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IN THE MATTER OF QWEST
CORPORATION'S COMPLIANCE WITH
§ 271 OF THE
TELECOMMUNICATIONS ACT OF
1996.

DOCKET NO. T-00000B-97-0238

**QWEST'S BRIEF ON THE REMAND OF CHECKLIST ITEM 10:
WORLDCOM'S DEMAND FOR A DOWNLOAD OF QWEST'S CALLING
NAME DATABASE**

INTRODUCTION

Qwest Corporation ("Qwest") submits this brief in support of Staff and the Administrative Law Judge's previous determination that Qwest is not required to provide "bulk access" to the InterNetwork Calling Name Database ("ICNAM") as a single Arizona CLEC, WorldCom, Inc. ("WCom"), demands.¹ In the Special Open Meeting on the ALJ and Staff's previous recommendation that Qwest satisfies checklist item 10, the Commission expressed interest in whether competition required Qwest to provide this "bulk access" to its ICNAM

¹ Although counsel for AT&T spoke on the alleged competitive need for "bulk" access to ICNAM at the Special Open Meeting, AT&T has not presented any testimony on this issue in the previous Arizona workshops and briefing on this topic, nor did it present any testimony on this issue in the remand hearing on January 10, 2002.

database. The short answer is no. Despite a third opportunity to address this issue, the record still does not support imposing this new requirement on Qwest. As the record demonstrates, there are no new products, no new services, and no tangible benefit that Arizona consumers will reap if WCom is granted the bulk access it demands. WCom presented no evidence that Arizona consumers will reap any cost savings by ordering Qwest to provide bulk access, and WCom failed to establish that even it would realize any cost savings. Furthermore, Qwest demonstrated that providing the copy of its ICNAM would present possible confidentiality issues for both end user customers and CLECs that store their data in the Qwest ICNAM. Finally, the FCC has determined that CLECs can self-provision calling-name databases or use alternative providers' calling-name databases without diminishing their ability to offer service.

Eleven state commissions in Qwest's region charged like this Commission with promoting competition, as opposed to the whims of competitors, have reached the conclusion that "bulk access" to the ICNAM database is unnecessary, not a condition of Qwest's compliance with checklist item 10, and therefore, not a public interest concern. The FCC has reached a similar conclusion in the *UNE Remand Order* by ordering access to the calling-name database on a query-response basis through the signaling network, as opposed to ordering BOCs to provide CLECs a copy of that database. The FCC also has declined in nine Section 271 orders to order a BOC to provide a copy or bulk access to its calling-name database as a condition of Section 271 relief. As Staff and the ALJ previously recommended, the Commission should find that Qwest's current "per query" access to ICNAM satisfies Qwest's obligations under checklist item 10, 47 U.S.C. § 271(c)(2)(B)(x), and the Telecommunications Act of 1996.

ARGUMENT

A. **The FCC Has Defined Signaling and Call-Related Databases Already, and It Does Not Require Incumbent LECs To Download Their Call-Related Databases.**

The FCC has already defined the unbundled network element ("UNE") that is signaling and call-related databases and defined the call-related database in terms of "per query" access through the signaling network. Because the FCC has already conducted the requisite "necessary" and "impair" analysis under 47 U.S.C. § 251(d)(2), this Commission should not "redefine" that network element. Under governing FCC standards, Qwest provides access that is wholly consistent with its obligations under Section 251(c)(3) and 271(c)(2)(B)(x).

In the original *Local Competition Order*,² the FCC determined that incumbent local exchange carriers must unbundle their signaling databases and call-related databases under Section 251(c)(3). In ordering this unbundling, however, the FCC unambiguously held that access must be provided on a "per query" basis only and defined the signaling and call-related database UNE in terms of this access:

We conclude that incumbent LECs, upon request, must provide nondiscriminatory access on an unbundled basis to their call-related databases *for the purposes of switch query and database response* through the SS7 network *We require incumbent LECs to provide this access to their call-related databases by means of physical access at the STP linked to the unbundled database.*³

The FCC determined that because the signaling transfer point ("STP") performs mediation and screening functions, "access to call-related databases must be provided through

² First Report and Order, *Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 96-98, 95-185, 11 FCC Rcd 15499 ¶ 484 (1996) ("*Local Competition Order*").

³ *Id.* ¶ 484 (emphasis added).

interconnection at the STP and *that [the FCC] do[es] not require direct access to call-related databases.*"⁴

In *AT&T Corp. v. Iowa Utils. Bd.*,⁵ the United States Supreme Court overturned the FCC's unbundling rules in the *Local Competition Order*, holding that the FCC had focused solely on whether it was "technically feasible" to unbundle particular network elements instead of applying the statutory criteria in Section 251(d)(2) that requires the FCC to analyze whether unbundling the network element is "necessary" or would "impair" a CLEC's ability to compete. The Supreme Court found that the term "technically feasible" in Section 251(c)(3) refers only to *where* the incumbent LEC provides access, not *what* the incumbent LEC must unbundle.⁶ Thus, whether it is "technically feasible" to download the ICNAM database is irrelevant to determining whether that download qualifies as a UNE under the Act. In accordance with this interpretation of Section 251(c)(3), the Supreme Court invalidated the FCC's original list of UNEs and remanded the issue to the FCC with instructions to conduct the requisite "necessary" and "impair" analysis.

In the *UNE Remand Order*, the FCC conducted its analysis and determined once again that "per query" access to call-related databases such as ICNAM is all the Act requires to provide CLECs with nondiscriminatory access to incumbent LEC signaling systems and call-related databases. Again, the FCC defined call-related databases in terms of access through the signaling network for purposes of switch query and database response:

we require incumbent LECs, upon request, to provide nondiscriminatory access to their call-related databases on an unbundled basis, *for the*

⁴ *Local Competition Order* ¶ 485 (Aug. 8, 1996) (emphasis added).

⁵ 525 U.S. 366 (1999).

⁶ *Id.* at 390-91.

*purpose of switch query and database response through the SS7 network."*⁷

Further, the FCC required incumbent LECs to provide access "by means of physical access at the signaling transfer point linked to the unbundled databases."⁸ Thus, Rule 51.319(e)(2)(A), which defines signaling and call-related databases (including calling-name databases such as ICNAM), provides that access is on a "per query" basis through signaling transfer points:

*For purposes of switch query and database response through the signaling network, an incumbent LEC shall provide access to its call-related databases, including but not limited to, the Calling Name Database . . . by means of physical access at the signaling transfer point linked to the unbundled databases.*⁹

Thus, the FCC has already defined calling-related databases and held that this element is accessed through the signaling transfer point, not via a "bulk" download. The FCC did not require incumbent LECs to download their databases to CLECs, nor did it require incumbents to provide CLECs with copies. Access is expressly provided to the databases via the STP, which is precisely what Qwest provides

As discussed fully in Section E, Qwest submits that the Commission can, in an appropriate docket, identify *additional* network elements that incumbent LECs must unbundle, provided the network element meets the requisite "necessary" and "impair" standards. The FCC has determined, however, that state commissions cannot "redefine" the UNEs the FCC has established. In the *UNE Remand Order*, the FCC stated that it intended to create a national list

⁷ Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 99-238, FCC 99-238, 15 FCC Rcd 3696 ¶¶ 402, 403 (Nov. 5, 1999) ("*UNE Remand Order*") (emphasis added).

⁸ *UNE Remand Order* ¶ 410.

⁹ 47 C.F.R. § 51.319(e)(2)(A) (emphasis added).

of UNEs that incumbent LECs must unbundle to provide a certain and uniform obligation. To ensure that these UNEs continue to satisfy the "necessary" and "impair" requirements, the FCC determined that it, not the state commissions, would conduct a periodic review of this national list of UNEs.¹⁰ Although state commissions can order additional unbundling so long as the UNE meets the "necessary" and "impair" test,¹¹ the *UNE Remand Order* provides they cannot remove UNEs from the FCC's list.¹² The FCC stated that allowing states to remove UNEs from the national list would not be consistent with the goals of the Act and would undermine the FCC's unbundling analysis. The FCC stated:

Specifically, in this proceeding, we have examined each network element identified previously by the Commission or by the parties, and we have made an affirmative finding as to whether or not the particular element now satisfies the unbundling standards of the Act as clarified by the Supreme Court. Moreover, we have considered how unbundling these elements will affect the development of competition in the local markets as contemplated by Congress, and whether unbundling particular elements will further the goals of the Act.¹³

The FCC determined that allowing states to modify the national list of UNEs by removing elements would disrupt certainty and predictability in the telecommunications market. The same rationale applies to state commission "redefinition" of the FCC-defined call-related database UNE: the FCC has conducted the requisite unbundling analysis and determined that access to call-related databases on a "per query" basis through the STP is necessary for competition. Any state-specific modification of that UNE will disrupt the certainty and predictability a national list of UNEs was intended to foster.

¹⁰ *UNE Remand Order* ¶¶ 148, 151.

¹¹ *Id.* ¶¶ 153, 155.

¹² *Id.* ¶¶ 157, 158.

¹³ *Id.* ¶ 157.

WCom was clear that to be of any use to it, bulk access to calling-name databases would need to be provided on a *national* level.¹⁴ Indeed, WCom admitted that to be useful for competitive purposes, it must "have access to the underlying data in all parts of the country."¹⁵ WCom acknowledged that even if the Arizona Commission ordered "bulk" access in Arizona, that access would not permit WCom to offer the "innovative" services to which it alluded: "We can't just have one piece here and one piece there because that causes an issue for [WCom] with respect to how [WCom] go[es] about displaying that information within the time frame that's required in order to meet the parameter between the first and second ring cycle."¹⁶ This Commission, however, cannot grant the nationwide access WCom seeks. In this regard, it is critical to note that the *FCC*, which has the authority to establish a "national" list of UNEs and requirements, is currently conducting the three-year review of its national UNE list that it had anticipated in the *UNE Remand Order*.¹⁷ Thus, the FCC now is considering the very issue of modifications to its national list of UNEs and what modifications are (or are not) necessary under the Act. To the extent WCom or any other carrier believes the FCC should modify access to call-related databases, the FCC has opened a docket to entertain precisely that type of question. This Commission should not step in to redefine the FCC's rules when what WCom seeks is what only the FCC can grant, *and* the FCC is in the process of reviewing its list of UNEs itself.

¹⁴ 1/10/02 Tr. at 15-16; *id.* at 50.

¹⁵ *Id.* at 15.

¹⁶ *Id.* at 15-16.

¹⁷ Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, FCC 01-361 (rel. Dec. 20, 2001).

B. The FCC Has Already Determined That "Per Query" Access To ICNAM Is Not Discriminatory.

WCom claimed at the remand workshop that access to ICNAM on a "per query" basis is "discriminatory" access. The FCC, however, has already conclusively determined that access to calling-name databases through the signaling network on a query-response basis is nondiscriminatory:

we require incumbent LECs, upon request, to provide *nondiscriminatory access* to their call-related databases on an unbundled basis, *for the purpose of switch query and database response through the SS7 network.*"¹⁸

Thus, this issue has already been decided against WCom. Indeed, the FCC stated the opposite: CLECs can self-provision calling-name databases or use alternative providers' calling-name databases without diminishing their ability to offer service.¹⁹

Regardless, Qwest does not enjoy superior access. As Qwest explained at the hearing, Qwest itself must launch queries to the ICNAM database for each call that requires retrieval of calling-name information.²⁰ As Ms. Bumgarner testified:

Mr. Lehmkuhl: How else do you get to the database? You have to be able to access. Doesn't 251 say you have to provide nondiscriminatory access to the UNE?

Ms. Bumgarner: And the nondiscriminatory access, we provide access to the database in exactly the same manner that we access that database, and that's through the STP on a query-response basis. When we provide a service to our end user customers and calling name is a terminating service, we provide that on a query-response basis. That if the end user is

¹⁸ *UNE Remand Order* ¶ 402 (emphasis added).

¹⁹ *UNE Remand Order* ¶ 415.

²⁰ 1/10/02 Tr. at 46.

paying for Caller ID and calling name service, we launch a call to [the] calling name database.²¹

Thus, Qwest does not enjoy superior access. Furthermore, industry standard groups have defined access to calling-name databases through the signaling network on a query-response basis.²² Thus, WCom's claim is not only inconsistent with the law, it is inconsistent with the facts and industry standards.

WCom suggests that it is discriminated against because it cannot store ICNAM data obtained from Qwest in its own database. Qwest, however, provided a solid explanation for this restriction. Qwest's ICNAM database includes the records of *other carriers*. Furthermore, as discussed in Section D, there is no privacy indicator that would be stored with that calling-name information for end users with non-published and non-listed numbers.²³

WCom appears to contend that because Qwest must provide access to its calling-name database "as a UNE," it must turn over that UNE to the CLEC. Neither the Act nor FCC orders contain any such obligation. Rather, under the terms of Section 251(c)(3), Qwest has the "duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, *nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory . . .*" Qwest is not required to replicate UNEs for CLECs. To the extent a CLEC wants access to Qwest's ICNAM, that access is provided, per FCC rules, "by means of physical access at the signaling transfer point linked to the unbundled databases."²⁴

²¹ *Id.* at 48.

²² *Id.* at 52 (discussing that Bellcore, ATIS, ANSI, and ITI standards provide the calling name delivery parameter on a query-response basis).

²³ *Id.* at 88-89.

²⁴ 47 C.F.R. § 51.319(e)(2)(A).

**C. WCom Presented No Real Evidence Of New Products Or New Services
"Bulk" Access Would Permit It To Provide That It Cannot Already Provide.**

The only so-called "innovative" service that WCom identified that it would provide if the Commission granted its request was a "unique ring" for certain names.²⁵ When questioned on the specifics of other services, WCom stated that it did not have to provide Qwest that information, and that it did not know the specifics of any other service it would offer if the Commission were to grant its request.²⁶ Thus, WCom has not identified specific telecommunications services that it will offer end users through this download of the calling-name database.

With respect to the only specific example WCom provided (the distinctive ring), the ICNAM is not the only means to provide this service. Indeed, it is not even necessary since this "service" could be (and probably would be) provided based upon the calling party's telephone number. A carrier need not know the calling party's *name* to create a distinctive ring for that caller's telephone number. Thus, if this is the service WCom seeks to provide, it can do that today through the messages sent across the SS7 signaling network without even launching a query to the ICNAM database.

WCom stated that if it were given a copy of the database, it could combine information in the database with "other elements" to offer some unspecified new services. However, Qwest demonstrated that it can do that today by dipping into Qwest's database, obtaining information, and combining it with other information the CLEC has or has created in its own databases.²⁷

Moreover, Qwest's directory assistance list ("DAL") and subscriber list information already give CLECs the customer name and telephone information WCom seeks through

²⁵ 1/10/02 Tr. at 16.

²⁶ *Id.* at 39.

²⁷ *Id.* at 69.

ICNAM. Under SGAT § 10.6., CLECs have access to Qwest's directory assistance list information. As defined in Section 10.6.1.1, directory assistance list information "consists of name, address and telephone number information for all end users of Qwest and other LECs that are contained in Qwest's Directory Assistance Database and, where available, related elements required in the provision of Directory Assistance Service to CLEC's end users." Under SGAT § 10.6, CLECs can obtain a download of Qwest's directory assistance list database and use it for any lawful purposes.²⁸ This directory list information includes indicators for numbers that are non-listed and non-published, and non-published telephone numbers are not included.²⁹ With DAL, which CLECs get already, non-listed and non-published number indicators are in place, and provide CLECs the information WCom seeks.

D. Bulk Access Presents Important Customer and Carrier Confidentiality Issues.

There are customer and CLEC privacy issues associated with WCom's request for a download of Qwest's ICNAM database. Under Rule 51.319(e)(2)(E),³⁰ incumbent LECs are required to provide CLECs access to call-related databases in a manner that complies with 47 U.S.C. § 222, the statutory provisions regarding customer proprietary network information. As Qwest demonstrated, access on a query-response basis provides protection of end user customer and carrier information that is in Qwest's database.³¹ Providing a *copy* of the database, however, raises potential privacy issues. With respect to end users, the ICNAM database includes non-

²⁸ See SGAT § 10.6.2.1.

²⁹ See, e.g., SGAT § 10.6.1.1 ("In the case of end users who have non-published listings, Qwest shall provide the end user's local numbering plan area (NPA), address, and an indicator to identify the non-published status of the listing to CLEC; however, Qwest will not provide the non-published telephone number.")

³⁰ 47 C.F.R. § 51.319(e)(2)(E).

³¹ 1/10/02 Tr. at 64.

published and non-listed end user information.³² This is information, however, protected from disclosure against the wishes of end users.³³ With respect to other carriers, there are also potential proprietary information issues. As Qwest demonstrated, Qwest's ICNAM database includes the customer records of CLECs and other carriers that have chosen to store their records in Qwest's database. Thus, by requiring Qwest to turn over a copy of its database, WCom would have total access to all records of these other carriers.³⁴

As discussed above, DAL provides CLECs calling name and telephone number information. However, this information includes indicators for numbers that are non-listed and non-published. Qwest has confirmed, however, that the ICNAM database privacy indicator only indicates that a customer does not want their name forwarded as part of a caller ID service; it does not indicate if the number is non-listed or non-published. Thus, by turning over a copy of the database, WCom and other CLECs would be acquiring that information without the privacy indicators that protects customer proprietary information.

Because the FCC has never required incumbents to provide downloads of their calling-name databases, the rules for protection of this proprietary information have not been established. By providing "per query" access, however, these proprietary issues are eliminated.

E. The Record Fails To Establish That "Bulk Access" Meets The "Necessary" and "Impair" Test in Rule 317.

As discussed above, the FCC does permit state commissions to add to the list of UNEs that incumbent LECs must provide. However, the FCC requires that before ordering additional

³² *Id.* at 64-65.

³³ *Id.* at 65-66.

³⁴ *Id.* at 68.

unbundling, state commissions must conduct a rigorous analysis under 47 C.F.R. § 51.317.³⁵ Rule 317 provides a detailed test for both "proprietary" and "non-proprietary" network elements. WCom failed to support unbundling under either test. For sake of argument only, using the less stringent analysis for "non-proprietary" network elements, the FCC still requires state commissions to conduct a detailed examination whether competing carriers will be "impaired" if the unbundling is not granted. For example, the state commission must determine "whether lack of access to a non-proprietary network element 'impairs' a carrier's ability to provide the service it seeks to offer."³⁶ Under Rule 317, a requesting carrier's ability to compete is "impaired" if, "taking into consideration the availability of alternative elements outside the incumbent LEC's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element materially diminishes a requesting carrier's ability to provide the services it seeks to offer."³⁷ The state commission is required to consider the "totality of the circumstances" to determine if alternatives are available to unbundling.³⁸ The test also requires state commissions to determine whether the "lack of access to a network element materially diminishes a requesting carrier's ability to provide service."³⁹ In making the analysis of whether practical, economical, and operational alternatives to unbundling exist, the state commission is required to consider five factors: (a) cost; (b) timeliness; (c) quality; (d) ubiquity; and (e) impact on network operations.

³⁵ 47 C.F.R. § 51.317(d) ("A state commission must comply with the standards set forth in this § 51.317 when considering whether to require the unbundling of additional network elements").

³⁶ *Id.* § 51.317(b)(1).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* § 51.317(b)(2).

WCom failed to provide sufficient evidence to support a showing that its ability to provide service would be "impaired" were it denied the "bulk" download of ICNAM it seeks. For example, WCom failed to establish that it cannot self-provision the calling-name database it seeks. Qwest demonstrated that WCom could construct a calling-name database from directory assistance and subscriber list information currently available and that other providers have done so.⁴⁰ WCom also failed to demonstrate the absence of alternative providers. Qwest, on the other hand, affirmatively established that the calling name database market is competitive, with several providers offering such storage service.⁴¹ Like these alternative providers, WCom could create its own database and offer service, or contract with these database providers to obtain calling name information from them. Only two Arizona CLECs have chosen to store their records with Qwest.

With respect to cost, WCom's evidence was also insufficient. First, it is important to note that the FCC previously determined that there are no cost impediments to CLECs self-provisioning access to calling-name databases. In the *UNE Remand Order*, CLECs claimed that it would be costly for them to replicate the incumbent LEC's calling-related databases or obtain access to call-related databases from third parties. The FCC rejected those arguments out of hand: "Based on the record before us, we find that the cost incurred by requesting carriers to self-provision or use alternative databases does not appear to materially diminish the carrier's ability to provide the services it seeks to offer."⁴² At the workshop, WCom could not establish that there would be *any* cost difference if Qwest were required to provide a copy of its ICNAM database. As Qwest demonstrated, WCom can receive access on a "per dip" basis at TELRIC

⁴⁰ 1/10/02 Tr. at 65, 68-69.

⁴¹ *Id.* at 58-60, 61-62, 69.

⁴² *UNE Remand Order* ¶ 415.

rates.⁴³ If it were to obtain the bulk access it seeks, WCom would need, at a minimum, to construct its own database to hold that data, a cost that it acknowledged was "not insignificant."⁴⁴ That construction would also not reflect TELRIC rates. In addition to constructing its own database, WCom would also need to pay for the copy of the database information as well as for all continuing updates to that database. It did not present any evidence that these costs would be lower than dipping into Qwest's database. WCom would also still need to dip its own database, and it did not present facts that this cost would be lower than dipping Qwest's database.⁴⁵ Furthermore, WCom failed to establish that it would avoid the costs of establishing signaling bridge or "B" links were it given a download of Qwest's ICNAM database: whether WCom has its own database or accesses Qwest's database, it must still have B links between its STP and its calling-name database.⁴⁶ Since WCom currently does not have such a database itself, it would have to establish those links at its own expense. Moreover, WCom must still retain its signaling links with Qwest to handle exchange of routine voice traffic.⁴⁷ Thus, there are no cost savings.

Furthermore, WCom would not avoid any time delays. There is no single database that contains all carriers calling-name information. Rather, carriers store their information in their own databases or those of third-party database providers. Obtaining the calling name information of Qwest and two other Arizona carriers does not eliminate the need to launch queries for all other service providers' customer name information. As discussed at the remand workshop, Qwest has to launch queries to other carriers or providers and has entered into twelve

⁴³ 1/10/02 Tr. at 113.

⁴⁴ *Id.* at 110.

⁴⁵ *Id.* at 111-12.

⁴⁶ *Id.* at 71-73.

⁴⁷ *Id.* at 74.

agreements with other database providers to permit it to do so.⁴⁸ For all other CLECs and independent telephone companies in Arizona, WCom would still need to launch a query to another database to obtain calling-name information for these carriers' customers.

WCom admitted that it had done no cost comparison whatsoever between the TELRIC-priced access it now has available and the anticipated costs of the bulk download it requests.⁴⁹ Indeed, it cavalierly stated that it need not provide this Commission with that information because the cost-savings were supposedly "self-evident."⁵⁰ As the workshop moderator noted, they are not.⁵¹ Also, as Qwest pointed out, whether WCom dips into its own database or dips into Qwest's at TELRIC, it still must perform database dips, which carry with them a cost.⁵² WCom failed to present any evidence of the cost saving that it would supposedly obtain through bulk access by performing dips into its own database as opposed to dipping into Qwest's database at TELRIC rates. As it relates to any public interest concerns, WCom also failed to present any evidence of cost savings that will inure to Arizona consumers as a result of its demand.

WCom also failed to present evidence to support the remaining "impairment" issues. It is difficult to fathom how WCom could do so, since it already has the ability to dip into Qwest's ICNAM database for calling-name information. Nevertheless, WCom did not present any evidence that absence of access to a copy of Qwest's ICNAM would delay its entry into the local exchange or exchange access market.⁵³ It also did not present any studies comparing the time it

⁴⁸ *Id.* at 52-53.

⁴⁹ *Id.* at 109-110.

⁵⁰ *Id.* at 110.

⁵¹ *Id.* at 110.

⁵² *Id.* at 111-12.

⁵³ See *UNE Remand Order* ¶ 462 (analyzing "timeliness" in terms of whether denial of access will delay CLEC entry into the local exchange and exchange access markets).

would take to dip into its own database versus the time it takes to dip into Qwest's ICNAM database.⁵⁴ WCom also did not establish that a bulk download of Qwest's ICNAM would permit WCom to provide calling-name service any more ubiquitously than it can already through the current means of per-query access. In fact, WCom acknowledged that without nationwide coverage, bulk access to ICNAM in Arizona alone does not meet its needs.⁵⁵

WCom relies heavily on a Michigan Commission decision that granted its request for bulk access to Ameritech's calling name database.⁵⁶ This decision, however, is cold comfort in Arizona. The discussion of this issue in the March 2001 Michigan Commission's decision is cursory at best. The Commission devotes four sentences to the issue and grants WCom's request with virtually no analysis. Certainly, the Michigan Commission did not discuss the cost issues, alternative sources for this information, and the possible proprietary information issues that Qwest has raised. WCom's excerpt of deliberations from the Tennessee Regulatory Authority⁵⁷ is also unhelpful, as the discussion is extremely abbreviated and does not discuss the evidence and arguments presented by the parties. The December 2001 Michigan decision⁵⁸ does not add any insight into the Michigan Commission's decision to order the download of the database; rather, it simply orders Ameritech to revise its tariff in conformance with the original decision. WCom has not provided the final approved tariff language, so it is difficult to draw any conclusions from this opinion.

