2893, which requires that no charge be imposed for withholding a number. To complete a call where the called party subscribes to Anonymous Call Rejection, the caller must incur the cost of calling from a pay phone to withhold the telephone number, thus incurring a charge to withhold the number.

21. Intervenor Roberts states that he has found Anonymous Call Rejection to be invaluable in protecting and enhancing his and his family’s privacy.

22. Pacific Bell offered two types of inside wire maintenance plans. For 60 cents/month, Wire Pro covers the repair of phone wiring and jacks on the customer’s side of the demarcation point. For \$2.25/month, Wire Pro Plus adds a 60-day use of a loaner telephone to the services covered by Wire Pro (Prices in effect at the time of the hearings held in this case.)

23. Pacific Bell had instructed its service representatives to offer Wire Pro Plus, and to explain Wire Pro only if the customer was not interested Wire Pro Plus.

24. Pacific Bell does not proactively inform apartment dwellers of the landlord’s statutory duty to maintain inside wire and one jack.

25. The fact that some other entity may be responsible for providing a service that a customer is considering purchasing from Pacific Bell is necessary to make an informed decision on a Pacific Bell offer.

26. The Commission has approved Pacific Bell’s tariff for Saver Packs of optional services. The names of the different Saver Packs are: Classic, Caller ID, Essentials, the Basics, and the Works. Pacific Bell began marketing “The Basics” and “The Essentials” in 1998.

27. Pacific Bell service representatives first offer customers the Works Saver Pack or Works Plus and, if rejected, offer the Basics Saver Pack.

28. Pacific Bell served copies of its tariff filings on complainants UCAN and Greenlining. No complainant, nor any other entity, protested the filings.

29. Pacific Bell's market research showed that focus group participants found the name "The Basics" to imply plain old telephone service ("a phone that works") and that the name is misleading because it contained too many optional services to be "The Basics."

30. In D.96-10-066, the Commission adopted rules that govern the provision of universal service to California telecommunications users and which require that all carriers provide all the 17 elements of basic service, including: access to single party local exchange service, ability to place calls, one directory listing, free white pages telephone book, and access to operator services.

31. "Basic" is commonly associated with local exchange service and, at least in the context of universal service, is a term of art meaning local exchange service.

32. There is no relationship between local exchange service or "basic" telephone service and "The Basics Saver Pack," a group of optional features.

33. The translation of "The Basics" to other languages carried through and in some cases accentuated the erroneous impressions created by the name.

34. "Essential" is virtually a synonym for "basic" and the services included in "The Essentials Saver Pack" are not at all essential for telephone service.

35. Pacific Bell offered customers a package of services named "The Basics Plus Saver Pack" which included The Basics Saver Pack and The Message Center. The Message Center is a voice mail service provided by Pacific Bell Information Services (PBIS), a Pacific Bell affiliate, but the service is tariffed with the Commission by Pacific Bell.

36. In 1997, Pacific Bell instituted a policy of promoting optional services, such as Call Waiting, Saver Packs, and Caller ID, on all customer contacts other than when a customer is disconnecting service or is temporarily disconnected for non-payment.

37. When promoting optional services, Pacific Bell's sales representatives are trained to offer first The Works Saver Pack, with nine custom calling features at a cost of \$16.95/month, or The Works Plus Saver Pack at \$24.95/month. If the customer is not interested in these packages, the service representative is trained to offer the Basics Saver Pack, which costs \$14.95/month with four custom calling features or \$12.95 with three custom calling features.

38. The sequence in which Pacific Bell has chosen to present customers with information on the multitude of custom calling services and packages is the sequence that most encourages sales.

39. Pacific Bell's 1986 script, which was part of the package selling abuses in the 1986 case, (1) made service recommendations to customers which reflected Pacific Bell's objective to increase sales, not provide service recommendations to the customer tailored to meet the customer's needs, (2) had fallback positions which attempted to sell as many services as possible to the customer, again without regard to the customer's needs, and (3) did not offer optional services on an individual basis.

40. Pacific Bell's 1998 script entitled "Selling to Success with the New Connect Model Contacts!!!" instructs the service representative to ask the customer a few questions about household composition, frequency of use of the phone, and whether the customer ever works at home or telecommutes. Regardless of the customer's response, the service representative is directed to recommend Basics Saver Pack to the customer. If the customer refuses, a fallback

package of fewer services is offered. If the fallback package is rejected the service representative is to attempt to sell individual services.