⁵⁴ Qwest established that the SS7 network and calling name delivery service, including the time for providing a query response are industry standards. WCom and its vendors use the same SS7 protocols and standards. 1/10/02 Tr. at 52.

⁵⁵ 1/10/02 Tr. at 15-16.

⁵⁶ Exhibit WCom 7-1.

⁵⁷ Exhibit WCom 7-3.

⁵⁸ Exhibit WCom 7-2.

Regarding the Georgia Commission decisions,⁵⁹ they do not support WCom's position. In its February 2001 decision, the Georgia Commission erroneously ordered BellSouth to provide WCom with downloads of its calling-name database.⁶⁰ The Georgia Commission's original decision rested heavily on its view that it is "technically feasible" to provide the database download. As discussed above, the Supreme Court held that "technical feasibility" does not determine the elements incumbent LECs must unbundle; rather, it applies only to *where* access must be provided. Furthermore, as demonstrated above, per dip access is not discriminatory: it is the means of access identified by the industry and FCC, and it is how Qwest accesses its own database. Indeed, even if WCom creates its own database from Qwest's ICNAM, it must still dip into that database for every calling record stored in that database and will need to dip into the databases of other providers or carriers that do not store their data in Qwest's ICNAM for their calling-name data.

Nevertheless, in its September 2001 decision, the Georgia Commission held that BellSouth must only provide access to its CNAM database on a "per query" basis.⁶¹ BellSouth, like Qwest, stated that its CNAM database currently holds the records of other carriers.⁶² BellSouth also stated that its agreements with these carriers had confidentiality provisions.⁶³ Based upon these facts, the Commission stated that BellSouth need only provide access on a "per query" basis at this time.⁶⁴ Furthermore, the Georgia Commission imposed other restrictions on

⁵⁹ Exhibit WCom 7-5 and 7-6.

⁶⁰ Exhibit WCom 7-5.

⁶¹ Exhibit WCom 7-6.

⁶² *Id.* at 2-3.

⁶³ Qwest's contracts, on the other hand, contemplate that the database will be dipped, not downloaded.

⁶⁴ *Id.* at 3.

WCom's use of the CNAM database such as, for example, requiring WCom to assume the costs BellSouth incurred to remove data relating to other states and requiring WCom to use the information solely to provide the caller identification name to the WCom end user.

In contrast to the decisions WCom has cited, eleven state commissions in Qwest's region that have addressed the identical request WCom makes here have recommended *rejection* of WCom's position.⁶⁵ Beyond these eleven decisions, other state commissions outside Qwest's region have rejected WCom's arguments. For example, WCom recently lost this identical issue in California. There, the arbitrator found that PacBell's claims that FCC rules already defined the call-related database UNE as access on a query response basis. It also found that WCom's request presented significant privacy issues:

A review of the rules promulgated by the FCC in its UNE Remand Order supports Pacific's assertions. Section 51.319(e)(2) relates to call-related databases. Subsection (A) of that part reads as follows:

For purposes of switch query and database response through a signaling network, an incumbent LEC shall provide access to its call-related databases, including but not limited to, the Calling Name Database, 911 Database, E911 Database, Line Information Database, Toll Free Calling Database, Advanced Intelligent Network Databases, and downstream number portability databases *by means of physical access at the signaling transfer point linked to the unbundled databases.* (Emphasis added.)

In other words, the FCC defined this particular UNE narrowly to include access to databases at the STP. MCIIm [MCImetro Access Transmission Services] is correct that Section 251(c)(3) of TA96 [Telecommunications Act of 1996] states unequivocally that Pacific may not restrict MCIIm's use of a UNE to provide a telecommunications service. **However, the FCC has defined this particular UNE to be limited to access at the STP, which would not include downloading of the entire database.** Further, the FCC expressed concern with privacy issues related to access these call-related databases. In Subsection (E) of its rules, the FCC states:

⁶⁵ See Exhibit Qwest 7-4.

An incumbent LEC shall provide a requesting telecommunications carrier with access to call-related databases in a manner that complies with section 222 of the Act.

Section 222 relates to the privacy of customer information. **The language the FCC placed in Subsection (E) above shows the FCC's intent that access to information be granted in a way that protects customers' privacy. In order to protect customers' privacy, a carrier should not be permitted to save any information obtained from routine database queries.** Therefore, Pacific's position on the downloading of call-related databases for MCI is adopted.⁶⁶

The Florida Commission also rejected WCom's claims. The Florida Commission held that WCom's demand for a copy or download of the CNAM database failed to distinguish between "access to the CNAM database," which BellSouth (and Qwest) provide and the FCC rules require, and "actual physical possession of the database."⁶⁷ The Florida Commission rejected WCom's analogy between providing directory assistance list information in a download form and the entirely different demand for a download of the calling-name database. "The FCC in the UNE Remand Order, FCC 99-238, clearly delineates an incumbent's obligations for sharing Directory Assistance databases, which must be physically transferred on request, and CNAM databases, for which access must be provided only on an unbundled basis."⁶⁸ The Florida Commission also rejected WCom's discrimination claims, finding that WCom failed to

⁶⁶ *Application by Pacific Bell Telephone Company (U 1001 C) for Arbitration of an Interconnection Agreement with MCI Metro Access Transmission Services, L.L.C. (U 5253 C) Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Application No. 01-01-010, Final Arbitrator's Report, at 59-60 (July 16, 2001) (italicized text was emphasized in the original; bold text is emphasis added). A copy of this decision is attached to this brief as Attachment 1 for the convenience of Staff and the Commission.

⁶⁷ *In re: Petition by MCI Metro Access Transmission Services LLC and MCI WorldCom Communications, Inc. for Arbitration of Certain Terms and Conditions of a Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996*, Docket No. 000649-TP; Order No. PSC-01-0824-FOF-TP, Final Order on Arbitration, 2001 Fla. PUC LEXIS 505, at *97 (Mar. 30, 2001), *recon. denied*, 2001 Fla. PUC LEXIS 1007 (Aug. 31, 2001).

⁶⁸ *Id.* at *99.

establish that access to the CNAM database is insufficient to permit WCom to achieve the same efficiencies as BellSouth.⁶⁹

This Commission should follow the majority of state commissions and reject WCom's request for a download of the ICNAM database.

F. Qwest's Obligations Under Section 271 Are Measured By Existing and Settled FCC Rules.

To determine whether Qwest provides access to ICNAM consistent with checklist item 10, the FCC has been clear that the Commission should examine Qwest's compliance with *existing* FCC rules.⁷⁰

Section 271 conditions authorization to enter the long-distance market on a BOC's compliance with the terms of the competitive checklist, and those terms generally incorporate by reference the core local competition obligations that sections 251 and 252 impose on all incumbent LECs. In a variety of proceedings since 1996, this Commission has discharged its statutory authority to issue comprehensive rules and orders giving specific content to those obligations, often in considerable detail. *In determining whether a BOC applicant has met the local competition prerequisites for entry into the long-distance market, therefore, we evaluate its compliance with our rules and orders in effect at the time the application was filed.*⁷¹

The FCC recognized that during the 271 process, disputes may arise regarding the precise meaning of its rules and an incumbent LEC's obligations. However, the 271 process was not designed as forum for CLECs to raise these novel, interpretative disputes. The FCC stated:

Despite the comprehensiveness of our local competition rules, there will inevitably be, at any given point in time, a variety of new and unresolved

⁶⁹ *Id.* at *99-100.

⁷⁰ See Memorandum Opinion and Order, *Application of SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, FCC 00-238 at ¶¶ 22-26 (June 30, 2000) ("*SBC Texas Order*").

⁷¹ *Id.* ¶ 22 (emphasis added).

interpretive disputes about the precise content of an incumbent LEC's obligations to its competitors, disputes that our rules have not yet addressed and that do not involve per se violations of self-executing requirements of the Act. Several commenters seek to use this section 271 proceeding as a forum for the mandatory resolution of many such local competition disputes, including disputes on issues of general application that are more appropriately the subjects of industry-wide notice-and-comment rulemaking. Indeed, those commenters would apparently compel this Commission to resolve those disputes in this proceeding, and to resolve each one in favor of [Southwestern Bell Telephone], as a precondition to determining that [Southwestern Bell Telephone] has met the statutory obligations of section 271.

The position of those commenters is irreconcilable with this statutory scheme. There may be other kinds of statutory proceedings, such as certain complaint proceedings, in which we may bear an obligation to resolve particular interpretive disputes raised by a carrier as the basis for its complaint. But the section 271 process simply could not function as Congress intended if we were generally required to resolve all such disputes as a precondition to granting a section 271 application.⁷²

The FCC noted that Congress intended Section 271 proceedings as "highly specialized" and "narrowly focused" proceedings that are "inappropriate forums for the considered resolution of industry-wide local competition questions of general applicability."⁷³

Moreover, Congress intended Section 271 authority to act as an incentive to BOCs to open their markets to competition. As the FCC reasoned, "that incentive presupposes a realistic hope of attaining section 271 authorization."⁷⁴ That "hope," the FCC concluded, "would largely vanish if a BOC's opponents could effectively doom any section 271 application by freighting their comments with novel interpretive disputes and demand that authorization be denied unless each one of those disputes is resolved in the BOC's favor."

⁷² *Id.* ¶¶ 23-24 (emphasis added; footnote omitted).

⁷³ *Id.* ¶ 25.

⁷⁴ *Id.* ¶ 26.

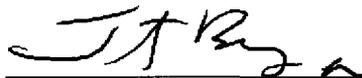
As set forth above, the FCC has not required incumbent LECs to provide a download of the calling-name database as a UNE. Instead, unambiguous FCC rules require incumbents to provide access to their calling-name databases through signaling transfer points. WCom's request for a copy of ICNAM is precisely the type of "novel dispute" the FCC found inappropriate for a Section 271 proceeding. There is currently a forum available for WCom to raise this issue: the FCC triennial review of its unbundling rules. WCom should bring its claims there.

CONCLUSION

Qwest established that it provides access to its calling-name database in accordance with FCC rules. Qwest further established that customer name and telephone number information is available from Qwest through other means already. It also established that bulk download of ICNAM is not required to provide any "innovative" service and would raise serious customer and carrier privacy issues. Qwest also established that WCom would not be impaired in its ability to provide service without this new network element. Staff and the Commission should find that Qwest provides access to ICNAM consistent with FCC rules and deny WCom's demand for bulk access to the ICNAM database.

DATED: January 25, 2002

Respectfully submitted,



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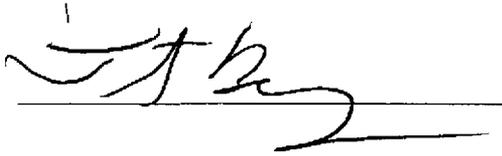
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A handwritten signature in black ink, appearing to read "S. Duffy", is written over a horizontal line.

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application by Pacific Bell Telephone Company (U 1001 C) for Arbitration of an Interconnection Agreement with MCImetro Access Transmission Services, L.L.C. (U 5253 C) Pursuant to Section 252(b) of the Telecommunications Act of 1996.

Application 01-01-010
(Filed January 8, 2001)

FINAL ARBITRATOR'S REPORT

I. Background

On January 8, 2001, Pacific Bell Telephone Company (U 1001 C) (Pacific) filed an application for arbitration of an interconnection agreement (ICA) with MCImetro Access Transmission Services, L.L.C. (U 5253 C) (MCIIm) pursuant to Section 252(b) of the Telecommunications Act of 1996 (Act or TA96). Pacific's previous three-year ICA with MCIIm expired on February 3, 2000.

The parties had an enormous number of disputed issues. Due to this fact, the parties twice agreed to extend the window for arbitration. The last of those agreements provided that the notice to commence negotiations would be deemed to have been sent by MCIIm and received by Pacific on August 11, 2000. Consequently, pursuant to 252(b) of TA96, the window for petitioning the Commission to arbitrate unresolved issues commenced on December 14, 2000 and remained open through January 8, 2001. The petition for arbitration is therefore timely.

On February 2, 2001, MCI¹ filed its Response to Pacific's application. In its Response, MCI summarized its position on the issues previously raised by Pacific and also raised a number of additional contract issues in dispute. Parties ultimately identified 347 disputed issues to be decided, but subsequently settled 247. The arbitrator was left with 100 issues to decide.

An Initial Arbitration Meeting (IAM) was held on February 6, 2001 to discuss the schedule for the case and to address various procedural issues. Pacific was allowed to file additional direct testimony to address the new issues and new positions on issues raised in MCI's Response.

Arbitration hearings were held on March 12 - 15, 2001 and March 20 - 27, 2001. Concurrent briefs were filed and served on April 24, 2001. The Draft Arbitrator's Report (DAR) was filed on June 4, 2001, disposing of the contested issues as set forth below. Comments on the DAR were filed on June 14, 2001 by MCI and on June 20, 2001 by Pacific. The comments have been taken into account as appropriate in finalizing the Arbitrator's Report, as set forth herein. The Final Arbitrator's Report (FAR) was filed and served on July 16, 2001.

During negotiations, the parties discussed significant numbers of issues related to Digital Subscriber Loop (DSL) and Line Sharing. The parties agreed that most of those issues would not be addressed in this arbitration, but would be deferred to the Permanent Line Sharing Phase of the Open Access and Network Architecture Development (OANAD) proceeding. The most significant issues presented in this arbitration are:

- 1) Should MCI have unlimited access to all information stored in the Calling Name (CNAM) and Line Information Data Base (LIDB) databases?¹

¹ Issues LIDB-3, LIDB-7, UNE-5, UNE-106, and Price-44.

- 2) Do Directory Assistance (DA) and Operator Services (OS) constitute UNEs?²
- 3) Should Pacific be required to combine Unbundled Network Elements (UNEs) for MCIIm?³
- 4) Should MCIIm be permitted to purchase Pacific's services at wholesale and then sell those services to a third party, for subsequent resale?⁴
- 5) What are the appropriate terms and conditions for Pacific to provide dark fiber to MCIIm?⁵

In the following discussion, the issues are organized in the same structure as in the ICA.

Parties shall file an ICA that conforms to the arbitrated decisions herein within 30 days of the filing of the FAR, along with a statement of whether the Agreement should be adopted or rejected by the Commission.

II. Disputed Issues

A. General Terms and Conditions (GT&C)

Issue GT&C - 1

- (a) **Should deposit language be included in the ICA?**
- (b) **Should the definition of Local Service Provider (LSP) be included in the contract?**

Pacific's Position

- (a) Pacific asserts that deposit language is necessary to minimize risk and exposure to Pacific against collection efforts due to non-payment of bills, and the very lengthy, and often unsuccessful,

² Issues DA-7, OS-1, UNE-31, UNE-33, Price-22, Price-25, Price-26, and Price-31.

³ Issues UNE-1, UNE-3, UNE-72, and UNE-81.

⁴ Issues DEF-3, RES-2, and ALL-1.

⁵ Issues Price-17, UNE-55, UNE-56, UNE-57, UNE-59, UNE-60, UNE-61, UNE-62, and UNE-64.

recovery through bankruptcies. A deposit is required only if the CLEC has not met the criteria identified. Requiring deposits is a standard business operating practice for Pacific. Pacific collects deposits from CLEC customers as well as its own end users.

This provision is necessary to protect Pacific in the event this agreement is adopted by other CLECs pursuant to § 252(i).⁶

Pacific states that AT&T opposed deposit language on this same ground in the Pacific/AT&T arbitration. Nevertheless, Pacific's deposit language was approved in the AT&T arbitration and Pacific believes it should be approved here.

- (b) Pacific states that if deposit language is included in the ICA, then the definition of LSP used in Section 3.2 should be included.

MCIIm's Position

- (a) MCIIm finds Pacific's proposed deposit requirements to be unreasonable in light of the parties' ongoing commercial relationship. While MCIIm understands Pacific's need to protect itself against non-payment from new or small CLECs, MCIIm has a long history of transactions with Pacific and is part of a Fortune 100 company. As has been MCIIm's practice, MCIIm will fulfill its payment obligations to Pacific and therefore should not be required to provide Pacific with a deposit. The parties have been doing business under a previous ICA in California for four years without the need for a deposit requirement.

⁶ Section 252(i) of TA96 requires an ILEC "to make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." In other words, a CLEC may "opt-in" or "MFN" [Most Favored Nation] into an entire agreement or into a provision in another carrier's agreement.

In fact, during the term of that previous agreement, MCIIm has no history of making late payments.

MCI proposes as an alternative that the Commission add language to the ICA that indicates that if certain affiliates of MCIIm were to opt in to the agreement pursuant to Section 252(i), no deposit would be required. However, if the ICA is adopted by other CLECs, the deposit requirements would apply.

- (b) MCIIm states it does not object to the definition but says it is unnecessary because the deposit language should be deleted.

Discussion:

- (a) Pacific's proposed language in § 3 is adopted. While the current ICA between the parties does not contain a deposit section, other CLECs could MFN into this agreement. Therefore it would be prudent to add such a provision to protect Pacific's financial interests. MCIIm indicates that it has "no history of making late payments." As long as MCIIm timely pays its bills, it will not have to pay a deposit and thus will not be harmed by the deposit rules. If MCIIm does not timely pay its bills, it will be required to pay a deposit, which is appropriate for MCIIm or for any CLEC that MFNs into the ICA. The deposit rules should apply to MCIIm's affiliates as well. As long as they timely pay their bills, no deposit would be required.

In its comments on the DAR, MCIIm asserts that Pacific's proposed language is *blatantly discriminatory because it is not reciprocal*. Pacific's language presumes that only MCIIm will pay deposits and ignores the fact that Pacific also makes payments to MCIIm under the terms of the ICA. MCIIm finds this to be problematic given the fact

that although MCIIm has no history of making late payments under the terms of its previous ICA, Pacific has repeatedly failed to make payments on a timely basis (if at all) as required under the terms of the previous ICA.⁷ MCIIm raises a valid point. To the extent that Pacific makes payments to MCIIm under the terms of the ICA, the deposit rules should apply. However, the language Pacific proposes is geared for deposits paid on Resale and Network Elements furnished under the ICA, which are services Pacific provides to MCIIm. The parties are directed to develop reciprocal deposit language which would be appropriate for Pacific and include that provision in their conformed ICA. To the extent parties cannot agree on the specific language to use, they should indicate any areas of disagreement in the conformed agreement and ask the Commission to rule on any disputed provisions in its decision approving the ICA.

- (b) Pacific's proposed definition for Local Service Provider shall be included in the ICA since Pacific's section on Deposits was adopted. The Deposit section uses the term "Local Service Provider" so the ICA should define exactly what that means.

Issue GT&C - 3 and PRICE - 32

Are Pacific's charges for NXX Migration reasonable?

Pacific's Position

⁷ MCIIm cites to Decision 00-04-034, finding that Pacific failed to make reciprocal compensation payments to a subsidiary of WorldCom for more than two years.

According to Pacific, each time a CLEC requests the migration of an NXX, certain activities are required to remove the NXX from Pacific's network and to reroute the NXX to the Competitive Local Exchange Carrier (CLEC)'s switch. These activities include project coordination, changing translations in end offices, tandems and Signaling Transfer Points (STP)s, and changes in several systems and service centers. Pacific only incurs these costs because a CLEC requests the migration of an NXX. As the cost-causers, CLECs should be required to pay for these costs.

MCIIm's Position

MCIIm asserts that the price for NXX migrations should be absorbed by all carriers as a cost of doing business. NXX migrations are an alternative means of porting numbers and the costs should likewise be treated in a competitively neutral manner as required by the FCC.

MCIIm also states that this Commission has already rejected Pacific's proposed NXX migration charge in the MFS WorldCom (MFSW)/Pacific arbitration. In the Final Arbitrator's Report (FAR) in A.99-03-047, the Arbitrator ruled that:

Although some level of costs can be expected to result from implementing the migration of an NXX code, each carrier should bear its own cost responsibility for this function as it does for the opening of an NXX code by other carriers. (FAR at 101.)

Discussion

MCIIm's position is adopted. Pacific's proposed language should be deleted from § 9.7 and the rate for NXX migrations should be deleted from the Pricing Appendix. The cost of NXX migrations should be absorbed by all carriers, in the same manner as opening an NXX code by other carriers. This is consistent with the Commission's outcome in the MFSW/Pacific arbitration.

Issue GT&C - 5

Should Pacific's or MCI's language regarding the effective date, term and termination of the ICA be adopted? This issue raises the following sub-issues:

- (a) Should a 3 year ICA term with a 1 year re-negotiation option be adopted?**
- (b) Should the ICA become effective upon approval by the CPUC or 10 days thereafter?**

Pacific's Position

- (a) Pacific proposes a term of 3 years with the right to seek negotiations after one year. This right would be reciprocal. A three-year term with the option to notice the agreement for renegotiation after 1 year is imperative based upon the fast-changing telecommunications market and ever-changing regulatory requirements. The FCC's Local Competition Order requires Pacific to make the agreement available for a reasonable period of time. A three-year agreement with a one year renegotiation option is not only reasonable but appropriate in the existing environment.
- (b) Pacific states that the parties will need a reasonable window of time in which to implement the new requirements that will be ordered in this arbitration. Billing and administrative changes likely will have to be implemented. An effective date of 10 days after Commission approval will allow for a smoother transition.

MCI's Position

- (a) MCI asserts the Commission should adopt MCI's proposed language for a definite three-year term for the ICA. The standard term

of an ICA is 3 years. In any case, the parties are always free to amend the agreement to reflect changing business needs and are obligated to negotiate in good faith to reflect changes in law. (See GT&C Section 29.18.)

- (b) MCIIm states that the Commission should reject Pacific's language that the ICA become effective 10 days after the Commission approves it. Such language is in conflict with agreed-to language in the preamble of the GT&C and would create an ambiguity. Moreover, given the procedure for adoption of a final arbitrated ICA, Pacific should have more than adequate time to implement most, if not all, required changes. If it has difficulty with one or more required changes, it can seek an extension of time to implement specific changes. If the Commission were to adopt Pacific's proposed language for Section 22, it would create a conflict as to the effective date of the contract.

Discussion

- (a) MCIIm's position is adopted. As MCIIm states, parties are free to amend the agreement to reflect changing business needs. Also, any changes in the law – which would include Commission or FCC orders or decisions of the courts – are covered by the Intervening Law section of the GT&C so that should not be grounds for renegotiation of the entire agreement. Negotiation of a new ICA is a lengthy and costly undertaking for the carriers involved, and a three-year cycle for ICAs is reasonable.
- (b) As MCIIm states, Pacific's proposal to make the ICA effective 10 days following approval by the Commission is at odds with the language in the Preface (which was not disputed by the parties). However, in its decisions approving ICAs, the Commission routinely orders the

parties to file the approved ICA within five days of the date of its order, and the date of Commission approval is deemed to be the date the signed ICA is filed. The effective date should be the date of Commission approval, which is the date the final conformed signed ICA is filed with the Commission. The language in the Preface and in Section 22.1 shall be changed to reflect the Commission's policy.

Issue GT&C - 8

- (a) Is it reasonable for Pacific to charge MCIIm for changes associated with assignment?**
- (b) Is Pacific's proposal for selling or assigning its assets reasonable?**

Pacific's Position

- (a) Pacific asserts it should be compensated for any costs that it incurs as a result of MCIIm's assignment of the ICA. MCIIm may assign this agreement to a third party or an affiliate and will require a change in Official Company Name "OCN" in all of Pacific's systems. Pacific does not wish to interfere with MCIIm's right to assign this ICA. However, Pacific believes that it is fair for MCIIm to reimburse Pacific's reasonable costs for accommodating MCIIm's assignment.
- (b) Pacific believes that MCIIm should not be able to restrict Pacific's ability to sell or assign local service exchanges, particularly when such sales are subject to Commission rules and procedures. The Commission's rules amply protect MCIIm against perceived harmful effects of such a sale.

MCIIm's Position

- (a) MCIIm states that Pacific's proposed language is vague, and overly broad and would give Pacific the ability to unreasonably delay an assignment by MCIIm. Pacific's language would require that MCIIm

pay not only for OCN changes but also for “any change, modification or other activity” associated with an assignment. Pacific has not demonstrated that such costs are more than the normal costs of doing business that each party should bear. Further, Pacific’s language is unfair in that it is not reciprocal and would not allow MCIIm to recover costs associated with an assignment by Pacific.

- (b) MCIIm states that Pacific includes language that would allow Pacific to, in effect, terminate the ICA on ninety days’ notice if Pacific sells its business to a third party. MCIIm believes that it is reasonable that any successor in interest to Pacific be required to honor the terms and conditions of the ICA.

Discussion

- (a) MCIIm’s position is adopted. Pacific’s proposed Section 29.9.2 shall not be included in the ICA. Pacific’s proposed language is vague and open-ended, especially the provision that requires MCIIm to pay for “any change, modification or other activity” associated with such assignment. Pacific indicates that MCIIm changes “shall be subject to Section 4.9.” However, there is no Section 4.9 in the GT&C. In any event, it is appropriate that the costs of name changes be absorbed by each carrier as a cost of doing business.
- (b) MCIIm’s position is adopted, and Section 29.9.3 shall not be included in the ICA. It is reasonable to require a successor in interest to Pacific to honor the terms and conditions of the ICA. Ninety days is an inadequate amount of time for MCIIm to negotiate a new agreement with the successor

company, and termination of the agreement would cause unnecessary disruption in service to MCI's end-user customers.

Issue GT&C - 10

Which party's proposed Dispute Resolution procedure should be adopted?

Pacific's Position

Pacific indicates that its proposed dispute resolution language affords both parties a means by which to resolve any dispute without the need to file a complaint with the Commission every time a dispute arises. Dispute resolution, when used as set out in Pacific's proposal, affords the disputing party with a means for investigation, communication, and several alternatives to resolve a dispute if it cannot be resolved after the investigation stage. These procedures should reduce the number of complaints by giving the parties ample opportunity and methods for resolving issues themselves. Pacific's dispute resolution language includes an arbitration provision for specific types of disputes. By contrast, MCI's proposal would require all service-threatening disputes to be resolved before J.A.M.S./Endispute, an expensive dispute resolution organization.

MCI's Position

MCI asserts that its proposed dispute resolution language is more balanced, commercially reasonable and clearly drafted than Pacific's proposal. In addition, Pacific's proposed language overlaps with the billing disputes language contained in Section 29.12 of the GT&C appendix.

Discussion

Pacific's proposed language in Section 29.13 is adopted, with some modification. MCI's proposed language does not include a process for

informal resolution between the companies, which is the preferred solution. The MCIIm language would have the parties bring all disputes to the Commission for resolution on an expedited basis, within 60 days of submission. The Commission has stated its preference that the ICAs it approves operate more like commercial agreements, and while the Commission is available to resolve disputes under ICAs, it does not want the obligation to resolve all such disputes, in an expedited timeframe, regardless of whether specific circumstances warrant such speedy resolution.

Also, MCIIm's proposed language is not clear in some respects. It is not clear which disputes will be submitted to the Commission under Section 29.13.1 versus those which will be submitted for binding arbitration under Section 29.13.2. As Pacific mentions, the two cannot be sequential, since any complaint submitted to the Commission will be resolved and would not need to be submitted to binding arbitration. Section 29.13.2 also includes a provision that "Parties shall file the arbitrator's decision with the Commission." It is not clear why the decision should be filed with the Commission.

Pacific's proposed language provides a more balanced approach since the companies first engage in informal discussions to attempt to resolve the dispute. However, one aspect of Pacific's proposed dispute resolution process is troubling. Section 29.13.4.1 includes a provision that if MCIIm fails to provide certain information regarding billing disputes within 29 days of the bill due date, MCIIm will have waived its right to dispute the subject charges. Considering the potential complexity of the bills for local service, this is not an adequate amount of time. Pacific shall amend the section to allow MCIIm 90 days to provide information about a particular billing dispute.

MCIIm indicates that Pacific's language conflicts with Section 29.12. However, Pacific intentionally omitted Section 29.12, and only MCIIm is

proposing language for Section 29.12. Since the dispute resolution process adopted in Section 29.13 includes a process for settling billing disputes, MCI's proposed Section 29.12 should be eliminated from the ICA.

In its Comments on the DAR, MCI asks that two additional modifications be made to Pacific's proposed dispute resolution language in Section 29.13. MCI asks that Pacific's proposed Section 29.13.1.1 be deleted from the ICA. The language limits to two years the time within which either party may bring a claim for any dispute arising from the ICA. According to MCI, such a provision is not ordinarily included in commercial agreements, since the time frames for bringing a claim are typically governed by statutory or common law. For example, the statute of limitation for claims arising out of a written contract in California is four years. I concur with MCI's assertion that Pacific has not justified limiting a party's right to bring claims to a time period different than otherwise permitted under state law. Section 29.13.1.1 shall be removed from the ICA. MCI also proposes that the Commission modify Pacific's proposed Section 29.13.1.2 to provide that billing disputes must be made within 24 months (rather than 12 months) of the bill due date. According to MCI, the 24-month limit is in keeping with the standard practice in the industry and is also a provision of the currently effective MCI/Pacific ICA. MCI's position is adopted. Section 29.13.1.2 shall be modified to allow parties 24 months to initiate billing disputes.

Issue GT&C - 11

Is it appropriate to incorporate by reference other documents, including tariffs, into the agreement instead of fully setting out those provisions in the Agreement?

Pacific's Position

Pacific objects to MCIIm's proposal to set forth all obligations of the parties in the ICA for ease of administration. To do so unnecessarily would encumber the ICA with information that is readily available in another form, such as handbooks and tariffs that are used by or affect the entire CLEC community. Moreover, tariff changes are publicly noticed and often the subject of open hearings in which all interested parties participate. In order to avoid discrimination, tariff changes must be binding on all affected carriers. As a result, Pacific's language proposes to incorporate these materials by reference. MCIIm's proposal to add all these items to the ICA should be rejected.

MCIIm's Position

MCIIm seeks certainty over the term of the ICA. Extraneous documents, including tariffs, may change over time. Therefore, any term or provision that affects the dealings of the parties should be included in the ICA itself. MCIIm asserts that if documents such as tariffs and CLEC handbooks are incorporated by reference into this ICA, Pacific will have the ability to unilaterally amend the terms and conditions of agreement, thereby depriving MCIIm of the benefit of its bargain.

Discussion

MCIIm's position is adopted, and Pacific's proposed language in Section 29.23 will not be included in the ICA. Pacific's language, which reads as follows, is much too open-ended:

The terms contained in this Agreement and any Schedules, Exhibits, Appendices, **tariffs and other documents or instruments referred to herein, which are incorporated into this Agreement by reference**, constitute the entire agreement between the Parties.... (Pacific's proposed language is in bold.)

Under Pacific's proposed language, any document referred to in the ICA becomes a part of the agreement. However, many of the documents referred to in the ICA can be unilaterally changed by Pacific, which means that MCIIm would have no certainty over the terms of the ICA. In other words, the terms of the ICA could be an ever-moving target, at Pacific's sole option. Other proposals to incorporate specific documents into the ICA will be analyzed on a case-by-case basis.

Issue GT&C - 12

Should Pacific's proposed Section 34 entitled Billing and Payment be adopted?

Pacific's Position

Pacific proposes language that details the obligations of the parties for billing and payment. These terms and conditions are consistent with Pacific's tariffs. Moreover, these provisions include notification of disputes and payment of disputed amounts into escrow accounts. This latter provision prevents a CLEC from avoiding payment by disputing every bill. This provision is more advantageous to CLECs instead of a requirement that all bills must be paid, even in the event of dispute. These provisions protect both parties and should be adopted.

MCIIm's Position

According to MCIIm, Pacific's proposed language covers a range of topics and overlaps with several portions of the ICA which are not the subject of this arbitration, including GT&C Section 21.8 (billing), GT&C Section 29.12 (disputed amounts) and Appendix Recording. If the Commission were to adopt Pacific's proposal for this section it would create conflicts among various provisions of the ICA.

Discussion

Pacific's proposed language in Section 34 is adopted, with modification. While MCIIm points to conflicts with other terms of the ICA, that is not the case. I have adopted Pacific's proposal to omit Sections 21.8 and 29.12 so there is no conflict with those sections. MCIIm also points to overlap with Appendix Recording, but the ICA does not include an Appendix Recording.

As Pacific states, its language is more precise. For example, on the topic of remittance, MCIIm's language is silent on how payments shall be made while Pacific's language specifies that payment shall be made through the Automated Clearing House Association network. In the same manner, while MCIIm's proposed language merely states that interest shall apply on overdue amounts, Pacific's language more exactly spells out that overdue amounts "shall bear interest from the Bill Due Date until paid" and that such interest will be "compounded daily." The additional precision in language should serve to lessen disputes between the parties.

Pacific's language requires disputed amounts to be placed in an interest bearing escrow account, while MCIIm's language contains no such requirement. However, Pacific does not allow MCIIm the option to paying the entire amount, including the disputed portion rather than establishing an escrow account. The language in Section 34.4 shall be modified to allow MCIIm the option of paying a bill in its entirety and disputing certain portions, or establishing an escrow account.

Pacific's language in Section 34.9 covers the parties' obligations for the exchange of billing message information. Apparently MCIIm disputes the language but has not proposed its own language. Including the specific information about Daily Usage Files (DUF) and what the DUF shall include should serve to eliminate the possibility of disputes between the parties.

Issue GT&C - 13

Should Pacific's proposed language regarding the remedies that should apply for nonpayment be adopted?

Pacific's Position

Pacific proposes a complete section that defines the parties' rights in the event of nonpayment. The ultimate remedy is disconnection. In the event MCIIm, or an adopting CLEC, refuses to pay for service or is unable to do so, Pacific like any other commercial entity, should not have to provide service. In view of the extensive dispute resolution procedures that will be included in the ICA, these remedies rarely should be encountered. However, when necessary, Pacific's proposed language details the rights and obligations of the parties and provides a mechanism for protecting end users as well.

MCIIm's Position

MCIIm asserts the Commission should reject Pacific's proposed language for non-payment and procedures for disconnection. First, this language is in conflict with the provisions of GT&C Section 29.12 (disputed amounts). Second, as with the deposit requirements proposed by Pacific, these requirements are unreasonable in light of the parties' ongoing commercial relationship. Finally, if adopted, Pacific's proposed language could result in unnecessary interruption of retail customers' service.

Discussion

Pacific's proposed language in Section 35 is adopted, with modification. MCIIm proposes that the ICA not include language on Nonpayment and Procedures for Disconnection, in light of the parties "ongoing commercial relationship." However, another CLEC could adopt the terms of this ICA under Section 252(i) of TA96, and that CLEC may not pay its bills to Pacific. Pacific needs to have the ability to get out from under an arrangement where it is not

being paid for the services it provides. Including language on Nonpayment and Procedures for Disconnection accomplishes that.

Similar language was adopted by the Commission in the AT&T/Pacific and Level 3/Pacific arbitrations. However, some of Pacific's proposed language shall be modified to bring it into conformance with the specific language adopted in the AT&T/Pacific arbitration. Section 35.6.3.1, which allows Pacific to bill MCIIm for transferring MCIIm's customers over to Pacific in the event of nonpayment, shall be deleted. MCIIm, or another CLEC which MFNs into this ICA, should not have to pay Pacific for taking over its customers.

In Sections 35.6.4, 35.6.5 and 35.6.7 Pacific indicates that customers transferred over from MCIIm shall have 30 days to select another local service provider. If they have not selected another service provider within 30 days, Pacific shall disconnect service to those end users. That language shall be deleted from the ICA. Pacific is the carrier of last resort in its service territory and is required to provide service to all end users transferred from MCIIm under the circumstances outlined in Section 35.

Issue MCIIm GT&C - 18

**Should Section 21.8 be deleted from the GT&C, as Pacific proposes?
Pacific's Position**

Pacific indicates that the parties reserved Remittance and Non-payment procedures as topics that were subject to negotiation. Through experience, Pacific has learned that specific terms and conditions for remittance are necessary to adequately protect both parties. Pacific proposes competing remittance language in Section 34. See Pacific's position statement on GT&C-12.

MCIIm's Position

MCIIm asserts that Section 21.8 was not listed on the Stipulation by either party and therefore was not subject to renegotiation by the parties or properly before the Commission in this arbitration proceeding.

Discussion

Pacific's position is adopted. As Pacific says, the issue of "Remittance" was to be subject to negotiation between the parties, and that general issue would certainly include the timing and process for payment of bills. Pacific's proposed Section 34 "Billing and Payment of Charges" was adopted in Issue GT&C 12, so the MCIIm's proposed language in Section 21.8 is not necessary.

Issue MCIIm GT&C - 19

Should Section 29.12 be deleted from this appendix, as Pacific proposes?

Pacific's Position

Pacific asserts that the parties reserved Remittance, Non-payment procedures and Dispute Resolution as topics that were subject to negotiation. Certainly Billing Disputes is a subset of these subjects.

As stated in GT&C 12, Pacific's proposal for Billing Disputes should be adopted because it fairly protects both parties' interests during billing disputes. Pacific's proposal requires that disputed amounts be paid into escrow which provides assurance that the funds are available pending the resolution of the dispute. In addition, this proposal prevents either party from avoiding payment by disputing every bill. This provision is more advantageous to CLECs than a requirement that all bills must be paid even in the event of dispute.

MCIIm's Position

MCIIm states that Section 29.12 was not listed on the Stipulation by either party and therefore was not subject to renegotiation by the parties and is not properly before the Commission in this arbitration proceeding.

Discussion

In GT&C - 12, I adopted Pacific's dispute resolution language in Section 34, which includes the process for settling billing disputes. Therefore, MCIIm's competing language in Section 29.12 will not be adopted, since it covers the same issue of billing disputes.

B. Definitions (DEF)

Issue DEF - 1

Should "Applicable law" be defined to include state and federal tariffs?

Pacific's Position

Pacific asserts that tariffs have the effect of law and bind the parties. Tariffs are changed only after public notice and hearings, to which CLECs could be parties. MCIIm would have the opportunity to intervene in any tariff filing.

MCIIm's Position

According to MCIIm, tariffs are not laws but a contract with the CPUC to offer a particular price. A tariff is not law under the intended meaning of the term. The inclusion of "tariffs" in the definition of "applicable law" would essentially allow Pacific to seek unilaterally to change provisions of the ICA by filing changes to its tariffs.

MCIIm states that Pacific's proposal is inconsistent with that reached in the Pacific/AT&T arbitration. In that proceeding the Final Arbitrator's report concluded:

The outcome on the issue of tariff references versus specific language in the ICA could vary by the service being offered and the specific tariff provisions. The issue of whether the

ICA should include specific provisions or reference tariffs will be decided on a case-by-case basis. (FAR at 19.)

MCIIm urges that any tariff reference proposed by Pacific should be analyzed on a case-by-case basis, where not agreed to by MCIIm.

Discussion

MCIIm's position is adopted, and tariffs will not be included under the definition of "Applicable Law." By including tariffs under the definition of applicable law, we would be including any and all of Pacific's tariffs, whether or not different terms were adopted in this ICA. Pacific should not be able to change a term of this ICA simply by filing a tariff change. We will address the issue of incorporating specific tariffs on a case-by-case basis.

Issue DEF - 2

Should Pacific's or MCIIm's proposed definitions of central office and types of switches be adopted?

Pacific's Position

Pacific's proposed definition for Central Office Switch states that it would include but not limited to an End Office.

In negotiations MCIIm proposed that a Central Office Switch would also include a switch that provided a combination of both end office and tandem switching functionalities. MCIIm proposes to classify all its switches as combination tandem/end-office switches. Pacific's concern with this is that MCIIm could require tandem and end office reciprocal compensation rates to be paid by Pacific. There would be, by definition, no end office to which Pacific could direct office trunk and avoid the tandem rate. Differences between a tandem and an end office switch include the following:

- 1) A tandem switch has trunk connections to other switches (i.e., tandem to tandem, tandem to end office).
- 2) No end users are served from a tandem.

- 3) A tandem services multiple end offices.
- 4) A tandem is entered into the Local Exchange Routing Guide (LERG) with serving wire centers delineated.

MCIIm's Position

MCIIm states that since the term "Central Office Switch" does not appear in the contract as a defined term, there is no reason to define it in the Definitions Appendix.

Even if there was any reason to define this term, the term Central Office Switch is confusing. MCIIm could agree to one definition for "Central Office" and one for "Switch." MCIIm's switch serves as both a tandem and an end office switch. Pacific's concern that MCIIm would require tandem and end office reciprocal compensation rates to be paid by Pacific is unfounded given the fact that MCIIm has stipulated not to litigate the issue of reciprocal compensation in this arbitration.

Discussion

MCIIm's position is adopted. As MCIIm states, its network is not configured the same as Pacific's and its switch serves as both a tandem and an end-office switch. In no event may MCIIm use these definitions to assert that it should receive tandem reciprocal compensation from Pacific.

Issue DEF - 3 (Related to RES-2 and ALL-1)

Should "End User" be defined to permit MCIIm to purchase Pacific services and then sell those services to a third party for subsequent resale, as MCIIm proposes?

Pacific's Position

Pacific is opposed to MCIIm's proposal to define "end-user" to include MCIIm's wholesale customers. This is prohibited by the Act. The Act defines a "telecommunications carrier" as an entity that is engaged in providing "telecommunications services." A "telecommunications service" is "the offering

of telecommunications for a fee directly to the public . . .” Selling Pacific’s telecommunications services to MCI’s wholesale customers is not an offer “directly to the public” and therefore MCI is not permitted to do so under the Act.

As a practical matter, the result of defining “End User” in MCI’s broad terms would allow an unknown third party, with which Pacific has no contract or contact, to resell Pacific services. Section 251 (4)(B) allows a state commission to maintain the categories of subscribers for a particular resold service. Unrestricted resale by MCI could establish new subscriber categories for a service in violation of a tariff restriction. A number of other such restriction issues exist for resale. For example, MCI’s carrier-customer would not be bound by the Pacific-MCI contract requirement that the reseller not use Pacific’s name brand or logo. Pacific would lose the ability to define terms and conditions of resale. In addition, this could result in end users receiving local service from companies not certified by the CPUC to provide such service. In order to avoid these consequences, MCI’s proposed definition of resale should be rejected and Pacific’s adopted.

MCI’s Position

According to MCI, it is Pacific’s intention to use the term “end user” rather than “customer” throughout the ICA to prohibit MCI from selling to other carriers for resale those services it purchases at wholesale from Pacific. This would violate § 251(c)(4) of the Act in that it would constitute a “prohibition” of resale and an “unreasonable or discriminatory restriction[s] or limitation[s]” on the ILEC’s duty to offer its services for resale. Moreover, it would place MCI in the position of denying to provide at wholesale to other telecommunications carriers for resale at least some of the services it offers at retail to its own end users, in violation of § 251(b)(1).

Discussion

MCIIm's position is adopted, and the definitions in the ICA will reflect the term "customer" rather than "end user."

Pacific cites ¶ 875 of the FCC's Local Competition Order to show that Section 251(c)(4) of the Act does not require ILECs to make services available for resale at wholesale rates to parties who are not "telecommunications carriers." Pacific asserts that if MCIIm is selling service to its wholesale customers, it is not an offer directly to the public. Pacific therefore concludes that MCIIm is not entitled to purchase those telecommunications services from Pacific at wholesale rates.

Paragraph 875 reads as follows:

We conclude that section 251(c)(4) does not require incumbent LECs to make services available for resale at wholesale to parties who are not 'telecommunications carriers' or who are purchasing service for their own use.

Paragraph 875 does not preclude the outcome that MCIIm requests. MCIIm is the entity purchasing service from Pacific at wholesale prices, and MCIIm is clearly a telecommunications carrier. Also, MCIIm is not purchasing the service for its own use, which was prohibited by ¶ 875, but for resale to other carriers.

In its Comments on the DAR, Pacific indicates that if MCIIm purchases telecommunications services at wholesale rates for the purpose of reselling those services to other wholesalers, this activity would not involve "the offering of telecommunications for a fee directly to the public" as is required under Sections 153(44) and 153(46). According to Pacific, in this capacity, MCIIm would not be acting as a "telecommunications carrier" and would not be entitled to obtain telecommunications services at wholesale rates. I disagree with Pacific's interpretation of the Act. Sections 153(44) and 153(46) require that a carrier must

sell service to the public in order to qualify as a telecommunications carrier. However, the Act does not say that a telecommunications carrier may only sell to the public, and never sell to other carriers. The defining statement made by TA96 is that to qualify as a telecommunications carrier, that carrier must offer service for a fee to the public. MCIIm clearly meets that requirement. The Act does not include a prohibition against a carrier selling at wholesale as well. If Congress had intended that outcome, it would have included the prohibition in the Act itself.

Pacific has cobbled together various definitions from the Act to support its conclusion that MCIIm may not purchase services for resale to other carriers, but that outcome is not supported by the clear language of the Act itself.

Section 251(b)(1) places on all local exchange carriers – both ILECs and CLECs-- the duty not to prohibit or impose “unreasonable or discriminatory conditions or limitations” on the resale of its telecommunications service. The limitation on further resale is unreasonable, and is not supported by the FCC’s implementing rules.

In its Comments on the DAR, Pacific concurs Section 251(b)(1) does not prohibit all restrictions on the resale of an ILEC’s telecommunications services; rather, it prohibits *unreasonable* restrictions. Pacific asserts that the resale restriction Pacific is seeking is not only reasonable but also consistent with the intent of the Act. According to Pacific, Section 251(c)(4) was intended to facilitate *resale competition*, not competition in the wholesale market. I disagree with Pacific’s conclusion that having MCIIm operate as a wholesaler will not facilitate resale competition in California’s telecommunications market. Having a choice of wholesalers, in lieu of the single ILEC wholesaler, could indeed facilitate resale competition.

Section 251(c)(4) requires ILECs:

to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers.

This section mandates that the ILECs provide any services at wholesale rates that the ILEC provides at retail to its end user subscribers. However, that section does not mandate that the CLEC, in turn, must sell those services to its own end user customers. Therefore, there is no reason that MCI cannot buy services at wholesale from Pacific and resale those services to other carriers.

However, Section 251(c)(4)(B) is clear that a state commission may prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a particular category of subscribers from offering such service to a different category of subscribers. This Commission has made it clear that certain types of arbitrage will not be tolerated, e.g., that residential access lines are not to be resold to business services (D.96-03-020 at 27). MCI will be responsible for maintaining those restrictions for the services it resells to other carriers. MCI also has the obligation to insure that the carriers or other non-end-user entities it sells to at wholesale are carriers certificated by this Commission to provide local service.

C. ALL

Issue ALL-1

Should the term "End User" or "customer" be used in this agreement?

This issue was addressed under DEF-3.

D. Directory Assistance (DA)

Issue DA-7

Does DA constitute a UNE?

Pacific's Position:

Pacific indicates that it is required to provide access to Directory Assistance under the Act, so the issue of whether it is a UNE goes only to the price to be charged. DA services are not a UNE per the language of the UNE Remand Order.

Under the FCC's rules and the UNE Remand Order, ILECs are not required to provide OS or DA as UNEs, so long as they "provide the [CLEC] with customized routing or a compatible signaling protocol" to allow the CLEC to route OS/DA traffic to alternative providers. (47 C.F.R. 51.319(f)) According to Pacific, the FCC concluded that there are multiple competing providers of OS/DA services and plentiful opportunities for CLECs to provide such services themselves or through a third party, and that these market conditions, coupled with "additional nondiscrimination requirements of section 251(b)(3)" which still apply, made it improper to continue treating OS and DA as UNEs. (UNE Remand Order, paragraph 441.)

The FCC rule states that ILECs would have to provide OS and DA as UNEs "only where the incumbent LEC does not provide the requesting telecommunications carrier with customized routing or a compatible signaling protocol." (47 C.F.R. 51.319(f).) In other words, if an ILEC chooses not to make customized routing available at all, or refuses to offer it to a specific requesting carrier, the ILEC would have to provide OS and DA as UNEs.