41. In both the 1986 and the 1998 scripts, the service representative is instructed to feign an interest in how the customer actually uses the telephone and to make a pre-determined “recommendation” ostensibly based on the customer’s information. The recommendation, in both scripts, is one of Pacific Bell’s most expensive packages of optional features. Should the customer refuse to purchase the package, both scripts require the service representative to offer a fallback package that has fewer features and is less expensive.

42. In 1998, Pacific Bell began paying service representatives up to \$150/month for meeting their sales revenue targets, and a 25% commission on all sales above the target, with no upper bound to the amount of the commission.

43. Pacific Bell’s sales strategy that emerged following our 1986 decision was focused on customer service and full and accurate disclosure of service information as demonstrated by its 1992 Sales Quota Policy.

44. Pacific Bell’s 1992 Business Office Sales Policy and Guidelines stated that service representatives are to engage in “consultative selling” by responding to verbal cues from the customer and to cues from the customer records in order to make personalized product and service recommendations in all appropriate contacts.

45. In contrast to the 1992 policies, which formed the basis for lifting the marketing prohibitions, Pacific Bell’s current sales strategies, as reflected in evidentiary record, rely on sales quotas, packaged selling and bonus/rewards based on sales volumes.

46. Pacific Bell has essentially changed course from its 1992 policies and reinstated certain abusive marketing practices that we enjoined in 1986.

47. Pacific Bell hires outside vendors and uses its corporate affiliates to handle both inbound and outbound customer contacts. Pacific Bell provides the vendors and/or affiliates access to customer information, including services purchases and financial information.

48. Complainants have not alleged that the information disclosed to non-affiliated, third-party vendors or corporate affiliates was used for any purpose other than to market Pacific Bell's custom-calling products.

49. Over 20% of Pacific Bell's service representatives handle calls at its foreign language centers. These representatives speak Spanish, Cantonese, Mandarin, Japanese, Korean, Vietnamese and Tagalog.

50. Pacific Bell engages in marketing efforts to build awareness of its products and services by using print advertising, newsletters, other media, and telemarketing, in addition to customer initiated contacts with service representatives, to explain the benefits of its products and services to these markets. Pacific Bell retains experts in each of the languages to translate and review marketing and service representative scripts, and it also works closely with groups that represent these customers.

51. Complainant Greenlining contends that immigrant and language minority groups are particularly vulnerable to high-pressure sales tactics and are less likely than other consumers to report abuse.

52. Field Research Corporation market research shows the following percentage interest levels for Caller ID: White, 23%; Hispanic, 39%; African-Americans, 37%; Asians, 42%.

53. All local exchange carriers charge ULTS qualified residential low-income customers a discounted installation charge of \$10, and a monthly fee of \$5.62 for flat rate service or \$3.00 for measured service.

54. For each ULTS customer served, the local exchange carriers are reimbursed from the ULTS Fund for the difference between the ULTS rate and the respective local exchange carrier's usual rate for residential basic service. The ULTS program is currently funded by a surcharge on all end users' bills.

55. UCAN provided a Pacific Bell document which stated: "when regrading a customer to Universal Lifeline, offer Caller ID and advise the customer that they will be paying roughly the same dollar amount they were paying before but enjoying the benefits of Caller ID."

56. Pacific Bell's Caller ID scripts have called into question customers' transfers from Complete Blocking to Select Blocking from January 1, 1998, to the present.

57. Remediating Pacific Bell's actions on Inside Wire, Packages Offered Sequentially, "The Basics," and ULTS requires customer notification.

58. In D.86-05-072, the Commission ordered Pacific Bell to cease and desist from: conducting an unauthorized trial program for enhanced services, engaging in "package selling abuses," violating Rule 6 in establishing credit, renaming basic service, and improperly administering the Universal Service program. The Commission also ordered Pacific Bell to refrain from any cold selling telemarketing and implementing any sales quota systems.

59. In response to the marketing abuses found in D.86-05-072, the Commission ordered Pacific Bell to refund over \$62 million to customers (as of November 1988) and to contribute \$16.5 million to the Ratepayer Education Trust Fund. Pacific Bell's marketing practices were also placed under the guidance of the Customer Marketing Oversight Committee.

60. In D.86-05-072, the Commission found that Pacific Bell had violated Tariff Rule 12 by packaging basic local exchange service with expensive optional services in such a way as to "mask the basic rate, thereby causing ratepayers to

unwittingly pay more for telephone service than they otherwise would, or worse, to go without such service at all,” and by failing to disclose the option to purchase services separately with the price for each component part of package of services.