Pacific asserts that is not the case here. Pacific makes customized routing available through Option B switching. In addition, Pacific is actively working with MCI on its line class codes specifications to route its DA and OS traffic to its Feature Group D (FGD) trunks. Pacific's witness Kirksey was optimistic that joint testing will establish the technical feasibility of this proposal for 411 traffic. (Kirksey for Pacific, 6 RT 436-437.) However, as MCI's witness Caputo

acknowledged during cross-examination, for Lucent switches, Pacific will need to purchase a new feature package to make DA customized routing work. (Caputo for MCIIm, 9 RT 867.) The Lucent materials included in Attachment 4 to Caputo's testimony also indicated "[t]here may be a need to build some unique digit and routing translations for the unbundled customers, depending on the ILEC configurations." (Caputo for MCIIm, 10 RT 918-920.)

According to Pacific, both Kirksey and MCIIm's witness Caputo agreed, however, that customized routing of 0+ and 0- traffic may be more problematic.⁸ Until testing is completed and feasibility is established (including the ability to generate a billing record), the only technically feasible form of customized routing is Pacific's Option B switching.

Pacific states that Pacific has offered to move forward on testing this form of customized routing. Routing configurations that prove to be technically feasible will be implemented, once financial arrangements in accordance with the Act are negotiated.

Pacific asserts that MCIIm has postured that Pacific has been dragging its feet, in an effort to have the arbitrator retain jurisdiction over the testing. This should be rejected. The only issue before the arbitrator is whether OS and DA are UNEs for purposes of pricing these services under this ICA. There is no contract language at issue here about testing alternative customer routing arrangements.

MCIIm's Position

⁸ Kirksey for Pacific, 6 RT 436 ("0 minus is inherent in the software of the switch. It is translated on the baseload of a switch. And there is no solution that I am aware of that allows you to carry that to a Feature Group D equal access trunk group"); Caputo for MCIIm, 9 RT 860-66) (Opening Statement and Arbitrator's questions.)

MCIIm believes that Pacific must provide MCIIm with DA as a UNE until such time as Pacific provides MCIIm with customized routing pursuant to the UNE Remand Order. The FCC's current rule states: "if an incumbent LEC does not provide customized routing to requesting carriers that use the incumbent's unbundled local switching element, it must provide unbundled access to its OS/DA service." (UNE Remand Order ¶ 462.) MCIIm asserts that more than five years after the passage of the Act, Pacific still has not proactively taken steps to deliver a usable customized routing option to MCIIm. Moreover, the record is unclear as to whether Pacific can provide the customized routing that MCIIm requires or if, Pacific will force MCIIm to directly connect to each of Pacific's 412 end offices with dedicated operator services trunks to enable the use of an alternative service. Given that customized routing may either be absolutely unavailable or made financially infeasible by Pacific's requirements, the FCC conditions regarding customized routing require that OS and DA be priced according to UNE rules.

MCIIm further asserts that even if the arbitrator does not find that OS and DA are UNEs or should be treated strictly as UNEs, it is plain that Pacific still maintains significant market power in the provision of OS and DA. It is not reasonable to allow Pacific to charge multiples of its cost for a function over which Pacific has substantial market power.

Furthermore, the Commission's OANAD proceeding defined DA as a UNE and that decision has not been modified. Under the Act, and FCC rules, states may define UNEs in addition to those required by the FCC.

Discussion

In its Comments on the DAR, MCIIm asserts the DAR errs in concluding that MCIIm's proposed customized routing is not technically feasible at the

present time. According to MCIIm, the evidence clearly establishes that MCIIm's requested routing is technically feasible. The contract language should require Pacific to provide MCIIm with its requested customized routing as described in Table 1 in MCIIm's comments where no software modifications are required, and after a reasonable schedule for implementation where they are. While MCIIm acknowledges that it may be easier to implement customized routing for DA than for OS, and easier to implement it for DA and OS in some switch types than others, it is technically feasible to custom route OS and DA traffic to MCIIm's FGD trunks from any switch. MCIIm asserts that joint tests are not necessary to establish technical feasibility.

MCIIm cites Pacific's witness Kirksey who admitted at hearing that it is technically feasible for Pacific to provide MCIIm with its requested customized routing of DA calls. The only evidence of any limitation on Pacific's immediate implementation of customized routing for DA in all switches was raised by MCIIm's own witness Caputo who acknowledged in his testimony that in order for Pacific to implement the routing for DA in Lucent switches, it would have to activate new software features available from Lucent. MCIIm states that the Lucent software requirement does not raise an issue of technical feasibility. The feature is fully developed, available and has been successfully tested by MCIIm. While Pacific may require implementation time to add this feature to its Lucent switches, that does not render MCIIm's request technically infeasible.

MCIIm states that the evidence also establishes that customized routing of OS calls is technically feasible. According to MCIIm, there is no difference between routing of 0+ and 0- calls. MCIIm successfully tested and currently provides customized routing for 0+ and 0- calls in Siemens switches, and Lucent switches only require the same additional software feature they need for DA. This too was successfully tested in MCIIm's lab. Only the Nortel switch currently

does not offer the feature necessary to custom route 0+ and 0- calls over FGD trunks. That does not make it technically infeasible; if Lucent and Siemens can do it, Nortel can. But it does make it unavailable to Pacific right now.

MCIIm cites a portion of ¶ 463 in the UNE Remand Order in support of its position that the FCC clearly provides that OS and DA are not to be treated as UNEs only in cases where ILECs provide customized routing. Paragraph 463, in its entirety, reads as follows:

We conclude that the interoperability issues identified in the record do not materially diminish a requesting carrier's ability to provide local exchange or exchange access service. In particular, MCI WorldCom complains that incumbent LECs should implement Feature Group D signaling, instead of the outdated legacy signaling protocol. According to MCI WorldCom, to use the incumbent LECs' signaling protocol instead of Feature Group D, most competitive LECs would have to either deploy new customized operator platforms or modify their existing platforms, both of which would impose substantial costs. SBC responds that the customized routing of Feature Group D is not technically feasible in all end-office switches. Bell South, however, offers a technical solution to MCI WorldCom's concern in some of its offices and states its willingness to deploy these solutions throughout its network. In instances where the requesting carrier obtains the unbundled switching element from the incumbent, the lack of customized routing effectively precludes requesting carriers from using alternative OS/DA providers and, consequently, would materially diminish the requesting carrier's ability to provide the services it seeks to offer. Thus, we require incumbent LECs, to the extent they have not accommodated technologies used for customized routing, to offer OS/DA as an unbundled network element.

Paragraph 463 refers to the same type of customized routing that MCIIm is requesting in this arbitration. It is significant that while the FCC acknowledges that there may be technical difficulties in accomplishing the customized routing

requested, it does not indicate that technical infeasibility would excuse the ILEC from offering OS and DA as UNEs. We will follow that rule in this arbitration as well.

Therefore, there is no need for the arbitrator to determine whether particular functions are technically feasible in particular switch types. I will leave that to the parties. However, if Pacific does not provide custom routing of either OS or DA calls using FGD, as MCIIm requests, MCIIm is entitled to receive either OS or DA, or both at UNE prices.

MCIIm's language in the Preface of Appendix DA is adopted, and OS and DA will be treated as UNEs in this ICA as long as Pacific does not provide the specific form of custom routing MCIIm has requested.

I note that MCIIm's reliance on the Commission's OANAD ruling that OS and DA are UNEs is misplaced. As MCIIm is aware, the Commission's pricing decision, D.99-11-050 was issued in November 1999, the same month as the UNE Remand Order. The Commission's order does not take the requirements of the FCC's order into account, and therefore does not address the FCC's analysis of whether OS and DA should be considered UNEs. While a state commission has the authority to name additional UNEs, it must be based on the robust "necessary and impair" analysis described in the FCC's UNE Remand Order. This Commission's determination of which elements constitute UNEs must conform to the process established in the UNE Remand Order.

E. Directory Assistance Listings (DAL)

Issue DAL - 4

How many days prior notice should MCIIm be required to give that it is requesting an initial load of subscriber listing information?

Pacific's Position

Pacific asserts that it needs 60 days because the "initial load" entails transferring the entire database to MCIIm. Pacific needs a reasonable amount of time to do this.

MCIIm's Position

MCIIm states that 10 days is adequate time to provide what it calls a "refresh." According to MCIIm, MCIIm received an "initial" load of Pacific's DAL database in April 1996. However, because data files sometimes become corrupted, MCIIm needs to "refresh" the initial load on occasion in order to protect the integrity of the DAL database. Sixty days notice to receive a true "initial load" may be reasonable, because Pacific needs to perform the necessary file analysis to insure a file format compatible with that requested by the CLEC, computer programming necessary to extract the data from its database, and installation of mutually agreeable network connections for data transmission. A refresh does not require these activities, and should be able to be accomplished in 10 days, as it is in other jurisdictions.

MCIIm proposes the following language to clarify the issue:

DA providers must provide Pacific with 60 days notice prior to requesting an initial load of Pacific's DAL where the DA provider has not yet provided Pacific with a requested file format and established a network connection with which to receive DAL. Those DA providers that have previously supplied Pacific a file format and have an established network connection must provide Pacific with 10 days notice when requesting a refresh of Pacific's DAL. A refresh is defined as a complete replacement copy of Pacific's DAL database or portions thereof as requested by the DA provider.

Discussion

MCIIm's alternative language cited above is adopted as a replacement for the second sentence of Section 2.3. MCIIm's argument that an initial load takes more time than a refresh makes sense, given the additional steps involved in performing the initial load. In its Brief, Pacific points out that the proposed language in the ICA does not distinguish between an initial load and a refresh, and MCIIm's proposed language clarifies the distinction. Also, by making the distinction between initial load and refreshes, Pacific will be protected from providing an initial download in 10 days for any other carrier that MFNs into this ICA.

Issue DAL - 7

Should Pacific be required to support the release of non-published numbers for emergency purposes?

Pacific's Position

Pacific asserts this is not an appropriate provision for this contract. This contract is to set terms for interconnection, not to align public policy efforts.

MCIIm's Position

MCIIm indicates it would like to have the parties agree to support the release of non-published telephone numbers for emergency purposes and has proposed language to facilitate that process.

Discussion

MCIIm's proposed language is adopted, with modification. MCIIm's proposed language in Section 3.4 makes it clear that MCIIm is not asking that Pacific release non-published telephone numbers to MCIIm, even in an emergency situation. Rather, MCIIm is asking for a service that is currently available to Pacific's retail customers and interexchange carriers (IXCs) under tariff, whereby the Pacific operator, in a true emergency situation, calls the customer with the non-published telephone number to forward the emergency

message. Therefore, there are no issues involving the release of non-published telephone numbers.

MCIm's proposed language at the end of the first paragraph is misleading because it states, "The Parties agree to support the release of these numbers for emergency purposes based on the following procedures:" However, the specific procedures described do not include the release of non-published numbers. Therefore, that language should be changed to read: "The Parties agree to support the following process for contacting customers with non-published numbers for emergency purposes:"

In its Brief, MCIm indicates that it has no objection to paying the tariff rate for the service (IXCs pay \$2.36 under Pacific's 175-T access tariff.) However, the final bullet of MCIm's proposed section 3.4 includes the provision that, "Neither party may charge the other for any services performed under this section." That bullet shall be removed from Section 3.4. Pacific's retail customers and IXCs pay for the service, and MCIm should as well.

This is a valuable service, which should be available to all customers, regardless of which carrier provides their local service. With this language in the ICA, an MCIm customer will be able to get emergency messages to a non-published Pacific customer.

Issue DAL - 8

Should MCIm be required to cease using Pacific's listings upon termination or expiration of this Agreement?

Pacific's Position

Pacific states that MCIm's license to use the DAL data terminates upon termination or expiration of the Agreement. As with any license, the right to use expires at that time. According to Pacific, MCIm has several options if this event

occurs: 1) it can renew the agreement; 2) it can negotiate a new agreement, or 3) it can purchase listings from an independent database provider.

MCIIm's Position

MCIIm asserts it depends on receiving DAL data from Pacific, which it cannot reasonably obtain elsewhere. MCIIm would be at a competitive disadvantage without the DAL, which would violate the non-discrimination provisions of the Act. Furthermore, Pacific is fairly compensated for the data. Pacific should not be permitted to prohibit the use of something for which it is equitably compensated.

Discussion

Under Issue DAL - 14, this appendix will stay in effect until a successor agreement is implemented between the parties. Therefore, MCIIm's proposed language is adopted in Section 3.5.

Under Pacific's proposed language, MCIIm must cease using the DAL information "upon termination of agreement." MCIIm has stated that it is at a competitive disadvantage without the DAL data, which it "cannot reasonably obtain elsewhere." Pacific is compensated for providing the DAL data and will continue to be compensated until a successor agreement is in place, and is therefore not harmed by continuing to provide the DAL data to MCIIm. If MCIIm relies on the DAL data to provide its own service, it must have the certainty of knowing that it will continue to receive the updated information until a successor agreement is in place.

Issue DAL - 9

Upon termination or expiration of this Agreement should Pacific be required to continue to provide Directory Assistance Listings to MCIIm until MCIIm finds a replacement agreement?

This issue was addressed under Issue DAL-8 above. MCIIm's proposed language in Section 3.5 is adopted.

Issue DAL - 11

Should Pacific have the right to suspend and/or cancel the Directory Assistance Listings Appendix in the event of a material breach by MCIIm?

Pacific's Position

Pacific states that due to the commercial value of the data and the potential for monetary loss if the license is breached, it is appropriate to provide additional remedies to protect the value of Pacific's property. These additional remedies include suspension of the license pending cure, and cancellation if cure is not effected within 30 days. These are reasonable remedies for the misuse of the databases at issue here.

MCIIm's Position

MCIIm disagrees as to the need for a breach of contract section in this appendix. As set forth in Section 22.2 of the GT&C, the parties have agreed upon a provision governing termination for material breach. Pacific's proposal is unreasonable in that it does not provide an opportunity to cure an alleged breach. Moreover, Pacific has not met its burden of demonstrating that a different standard should be applied to DAL.

Discussion

Pacific does not present any convincing arguments why the material breach language in Section 22.2 of the GT&C is not adequate to cover the DAL database. MCIIm's proposed language is adopted for Section 5.1.

Issue DAL - 12

Should MCIIm be granted "most favored nation" status with respect to DAL listings?

Pacific's Position

Pacific opposes granting most favored nation (MFN) status for MCIIm because it is restrictive in nature, anti-competitive and commercially unreasonable. Pacific should not be required to administer such a provision. While Pacific does not discriminate among similarly situated carriers, Pacific needs flexibility to change terms and conditions as to new contracts if its costs or other factors change without risking a breach of existing agreements. If MCIIm finds that Pacific has contracted with another CLEC on terms it considers more favorable than its own, it has the remedy of exercising its Section 252(i) rights.

Additionally, under Section 252(i) of the Act and the CPUC's Rule 7 set forth in CPUC Resolution ALJ-181, MCIIm and all other CLECs already have the ability to obtain or "adopt" the DAL terms that Pacific has offered to another CLEC in any ICA. Additionally, these provisions allow Pacific to object to any such adoption request where Pacific can prove that new circumstances involving cost or technical feasibility impair Pacific's ability to continue extending a particular offer to CLECs. MCIIm seeks to eliminate Pacific's statutory right in this regard by including contract language that would require Pacific to make available, in all circumstances, DAL rates and services to MCIIm that are no less favorable than those made available by Pacific to other CLECs. As the Act, the CPUC's rules, and the FCC's regulations acknowledge, however, there may be cost or technical feasibility reasons why Pacific cannot offer a CLEC the same DAL prices and services that Pacific previously offered to another CLEC. If such circumstances exist, Pacific should have the opportunity to prove those circumstances.

MCIIm's Position

Based upon non-discrimination principles, MCIIm should be entitled to the best rates and services offered by Pacific to any other CLEC.

Discussion

Pacific's position is adopted, and MCI's proposed language in Section 6.2 shall be deleted from the ICA. Under Section 252(i) of the Act, MCI would have the opportunity to *opt-in to another carrier's terms for DAL*. However, part of the process of opting in to another ICA's language requires the carrier to address any cost or technical feasibility issues raised by the ILEC. The opt-in provision should not be automatic as MCI requests since cost or technical feasibility issues could exist. Instead, MCI should go through the process established in Resolution ALJ-181 if it finds DAL terms and conditions that are superior to those adopted in this ICA.

Issue DAL - 13

Should liability and indemnity provisions be included in Appendix DAL?

Pacific's Position

Pacific states that some liability provisions are warranted within this appendix because of the special nature of this product. In the AT&T arbitration, such a Limitation of Liability for DAL, was adopted by the arbitrator. Pacific passes to MCI what is in its database and is not responsible for incorrect data provided to Pacific by third parties. The Limitations of Liability Section in the GT&C does not necessarily cover this situation. MCI can minimize its own exposure to liability by filing a tariff limiting its liability to its end-user customers.

MCIIm's Position

MCIIm asserts that Pacific should not be allowed to disclaim liability for all errors and omissions in DAL information or for a delay in providing the information to MCIIm. As provided in MCIIm's proposed limitation of liability language in the GT&C, Pacific should be liable for direct damages at a minimum.

Although Pacific's proposed language is confusing, its intent seems to be to require MCIIm to indemnify Pacific for any possible claim by a third party related to Pacific's provision of DAL information to MCIIm. Such a requirement is unreasonable and Pacific has not met its burden of demonstrating why this additional provision is necessary.

Discussion

Although MCIIm expresses concerns with Section 7.1 in its Brief, that section has been marked as "intentionally omitted" in the ICA submitted with parties' briefs so I will not deal with that issue.

Section 7.2 includes limitation of liability language, and Pacific's proposed language will be adopted, with modification. As Pacific states, it should not be held responsible for errors in the database from information it receives from third parties. Pacific includes a provision in its tariff that limits its liability for information provided to its end users, and suggests that MCIIm place similar language in its tariff. That way MCIIm could be protected against claims on the part of its end users.

However, Pacific's proposed Section 7.2 would release Pacific from liability for damages "by reason of delay in providing the directory assistance listing information." As MCIIm says, that language takes away any incentive for Pacific to meet its contractual obligations to provide DAL to MCIIm on a timely basis. That language shall be deleted from Pacific's proposed Section 7.2.

In Section 7.3 Pacific proposes indemnification language specific to DAL. In the arbitration between AT&T and Pacific, the arbitrator allowed the limitation of liability language to be included but ordered that the indemnification language be deleted. In the AT&T arbitration, the arbitrator concluded, "it is inappropriate to put AT&T on the hook when it has no control over the actions of either Pacific or any possible claimant." As with the AT&T case, MCIIm has no control over third parties that might seek to make claims directly against Pacific and no control over Pacific's actions that might give rise to those claims. MCIIm's position is adopted, and Section 7.3 shall be deleted from the ICA.

Issue DAL - 14

Should language pertaining to "Term of Appendix" be included in the Appendix DAL?

Pacific's Position

According to Pacific, DAL is a competitive service that MCIIm can buy from other providers. Therefore, the term of this appendix should be flexible for Pacific to be able to update its offering. Pacific needs a 12-month commitment so that the set-up expense is justified. After that, either party may terminate upon 120 days, a period sufficient to allow the other party time to adjust its operations accordingly. This termination provision affords MCIIm the opportunity to purchase listings from another supplier at better rates if such an opportunity arises.

MCIIm's Position

The term of Appendix DAL should be the same as the term of the ICA. MCIIm needs certainty across the term of the contract.

Discussion

MCIIm's proposed language in Section 8.1 is adopted. One of the key reasons for entering into an ICA is to provide certainty for a particular period of the terms and conditions of service. Under the language Pacific proposes (with the word "later" changed to "earlier" in Pacific's Brief), either party could terminate the appendix after 12 months, with 120 days notice.

The current ICA between the parties includes an "evergreen" provision which maintains the ICA in effect until a successor agreement is completed, and this new contract contains a similar provision. There is no reason that the evergreen provision should not apply to this appendix, as well as to the rest of the ICA. While Pacific sees it as an advantage for MCIIm to be able to purchase service from another supplier at better rates, MCIIm appears to prefer the certainty of knowing that it will have the DAL information for the life of the ICA.

E. Digital Subscriber Line (DSL)

Issue DSL - 10

Should Pacific be obligated to share information and product descriptions with MCIIm on any new deployment of its affiliate or any other CLEC before such deployment can take place?

Pacific's Position

According to Pacific, since there are confidentiality clauses in all of the ICAs with other CLECs, it would be a breach of contract for Pacific to share competitive information of this type with MCIIm. In a competitive market, it is up to MCIIm to stay abreast of technological developments. If a new loop type were offered to any other CLEC, Pacific would be glad to offer it to MCIIm along with all related terms and conditions. In addition, MCIIm could exercise its Section 252 (i) rights.

Pacific is opposed to setting up OSS procedures for a new flavor of DSL when neither MCIIm nor any other provider has made the investment decision to offer that flavor. Pacific believes that an ILEC should provide advance notice of its release of a new technology, but it should be afforded time to develop the necessary processes if a CLEC wants to offer it as well.

MCIIm's Position

During negotiations MCIIm proposed language in this section that stated Pacific should not deploy any technology covered by this Appendix for its own retail operations, for the retail operations of an affiliate, or provide service to a third party (whether retail or wholesale) until it has made ordering procedures for the related unbundled loop type, and reasonable rates, terms and conditions for such loop type available to MCIIm. Otherwise it would discriminate against MCIIm in favor of Pacific's affiliates. In its Brief, MCIIm indicates it is willing to drop the requirement to provide information about third parties that are unaffiliated with Pacific.

Discussion

MCIIm's proposed language in Section 5.1.3 is adopted, with the modification that Pacific is not required to provide information about third-parties that are not affiliated with Pacific. Pacific or its affiliate would have an enormous competitive advantage in marketing a new flavor of DSL, if ordering procedures have not been developed and at least interim rates, terms and conditions adopted for use by MCIIm (and other CLECs) until several months after Pacific (or its affiliate) begins to market the new service.

Issue DSL - 11

Should MCIIm be permitted to trial unapproved loop technologies without having to comply with the procedures for unapproved technologies?

Pacific's Position

According to Pacific, during negotiations, MCIIm proposed language that gives it a 12-month period to test unapproved DSL technologies without complying with the applicable safeguards. This would circumvent the safeguards to preclude disruption of customer service from potentially disturbing technologies. There is no basis to suspend these safeguards for any period of time.

MCIIm's Position

MCIIm indicates it permits cooperative field testing for new DSL technologies in a closed and limited environment only after lab testing. MCIIm believes that Pacific should perform field trials to ensure that MCIIm's technologies and Pacific's network perform appropriately. CLECs should be allowed to field trial new technologies, with careful monitoring and testing, without the need for a prior review of the test by the Commission. If Pacific has concerns with MCIIm's proposed deployment when MCIIm proposes to deploy the technology commercially, Pacific has the right to argue in front of the Commission that the technology was not successfully deployed. This approach has been agreed to by Southwest Bell Telephone Company in Texas.

Discussion

MCIIm's proposed language in Section 5.1.1 is adopted. Pacific is correct that the FCC describes technologies presumed acceptable for deployment and gives states jurisdiction to make necessary determinations in its Line Sharing Order at ¶¶ 195-211. Section 5.1.2, which includes language the parties agreed to, describes the process outlined by the FCC. However, in Section 5.1.1 MCIIm is asking for approval to conduct technology trials of new loop types, and the only disputed language involves whether MCIIm should first have to make a showing to the CPUC.

The Commission wants to encourage the parties to engage in such trials to determine whether new technologies are ready for widespread deployment. However, the parties should be able to enter into those cooperative trials, without the need for the Commission to be involved. Before MCIIm could deploy a service as a result of its trials, it would have to comply with the provisions of Section 5.1.2, which requires it to demonstrate to the CPUC that the loop technology it is proposing will not significantly degrade the performance of other advanced services or traditional voice services.

Issue DSL - 20

When should MCIIm notify PACIFIC of the PSD mask to be used?

Pacific's Position

Pacific asserts it should receive the PSD mask information at the time of ordering. Pacific says it is required by the FCC's spectrum management rules to collect this data and make it available to CLECs upon request. The data provided allows Pacific to comply with these rules and manage the network for the benefit of all DSL providers. It allows Pacific to identify and address specific disturbers before network harm occurs.

MCIIm's Position

MCIIm asserts that it should provide the information at the time MCIIm initially deploys the technology.

Discussion

Pacific's proposed language in Section 4.2 is adopted. MCIIm should provide the PSD information as part of each order so that Pacific has that information readily available for provisioning the service.

In its Comments on the DAR, MCIIm raises the point that the standards body authorized by the FCC to review PSD issues, T1E1.4, has adopted a standard --T1.417-- where PSD mask information is unnecessary for spectrum

management. MCIIm suggests that the contractual requirement to provide PSD information on every order be rescinded if the standards bodies or the FCC rescind such a requirement. MCIIm's suggestion is adopted, at least in part. According to Pacific, the FCC requires ILECs to collect spectrum management data and make it available to CLECs upon request, and this Commission does not have the authority to rescind the FCC's requirement, even if a standards body rules that the PSD mask information is not necessary for spectrum management. However, if the FCC determines that Pacific does not need the PSD mask information for spectrum management, MCIIm should not have to supply PSD information to Pacific.