61. To remedy Pacific Bell’s 1986 marketing abuses, the Commission established the Customer Marketing Oversight Committee that oversaw Pacific Bell’s adoption of sales policies that were consistent with the law and regulatory policy. Pacific Bell has since abandoned those policies.

62. Pacific Bell has exhibited a pattern of regulatory compliance during periods of special oversight, only to be followed by noncompliance in furtherance of Pacific Bell’s revenue goals when the special oversight ends.

63. Pacific Bell’s practices of instructing its representatives to ask each caller, at the beginning of every call, for permission to access the subscriber’s proprietary network information and to repeat the question if the answer is “no”, and forcing customers to listen to unwanted sales pitches are unreasonable.

64. Pacific Bell forecasted that it would gain \$312.9 million in revenues (net present value of \$1.2 billion over a 10-year period) for increased sales of vertical services.

65. Pacific Bell’s Tracking Report # P.D.-01-27, Cumulative Through December 1998, line 7, shows annual revenue of \$9.4 billion.

Conclusions of Law

1. Neither Robert nor TIU presented sufficient justification to set aside submission.

2. Section 451 requires that all charges imposed by a public utility be just and reasonable and that all utilities’ rules pertaining to or affecting a utility’s charges or service to the public be just and reasonable.

3. Charges obtained by means of misleading or confusing sales tactics are unjust and unreasonable.

4. Pacific Bell has a duty, pursuant to § 451, to provide adequate, efficient, just and reasonable customer service to its customers.

5. Section 2896 requires utilities offering telephone services in California to meet reasonable standards of customer service.

6. Section 2896 mandates that every telecommunications corporation provide its customers: “Sufficient information upon which to make informed choices among telecommunications services and providers. This includes, but is not limited to, information regarding the provider’s identity, service options, pricing, and terms and conditions of service.” This provision sets a minimum disclosure standard for utilities offering telecommunications services in California.

7. Pacific Bell’s Tariff Rule 12 governs the offering of optional services to a customer. It states that Pacific Bell may call a customer’s attention to the fact that optional services are available, that the customer may designate which services are desired, and that Pacific Bell must disclose all applicable recurring rates and nonrecurring charges for those services.

8. Tariff Rule 12 is required by the Commission’s GO 96-A, which requires that each utility provide customers with up-to-date information regarding their service, and allow customers to choose from among any service options available to them.

9. Implicit in the language of Tariff Rule 12 is the premise that a utility will not insist on giving customers information about optional services when customers do not wish to listen to such information.

10. Tariff Rule 12 and Commission decisions require that when offering packages of services, a telecommunications utility must (1) offer basic exchange service apart from packages of optional services, (2) disclose that package

components can be purchased separately, and (3) itemize each price on a stand-alone basis.

11. Section 2893 requires that every telephone corporation that provides Caller ID comply with the Commission's rules on blocking services, which require them to provide each caller with a means of withholding display of the caller's telephone number from the telephone instrument of the called party.

12. The Commission has determined that, to the greatest extent possible, a customer's decision to allow a calling party's number to be displayed must be the result of informed consent and a knowing and intelligent waiver of the right to privacy.

13. Pacific Bell's Caller ID scripts as set out in Finding of Fact 8 were deficient in that customers were neither fully informed of the two options nor allowed to choose between them on that basis.

14. Pacific Bell changed customers' Caller ID blocking choice in violation of § 2893 and the Commission decisions authorizing the sale of Caller ID services.

15. Pacific Bell may determine that it is financially advantageous to Pacific Bell that customers use Selective Blocking rather than Complete Blocking, and may raise the issue of blocking options with its customers that have Complete Blocking. When presenting the options to customers, however, Pacific Bell must give customers sufficient non-misleading information to enable customers to make an informed decision.

16. BRI's calls were deceitful and dishonest.

17. BRI's script violated the disclosure requirements because customers were not presented information upon which to make a knowing waiver of the right to privacy, and customers also received misrepresentations of fact.

18. The Commission has previously determined that the called party has every right not to answer the phone, and to secure services from Pacific Bell to prevent certain calls from being presented to the phone.

19. Section 2893 places no burden on called parties to receive anonymous calls; it only requires that telephone corporations provide a blocking service at no charge to the caller.

20. Anonymous Call Rejection does not violate the requirements of § 2893.

21. By offering Wire Pro Plus first and only discussing the alternative of Wire Pro upon the customer's rejection of Wire Pro Plus, Pacific Bell effectively "masked" the lower-priced alternative of Wire Pro and may have caused customers unwittingly to pay more for inside wire service than they otherwise would have.