Issue MCIIm DSL - 33

Should Pacific be excused from providing DSL loops where physical facilities do not exist?

Pacific's Position

Pacific states that although it is under no legal obligation to provide a loop where one does not currently exist, it has developed a facilities modification policy to identify and offer modifications to existing facilities that would accommodate an MCIIm order. The modifications will be categorized into one of three categories: simple, complex, and new build. Simple modifications would be performed automatically with no additional cost to MCIIm. Complex modifications and new build modifications will require a negotiated due date to allow for engineering, construction, and equipment installation as required. The same policy applies to Pacific's affiliates and to CLECs.

MCIIm's Position

MCIIm asserts that if Pacific makes loops available to its data affiliates when loops are initially unavailable, MCIIm should have the same arrangement. The standard should be parity with what Pacific provides itself or its data

affiliates. According to MCIIm, at the hearing there was considerable discussion about facilities modification policies. At the end of that discussion, Pacific's witness agreed that if Pacific were to provide a facilities modification policy similar to Ameritech's, it would be provided to CLECs and ASI on a discriminatory basis.

Discussion

Pacific's proposed language in Section 4.1 is adopted with modification. Pacific is correct that it is under no legal obligation to provision DSL-capable loops where physical facilities do not exist. However, Pacific is under an obligation to provide service on a nondiscriminatory basis to its affiliates and unaffiliated CLECs alike. Therefore, Section 4.1 shall be modified to include a statement that any facilities modification policy adopted by Pacific will be available to Pacific, its affiliates, and unaffiliated CLECs on a nondiscriminatory basis.

Issue MCIIm DSL - 38

Should the Commission adopt MCIIm's proposed language providing that spectrum exhaust shall not be a cause for delaying provisioning of DSL orders?

Pacific's Position

Pacific asserts that the agreed-upon language in Section 8 tracks the interim Line Sharing FAR, unlike MCIIm's proposal. MCIIm proposes Selective Feeder Separation (SFS) which is the practice of placing a particular technology such as DSL in specific binder groups as a means of spectrum management. This was disapproved by the FCC. Pacific discontinued this practice and dismantled all existing SFS to ensure compliance with the FCC's directive.

On cross-examination, MCIIm's witness Currence conceded that Pacific should not be held liable if DSL loops become unavailable from spectrum

exhaust where Pacific is not at fault and applicable work-arounds have been tried. However, MCI's proposed language imposes liability in exactly that circumstance.

MCI's Position

MCI asserts that Pacific may only implement non-discriminatory spectrum management programs that are based on industry standards. Pacific has not identified any industry standards that would justify a delay in provisioning MCI's DSL orders based on alleged spectrum exhaust.

Discussion

Pacific's position is adopted, and MCI's proposed language shall be deleted. Pacific makes a convincing argument if Pacific is not at fault for spectral exhaust, and it has tried work arounds, it should not be liable for delays in provisioning a DSL-capable loop.

F. ITR (Trunking Requirements)

Issue ITR -2

Is it reasonable that the trigger for requiring direct trunking to third parties be limited to MCI's originating traffic?

Pacific's Position

Pacific states that all third-party traffic on the tandem trunk group in question should be considered. It does not matter whether MCI is originating that transit traffic itself, or receiving terminating transit traffic from another carrier – all of the transit traffic that MCI sends or receives through Pacific's tandems takes up tandem capacity.

MCI's Position

MCI agrees that when originating transit traffic from MCI exceeds 5 T-1's worth of traffic, MCI has the responsibility to enter into an agreement with the third party carrier that receives this transit traffic. While MCI is

negotiating these third party agreements, Pacific should continue to provide this transit on an interim basis. Any third party delivering more than 5 T - 1's will need to work with Pacific to determine the availability of transiting with Pacific. However, MCIIm will negotiate with third parties that it sends traffic to and will negotiate when approached by third parties from whom it receives transit traffic.

Discussion

In its Comments on the DAR, Pacific states that the DAR properly rejects MCIIm's proposal and concludes that all transit traffic must be considered. According to Pacific, this outcome is consistent with Section 251(a)(1) which requires all carriers to interconnect with each other. Pacific urges the arbitrator to retain that outcome in the FAR.

MCIIm, in its Comments on the DAR, asserts that the originating carrier causes the cost and would therefore benefit from the direct interconnection. Accordingly, says MCIIm, it should be the originating carrier that pursues negotiations based on its originating traffic volumes, not total traffic volumes. Furthermore, a third-party CLEC has no obligation to negotiate direct interconnection with another CLEC. While Section 251(a)(1) requires all carriers to "interconnect," they may do so "directly or indirectly with the facilities and equipment of other telecommunications carriers." I agree with MCIIm that interconnecting through a Pacific tandem clearly qualifies as "indirect" interconnection so carriers that interconnect at a Pacific tandem have satisfied their Section 251(a)(1) obligations.

MCIIm's position in Section 1.1 and 1.2 regarding the type of traffic to consider is adopted. As MCIIm says, the carrier that originates the traffic is the "cost causer," and that carrier is the one that should be encouraged to pursue direct interconnection. This should be done through interconnection

arrangements Pacific has with that carrier, and should not be MCI's responsibility.

MCI's proposed language in Section 1.2 regarding its willingness to negotiate with third party carriers is rejected. The agreed upon language in the sentence in front of the disputed sentence says: "MCI agrees to use reasonable efforts to enter into agreements with third-party carriers as soon as possible after the Effective Date." The language MCI seeks to add would limit the negotiations to those where the third party carrier initiates negotiations with MCI. MCI should be proactive in entering into agreements with other carriers once MCI's originating traffic volumes reach a certain volume.

Issue ITR -3

Is it reasonable to require that MCI establish interconnection with third parties to whom it is sending traffic instead of sending it via Pacific's tandem once that traffic reaches a capacity of 24 trunks?

Pacific's Position

Pacific states that it is willing to transport transit traffic via its tandems to third parties but has established a threshold of 24 trunks worth of transit traffic as a reasonable point at which CLECs should seek direct interconnection with third parties. This threshold is critical to help avoid the problem of tandem exhaust which affects all carriers.

Pacific indicates that it is not asking MCI to establish direct end-office trunking where traffic volumes do not warrant it. Indeed, at the 24-trunk threshold that Pacific proposes, a direct end-office T-1 would be fully utilized.

MCI's Position

MCI believes a threshold of 5 T-1's worth of traffic (120 trunks) is the appropriate minimum threshold. Pacific's requirement of 1 T-1's worth of traffic would have all CLECs overbuilding network facilities. To convert to direct

trunks at a lower traffic threshold than MCIIm proposes would be an improper use of resources as the costs to establish such interconnection would exceed the benefits. For example, nowadays transmission facilities are typically installed in increments of DS3 or greater. If Pacific's conversion criteria were implemented, MCIIm would have to convert to direct third party trunks at a single T-1's worth of traffic, resulting in facility utilization rates as low as 3.5% (1 out of 28 T 1's).

Discussion

MCIIm's position in Section 1.1 is adopted, with modification. CLECs should not be required to overbuild network facilities. At the same time, tandem exhaust is a serious problem that affects all carriers. I will compromise and set the threshold at 3 T-1s. By setting the threshold at 3 T-1's, MCIIm should not have to build facilities which will not be fully utilized, at unnecessary expense to the company.

Issue ITR -6

Is it reasonable to offer only 2-way interconnection trunks?

Pacific's Position

Pacific seeks to offer 2-way interconnection trunks. First, says Pacific, two-way trunks are more efficient than one-way trunks, a fact which MCIIm does not dispute. Second, two-way trunks are more economical than one-way trunks. Third, because two-way trunks are usually designed with a mid-span fiber meet, two-way trunks ensure that facilities costs are equitably shared.

MCIIm's Position

According to MCIIm, the Act allows CLECs to interconnect in any technically feasible way, utilizing either one-way or two-way trunks. MCIIm should have the option to utilize one-way trunks to manage its network to serve its customers.

In the Pacific Bell/AT&T arbitration, the Commission adopted AT&T's position which specifically allowed for the use of one-way interconnection trunks. In its decision adopting the FAR, the Commission commented that, "The FCC in its Local Competition Order supports AT&T's contention that the method of interconnection should be at the CLEC's option. (D.00-08-010 at 14.)

Discussion

MCI's proposed language regarding MCI's option to use either one-way or two-way trunks in Sections 2.4.1.1, 2.4.4, 2.4.5, 2.5.2, and 2.5.3 is adopted. MCI is in the best position to decide whether one-way or two-way trunks best meet its network needs in a particular situation and should have the option to make that choice. As MCI states, this is consistent with the outcome in the AT&T/Pacific arbitration.

Issue ITR -22

What method should be used to forecast trunking requirements?

Pacific's Position

Pacific proposes that trunk forecasting and servicing be based upon a time consistent average busy season, busy hour, 20-day study. Pacific's method would be based on the average call volume for the 20 busiest hours in a given month, while MCI's method would be based on the call volume for the single busiest hour in a month.

Pacific asserts that MCI's witness conceded on cross examination that under the provisions of Paragraph 6.9 of Appendix ITR, MCI would be permitted to order a third more trunks than actually were required (regardless of whether MCI or Pacific's method was used). Section 6.9 reads as follows:

If a trunk group is under 75 percent (75%) of CCS capacity on a monthly average basis, for each month of any three (3) consecutive months period, either Party may request the issuance of an order to resize the trunk group, which shall be

left with not less than 25 percent (25%) excess capacity. In all cases grade of service objectives shall be maintained.

MCIIm's Position

MCIIm prefers to use peak busy hour over a 20-day period because peak busy hour is more reflective of the utilization on the trunk group and will better indicate the need to augment trunk groups for MCIIm. Peak busy hour provides more accurate results for smaller, fast-growing networks such as MCIIm's. The nature of CLEC traffic does not necessarily reflect historical voice trending which is captured by Pacific's proposed method of measurement. According to MCIIm, Pacific's proposal of "time consistent busy hour" is only suitable for low growth networks such as the mature networks of the ILECs because it uses an averaged peak traffic volume. Using an average busy hour necessarily reduces the baseline off of which the traffic forecast is developed and thereby underestimates the forecasted trunking requirements (Exh. 201 at 10.)

MCIIm asserts that Pacific's logic in pointing to Section 6.9 to show that MCIIm can inflate any trunking forecast by as much as one-third is flawed. Section 6.9 pertains to reducing the embedded base of trunks because of under-utilization, not forecasting future projected trunking requirements.

Discussion

MCIIm's method for trunk forecasting in Section 4.1 is adopted. As MCIIm points out, its methodology gives a better forecast for a small, fast-growing network like MCIIm's.

Pacific mistakenly points to Section 6.9 to attempt to prove that MCIIm could use that language to order one-third more trunks than required. As MCIIm points out, that section relates to reducing the current number of trunks, based on a certain level of under-utilization, not forecasting future projected trunking requirements.

In its Comments on the DAR, Pacific asks that if the arbitrator does not agree to adopt Pacific's methodology, that limiting language be included that Section 6.9 may not be used to augment trunk capacity beyond the number of trunks forecasted under MCIIm's methodology. Pacific's request is granted. The parties shall add language to Section 4.1 to that effect.

Issue ITR -28

Should MCIIm have Access Service Request (ASR) control for all one-way trunks?

Pacific's Position

Pacific wants to retain ASR control over one-way trunks carrying Pacific's originating traffic. Across the industry, the standard is that when a company seeks to install trunks from itself to another company, the company originating those trunks is the one that issues the ASR. There is a practical reason for this; if an ASR is improperly issued, resulting in a failure to get additional trunks timely provisioned, the one harmed is the company that was seeking the additional trunks.

Pacific states that MCIIm has not given any indication that Pacific's manual ASR process, which the parties currently use, has posed any of the difficulties that MCIIm insists will be a problem.

MCIIm's Position

MCIIm asserts it should have ASR control for all one-way trunk orders because Pacific has no electronic process in place for sending ASRs to MCIIm. Instead, Pacific must send facsimiles. Based on past experience, MCIIm has found the facsimile process to be lengthy and cumbersome. In some cases, MCIIm has waited up to 180 days to receive an ASR in response to a TGSR sent to Pacific. MCIIm proposes to be in control of all ASRs until such time as a workable electronic solution is available.

Discussion

Pacific's proposed language in Section 6.10 is adopted. I agree that an electronic system for the exchange of ASRs would be preferable to the use of FAXes. However, it is Pacific that should decide when its originating traffic warrants the need for additional trunking, and therefore Pacific must issue the ASR.

Issue MCIIm ITR -37

Should the contract include a provision for trunk charges?

The Parties agreed that this disputed language should be in Appendix NIM where it has been inserted as Section 10.

Pacific's Position

Pacific states that MCIIm's proposal for a shared meet other than MCIIm's office in a one-way trunking scenario eliminates Pacific's presence in an MCIIm office for which a space use charge should be applied. Also, entrance facility costs are completely unrelated to the space use costs MCIIm is referring to here.

MCIIm's Position

According to MCIIm, for one-way trunks, Pacific has historically compensated MCIIm for the space its terminating equipment occupies in the MCIIm office. This charge was reflected in the first MFS/Pacific ICA, but inadvertently left out of the second generation ICA. MCIIm wants these charges reinstated and has proposed to charge Pacific rates equivalent to the rates Pacific charges MCIIm for collocation. The rationale for this charge is to offset the collocation charge that MCIIm incurs when terminating similar facilities in a Pacific office. Since Pacific is not required to pay collocation charges to MCIIm, it is appropriate that they incur some charge for the occupancy of space in the MCIIm office. The proposed language is based on and intended to duplicate the

language in the AT&T/Pacific ICA in which the parties voluntarily agreed to these offsetting charges.

MCIIm acknowledges that the target architecture of a mid-span fiber meet does not require offsetting collocation charges because each company is responsible for installing the optical terminating equipment in its offices. However, the ICA does provide for alternative network architectures that the parties could agree to use which would require the offsetting collocation charges.

Discussion

To the extent that one-way trunks are employed under this ICA, MCIIm should be able to charge Pacific for terminating the trunks, in the same manner that Pacific charges MCIIm for terminating trunks at its collocation arrangements. MCIIm's proposed language in Section 10 shall be adopted.

G. LIDB and CNAM Service

Issue LIDB - 1

Should a reference to a tariff for terms and conditions and pricing be utilized for LIDB services?

Pacific's Position

Pacific states that there are some services provided to CLECs that have been standardized in form, function and pricing, and should be tariffed. This assures identical treatment to all purchasers, while reducing negotiating costs. Although MCIIm does not want any tariff references in its ICA, Pacific believes that in some instances the tariff should be utilized to achieve parity for all CLECs. This situation applies especially for LIDB. MCIIm argues that it loses the ability to control changes to a tariff, and wants assurances that the terms, conditions and pricing will remain constant for the life of its contract.

According to Pacific, MCIIm's witness objected to using the LIDB tariff primarily on the grounds that it would allow Pacific to increase the price of LIDB

queries during the term of the contract. However, a review of the pricing sheet shows that MCIIm will not be paying a tariff price, but rather the TELRIC rate shown in the price sheet. Pacific asserts that while it is not proposing to use tariff prices, it is proposing to apply the tariff to the other terms and conditions.

MCIIm is made aware of any request by Pacific to change tariffs and would have full recourse to intervene in such filing. As prior arbitrators have ruled, use of tariffs is permissible and should be approved here.⁹ Therefore, MCIIm's position is unwarranted.

MCIIm's Position

MCIIm wants certainty over the life of the ICA and believes that tariffs can change and thereby change the terms of the ICA without MCIIm's knowledge and consent. If the terms of the tariff were to supercede the contract, there would be no point in negotiating a contract. Further, as a matter of business practicality, MCIIm wants its contract terms in the contract and does not want to refer to extraneous documents for terms and conditions. Pacific even proposes that LIDB queries be priced at the tariff price, despite the fact that the CPUC has established a cost-based price in the OANAD proceeding.

Discussion

Pacific's proposed language in Section 3.1 is adopted. Pacific's language indicates that the terms and conditions of LIDB service are contained in its FCC Tariff 128. MCIIm has not provided any alternate terms and conditions for the provision of the service to be used in lieu of the tariff language. Since LIDB service is a part of this ICA, there must be some reference to the terms and conditions under which the service is offered.

⁹ AT&T/Pacific Bell FAR, p. 19; Level 3/ Pacific Bell FAR, pp 15-17.

However, Pacific's language in Section 4.4 is problematic. The agreed-upon language in that section indicates that the prices for LIDB are set forth in the Appendix Pricing. However, Pacific's proposed additional language states "All tariffed rates associated with LIDB Services and/or CNAM Query provided hereunder are subject to change effective with any revisions of such tariffs." Since Pacific itself indicates that MCIIm will be paying TELRIC rates rather than tariff rates, its proposed language should not apply and should be removed from the ICA.

Issue LIDB - 3

Should MCIIm have access to the functionality of the CNAM and LIDB data bases for use in call processing or should MCIIm have unlimited access to all the information stored by the entire LEC community?

Pacific's Position

According to Pacific, this is a core issue in this arbitration. Pacific believes that MCIIm may use LIDB, CNAM, E-911 and all other call-related data bases to query for calls that pass through the network and to maintain its own end user records in such data bases. However, MCIIm wants Pacific to provide the records of all carriers that reside in the database. Interestingly, MCIIm was the CLEC who requested that Data Screening be made available (in Texas) which acts to preclude such general disclosure. Conversely, in California MCIIm refuses the very product that was designed in Texas specifically to meet MCIIm's needs. (See UNE-106.)

Per-query access is consistent with the FCC's orders on these databases, which provide for access only at the Signal Transfer Point (STP). As the FCC stated in paragraphs 484 and 485 of its Local Competition Order:

We require incumbent LECs to provide this access to their call-related databases by means of physical access at the STP linked to the unbundled database...

We note that the overwhelming majority of commenters comment that it is not technically feasible to access call-related databases in a manner other than by connection at the STP directly linked to the call-related database. Parties argue that the STP is designed to provide mediation and screening functions for the SS7 network that are not performed at the switch or database. We, therefore, emphasize that access to call-related databases must be provided through interconnection at the STP and that we do not require direct access to call-related databases.

The FCC confirmed its order in the UNE Remand Order, requiring “incumbent LECs, upon request, to provide non-discriminatory access to their call-related databases on an unbundled basis, for the purpose of switch query and database response through the SS7 network.” (UNE Remand Order ¶ 402.) MCI’s witness Lehmkuhl cited unrelated sections of the UNE Remand Order to argue that the FCC’s rules from the Local Competition Order were no longer applicable and that batch access should be allowed. (Lehmkuhl for MCI, Exh. 210, pp. 7-8.) His analysis ignores, however, that the FCC has consistently limited this UNE to “access to” the databases, and not the databases themselves.

Pacific asserts that if the LIDB and CNAM databases were downloaded in bulk, it would result in the wholesale release of proprietary customer information to MCI. (Vandigriff for Pacific 9 RT 783.) For example, PIN numbers for calling cards, including for CLEC customers, are included in the database. And, under the FCC’s “pick and choose” rule, the information could be released to all CLECs.

MCI’s Position

MCI states that it should have full and nondiscriminatory access to Pacific’s LIDB and CNAM. The Act does not permit Pacific to restrict MCI’s use of these databases, and Pacific does not itself restrict its use of the information. “Nondiscriminatory access” under the Act refers to access that is at

least equal in quality to that Pacific provides to itself and includes equal rates, terms and conditions of the access.

Pursuant to Section 251(c)(3) of the Act, Pacific must not restrict MCI's use of CNAM and LIDB to provide a telecommunications service. Pacific attempts to impose an unreasonable restriction when it implies that only "per query" access to these databases constitutes the UNE. It is not "per query" access but the underlying database that is the UNE.

In § 3.9 of the LIDB and CNAM appendix of the ICA, Pacific proposes language to restrict MCI's use of the databases for "local" service only. Aside from the fact that Pacific does not itself provide local-only service, the Act specifically prohibits Pacific from imposing use restrictions that prohibit MCI from utilizing CNAM and LIDB to provide any telecommunications service. This requirement can also be found under Section 51.309 of the FCC's Rules:

...that this language bars incumbent LECs from imposing limitations, restrictions, or requirements on requests for, or the sale or use of, unbundled elements that would impair the ability of requesting carriers to offer telecommunications services in the manner they intend... We also conclude that section 251(c)(3) requires incumbent LECs to provide requesting carriers with all of the functionalities of a particular element, so that requesting carriers can provide any telecommunications services that can be offered by means of the element. We believe this interpretation provides new entrants with the requisite ability to use unbundled elements flexibly to respond to market forces, and thus is consistent with the pro-competitive goals of the 1996 Act.
(Local Competition Order at ¶ 292.)

According to MCI, Pacific may not impose use restrictions on UNEs that would restrict MCI's provision of any telecommunications service that can be offered utilizing CNAM or LIDB.

In Section 3.7, Pacific proposes to restrict MCIIm's access by allowing some providers of the LIDB/CNAM data within the databases to opt out of the databases provided to MCIIm. As the Commission recognized in D.00-10-026, with respect to directory assistance databases, the quality of the data suffers when such providers are allowed to make a patchwork of the database, which ultimately affects the quality of service that customers receive.

Pacific seeks to limit MCIIm's access to "query only." MCIIm requires batch access so that the databases come to MCIIm in a readily accessible format that can be incorporated into MCIIm facilities with no dialing delays. The industry standard for CNAM requires that the caller information be provided to the subscriber before the second ring cycle. (Exh. 210.) Pacific's proposed query access could result in delays past the second ring cycle due to Pacific's capacity constraints and thus clearly is discriminatory.

MCIIm refutes Pacific's assertion that Pacific has only query access to the database. While Pacific operators access the database on a query basis, Pacific is able to manipulate the data within the database and utilize the database in any lawful way it likes. This includes using the database to support any of the telecommunications services it provides.

Despite Pacific's assertions, there is nothing in the FCC's rules or interconnection orders that prohibits batch access to the entire LIDB or CNAM database.

Discussion

In its Comments on the DAR, Pacific asserts that, by allowing MCIIm to download the LIDB and CNAM databases, the DAR effectively departs from the FCC definition of this UNE. Pacific states that the call-related database UNE codified in the formal FCC rules as a result of the FCC's "necessary and impair" analysis explicitly and unequivocally limits this UNE to per-query access. Pacific

also states that the CPUC cannot modify a UNE for which the FCC has done a formal “necessary and impair” analysis and set specific parameters, without first conducting its own “necessary and impair” analysis. And, as Pacific states, none was conducted here.

Pacific states that while access to databases has been classified as a UNE under Sec. 251(c)(3) of the Act, obtaining the databases themselves has not. Downloading databases, such as occurs today with the magnetic tape transfers of the DAL database, has always been treated by the FCC not as a UNE but under the “non-discriminatory access” provisions of Sections 251(b)(3). Pacific states that MCI is already receiving non-discriminatory access to this information: it receives per query access in the same way Pacific uses it, and in the same way that the information is available to other CLECs.

Finally, Pacific states, the DAR does not adequately address the privacy issues around batch release of the CNAM database. Sensitive consumer information is contained in the database.

A review of the rules promulgated by the FCC in its UNE Remand Order supports Pacific’s assertions. Section 51.319(e)(2) relates to call-related databases. Subsection (A) of that part reads as follows:

For purposes of switch query and database response through a signaling network, an incumbent LEC shall provide access to its call-related databases, including but not limited to, the Calling Name Database, 911 Database, E911 Database, Line Information Database, Toll Free Calling Database, Advanced Intelligent Network Databases, and downstream number portability databases *by means of physical access at the signaling transfer point linked to the unbundled databases.* (Emphasis added.)

In other words, the FCC defined this particular UNE narrowly to include access to databases at the STP. MCI is correct that Section 251(c)(3) of TA96

states unequivocally that Pacific may not restrict MCIIm's use of a UNE to provide a telecommunications service. However, the FCC has defined this particular UNE to be limited to access at the STP, which would not include downloading of the entire database. Further, the FCC expressed concern with privacy issues related to access these call-related databases. In Subsection (E) of its rules, the FCC states:

An incumbent LEC shall provide a requesting telecommunications carrier with access to call-related databases in a manner that complies with section 222 of the Act.

Section 222 relates to the privacy of customer information. The language the FCC placed in Subsection (E) above shows the FCC's intent that access to information be granted in a way that protects customers' privacy. In order to protect customers' privacy, a carrier should not be permitted to save any information obtained from routine database queries. Therefore, Pacific's position on the downloading of call-related databases for MCIIm is adopted.

MCIIm's position is adopted in Section 3.7. Both this Commission and the FCC recognize that the ILEC's historical monopoly position as the provider of local services makes its database the most complete compilation of the data to be had in this region when it deemed call-related databases to be UNEs in its Local Competition Order. To deny MCIIm use of the same database Pacific uses in this manner would be patently discriminatory.

MCIIm's proposed language in Section 3.9 is granted. Pacific may not restrict MCIIm's use of the information in the databases to "local" only service.

Section 5.2: MCIIm's proposed language is rejected. MCIIm's request for bulk access to the databases as a UNE, which is addressed in Appendix UNE, is rejected. (See Issue UNE-5.)

Pacific's proposed language in Section 5.3 – 5.5 is adopted. This language prohibits MCIIm from storing such information in any table or database for any reasons, which is appropriate given the form of database access granted by the FCC.

Issue LIDB - 5

Is it reasonable to require MCIIm to self-report usage for billing purposes until such time as Pacific has usage recording capability?

Pacific's Position

According to Pacific, it should have billing capability for LIDB during the early part of 2001. (Exh. 125 at 20.) Given that the capability may be available by the time this ICA becomes effective, the most efficient solution would be to have MCIIm pay the rate suggested by Pacific's witness Vandagriff for any interim period. Vandagriff's alternative language would allow billing for this service without requiring MCIIm to self-report:

Until such time as Pacific is able to bill its CNAM Query using a single per query rate, Pacific will bill CNAM Queries in the same manner that Pacific bills Validation Queries. Pacific will bill its CNAM Query a per-Query and a per-Query Transport rate for each CNAM Query initiated into Pacific's LIDB. The per-Query Transport rate Pacific will bill will be the same per-Query Transport rate Pacific bills for Validation Queries. The sum of the per-Query and per-Query Transport Pacific will bill for its CNAM Query will equal the CNAM per-Query rate in Appendix Pricing.

MCIIm's Position

MCIIm objects to having to incur costs to develop self-reporting systems just because Pacific lacks the ability to record usage. The burden should be on Pacific to build its own systems to do its own billing.

Discussion

Pacific's alternate language cited above will be adopted, in lieu of its original proposal in Sections 4.11.2 through 4.11.5. Under Pacific's proposal, MCIIm would not have to develop a system to self-report the information Pacific requires. This should serve as a good interim measure until Pacific's billing system for LIDB is operational.

Issue LIDB - 7 (Related to UNE-6 and LIDB - 3)

Should proprietary customer information provided by Pacific, be protected by MCIIm?

This issue was addressed under Issue LIDB - 3.

Issue LIDB - 11

Is it reasonable to limit the liability of either party for LIDB Service and/or CNAM Database, in addition to the general liability provision in the GT&C's?

Pacific's Position

According to Pacific, the LIDB/CNAM databases present a different liability issue, justifying a specific liability clause. The LIDB/CNAM databases contain millions of subscriber records, updated based on information provided by a wide variety of LECs. The accuracy of the database is dependent upon the accuracy of the information submitted by the various carriers, like MCIIm.

To keep costs and prices reasonable, Pacific's liability must not exceed damages in the amount of the price paid for LIDB/CNAM services. Carriers typically limit their liability to the value of the services that are rendered.

MCIIm's Position

According to MCIIm, in Sections 7.1 and 7.2 Pacific seeks to make direct damages the sole and exclusive remedy for breach of an obligation contained in the LIDB appendix. This would prevent either party from seeking injunctive

relief or seeking specific performance. MCIIm believes that such a restriction is unreasonably narrow and that Pacific has failed to justify why this limitation is necessary.

Also, in Section 7.8 Pacific would require MCIIm to indemnify Pacific for claims related to a failure to block calling name information and limit Pacific's indemnity obligations under this appendix to privacy-related claims, damages or actions caused by Pacific's willful misconduct or gross negligence. MCIIm believes the standard it proposes for the general indemnity section is more appropriate here. Pacific has provided no justification for this additional indemnity provision.

Discussion

Pacific's proposed language for Sections 7.1 and 7.2 is adopted. This treatment would be the same as for other services, e.g., directory assistance information, where Pacific's liability is limited to the revenues received from the service.

Pacific's proposed language for Section 7.8 is rejected. Pacific does not meet its burden of proof that the standard indemnity language in the GT&C is not adequate to cover this appendix.

Issue LIDB - 13

Should Pacific's liability be expanded beyond willful misconduct or gross negligence?

Pacific's Position

Pacific states that its liability in this ICA should be the same as when it furnishes the same LIDB service to non-CLECs under its 175-T tariff. MCIIm requests that Pacific be held liable for any "acts or omissions," which is vague and could leave Pacific with liabilities when unintentional omissions of a third party user occur accidentally. As Pacific's witness testified, much of the data in

the LIDB database is provided by third parties and its accuracy is largely outside of Pacific's control. Pacific should not be required to be an insurer. MCIIm can cover its own liability to its own customers through limitations in its tariffs similar to what Pacific has in its 175-T tariff.

MCIIm's Position

MCIIm believes that the standard it has proposed for indemnity based on a party's acts or omissions is appropriate here and that Pacific has not met its burden of demonstrating that a different standard should be applied in this instance. MCIIm states that Pacific has provided no justification for departing from a basic fault-based or negligence standard. Such a standard would not expose Pacific to claims arising from acts or omissions of carriers other than Pacific.

Discussion

Pacific's proposed language will be adopted in Sections 7.4 and 7.6. As Pacific says, the term "acts or omissions" is vague and could leave Pacific with liabilities when unintentional omissions of a third-party user occur accidentally. It is appropriate that Pacific's liability be limited to "willful misconduct or gross negligence."

Issue NIM - 1

Should trunks for interconnection of Pacific's and MCIIm's networks be provisioned as one-way or two-way?

This issue was addressed under Issue ITR-6. MCIIm shall have the option of determining whether one-way or two-way trunks best meet its needs in a particular circumstance. MCIIm's language in the second paragraph of the Introduction is adopted.

H. Line Share

Issue Line Share - 18

- 1) **If Pacific believes that an MCIIm request for conditioning will significantly degrade a customer's voice service, should Pacific be required to make such a showing to the Commission prior to denying MCIIm's request?**
- 2) **Should the agreement specify the work-around Pacific should take if MCIIm's conditioning request is technically infeasible?**

Pacific's Position

- 1) Pacific states that, as its witness Welch testified, it is impractical to believe that Pacific will be able to successfully make any showing regarding the ability to condition a loop within the abbreviated timeframes allowed for conditioning.
- 2) Pacific asserts that its systems automatically perform Line and Station Transfers (LSTs) to spare loops to provision DSL-capable loops, so there is no need to add MCIIm's language requiring dead count copper or LSTs. That exercise would have already been undertaken prior to notifying MCIIm a loop was unavailable.

MCIIm's Position

- 1) MCIIm believes it is reasonable to require that Pacific make such a showing before denying MCIIm's request for conditioning. Such a requirement will give Pacific an incentive to thoroughly and carefully consider MCIIm's requests for conditioning. MCIIm's language is also supported by Paragraph 68 of the FCC's Advanced Services Order.
- 2) MCIIm states that Pacific's attempt to get approval of charges for LSTs through a placeholder TBD charge is inappropriate. This proposal is discriminatory because Pacific does not apply the same charges in other circumstances in which LST's occur and does not reflect a forward

looking network design which would eliminate the need for LSTs to provision loops that are capable of carrying services based on digital subscriber line (DSL) technology.

Discussion

MCIm's proposed language in Section 7.2 is adopted. The agreed-upon language indicates that Pacific must make an affirmative showing to the CPUC that conditioning the specific loop in question will significantly degrade voice services. That showing should be made before Pacific denies the request for conditioning. Since the showing must be made, it makes sense to let the CPUC's decision determine whether the requested conditioning should occur.

Pacific states that it is unnecessary to add MCIm's language requiring dead count copper or LSTs because its systems automatically perform that test. However, I can appreciate MCIm's desire for certainty that the test will be performed, so MCIm's proposed language will be included at the end of Section 7.2.

Issue MCIm Line Share - 40

Should Pacific be required to provide MCIm with notice of service interruptions related to splitter maintenance?

Pacific's Position

Pacific agrees that from time to time it may need to replace or repair Pacific-owned splitters or splitter cards, which will necessitate a brief interruption of service. Pacific has also clearly stated its repair interval of Pacific owned splitters in Section 8.3.3.2.1 of its Line Share Appendix. Pacific does not anticipate any splitter outages lengthy enough to necessitate notification to MCIm. In fact, since the interval would likely be short in duration it would be faster to perform the repair rather than create unnecessary delays by requiring Pacific to notify MCIm.

MCIIm's Position

MCIIm states that its request for notice is reasonable and its proposed language tracks that ordered by the Commission (see California Interim Line Share appendix at 5.1.2.7). Since this maintenance is customer-affecting, MCIIm seeks to add only a requirement that Pacific provide at least 2 hours' notice.

Discussion

MCIIm's proposed language is appropriate. If the service interruption will last more than 15 minutes, MCIIm should be informed so that it can notify its customers to let them know of the outage.

In its Comments on the DAR, Pacific indicates that it should not be required to undertake this notification unless MCIIm is actually going to use the information. Pacific asks that the ICA language be modified to read "15 minutes, or the outage time MCIIm uses as a trigger to notify its own customers, whichever is greater." Pacific's modification makes sense. If MCIIm uses a trigger of an hour for when it will notify its subscribers of an outage, Pacific should not have to make the notification to MCIIm for an outage of 15 minutes. MCIIm shall inform Pacific of the trigger it uses for notifying its customers of an outage.

I. FCC Merger Conditions

Issue MERG-1

Should FCC Merger Conditions Appendix be part of the ICA?

Pacific's Position

Pacific asserts that the terms and conditions for discounts and offerings associated with the conditions of the merger of SBC and Ameritech should be included in the ICA. MCIIm has advised Pacific that it intends to request discounts and terms of the merger applicable to CLECs. If so, the terms and conditions should be a part of the ICA. The FCC Merger Conditions are not

incorporated by reference into this Agreement, rather, they need to be delineated. MCIIm will not be able to receive the FCC's Merger Conditions unless the appropriate terms and conditions associated with the Merger Condition are included in the ICA.

MCIIm's Position

MCIIm believes it should be able to enjoy the terms and conditions of the FCC Merger order by reference to the FCC Merger order. MCIIm believes it should not be required to adopt a Merger Appendix in which Pacific seeks to unilaterally interpret the Merger Order. The SBC/Ameritech merger conditions are not subject to change by unilateral imposition of Pacific's interpretation of that Order in its proposed Merger Appendix.

Discussion

MCIIm's position is adopted. Rather than restate the conditions of the lengthy, complex Merger Order, the ICA should incorporate by reference the FCC Merger Conditions. Therefore, Section 1.3 is adopted. That section states: "The Parties agree to abide by and incorporate by reference into this Appendix the FCC Merger Conditions." In that way, there is no dispute about the actual terms and conditions, and since they have been incorporated by reference, MCIIm would be entitled to any of the discounts offered in the Merger Order. All other proposed sections for this Appendix are to be deleted.

J. NIM (Network Interconnection Methods)

Issue NIM - 3

Is it reasonable that each party bear interconnection facility costs in proportion to the percentage of originating traffic of each party over two-way trunks?

Pacific's Position

Pacific states that although MCIIm conceded during the hearings that its proposed cost allocation method should not apply where the parties have implemented a mid-span fiber meet, the contract language that MCIIm has proposed would require that result. MCIIm's proposed language is as follows:

Each party shall bear interconnection facility costs in proportion to the percentage of originating traffic for which its customers are responsible.

There is no language in the Appendix NIM that would limit the application of the foregoing provision to those situations where the parties do not implement mid-span fiber meets. Also, Pacific objects to MCIIm's proposal because it is lopsided. Pacific originates more traffic to MCIIm than MCIIm originates to Pacific. Second, Pacific disagrees with MCIIm's premise that the only traffic of value to a carrier is the traffic the carrier terminates. Pacific's proposal of equal apportionment of facility costs recognizes that traffic to all carriers and their customers is of value in each direction. Additionally, MCIIm's proposed language conflicts with the POI selection process.

MCIIm's Position

According to MCIIm, the Local Competition Order contemplates that each party will bear network costs in proportion to network usage. MCIIm's position is that each company should bear its costs associated with the interconnection facilities.

MCIIm indicates that the Commission supported the same cost allocation principle in the AT&T/Pacific arbitration. (FAR, Issue 228 at 408-409.)

In its Brief, MCIIm acknowledges that the language in Introduction Paragraph 4 is not intended to apply to a mid-span fiber meet. MCIIm proposes that the last sentence in the Introduction be modified to read: "Where the parties

interconnect by a method other than the mid-span fiber meet, each party shall bear interconnection facility costs in proportion to the percentage of originating traffic for which its customers are responsible.”

Discussion

MCIIm’s revised language cited above is adopted, with modification. It clarifies that this particular section does not apply to mid-span fiber meets. However, parties need to further clarify that this language applies only to two-way trunks, according to the language used by the parties to frame Issue NIM-3.

Issue NIM - 17

Is it reasonable for MCIIm to use Unbundled Dedicated Transport (UDT) instead of leased facilities for network interconnection?

Pacific’s Position

According to Pacific, MCIIm is requesting the use of a UNE for the purpose of interconnection. In order to satisfy MCIIm’s request, Pacific would be required not only to allow MCIIm access to UNEs at points other than technically feasible points, but also to combine the transport UNE with non-UNE elements in order to successfully complete MCIIm’s requested interconnection arrangement. MCIIm’s request is also inconsistent with the United States Court of Appeals for the Eight Circuit.

MCIIm’s Position

MCIIm wants the option to purchase UDT to provide interconnection facilities and does not intend to lease facilities where UDT is available. MCIIm’s position is supported by the Act and the FCC’s Local Competition Order. Paragraph 440 states that ILECs “must provide unbundled access to dedicated transmission facilities” and that such facilities “could be used by a competitor to connect to the incumbent LEC’s switch.” In ¶ 346 of the UNE Remand Order, the FCC commented that CLECs “required dedicated transport to deliver traffic

from their own traffic aggregation point to the incumbent LEC's network for purposes of interconnection."

The Act is clear that network interconnection and UNEs have the same pricing standard. Pacific's witness Debella in her direct testimony suggests that using UDT for interconnection would somehow violate an FCC rule. This FCC rule supposedly requires the use of collocation to access UNEs. On cross-examination, she acknowledged that collocation is only one of multiple ways in which a CLEC can access a UNE.

Discussion

MCIm's proposed language in Section 8.1 is adopted. As Paragraph 346 in the UNE Remand Order clearly states, CLECs can use UDT for purposes of interconnection.

K. Operator Services (OS)

Issue OS-1

Is it reasonable to describe Pacific's Operator Services offering as a UNE?

Pacific's Position

According to Pacific, the UNE Remand Order found that operator services is not a UNE. The only exemption is where Pacific does not offer customized routing, which does not apply here. Pacific does offer customized routing and therefore the exception stated in the UNE Remand Order does not apply in this instance. (See also Issue DA-7.)

MCIm's Position

MCIm takes the same position with respect to OS as a UNE as it does for DA. See DA-7. Pacific must provide MCIm with OS as a UNE until such time as Pacific provides MCIm with customized routing pursuant to the UNE Remand Order. Furthermore, OANAD defined OS as a UNE and that decision has not

been modified. Under the Act, and FCC rules, states may define UNEs in addition to those required by the FCC.

Discussion

MCIIm's proposed language in Section 1.1 and 5.1 is adopted. This reflects the fact that MCIIm will receive operator services at UNE prices unless Pacific provides MCIIm with customized routing. See Issue DA-7 for complete analysis of the issues.

Issue OS-13

Should the parties bear their own costs in providing the facilities necessary for OS?

Pacific's Position

According to Pacific, the only equitable approach is for parties to bear their own costs. This issue was arbitrated in the AT&T/Pacific arbitration, and the language adopted there is the language Pacific is proposing here.

MCIIm's witness Saltzman argues that MCIIm should be able to use existing interconnection trunks to transport OS/DA traffic to Pacific's OS/DA platforms. Pacific says that his arguments are misplaced. First, if MCIIm can build these separate trunks from existing interconnection facilities, it may do so under the contract. Interconnection facilities typically run between CLEC switches and Pacific tandems or end-offices, and not to Pacific's OS/DA platforms, so these facilities may not always be available. Further, the cost of transport between an MCIIm end-office switch and Pacific's OS platform is not already included in the price MCIIm is charged. Where MCIIm purchases Pacific's OS/DA for resale, the costs included in that price are trunks between Pacific's end office and its OS/DA platform. The trunks required between an MCIIm switch and Pacific's platform require new facilities to be built, and are not included in the retail price for the service.

MCIIm's Position

MCIIm believes that ancillary traffic such as OS is a part of local traffic and should be allowed over the local interconnection facilities. Thus, the parties would bear their respective costs in accordance with Appendices NIM and ITR. It is MCIIm's position that no additional dedicated trunks and related costs are necessary.

Pacific's witness Vandagriff implies that MCIIm must provide the trunks from its switch all the way to Pacific's operator switch. This contradicts the general agreement among the parties as set forth in NIM Introduction Paragraph 2 which states that the interconnection facilities can be used to support the OS/DA trunks, along with trunks for other ancillary traffic including 911 traffic.

Discussion

Pacific's position is adopted. There is a big difference between MCIIm's OS/DA traffic, and traffic which passes over its local interconnection trunks. All of the OS/DA traffic is one-way, originated by MCIIm's end users and terminating at Pacific's operator platform. MCIIm should supply the necessary trunks to carry its customer's traffic to Pacific's operator platform.

Issue OS-18

Beyond the term of the Appendix, should Pacific be allowed to change the rates specified in Appendix Pricing upon 120 days notice?

Pacific's Position

Pacific asserts that OS is a competitive service that MCIIm can purchase from other providers. Although Pacific commits to a set price for the term of the Appendix, Pacific must reserve its right to change the price once the term expires. It often happens, as with the MCIIm contract, that a successor agreement is not put into place immediately upon the expiration of the original agreement.

Pacific does not want to have the rates for a competitive service like OS held hostage during the negotiations for an entirely new agreement; 120 days notice of a price change gives MCIIm sufficient time to determine whether to accept the change or to purchase from an alternative provider.

MCIIm's Position

Unless and until MCIIm gets customized routing, OS and DA are UNEs and therefore the rates are as set forth by the Commission in OANAD. Pacific may not update those prices until the Commission sets new prices as part of any subsequent review of UNE prices.

Discussion

Pacific's proposed language which would allow the company to change the prices in the Appendix upon 120 days notice to MCIIm is rejected. MCIIm is entitled to certainty in pricing during the life of the ICA.

L. Performance Measurements (PERF)

Issue PERF-1

- a) **Should Sections 3 and 8.3 relating to Performance Incentives incorporate a final decision in R.97-10-016/I.97-10-017 on the effective date of said decision or only after appeals have been exhausted?**
- b) **Should Pacific's Sole Remedy language in Section 7 be adopted?**

Pacific's Position

- a) Pacific asserts the ICA should incorporate a final decision only after appeals have been exhausted. Pacific asks that it not be required to incorporate the results of a decision on performance incentives/remedies that may be stayed or overturned.
- b) Pacific asks the Commission to adopt Pacific's proposed sole remedy language for three reasons: First, under California law, liquidated damages (which is what the parties have agreed to in Section 8.1 that

performance remedy/incentive payments are) constitute an alternative to payment of actual damages. Second, the parties have agreed that any liquidated damages paid by Pacific to MCIIm shall be for MCIIm's loss of end-user opportunities due to a performance breach by Pacific. Third, they have agreed in Section 8.2 that any such payment will constitute a "reasonable approximation of the damages MCIIm would sustain if its damages were readily ascertainable." If Pacific's payment of performance remedies is both in recognition of and a reasonable approximation of actual damages to MCIIm due to a performance breach by Pacific, then any liquidated damage payments that MCIIm may receive will make MCIIm whole. There is no justification for allowing MCI the opportunity seek additional damages.

MCIIm's Position

- a) The ICA should incorporate a final decision as of the effective date of said decision. Pacific gives no justification for its proposal to alter the normal procedural rules that provide for a Commission order becoming effective pending rehearing and appeal, unless stayed by the Commission or a court of competent jurisdiction.
- b) MCIIm asserts it should not be precluded from seeking additional damages in the event that Pacific fails to meet specified performance measures. This issue was previously decided against Pacific in the first MCIIm/Pacific arbitration. In D.97-01-039, the Commission denied Pacific's request that performance incentive penalties apply as liquidated damages and the sole remedy in its ICA with MCIIm. In doing so, the Commission stated, in part: "...liquidated damages are intended to approximate the amount necessary to put [the aggrieved party] in the position it should have occupied but for the shortfalls."

(D.97-01-039 p. 17) However, performance incentives are not designed to approximate liquidated damages, but to constitute a system of incentives, an enforcement mechanism to promote Pacific's satisfactory performance of its obligations under the Act.

Discussion

- a) MCIIm's proposed language in Sections 3 and 8.3 is adopted. Commission decisions are effective when approved by the Commission, and not when any and all appeals have been exhausted.
- b) Pacific's language in Section 7 is rejected. This language would make the liquidated damages adopted in docket R. 97-10-016/I.97-10-017 MCIIm's sole and exclusive remedy. As MCIIm states, performance incentives are not designed to approximate liquidated damages, but to constitute a system of incentives, an enforcement mechanism to promote Pacific's satisfactory performance. Also, the performance measures and incentives adopted by the Commission may not address all performance issues under this ICA. MCIIm should not be precluded from seeking additional remedies.

M. Pricing

Issue PRICE - 2

Is a To Be Determined (TBD) price or MCIIm's proposed price more reasonable for OC3 and OC12 unbundled loops?

Pacific's Position

Pacific states that the price for OCN-level loops should be set at TBD pending the completion of cost studies.

MCIIm's Position

According to MCIIm, Commission-adopted entrance facility prices provide a reasonable proxy for interim OC3, and OC12 loop prices. There is no dispute

that the FCC's UNE Remand Order required Pacific to provide unbundled OC3 and OC12 loops more than a year ago. Moreover, as MCIIm requested those elements in its negotiations with Pacific, Pacific cannot claim to be unaware that demand exists. Therefore, there is no justification for Pacific's failure to propose specific pricing for these elements.

There is no meaningful debate that the specific proxy prices MCIIm has proposed are reasonable. MCIIm's proposed prices are based on Pacific's own Commission-adopted costs for reasonably comparable services. In fact, Pacific itself has used the analogous entrance facility price as the basis for its proposed proxy for another high-capacity loop UNE price (Exh 208 C at 7-8.) Pacific failed to provide any specific evidence that MCIIm's proposal to use the same proxy data for additional loop options is not at least as accurate as Pacific's own use of that data as the basis of its proposed proxy price for the DS3 loop.

Discussion

MCIIm's proposed prices for OC3 and OC12 loops will be adopted, subject to true-up as determined in Issue Price 41. As MCIIm states, Pacific used a similar methodology to determine interim rates for DS3 loops, so there is no reason why the same methodology cannot be used for OC3 and OC12 loops. Although the rates will be subject to true-up, MCIIm will have specific interim rates in place which allow it to order the loops, without the time delay of negotiating the TBD rates with Pacific. Pacific is not harmed because the rates will be subject to true-up.

Issue PRICE - 4

Are Pacific's prices for DSL Loop Qualification reasonable?

Pacific's Position

Pacific indicates that the 10¢ mechanized price is the Texas price. The \$34.33 manual price is supported by a TELRIC study. The TBD price of "detailed manual" is necessary because a cost study has not been completed.

During negotiations, MCI_m proposed, and the parties agreed upon language for manual loop qualification that stated:

13.5 Manual loop qualification requires the manual look-up of data that is not contained in an electronic database. Manual OSS data may include the following; (a) the actual loop length; (b) the length by gauge; (c) the presence of repeaters, load coils, bridged taps. In addition, manual OSS data shall include, if noted on the individual loop record, (a) the total length of bridged taps; (b) the presence of pair gain devices, DLC, and/or DAML, and (c) the presence of disturbers in the same and/or adjacent binder groups. MCI_m will be billed a manual loop qualification charge for manual OSS information at the rates set forth in Appendix Pricing. (Appendix DSL.)