22. Pacific Bell has violated Tariff Rule 12 by failing to state that components of the Wire Pro Plus package may be purchased separately at a lower price.

23. In D.99-06-053, we noted that Pacific Bell's service representatives only present customers with the option of Wire Pro as a fallback when the customer rejects Wire Pro Plus, found that this sequence "may be misleading to residential customers," and ordered Pacific Bell to clearly explain both options to residential customers.

24. The Commission previously required Pacific Bell to disclose the landlord's responsibility for inside wire, by stating in bold and underlined (when in writing) "You should be aware that, under state law, landlords, and not tenants, are responsible for repairs to and maintenance of inside telephone wire." This disclosure requirement expired on September 1, 1994.

25. In marketing inside wire repair service to renters, Pacific Bell has an affirmative duty, pursuant to § 2896 and its Tariff Rule 12, to disclose to customers all facts needed to make informed decisions about inside wire repair

options, including the fact that landlords are responsible for maintenance and repair of inside wire.

26. In D.99-09-036, we ordered Pacific Bell's service representatives to clearly explain to its residential customers that they have four options for the repair and maintenance of inside wire: (1) Pacific's Wire Pro plan which covers repair of the customer's inside wire and jacks, (2) Pacific's Wire Pro Plus plan that covers the use of a loaner telephone instrument for up to 60 days, (3) outside vendors to perform inside wire repair maintenance, and (4) making the repairs themselves.

27. D.99-09-036 addressed the issue that complainants have raised regarding disclosure of alternative vendors for inside wire repair.

28. The public interest requires that Pacific Bell notify its inside wire maintenance plan customers that landlords are responsible for maintenance and repair of inside wire.

29. In D.86-06-072, the Commission found that creating an association between local exchange service and packages of optional services violated Tariff Rule 12.

30. Pacific Bell knew or should have known that transplanting the term "basic" from local service to what could be the most expensive group of optional services available created a potential for customer confusion.

31. The name "The Basics Saver Pack" creates an association between local exchange service and optional services in violation of Tariff Rule 12. In its marketing efforts, Pacific Bell used this name in a manner that was misleading and confusing, and that undermines our universal service goals.

32. The package named "The Essentials" suffers from a potential to mislead customers in a manner similar to "The Basics."

33. Pacific Bell's "offer on every call" strategy violates §§ 451 and 2896 and Tariff Rule 12 because it interferes with providing customers with information to which they are entitled.

34. Pacific Bell used sales tactics likely to mislead customers by creating the often unfounded impression that the representatives were recommending that a customer purchase additional products or services based on an analysis of that particular customer's usage patterns.

35. Package sales tactics that result in a quotation of rates for individual services only if customers persistently refuse the packages violates Tariff Rule 12 because information necessary to allow customers "to designate which optional services they desire" is withheld.

36. Pacific Bell may offer optional services on incoming calls, but in doing so, it must comply with the disclosure standards and informed choice requirements of §§ 451 and 2896, and must provide customer service of reasonable quality.

37. Pacific Bell's current incentive compensation programs closely resemble the marketing programs that did not comply with violated statutes, orders, and tariffs, and which led to the Commission's prohibition on cold selling telemarketing and sales quotas in D.86-05-072.

38. The public interest requires limitations upon Pacific Bell's incentive compensation programs.

39. The public interest requires that Pacific Bell's service representative compensation based on sales volume be limited to five percent of the sales representative's monthly pay, which is not affected by sales volume.

40. P.U. Code § 2896 directs us to set reasonable statewide service quality standards, including customer service standards. Pursuant to our authority in § 2896 we declare that customer service quality is compromised when Pacific Bell representatives ask each caller, at the beginning of every call, for permission to

access the subscriber's proprietary network information and to repeat the question if the answer is "no", and force customers to listen to unwanted sales pitches prior to providing a response to a customer service inquiry. Therefore such practices are inconsistent with reasonable service quality.

41. As codified in under 47 C. F. R. § 64.2005, the FCC regulations implementing 47 U.S.C. § 222 allow telephone corporations to use customer private network information to market custom calling services such as those featured in The Basics, The Savers Pack, and The Works, without obtaining prior customer approval.

42. Section 2891 prohibits all California telephone corporations from making available to "any other person or corporation" various types of customer information, including customer calling patterns and financial information.