According to Pacific, MCI_m asked for the data-gathering work activities described in the above contract language. Pacific could have chosen to provide MCI_m with the access to data and information ordered in the FAR in the Interim Line Sharing (ILS) proceeding and nothing more. Obviously, Pacific would not have agreed to offer this additional service, in which Pacific's personnel do the data gathering at MCI_m's request, at a zero price. Pacific's witness Cass presented a cost study substantiating the TELRIC costs of providing the service MCI_m requested in the negotiation. (Cass for Pacific, Exh. 120-C pp. 5-6, Attachment 2.)

MCI_m's Position

As the Commission found in its Order concerning Interim Line Sharing Prices, loop qualification prices should reflect the *de minimis* cost to Pacific of

providing access to loop makeup information in a forward-looking environment. Therefore, the arbitrator should reject Pacific's proposed prices.

Discussion

Pacific's proposed prices for loop qualification are adopted. If MCI were simply being given access to information, a loop qualification charge would not apply under the terms established in the ILS proceeding. However, in this case, MCI is asking Pacific to perform data gathering research on loops, and Pacific should be compensated for that work. In the agreed-upon language in Section 13.5 which Pacific cites above, MCI acknowledges that it should pay a manual loop qualification charge for the work Pacific performs on its behalf.

In its Comments on the DAR, MCI disputes the loop qualification prices adopted by the arbitrator. MCI states that the record, including the contract language cited by Pacific at Appendix DSL, § 13.5 shows that MCI has only asked Pacific "to make the relevant data concerning its loops available directly" to MCI. MCI asserts that the record also shows that, if Pacific does not have that data already available in its databases to supply electronically to MCI, Pacific's cost to clean up its databases by adding that information is already assigned as a portion of the recurring cost and price of Pacific's UNE recurring prices. Section 13.5 makes it clear that Pacific is performing *manual* look-up of information *not* included in electronic databases. While MCI states that the manual information could be added to electronic databases, there is nothing in the record of this proceeding to demonstrate which of the information would continue to be extracted manually, and which could be added to electronic databases.

Issue PRICE - 5

Are Pacific's prices for sub-loops reasonable?

Pacific's Position

Pacific states that its prices for sub-loops are supported by TELRIC cost studies provided to MCIIm during negotiations. MCIIm asked that the nonrecurring rates be split into "connect" and "disconnect" rate elements, which Pacific agreed to do. MCIIm requested additional information regarding the SPOI priced at lines 134-41 of the Price Sheet. A description of the SPOI is contained in Appendix UNE. The SPOI arises from the rapidly evolving situation with Minimum Points of Entry (MPOE) and location of demarcation points at customer locations, recently before the Commission. Pacific recommends it be handled through the BFR process, given the current fluidity in that area of regulation.

During negotiations, MCIIm requested that DLC over copper feeder be offered at the price for the "CO to SAI" sub-loop. However, MCIIm presented no testimony establishing that the two are similar. According to Pacific, MCIIm's witness Murray incorrectly re-characterizes DLC over copper feeder as a sub-loop and then looks to other sub-loop prices as a surrogate. She did not present any evidence that DLC over copper and the CO to SAI-sub-loop are similar.

MCIIm's Position

MCIIm accepts most of Pacific's proposed pricing for sub-loops, for purposes of this arbitration. However, certain errors in Pacific's cost estimates should be corrected and prices should be set for sub-loop options ignored by Pacific.

MCIIm urges the arbitrator to establish interim prices for sub-loops that originate or terminate at a Pacific remote terminal. Pacific originally proposed

prices for these elements and then withdrew its proposal (Exh. 208-C, Murray for MCIIm at 16-17.) Given that MCIIm may require this service option during the life of this ICA, the arbitrator should set an interim price if a reasonable proxy price is available. Based on Pacific's own data, it appears that highly congruent proxy costs do exist (Exh 208-C, Murray Testimony at 17-18.)

Also, Pacific placed a single sub-loop nonrecurring charge, the "DS1 - Fiber" into its proposed recurring price appendix. Pacific's DS1 - Fiber nonrecurring cost proposal is doubly curious because Pacific did not provide a supporting cost study and is proposing a price for this element that is substantially out of line with the nonrecurring price for other comparable sub-loop elements. According to MCIIm, the price for fiber DS -1 sub-loops should be set equal to Pacific's proposed price for the 4-wire DS-1 loop, which is a reasonable comparable facility, until Pacific obtains a Commission approved cost and price.

Discussion

In its Comments on the DAR, MCIIm disputes the DAR's outcome on sub-loop pricing issues. MCIIm asserts that the Permanent Line Sharing Phase of OANAD will not set rates for many of the sub-loops because PLS is concerned with DSL services, not all types of loops, such as the missing sub-loop options for copper feeder and voice grade services that MCIIm proposed prices for in this arbitration. MCIIm also disputes the arbitrator's finding that there is inadequate record in the proceeding to determine prices for some of the sub-loop options. MCIIm has shown that Pacific itself originally proposed the prices that MCIIm has recommended for similar or identical services. MCIIm's position is adopted. The sub-loop rates MCIIm proposes will be adopted on an interim basis, subject to true-up. Setting rates for these sub-loop options will enable MCIIm to purchase

subloops without any delays, and neither party is harmed by the interim prices, since the rates are subject to true-up.

Issue PRICE - 17

Are Pacific's rates for dark fiber reasonable?

Pacific's Position

Pacific states that its rates for dark fiber are based on TELRIC studies. Pacific points out that the issues of whether the "Administrative Loading Factor" and "true-up" issues should be adopted are addressed under Issues Price-42 and Price 41.

In addition to the Administrative Loading Factor and the "true-up" issue, MCI's witness Murray argued that investment and related costs should be excluded for these rate elements. On cross-examination, Murray was asked to review the TELRIC cost study methodology and in particular the assumptions a TELRIC study makes that the cost study starts from a network topography that has been "scorched" of its facilities. Murray acknowledged that TELRIC studies scorch all existing facilities and rebuild the network from the ground up (Murray for MCI, 8 RT 717.) She acknowledged that the resulting UNEs include the investment cost to do that rebuilding and that other UNEs contain investment costs. (Murray for MCI, 8 RT 718-719.) Murray singles out dark fiber as the single exception which would not include investment costs, which Pacific finds to be unpersuasive. First, Murray describes dark fiber variously as "spare" and as an "excess capacity" UNE. Second, in a TELRIC study one scorches the entire network. Defining the UNE as just excess capacity fails to scorch any facilities. Third, by limiting the UNE to just excess capacity, Murray is not capturing the total element increment of demand required for a TELRIC study, which would include all uses of a UNE, including Pacific's use. Four, Pacific states that Murray's argument for investment-free fiber based on Pacific's right to reclaim it

is misplaced. The CLEC is still using up the economic life of Pacific's fiber. The only correct way to price dark fiber is to determine the total cost of all fiber in the network, as is done for all other UNEs.

MCI's Position

Pacific's proposed prices for the dark fiber element are inconsistent with the definition and nature of that element. As a result, Pacific both overstates the cost of the dark fiber UNE and double counts its cost for physical fiber facilities that would be used to supply dark fiber.

MCI asserts that Pacific treats the fiber in the dark fiber UNE as if it were part of functioning UNE loops. Pacific's justification of its costing approach rests on its assertion that dark fiber uses similar fiber facilities and that the Commission's costing principles require "that any function necessary to produce a service should have an associated cost." (Cross-examination of Pearsons for Pacific, 8 RT 667.)

According to MCI, Pacific's analysis goes astray because Pacific fails to account for the nature of the dark fiber UNE, which is fundamentally different from other UNEs. By definition, dark fiber is a spare facility that Pacific placed based on Pacific's own estimates of its expected demand for its services. Because the TELRIC studies that this Commission adopted for the UNE loop were based on total demand, all the cost for the dark fiber that will be available in Pacific's network on a forward-looking basis is already captured as the "spare capacity" or "fill" loading that is part of the cost of existing loop and transport UNEs. Hence, because forward-looking utilization is already included in all the total network TELRIC cost analysis adopted by the Commission, the cost of spare fibers that Pacific does not currently utilize are, by definition, already included in existing UNE prices. Pacific's dark fiber pricing proposal would double-recover

capacity costs already recovered through other UNE prices. (Exh. 208-C, Murray for MCIIm at 23-34.)

Because the Commission considered and assigned the cost of all outside plant facilities when it adopted TELRIC costs in OANAD and it did not anticipate that those facilities would also yield an additional UNE, i.e. dark fiber, the Commission did not assign any portion of the outside plant cost to dark fiber but instead assigned the cost for Pacific's total plant to other UNEs. Because Pacific will not build additional plant to provide dark fiber, the cost of facilities used for dark fiber must already be assigned to other UNEs.

MCIIm also asks the arbitrator to direct Pacific to separate its dark fiber nonrecurring charges into connection and disconnection components, which is the format that the Commission ordered for all of the adopted UNE nonrecurring charges.

Discussion

MCIIm's position is adopted, and investment costs will not be included in the dark fiber UNE. MCIIm has made a convincing argument that it would constitute double-recovery, since those costs have already been included in the cost studies previously adopted for the loop and transport elements.

In its Comments on the DAR, Pacific asserts that investment costs should be included in the TELRIC prices for dark fiber, as is the case with all other UNEs. Pacific states that double-counting issues, if any exist, should be referred to the three-year review of OANAD scheduled to start in 2002. I am persuaded by MCIIm's argument that double-counting would occur if investment costs were included in the dark fiber prices adopted in this arbitration. Therefore, I am unwilling to include the investment costs for dark fiber, which are currently being captured in the costs of other UNEs.

In addition, Pacific is to establish separate nonrecurring charges for “connect” and “disconnect,” as has been done for other nonrecurring charges.

Issue PRICE-22

Is Pacific’s proposed price for Call Branding reasonable?

Pacific’s Position

According to Pacific, call branding is a part of OS and DA, and is therefore, not a UNE so it can be market-priced. As the FCC stated in the UNE Remand Order, where a network element is no longer unbundled, “it would be counterproductive to mandate that the incumbent offers the element at forward-looking prices. Rather, the market price should prevail, as opposed to a regulated rate which, at best, is designed to reflect the pricing of a competitive market.” (UNE Remand Order ¶ 473.) Pacific substantially reduced the price during negotiations – from \$3,000 to \$1,800 non-recurring charge per switch. Pacific also agreed to charge only once for both DA and OS operations.

MCIm’s Position

MCIm asserts that Pacific’s proposed price is unreasonably far above its cost and double counts Pacific’s cost for this element. According to MCIm, the arbitrator should set the rate for this element at \$0. Moreover, even if the arbitrator finds that this cost is not double counted in its entirety. Pacific’s proposed price is an unreasonable exploitation of Pacific’s market power and the arbitrator should impose a more reasonable price.

Discussion

As Pacific acknowledges, call branding is part of OS and DA. MCIm’s proposed price is adopted, until Pacific provides the custom routing MCIm is requesting. See also Issue DA-7.

Issue PRICE-23

Are Pacific's proposed TBD rates for Rates/Reference Information Services for DA and Operator Services reasonable?

Pacific's Position

Pacific states that Rate/Reference information is not currently available to CLECs in California. When it becomes available, Pacific will propose prices. Until then, it should be TBD.

MCIIm's Position

MCIIm agrees to accept Pacific's proposed TBD price for this service for purposes of this arbitration as long as the Rate/Reference Service is entirely optional.

Discussion

According to Appendix DA Section IV.A, which was agreed to by the parties, Pacific's Rate/Reference Service is "at MCIIm's option." Therefore, Pacific's proposed TBD price for the service is adopted.

Issue PRICE-24

Are Pacific's proposed prices for "Operator Services-Fully Automated Call Processing," and for "Call Completion LATA Wide" for Operated-Assisted Calls reasonable?

Pacific's Position

Pacific states that these are reasonable prices. They are not UNEs, and have a market-based mark-up. This is a competitive market in which MCIIm has several choices. These rates are the same or similar to rates agreed to by AT&T.

MCIIm's Position

MCIIm asserts that Pacific proposes to charge MCIIm 50% more than AT&T for "Operator Services - Fully Automated Call Processing" and a slightly higher rate for "Call Completion LATA Wide." Such substantial difference in prices for similarly situated competitors is discriminatory and unjustified.

Discussion

Pacific's proposed rates are adopted. Those rates are identical to those which appear in the AT&T/Pacific ICA.

Issue PRICE-25

Are Pacific's proposed prices for OS/DA trunks reasonable?

Pacific's Position

Pacific asserts that its proposed prices are reasonable. Since OS and DA are not UNEs, market-based pricing is appropriate. Pacific's proposed prices come from Pacific's 175-T tariff for trunks. AT&T agreed to slightly higher prices in its ICA.

MCI's Position

MCI indicates that Pacific's proposed price, which is unreasonably far above its cost, is an unreasonable exploitation of Pacific's market power. The arbitrator should impose a more reasonable price.

Discussion

MCI's proposed pricing is adopted, until Pacific provides the custom routing MCI is requesting. (See also Pricing-22.)

Issue PRICE-26

Are Pacific's proposed prices for BLV/I trunks reasonable?

Pacific's Position

Pacific indicates that since OS is not a UNE, the prices for BLV/I trunks should be market-based, and not based on cost. Pacific states that its proposed prices are from Pacific's 175-T tariff. They are less than the price adopted in the AT&T ICA.

MCIIm's Position

MCIIm asserts that Pacific's proposed price, which is far above its cost, is an unreasonable exploitation of Pacific's market power. The arbitrator should impose a more reasonable price.

Discussion

MCIIm's position is adopted. See Discussion in Issues Pricing -22 and Pricing - 25.

Issue PRICE-31

Is Pacific's proposed price for Directory Assistance Listings reasonable?

Pacific's Position

According to Pacific, DAL listings are not a UNE and so can be market-priced. As Pacific's witness Vandagriff testified, Pacific's price structure for DALIS has changed since the AT&T arbitration. There, the FAR rejected the tariff's \$.05 per listing usage fee on the grounds that it was essentially uncollectible. (AT&T/Pacific FAR at 248.) Here, Pacific is proposing the same price set by the FCC for the same listings when sold to directory publishers. That price is structured without any usage fee, but instead has tiered prices for base file and update listings. The FCC's finding of fair prices for subscriber listings was \$.04 for base file listings, and \$.06 for updates. Vandagriff testified that with the new price structure, current customers "would actually be saving money." (Vandagriff for Pacific, 9 RT 782.)

MCIIm proposed a price for unbundled DAL listings based upon significant adjustments to a Pacific study submitted in OANAD. Those adjustments have not been evaluated by the Commission in that proceeding, as no decision has issued on the issue. Moreover, the adjustments cannot be evaluated here because MCIIm's witness Murray did not introduce the underlying cost study itself into the record of this proceeding.

MCIIm's Position

MCIIm asserts that Pacific's proposed price, which is unreasonably far above its cost is an unreasonable exploitation of Pacific's market power. The arbitrator should impose a more reasonable price. A cost-based price for this element would be \$0.0020 per record via tape and \$0.0018 via Network Data Mover.

Discussion

In its Comments on the DAR, MCIIm criticized the DAR's conclusion that since Directory Assistance Listings (DAL) is not a UNE, it can be market-priced, as Pacific proposes. According to MCIIm, the DAL database is an essential input that must be acquired by MCIIm to provide its own OS/DA service. Even if not a UNE, pricing of DAL is subject to strict nondiscrimination requirements under the Act and FCC orders. As the FCC recognized in its DAL Provisioning Order,¹⁰ this nondiscriminatory access requirement extends to pricing. In its order, the FCC recognized that ILECs continue to charge competing DA providers discriminatory and unreasonable rates for DAL. Although the FCC declined to support a specific pricing structure for DAL, it encouraged states to set their own rates consistent with the nondiscrimination and reasonable pricing requirements of Section 251(b)(3).

While MCIIm acknowledges the FCC has not adopted a specific pricing standard, MCIIm asserts that over the past year, the FCC reaffirmed that incumbents must:

“make available to unaffiliated entities all of the in-region telephone numbers they use to provide non-local directory

¹⁰ Provision of Directory Listing Information under the Telecommunications Act of 1934, As Amended, CC-Docket No. 99-273, FCC 01-27, released January 23, 2001 (“DAL Provisioning Order”).

assistance service at the same rates, terms and conditions they impute to themselves.”¹¹

According to MCIIm, the true economic cost to Pacific of access to directory listing data is the forward-looking economic cost of making that data available. The FCC found that incumbents enjoy a competitive advantage with respect to the provision of directory assistance service as a result of their legacy as monopoly providers of local exchange service, and their “dominant position in the local exchange and exchange access markets.”¹² According to MCIIm, these FCC findings compel the conclusion that, absent nondiscriminatory access to the incumbent’s directory assistance data, competitors’ ability to provide a comparable directory assistance product would be impaired.

MCIIm asserts that the arbitrator should not permit Pacific to charge prices for DAL that are above the cost Pacific “charges itself.” According to MCIIm, the only evidence of what that cost is on this record is the economic cost Pacific incurs to provision DAL. If the nondiscriminatory access requirement of Section 251(b)(3) and the FCC Forbearance Order is to be adhered to, the Commission must consider the economic costs incurred by Pacific.

Pacific’s prices appear to be based on the four and six cent rates the FCC suggested as reasonable prices for directory publishing listings. Although the FCC said in its Local Competition Third Report & Order, FCC 99-227 at ¶ 103, that four and six cents might be appropriate prices for directory publishing, it did not do so for DAL. Rather, in the DAL Provisioning Order, the FCC

¹¹ FCC Memorandum Opinion and Order, in the Matter of the Petition of SBC Communications Inc. for Forbearance of Structural Separation Requirements and Request for Immediate Interim Relief in Relation to the Provision of Nonlocal Directory Assistance Services, *et al* CC Docket No. 97-122, DA 00-514, Adopted April 11, 2000, at ¶ 2.

¹² Id. at fn 42.

specifically rejected this by making it clear that directory assistance and directory publishing are statutorily separate and distinct. The FCC concluded that the rates for one cannot be used to justify the rates for the other. DAL Provisioning Order at ¶ 37.

According to MCIIm, Pacific's cost analysis filed on April 6, 1998 in the OANAD docket, are multiples lower than the 4 to 6 cents appropriate for directory publishers. According to MCIIm, Pacific's reported costs reflect a number of errors that resulted in substantial overstatement. Therefore, MCIIm proposes pricing DAL at the fully corrected cost developed by MCIIm in OANAD.

In its Post-Hearing Brief, Pacific makes the following assertions: "DAL listings are not a UNE and so can be market priced," (Brief at 86.) and "Here Pacific is proposing the same prices and price structure established by the FCC for the same listings when sold to directory publishers." (Id. at 86-87.) Those statements are both problematic in light of recent FCC rulings regarding the pricing of DAL.

While the FCC has not adopted a definitive methodology for pricing DAL, it gives every indication that market pricing is not acceptable. Paragraphs 34 and 35 in the DAL Provisioning Order read as follows:

34. In responding to the Notice, many commenters asserted that LECs are charging competing DA providers discriminatory and unreasonable rates for access to their directory assistance databases. For example, Teltrust contends that some LECs charge an initial access fee of \$25,000. LSSi maintains that LECs are manipulating prices for directory assistance databases in order to limit or even exclude competition. Similarly, Excell claims that Southwestern Bell Telephone Company charges it 53 times the approved cost-based rate that it may charge telecommunications providers.

35. Section 251(b)(3) of the Act and the Commission's rules prohibit LECs from charging discriminatory rates, for access to DA databases, to competing directory assistance providers that fall within the protection of that section (i.e., those that provide telephone exchange service or telephone toll service). Thus, LECs must cede access to their DA database at rates that do not discriminate among the entities to which it provides access. Further, failure to provide directory assistance at nondiscriminatory and reasonable rates to DA providers within the protection of section 251(b)(3) may also constitute an unjust charge under section 201(b).

Further, the FCC's imputation requirement in its Forbearance Order gives another strong signal that market-based pricing is not appropriate for DAL. Paragraph 14 allows the petitioners [Bell South, SBC and Bell Atlantic]:

"to provide nonlocal directory assistance service on an integrated basis, but require them to provide to unaffiliated entities all of the in-region directory listing information they use to provide nonlocal directory assistance service at the same rates, terms and conditions they impute to themselves."

Therefore, the market pricing which Pacific proposes in this arbitration is inconsistent with the FCC's directives, as is Pacific's use of subscriber list prices as a proxy for DAL. The FCC makes that clear in ¶ 37 of its DAL Provisioning Order:

We also decline to adopt, for DA purposes, the rate methodology for subscriber list information under section 222(e) of the Act. We agree with the majority of commenters that the pricing structure for directory assistance and access to associated databases should remain distinct from that of subscriber list information. We conclude that, because of the statutory differences between directory assistance and directory publishing, the Commission can not at this time justify setting a rate that would apply to both access to directory assistance databases and directory publishing.

To summarize, the rates Pacific proposes in this arbitration do not comply with the nondiscrimination requirements of Section 251(b)(3) or with the FCC's requirement for "reasonable" pricing for DAL. In addition, the FCC does not support the use of subscriber listing information as a basis for pricing DAL. Therefore, Pacific's rates will not be adopted.

The rates MCIIm proposes in this arbitration are based on MCIIm's adjustments to the cost studies submitted by Pacific in OANAD. Those cost studies were submitted in 1998, when DAL would have been considered a UNE and subject to TELRIC pricing, so Pacific's cost study would have been based on TELRIC, which may or may not be appropriate because DAL is no longer a UNE. Also, as Pacific states, the Commission has never ruled on the validity of the adjustments MCIIm proposes. MCIIm's proposed rates for DAL will be adopted, on an interim basis, until final rates for DAL are adopted in OANAD. On the basis of the record in this arbitration, I will propose that the assigned ALJ in the OANAD DAL proceeding update the record, which is currently 2 years old, and move toward the adoption of final rates for DAL. Those rates shall be reflected in this ICA. MCIIm's interim rates will be subject to true-up. In that way, Pacific will not be harmed if the rate ultimately adopted by the Commission is higher than the rates MCIIm proposes.

Issue PRICE-32

Is Pacific's proposed price for NXX Migration reasonable?

In Issue GT&C 3, I determined that the cost of NXX migrations should be absorbed by all carriers and ordered that the rate for NXX migrations be deleted from the Pricing Appendix.

Issue PRICE-40

Is Pacific's proposed price for the transit rate element reasonable?

Pacific's Position

Pacific states that its proposed price for the transit rate element includes cost recovery for transport. It is a cost incurred by Pacific in providing transiting, and should be recovered per the Act.

According to Pacific, the cost study Pacific presented was approved in the MFS/Pacific arbitration, but was not presented in the AT&T/Pacific arbitration, resulting in Pacific recovering only tandem switching costs there. According to Pacific's witness Pearsons, the study justifies the other costs entailed in providing CLECs with transiting. Those costs include the trunk port costs on the tandem switch and the multiplexing equipment necessary to take the optical signals off of the fiber transport medium and convert it to electrical signals understandable to the tandem switch. MCI's cost witness offered no critique of the cost study.

MCI's Position

MCI asserts that Pacific should provide this element to MCI at the same price as established in the AT&T/Pacific agreement. Pacific proposes to charge MCI a price more than four-times higher for the minute of use portion of the transiting rate element than the price it charges AT&T for the same service under its recently executed ICA.

Discussion

Pacific's transit rate is adopted on an interim basis. Pacific did not present its cost study in the AT&T arbitration case so the arbitrator there had no record to adopt Pacific's cost study, so AT&T's proposal to use the switching rate for transiting was adopted, since it was the only record-based proposal on the table. Also, AT&T's pricing witness testified that AT&T's proposed network architecture calls for the delivery of transit traffic to Pacific's tandem switches. Thus, in serving transit traffic, Pacific will provide only tandem switching and not transport. (AT&T/Pacific FAR at 231.) There is no evidence in the record of

this proceeding as to whether MCIIm's network configuration would allow it to avoid the transport element.

Pacific did present its cost study in this arbitration case, and MCIIm did not rebut Pacific's cost study. MCIIm should ask the Commission to set final rates for the transit rate element in the OANAD proceeding. Those rates would apply to all carriers.

Issue PRICE-41

Is it reasonable to require a true-up on interim prices where there are no permanent OANAD prices or OANAD phase underway to set permanent prices?

Pacific's Position

Pacific asserts that it is administratively too difficult to true-up prices over several years. Where there is no phase of OANAD underway to set a permanent price, it may be several years before a permanent price is set. True-ups should occur only where the Commission orders it at the time it opens the proceeding to set the permanent rate.