43. Complainants have not alleged that subscriber information Pacific Bell disclosed to corporate affiliates or to non-affiliated, third party vendors was used for any purpose other than to market Pacific Bell's custom calling products.

44. UCAN has failed to state a claim under either 47 U.S.C. § 222 or Public Utilities Code §2891.

45. The statutory standards applicable to Pacific Bell's marketing to ethnic minority customers are the same standards applicable to its other customers.

46. ULTS is designed to promote the use of affordable, statewide, basic telephone service among low income households by providing a subsidy to low income customers funded by a surcharge on all end-users' bills.

47. The purpose of the ULTS subsidy program is to provide affordable service to low income consumers, not to provide Pacific Bell a cross-marketing sales opportunity. Attempting to undo the lower-priced service offering undermines the Legislature's, and this Commission's, universal service goals.

48. The public interest requires that Pacific Bell confirm that all customers who have switched from Complete Caller ID Blocking to Selective Blocking since January 1, 1998, understood the privacy consequences of the switch and intended to make the change.

49. The public interest requires that Pacific Bell notify customers who, since January 1, 1998, have purchased a discounted package of custom calling services of the full range of choices for discounted packages of custom calling services, including the option to decline to subscribe to any of these services.

50. The public interest requires that Pacific Bell determine which, if any, of the inside wire options and discounted packages of custom calling services customer wish to purchase, and immediately implement the customer's choice.

51. The public interest requires that Pacific Bell provide to ULTS customers who also subscribe to optional services a specific explanation of the price for ULTS service as clearly distinguished from optional services.

52. The Commission may impose fines of between \$500 and \$20,000 per offense payable to the State of California pursuant to § 2107. Each day of a continuing offense constitutes a separate and distinct offense per § 2108.

53. In setting fines, the Commission considers the severity of the offense, the utility's conduct, including conduct in mitigation, the financial resources of the utility, the totality of circumstances in light of the public interest, and the role of precedent.

54. The violations identified in this proceeding are serious offenses. A major aggravating factor is the fact that Pacific Bell's conduct is recidivist.

55. The fact that Pacific Bell took action to halt abuses by BRI, has cooperated in these proceedings, and that the applicable laws and regulations may have lacked clarity are mitigating factors.

56. In light of Pacific Bell's corporate size and 1998 revenues, a substantial fine is necessary to achieve deterrence.

57. The most comparable fine precedents are the Pacific Bell penalty of \$16.5 million imposed in the 1986 case and the payment of \$13 million in settlement of marketing abuse allegations against GTE California Incorporated approved by the Commission in D.98-12-025.

58. The public interest requires that Pacific Bell be fined \$25.55 million.

59. To remedy the results of improper marketing by Pacific Bell without further delay, and to reform those practices as soon as possible, this decision should be made effective immediately.

60. ORA's and Pacific Bell's requests for official notice meet the requirements of Rule 73 and Evidence Code § 452 and should be granted.

FINAL ORDER

IT IS ORDERED that:

1. Pacific Bell shall comply with this decision, all previous decisions, and other applicable law in making the required disclosures about Caller ID blocking options.

2. No later than 90 days after the effective date of this order, Pacific Bell shall begin including on every bill the Caller ID blocking status of each telephone line. The bill shall also contain (either on the front or back) the code required to block or unblock the number.

3. No later than 90 days after the effective date of this order, Pacific Bell shall mail a written notice, approved by the Public Advisor, to all residential customers that have been switched from Complete Caller ID Blocking to Selective Blocking since January 1, 1998, setting forth the privacy consequences

of such change. The notice shall also contain a telephone number for customers who wish to switch back to selective blocking to do so without charge.

4. No later than 90 days after the effective date of this order, Pacific Bell shall resume disclosing to its inside wire customers and shall mail a notice to all Wire Pro customers stating in bold and underlined “You should be aware that, under state law, landlords, and not tenants, are responsible for repair to and maintenance of inside telephone wire.”

5. Pacific Bell shall mail a notice to custom calling service package customers informing them of the full range of individual services and packages of services available and giving the customer the opportunity to discontinue any undesired services.

6. Within 90 days of the effective date of this order, Pacific Bell shall include prices in all descriptions of optional services, and packages of such services, presented to customers. The descriptions of the services shall be included in all published telephone directories and shall include prices.

7. Within 45 days of the effective date of this order, Pacific Bell shall file an advice letter modifying Tariff Rule 12 to create a clear distinction between customer service and sales or marketing efforts in conformance with the directives set out in Ordering Paragraph 8 and as described in Section 9.3 of this order. This rule shall remain in effect so long as Pacific Bell serves 60% or more of residential access lines.

8. Revised Tariff Rule 12 shall provide that service representatives who answer inbound customer service calls must first fully address and resolve the customer’s request. The service representative must describe the lowest-priced option for purchasing the requested services. After completely addressing all the customer’s requests, the service representative shall summarize the customer’s order including itemized prices, and inform the customer that the order is

finished. After that, the service representative may inquire whether the customer is interested in hearing about other optional services. If the customer responds in the affirmative, only then may the service representative engage in unsolicited sales or marketing efforts.

9. Pacific Bell shall train its managers and service representatives on implementation of Ordering Paragraph 8.

10. Revised Tariff Rule 12 shall be prominently displayed in the work area of service representatives.

11. The Consumer Services Division (CSD) shall comment on Pacific Bell's advice letter containing revisions to Tariff Rule 12 and recommend any changes necessary to ensure enforcement of our objective to clearly distinguish between customer service and sales and marketing efforts. In consultation with the Telecommunications Division, CSD shall also prepare a plan for monitoring of Pacific Bell's compliance with the revised Tariff Rule 12 and §2896, and such plan shall include periodic unannounced visits to Pacific Bell service offices.

12. Pacific Bell sales-volume based incentive compensation to service representatives and their immediate supervisors shall not exceed five percent of the service representatives' or supervisors' monthly compensation.

13. Within 45 days of the effective date of this decision, Pacific Bell shall submit an advice letter setting out its standards for proposed internal corporate rules and practices that would prohibit unfair, misleading, and predatory sales practices.

14. Pacific Bell shall provide customers contacted in compliance with this order an opportunity to have their concern or complaint regarding the subject optional service immediately addressed.

15. We will assess a fine of \$17,500 for each day of violation of the Caller ID disclosure requirements and for each day of violations of §§ 451, 2896, and Tariff

Rule 12, for a total of \$35,000/day. We will use the time period from January 1, 1998, to December 31, 1999, or 730 days. This yields a fine of \$25.55 million.

Within 180 days of the effective date of this order Pacific Bell shall pay a fine of \$25.55 million to the General Fund of the State of California.

16. Greenlining's request that Anonymous Call Rejection be prohibited is denied.

17. Greenlining's request for special disclosure requirements for ethnic minorities, recent immigrants, and customers that prefer to use a language other than English is denied.

18. Complainants have failed to meet the burden of proving that Pacific Bell has violated state or federal laws covering the use of Customer Proprietary Network Information.

19. This proceeding is closed.

This order is effective today.

Dated September 20, 2001, at San Francisco, California.

LORETTA M. LYNCH
President

CARL W. WOOD
GEOFFREY F. BROWN
Commissioners

I will file a dissent.

/s/ RICHARD A. BILAS
Commissioner

I will file a dissent.

/s/ HENRY M. DUQUE
Commissioner

C.98-04-004 et al.

D.01-09-058

Commissioners Henry M. Duque and Richard A. Bilas dissenting:

We find that the majority decision's interpretation of the standards of review for this complaint case is erroneous, and the fines and requirements imposed on Pacific Bell are too harsh and unwarranted.

Section 2107 of the Public Utilities Code allows fines to be set in the range of \$500 to \$20,000 per offense. The Commission has used this standard many times in the past. The level of fines is a judgment call to be based on, among others, the seriousness of the offense tempered by mitigating factors. One of those factors is the conduct of the utility in mitigating the offense. Today's decision recognizes that Pacific Bell did take mitigation efforts (page 82). For example, Conclusion of Law 55 states that "... Pacific Bell took action to halt abuses by BRI, has cooperated in these proceedings, and that the applicable laws and regulations may have lacked clarity are mitigating factors." And in apparent recognition of these factors, it establishes that "the fine should be set near the middle of the range permitted by Section 2107." (Page 83) However, the majority decision departs from these findings and sets an unreasonably excessive and harsh fine at near 90% of the maximum limit or \$17,500 per offense. In this respect, the majority decision tramples well-established precedents of considering mitigating circumstances whereby, as in here, (1) actions taken to correct improper behavior and (2) cooperation in proceedings, would otherwise help to reduce levels of fine. The majority decision trivializes these values and is capricious.

We will now turn to other infirmities of the decision that caused us to dissent. The standard to be derived from § 2896 is a general directive to telecommunications corporations to provide consumers with sufficient information to allow them to make informed choices among telecommunications services and providers. The statute does not set out any specific script or presentation sequence that must be followed by utility sales personnel. Nor is there any requirement that Pacific Bell, or any telecommunications corporation, must explain to a customer in each transaction, each product, optional service, package of services, or promotion that the carrier has in its tariffs.

As a policy matter, the relationship between any telecommunications service provider and customers of basic exchange monopoly service is, and should be, different than the relationship between a provider of discretionary, competitive services and its customer. In recognition of that fact § 2896 (c) required the Commission to "require telephone corporations to provide customer service to telecommunications customers that includes, but is not limited to, ... reasonable statewide service quality standards including but not limited to, standards regarding ... customer service...." Although this mandate became effective January 1, 1994, the Commission failed to act upon it until after this case was filed. On February 3, 2000, the Commission initiated Order Instituting Rulemaking on the Commission's own Motion to Establish Consumer Rights and Consumer Protection Rules Applicable to all Telecommunications Utilities, known as the Telecommunications Bill of Rights proceeding. Issues we should have dealt with before this complaint was filed were included in this proceeding. It was cases such as this one, which finally spurred the commission to take long overdue action. To date, there are still no clear guidelines or directions in the marketing of telecommunications services as the majority decision expected Pacific to act in its marketing efforts.

Tariff Rule 12, by far the most specific direction to Pacific from this Commission on sales practice, requires that Pacific Bell disclose the applicable recurring rates and nonrecurring charges for each service designated by the customer.³⁵ However, as a matter of regulatory requirement, this rule does not obligate Pacific Bell to separately quote applicable rates and charges for those optional service packages the customer has not designated. Therefore, although Pacific's marketing practices at issue in this decision fall short of disclosure of all possible options, such conduct is not prohibited by Tariff Rule 12.

Moreover, a requirement such as that envisioned by the majority decision would be unfeasible even if the Commission were to require such sales practice. Due to the myriad of options and packages of enhanced services now available, to require any provider to disclose each and every one of the options, separately and as packages, is impractical for Pacific and unfriendly to customers.

Tariff Rule 12 is vague, despite the Commission's decisions in the 1986 marketing abuse case in which Tariff Rule 12 was in fact modified to prevent against marketing abuses regarding packages, the term "optional service" continues to be vague as to whether it includes a package or the components of a package. Thus, while there is good reason to fix Rule 12 prospectively, there is no basis to find a violation of Rule 12 and impose a hefty fine on Pacific Bell.

The majority decision on Pacific Bell sales practice misses the point

In D.99-06-053, we addressed the interrelationship of Pacific Bell's inside wire services and the use of other vendors to perform the actual repair of faulty wires. The instant Complaint was filed on April 6, 1998; two months after Pacific filed its Application to re-categorize Inside Wire Repair Services. The Commission's decision disposing of Pacific's Application was rendered on June 10, 1999 while this proceeding was underway. Complainants have not produced substantially different evidence that distinguishes this allegation from the issues the Commission addressed in D.99-06-053. That decision addressed and resolved the disclosure issue the complainants raise in this proceeding.

³⁵ "Where there are additional residence optional services (other than exchange access service) available, the Utility, or its authorized employees, **may** call applicant's attention, at the time application is made, to the availability of such optional services and the customer may designate which optional services they desire. The Utility shall provide a quotation of the applicable recurring rates and non recurring charges applicable to each service designated by the customer. The quotation of applicable rates and charges shall be stated separately for each optional service designated by the customer." (Emphasis added.)

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Decision 99-06-057 determined that residential inside wire repair is one “market” with two payment options – either on a per-month basis or on a per-visit basis because both payment options are designed to solve the same problem, faulty inside wire. (D.99-06-053, mimeo., at 54.) The record in this complaint case does not change the Commission’s findings and conclusions reached in D.99-06-053 with respect to Inside Wire services marketing the disclosure requirement Pacific was directed to follow. There is no basis to revisit this issue.

The case involving the landlord’s responsibility to maintain inside wire is also a matter for which the Commission lacks a basis to fine Pacific. The Commission previously required Pacific Bell to make a specific written disclosure, to inform tenants that, under state law, landlords, and not tenants, are responsible for repairs to and maintenance of inside telephone wire. The Commission required Pacific to make this statement to all customers receiving information in person or over the telephone. (Revision of the Accounting for Stations Connections and Related Ratemaking Effects and the Economic Consequences of Customer-Owned Premise Wiring, (D.92-09-024 at 9, 45 CPUC2d 411)) However, the requirement for Pacific Bell make this specific disclosure expired on September 1, 1994. (*Id.*) As a matter of law, Pacific Bell is no longer under an obligation to disclose that landlords and not tenants are responsible for inside wire repair.

While the irrational expiration of this requirement is puzzling and would justify reinstating the requirement, it deprives the Commission a basis to fine Pacific Bell for its failure to make the disclosure to tenants.

Similarities between the 1986 complaint case and this complaint case are misplaced

In the first of a series of decisions in the “1986 Marketing Case”, the Commission found that Pacific Bell was marketing its basic local exchange service in a package with expensive optional services. (D.86-05-072, 21 CPUC2d 182, 188.) Such marketing, the Commission determined, contravened the Legislature’s and this Commission’s universal service directives because it masked the basic rate. The statutes and our decisions all focused on reducing the basic rate as the means of ensuring universal service.

Creating an association between local exchange service and packages of optional services was at issue in 1986, when the Commission found that these “package selling abuses” violated Tariff Rule 12. (21 CPUC2d 182, Finding of Fact 2, Conclusion of Law 2.) The Commission also found that such an association “masks” the basic rate, which is the focus of the universal service subsidy program. (*Id.* at 188.)

In contrast to the 1986 Marketing Case, in this complaint case there is no allegation that Pacific Bell is selling local exchange service as part of its packages of optional services. Each of the packages contains only optional services such as call forwarding and call waiting. The complainants know that and instead allege that the name “The Basics” creates an association with local exchange service, which they believe is prohibited by the earlier decisions. Both the complainants and the majority decision commit a grave error in false analogies and jumping to conclusions. The facts do not support the findings.

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The order in which Pacific presents customers with service choices obviates any confusion between the basic service and optional packages, unlike the 1986 case. Here, customers first select their local service (flat rate or measured rate), and then discuss optional services. The optional services are offered to a customer only after the customer has initiated local exchange service. In this way, Pacific Bell creates clear separation between its local service offerings and its optional services, as is required by the 1986 decision. The 1986 decision prohibits packages that mix local exchange service and optional services. There is no evidence in this record that Pacific Bell has violated this prohibition.

Similarly, the finding that “offer on every call” policy, under which Pacific must quote all recurring rates and nonrecurring charges for all services, violates Tariff Rule 12 is baseless. Again, proving a violation of this rule requires the opposite of what UCAN has shown: customers may be receiving unwanted information, but they are not being deprived of information. The Commission may presume that offer on every call could potentially degrade service quality, even though the record provides no help, but finding a violation on this basis that it violated a provision of law or any order or rule of the Commission is preposterous.

Offer on every call and sequential offerings are not prohibited

Pacific’s marketing strategy of offering the higher priced package (The Works Plus or The Works) first and withholding information on the lower priced package (such as The Basics Plus or The Basics) until the customer rejects the first offer is not a violation of any law or standard because there is no law that orders Pacific to sell these optional services in any order. The majority decision errs in finding a violation on regarding sequential offerings (even if the offer is made starting with high-priced services and proceeding to lower priced options only when the customer refuses to accept the first offer). Some sort of a sequence is inevitable whenever Pacific Bell presents customers with information on the multitude of custom calling services and packages. The sequence that Pacific Bell has chosen and has mandated that service representatives use is only one of many possible sequences, all of which could comply with the statutes and Commission directives.

Today’s decision also enters a realm in which there is not much precedent in its draconian limits on incentives. If it does not like the message, the majority decision would kill the messenger. First, we have serious doubt that this Commission has the authority to place limits on employees’ compensation. However, even if we have the authority to set limits on employees’ incentives, exercising that authority in the manner the majority decision does is improper as a policy matter. It punishes those that do not deserve it.

Pacific Bell negotiates salaries and wages with the Unions of its service representatives through the collective bargaining process. The evidence in this case shows no wrongdoing on the part of the service representatives. Nothing in the record establishes a correlation between incentives and wrongdoing by sales reps. These employees performed their duties as prescribed

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by management. If the Commission finds management gave improper instructions to the service representatives, then the focus should be on correcting management's behavior. It is neither appropriate nor warranted for the CPUC to intercede in employee and employer negotiated labor and compensation agreements.

For all the above reasons, we dissent.

/s/ Henry M. Duque

Henry M. Duque
Commissioner

/s/ Richard A. Bilas

Richard A. Bilas
Commissioner

September 20, 2001
San Francisco, California