Pacific believes that the cost studies provided to MCIIm during negotiations starting last summer are adequate to set cost-based prices in compliance with the Act. According to Pacific, MCIIm's concern that TELRIC cost studies can only be adequately reviewed in generic proceedings is incorrect.

According to Pacific, MCIIm's dismissal of the administrative burden associated with true-ups is also mistaken. The language MCIIm proposes would require Pacific to "track and record all quantities provisioned, durations, and amounts of payment." The billing systems would require programming to capture and store the data for this purpose.

MCIIm's Position

MCIIm asserts that in order to establish cost-based prices as required by law, prices for all unbundled network elements for which the Commission has yet to establish approved prices should be subject to true-up without a time limit.

MCIIm realizes that with a true-up, it could owe Pacific additional compensation should the Commission adopt higher permanent rates. Nonetheless, a true-up is superior to forcing competitors to accept prices based on costs that have not been subjected to full industry and regulatory scrutiny. Furthermore, this Commission has forcefully communicated that it will not establish permanent cost-based prices in two-party arbitration proceedings.¹³ Also, there is no exception to TA96's requirement for cost-based prices. If the Commission has not examined Pacific's supposed cost basis for an element, the Commission cannot certify that Pacific's proposed price is cost-based. (Exh. 208-C, Murray for MCIIm at 10.)

Discussion

MCIIm's position is adopted. The Commission has stated its intent that costs be determined in generic proceedings, and I am not willing to adopt final prices based on the limited review of cost studies which can be performed in an arbitration setting. There are only two parties to this proceeding, so other CLECs and interested parties have had no opportunity to examine the cost studies. Since the rates set in the arbitration will be interim, pending review in a generic proceeding, they should be subject to true-up.

I believe that Pacific overstates the difficulty of capturing the data needed for a true-up. Computer programs can be written to capture the needed data for later true-up.

¹³ Final Arbitrator's Report, AT&T/Pacific Bell arbitration at 210-211 and 224-225.

Issue PRICE-42

Should Pacific's non-recurring charges for post-OANAD UNEs include an additional Administration Factor for employee break-time and employee administrative time?

Pacific's Position

Under the Act, Pacific is entitled to recover all costs arising from the Act's requirements. Without the Administrative Factor, Pacific would not recover its labor costs. Under the Commission's Consensus Cost Principle No. 4 any function necessary to produce a service must have an associated cost. As Pacific's cost witness Pearsons testified, without the Administration Factor, both of the above rules would be violated because Pacific would not recover all of its labor costs. (Pearsons for Pacific, Exh. 122-C, pp. 6-7.)

The costs involved are associated with work activities such as union-mandated breaks and other administrative functions like filling out timesheets and staff meetings.

MCI's Position

Pacific's proposed unilateral modification to the OANAD-approved methodology for calculating labor costs associated with non-recurring costs is discriminatory. MCI's witness Murray asserts that Pacific's implication that it is somehow correcting an error in the Commission-adopted nonrecurring cost methodology is false. Murray explains that:

...the Commission has already weighed, and rejected, Pacific's claim to include such administrative costs in non-recurring charges for unbundled network elements. Pacific's proposal to add such a factor now entirely ignores that the Commission-adopted methodology resolved both Pacific's assertion that the adopted labor rate inputs were too low and the assertion of other parties that they were too high.

Discussion

MCIIm's position is adopted, and the Administration Factor will be deleted from the cost studies Pacific proffered in this arbitration. As MCIIm's witness Murray testifies, that specific issue was examined in the OANAD proceeding, and Pacific's position was not adopted, and I do not intend to modify the OANAD methodology in this arbitration. The appropriate place for Pacific to pursue its argument in support of its Administration Factor is in the generic OANAD proceeding with regards to all nonrecurring charges adopted by the Commission.

Issue MCIIm PRICE - 43

Should specific guidelines for determining "To Be Determined" or "TBD" prices be included in the contract?

Pacific's Position

Pacific asserts that MCIIm's proposed language for TBD pricing is unreasonable. First, the proposed language requires Pacific to undertake a TELRIC cost study prior to any expression of firm interest by MCIIm to actually buy the item. Second, MCIIm's witness Murray testified that the proposed language requires TELRIC studies even for TBD items that are not UNEs. This is overbroad since non-UNEs are not governed by TELRIC rules. Third, if a price cannot be agreed upon, the proposed language requires the parties to come to this Commission for resolution. Pacific says it is unclear why this should turn into a Commission case when there already is a dispute resolution mechanism in the ICA which does not entangle the Commission.

MCIIm's Position

MCIIm proposes guidelines for determining the specific price of elements that are now listed as TBD. Guidelines should include requirements for Pacific

to produce its estimate of costs in a timely manner, for establishing interim prices so that ordering is not unduly delayed and for dispute resolution.

According to MCIIm, Pacific has proposed that numerous prices be set as "TBD," but Pacific has not developed contract language to define the process for transforming TBD rates into specific, cost-based prices. Lacking any such guidelines, Pacific can severely impede MCIIm's ability to compete by applying erratic standards, withholding cost data, etc.

Discussion

The language MCIIm proposes in Paragraph 3-6 in Section 1 is adopted, with some modification. There needs to be a specific process in place for addressing TBD prices because MCIIm cannot order a particular element or service until a specific price has been set. However, as Pacific states, not all of the TBD prices relate to elements which have been declared UNEs under the rules established in the FCC's UNE Remand Order, and only UNEs are subject to TELRIC pricing. In its OANAD proceeding, the Commission set UNE prices for some elements which were not declared to be UNEs by the FCC. Those elements are, therefore, not subject to TELRIC pricing. This Commission (or the FCC) could expand the list of UNEs, after performing the "necessary and impair" test outlined by the FCC in its UNE Remand Order.

Pacific should not have to perform a TELRIC cost study for particular UNEs until MCIIm indicates firm interest in buying the element, and the language should be changed to reflect that. In addition, MCIIm's guidelines should not apply to elements or services which are not UNEs.

Issue MCIIm PRICE - 44

What is a reasonable price for CNAM listings?

Pacific's Position

MCIIm is seeking a download of the entire LIDB/CNAM database, in bulk, separate from the associated signaling, which is outside the requirements of the Act. MCIIm's proposal has been specifically rejected by the FCC, since it overreaches obligations imposed by the Act with respect to call-related databases and associated signaling. Pacific concludes that no pricing is necessary because MCIIm's request for CNAM listings in bulk is outside the Act.

MCIIm's Position

MCIIm states that, on an interim basis Pacific should provide CNAM listing data for the same price at which it provides directory assistance listing data. Given that both CNAM and DAL involve maintaining a large database of similar data and transmitting those data to MCIIm, the forward-looking costs for both functions should be similar.

Discussion

In issue LIDB-3, I determined that MCIIm would be limited to query-only access to the CNAM database, so there is no need to adopt a rate for purchase of the CNAM listings in bulk.

Issue MCIIm PRICE-45

What is the appropriate resale discount for broadband and fast packet services?

Pacific's Position

According to Pacific the appropriate resale discount is 0%. Per CPUC D.97-08-059, access tariffed products have no avoided costs and therefore no discount is applicable.

MCIIm's Position

MCIIm indicates that broadband and fast packet services should be subject to the same Commission-approved resale discount (17%) that Pacific's other

retail services are. Pacific has not established any basis for exempting these services from the retail discount. The US Court of Appeals for the District of Columbia recently agreed that, in drafting the Act, Congress did not treat advanced services differently from other telecommunications services.”¹⁴ MCIIm asserts that there is no reasonable basis for exempting these services from the resale discount.

Discussion

MCIIm’s position is adopted. The January 9, 2001, decision of the DC Circuit Court is clear that advanced services should be subject to the resale requirements of § 251(c):

As the Commission [the FCC] concedes, Congress did not treat advanced services differently from other telecommunications services. (See Deployment Order p 11.) It did not limit the regulation of telecommunications services to those services that rely on the local loop. For that reason, the Commission may not permit an ILEC to avoid s 251(c) obligations as applied to advanced services by setting up a wholly owned affiliate to offer those services. (Association of Communications Enterprises v. FCC.)

In its Comments on the DAR, Pacific states the DAR confuses the requirement to offer a service for resale with the amount of the resale discount to be applied to a particular service. The services at issue are tariffed in Pacific’s 175-T wholesale tariff. In D.97-08-059, the Commission held that services in the 175-T tariff, while they were subject to the Act’s resale obligations, would not have the 17% discount because they were already wholesale services, and

¹⁴ Association of Communications Enterprises, Appellant v. Federal Communications Commission, Appellee, AT&T Corporation, et al., Intervenor, Appeal of an Order of the Federal Communications Commission, United States Court of Appeals for the District of Columbia Circuit, Argued October 11, 2000, Decided January 9, 2001, No. 99-1441.

whatever discounting was appropriate had already occurred. According to Pacific, the Commission's decision in D.97-08-059 remains in full force and effect.

Section 251(c)(4) requires ILECs "to offer for resale *at wholesale rates* any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." (Emphasis added.) The Commission's decision in 1997 was based exclusively on private lines and special access services deployed at the time, and did not take point-to-point advanced services into account in making its determination. The Commission's decision on whether to apply an avoided cost discount to private line/special access services rested in large part on the FCC's conclusions in paragraph 874 of its Local Competition Order, which the Commission cited in D.97-08-059:

We find several compelling reasons to conclude that exchange access services should not be subject to resale requirements. First, these services are predominantly offered to, and taken by, IXCs, not end users....The mere fact that a fundamentally non-retail services are offered pursuant to tariffs that do not restrict their availability, and that a small number of end users do purchase some of these services does not alter the essential nature of the services. Moreover, because access services are designed for, and sold to, IXCs as an input component to the IXC's own retail services, LECs would not avoid any 'retail' costs when offering these services at 'wholesale' to those same IXCs.

Based on the FCC's reasoning, the Commission found that there are no avoided retail costs for private line services when sold to CLECs for resale. "Since the service is essentially wholesale in nature, we conclude that the CLC reseller should pay the same rate as the IXC. No further discount is appropriate...." (D. 97-08-059, mimeo at 38.) The Commission made its decision based on a special access market where the same services were purchased by IXCs and CLECs, and the Commission concluded they should pay the same

rates. That decision was made before the advanced services market blossomed, and the Commission did not take advanced services into account when it made the determination that a wholesale discount was not warranted for private line/special access services.

According to the recent D.C. Circuit decision in Association of Communications Enterprises v. FCC, advanced services, including broadband and fast packet, are subject to the Act's resale requirements, including the requirement that services be offered at wholesale rates. Pacific's reliance on a 1997 Commission order is misplaced.

N. Reciprocal Compensation (RECIP COMP)

Issue RECIP COMP-1

Is it reasonable to include a provision in the Recip Comp Appendix that any orders in the CPUC's Reciprocal Compensation docket should be incorporated into the Appendix when effective?

Pacific's Position

Pacific states that, according to MCIIm, the language originally drafted by Pacific was as follows: "The following terms and conditions of this Appendix Reciprocal Compensation are subject to the Order(s) of the Commission in Docket No.00-02-005. Such Order(s) will be deemed incorporated into this Appendix upon their effective dates, including any true-up specifically ordered by the Commission." Regardless of who may have originally drafted this language, Pacific would be agreeable to it if the phrase "or any other entity of competent jurisdiction" were added to the end of the sentence. The reason is that, as proposed by MCIIm, the language would not require the parties to conduct any true-up that may be ordered by an entity other than the Commission - i.e., the FCC or a court. By adding the phrase "or any other entity of competent jurisdiction" to the end of the sentence as Pacific proposes, the parties would be bound to perform a true-up whether ordered by the

Commission, the FCC, or the courts. There is no valid reason why MCIIm should oppose the inclusion of this additional language, as it imposes no harm to MCIIm and serves only to clarify the obligations of the parties.

MCIIm's Position

MCIIm states that in negotiations both parties agreed to add language incorporating the orders that come out of the CPUC's Reciprocal Compensation docket. Pacific's attorney drafted this language, but it was apparently inadvertently omitted from the filed version of the contract. MCIIm does not agree to Pacific's proposed reference to the FCC, since MCIIm disputes the FCC's jurisdiction over this issue.

Discussion

MCIIm's proposed language is adopted, with the phrase Pacific proposes, "or any other entity of competent jurisdiction." Under the Intervening Law language in Section 29.18 of the GT&C, the parties would have to incorporate any true-up ordered by the Commission, the FCC, or a court of competent jurisdiction. The FCC, which recently released an order on reciprocal compensation issues¹⁵, would dispute MCIIm's conclusion that the FCC has no jurisdiction over this issue.

O. Resale (RES)

Issue RES-2 (Related to DEF-3 and ALL-1)

This issue was resolved under DEF-3.

Issue RES-6

¹⁵ Order on Remand and Report and Order, FCC 01-131, released April 27, 2001.

Should this discount rate section refer to Pacific's generic "Appendix Merger Conditions" as Pacific proposes, or to the FCC's Merger Conditions Order as MCIIm proposes?

This issue was addressed under Merg-1. Section 3.3 should refer to Merger Conditions Order, Section XV(c). In Appendix Merg, the FCC's merger order was incorporated into the ICA by reference.

Issue RES - 20

Should Pacific's language regarding limitations of call blocking be included in this Agreement?

Pacific's Position

Pacific believes that the responsibilities for and limitations of call blocking need to be memorialized in this ICA. Call blocking, although available, is not foolproof. If MCIIm chooses to use this functionality, MCIIm should acknowledge and incur the risk of such use. The call blocking that Pacific is offering to MCIIm is at parity with the call blocking that Pacific offers to itself. Yet MCIIm seeks to require Pacific to provide MCIIm with a more effective call blocking system than Pacific uses itself. Pacific is not obligated to give MCIIm a higher standard of service than Pacific gives to itself and its own end-users.

MCIIm's Position

MCIIm states that if it chooses to block certain services, MCIIm should be provided call blocking in the same manner Pacific provides call blocking for its own customers. Pacific does not charge its own customers when Pacific fails to block a call that it is technically capable of blocking and for which it offers call-blocking. MCIIm should not be forced to absorb charges for Pacific's network failure to provide a functional blocking system.

Discussion

Pacific's proposed language is adopted with some modifications. Pacific is correct that it is not required to offer MCIIm a more effective call blocking system

than Pacific itself uses. The requirement that MCIIm "pay any applicable charges" for blocking shall be modified to reflect the fact that Pacific's residential customers do not pay for call blocking, and MCIIm (or its residential customers) should not have to pay either. Pacific's language makes clear that call blocking is not available for certain types of calls. Pacific includes language that requires MCIIm to acknowledge responsibility for "any charges associated with calls for which blocking is not available and any charges associated with calls that bypass blocking systems." It is appropriate that MCIIm acknowledge that no blocking is available for certain types of calls, but MCIIm should not be responsible if Pacific's network fails to provide blocking in those cases where call blocking is available. The phrase "and any charges associated with calls that bypass blocking systems" shall be deleted.

Issue RES-23 (Related to PRICE-33)

Should Pacific's language, which merely notes that there are charges associated with the customer usage data, be adopted?

Pacific's Position

Pacific believes it is only fair to point out when a delineated service has a cost associated with it. As such, Pacific has proposed the following language: "Should MCIIm elect to subscribe to the DUF, MCIIm agrees to pay Pacific the charges specified in Appendix Pricing under the "Other (Resale)" category listed as "Electronic Billing Information Data (daily usage) (per message)." As indicated by the foregoing, the actual price element is contained in the Appendix Pricing. Pacific's proposed language merely provides a cross-reference to the Appendix Pricing, specifying which element in the Pricing Sheet would apply for this service.

MCIIm's Position

MCIIm strongly disagrees with Pacific's position. MCIIm does want the option to receive the DUF as necessary to bill its resale local service customers. However, there is no price for the DUF delineated in Appendix Pricing or anywhere in Pacific's agreement. According to MCIIm, Pacific did not provide any cost studies for the DUF. Pacific never raised the issue of a cost or price during the negotiations nor is such cost or price addressed anywhere in Pacific's proposed agreement. Moreover, no cost or price for DUF has been approved by the CPUC in its OANAD proceeding.

MCIIm states that Pacific is required to provide its services at wholesale at its retail rate minus avoided cost. There is absolutely no authority for charging any additional fees to Pacific's wholesale customers for the electronic data maintained routinely by Pacific to bill its own customers and essential for a reseller to bill its customers. If Pacific's position were adopted, it would be improperly allowed to charge its wholesale customers more than its retail rate, less avoided cost.

Discussion

MCIIm's position is adopted. Pacific's retail service would include the daily usage information for its own customers, so that daily usage information should be available also to MCIIm as a routine part of the wholesale service it purchases from Pacific. Pacific should not be allowed to assess additional charges.

Issue MCIIm RES-28

Should Pacific's broadband service be offered at an avoided cost discount?

This issue was addressed under Issue Price - 45. MCIIm is entitled to purchase broadband service at an avoided cost discount.

Issue MCIIm RES-31

Should Pacific's language regarding a "Slamming Investigation Fee" be included in the contract?"

Pacific's Position

Pacific states that it should be able to recover the cost of a slamming investigation, on behalf of MCIIm, or its end user. This cost should be ICB.

MCIIm's Position

MCIIm opposes the slamming investigation fee because there is no such charge approved by the CPUC.

Discussion

Pacific's position is adopted. If Pacific conducts a slamming investigation on behalf of MCIIm or one of its end users, Pacific should be compensated for conducting the investigation.

P. UNE (Unbundled Network Elements)

Issue UNE-2

- a) **Should Pacific be required to combine UNEs on MCIIm's behalf if those UNEs are not already combined in Pacific's network?**
- b) **Should Pacific be required to connect MCIIm's facilities to Pacific's network?**

Pacific's Position

- a) Pacific asserts that pursuant to the UNE Remand Order, and the 8th Circuit decision on remand from the U.S. Supreme Court, Pacific is not required to provide new combinations. Pacific will make available "currently" combined, not "ordinarily" combined, UNEs. As MCIIm's witness Haroutunian explained on cross-examination, MCIIm seeks to

require Pacific to combine UNEs on MCI's behalf, even when those UNEs are not already combined in Pacific's network. (Haroutunian for MCI, 7 RT 613-614.) Pacific asserts that MCI's request to have Pacific combine UNEs on MCI's behalf when those UNEs are not currently combined in Pacific's network goes beyond the requirements of FCC Rule 315(b).

The new combinations obligation that MCI seeks to impose on Pacific is the same obligation that the FCC sought to impose on all ILECs in FCC Rules 315(c)-(f). Those rules require ILECs to combine UNEs for CLECs "in any manner even if those elements are not ordinarily combined in the incumbent LEC's network." However, in 1997, the 8th Circuit vacated Rules 315(c)-(f) as contrary to the Act. (Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997.)) Three years later, the 8th Circuit reaffirmed its vacatur of those rules stating:

Unlike 51.315(b), subsections (c)-(f) pertain to the combination of network elements. Section 251(c)(3) specifically addresses the combination of network elements. It states, in part, 'An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunication service.' Here, Congress has directly spoken on the issue of who shall combine previously uncombined network elements. It is the requesting carriers who shall 'combine such elements.' It is not the duty of the ILECs to 'perform the functions necessary to combine unbundled network elements in any manner' as required by the FCC's rule. See 47 C.F.R. § 51.315(c). We reiterate what we said in our prior

opinion: '[T]he Act does not require the incumbent LECs to do all the work.'¹⁶

Although Pacific was ordered in the Pacific/AT&T arbitration to combine UNEs on behalf of AT&T even where the UNEs are not currently combined in Pacific's network, the arbitrator's reports in that proceeding were issued prior to the release of the 8th Circuit's July 18, 2000 decision affirming the vacatur of Rules 315(c)-(f) so parties had no opportunity to brief the issue. A few months later, the Commission corrected its position in the Pacific/Level 3 arbitration by declining to order Pacific to create new combinations on behalf of CLECs. (Level 3/Pacific FAR at 38.)

- b) Pacific asserts that it should not be responsible for managing MCI's network. It is MCI's responsibility to interconnect with Pacific's network. Pacific will provide MCI methods of interconnecting with Pacific's network for access to UNEs.

MCI's Position

- a) MCI asserts that the FCC's Rule 315(b), the Supreme Court's decision in AT&T v. Iowa Utilities Board, and recent decisions of the U.S. Court of Appeals for the 9th Circuit all support this Commission's requirement that Pacific is required to perform the functions necessary to combine UNEs. In the OANAD order D.99-11-050, the Commission required Pacific (i) to combine UNEs that are already used in combination by Pacific to provide service to a Pacific customer who is switching to a CLEC, (ii) to combine UNEs that are not currently combined to provide

¹⁶ Iowa Utilities Board v. FCC, 219 F.3d 744, 759 (8th Cir. 2000).

service, and (iii) to combine new UNEs with UNEs that are already combined to serve a Pacific customer who is switching to a CLEC. (D.99-11-050 (mimeo.), at 142-144. In establishing this requirement, the Commission affirmatively decided that it had the authority under California Public Utilities Code § 709.2(c)(1) "to order ILECs to combine separate UNEs upon request of a telecommunications carrier, or to order an ILEC to combine additional UNEs with an existing UNE platform." According to MCIIm, the Commission's decision is consistent with § 261(c) of the act which expressly allows states to impose pro-competitive requirements in addition to the Act's minimum mandates.

According to MCIIm, Pacific's proposed language is ambiguous, because the language does not define what is meant by "existing" UNEs. Moreover, Pacific attempts to use the need for a mere cross-connect as a way of avoiding defining UNE combinations as existing. MCIIm asserts that Pacific's language would enable Pacific to control completely both when existing combinations occur and under what circumstances. Pacific has stated its reluctance to classify already combined UNEs as "existing" when they are serving new customers. The network facilities used to provide residential service to the customer's house are currently combined by Pacific in what is often referred to as UNE Platform or UNE-P. Yet, under Pacific's language, if the customer sells his house, the CLEC might not be able to offer service using the loop/port combination of the new owner, because he is not an "existing" Pacific customer. This is despite the fact that the same local loop, the same switch port, and the same connections would remain in place.

Pacific is reluctant to provide existing combinations where only a cross connect is missing. Pacific refuses to classify second lines as existing combinations when these lines have never been used, despite the fact that Pacific has completely combined these facilities, but for a mere jumper that attaches the second line to the line side of the MDF.

According to MCIIm, a reasonable reading of FCC Rule 315(b) includes requiring Pacific to combine new UNEs that it ordinarily combines, even if such UNEs are not already combined. MCIIm refers to ¶ 296 of the Local Competition Order where the FCC explained that “currently” was intended to mean “ordinarily.” MCIIm asserts that only truly new types of combinations were intended to be addressed in Rules 51.315(c)-(f), which contain the rules for claims of technical feasibility. The Commission’s rules are also supported by the 9th Circuit Court of Appeals, the Federal Circuit Court with binding authority over California. Specifically, the 9th Circuit recently upheld on appeal two arbitration decisions by the Washington Utilities and Transportation Commission ordering US West to combine for CLECs any UNEs they request, without regard to whether it is an “existing” or “new” combination. The 9th circuit held that, under their own authority, state commissions could mandate new combinations under the Act. Thus, the 9th Circuit upheld the state commission’s UNE combination rules despite the 8th Circuit’s decision to vacate some of the FCC’s combination rules. It is significant, says MCIIm, that the Supreme Court has decided to review the 8th Circuit’s opinion on this issue although the Court has declined to review the 9th Circuit’s holding

on UNE combinations, leaving the 9th Circuit decisions as settled and binding law in California.¹⁷

- b) MCIIm states that Pacific must allow MCIIm to interconnect with Pacific's network at any technically feasible point for access to UNEs. This does not change the fact that under the Act, as interpreted by the U.S. Supreme Court, the 9th Circuit Court of Appeals, the FCC's rule, and applicable Commission orders, Pacific is required to provide existing and ordinary combinations in a combined form. In reinstating Rule 315 (b), the Supreme Court agreed that the FCC reasonably concluded that the Act does not require a CLEC to own any facilities in conjunction with UNEs leased from an ILEC. Instead, according to the Supreme Court, CLECs are entitled to "an entire preassembled network." When UNEs are typically combined in Pacific's network, MCIIm is entitled to such combinations without investment in physical facilities and without incurring the cost of collocation.

Discussion

- a) The Commission concluded in its OANAD Order, D.99-11-050, and in its decision approving the arbitrated agreement between AT&T and Pacific, that it has the independent authority under state law to order Pacific to combine UNEs for CLECs. While the FAR in the Level 3 arbitration had a different outcome, the arbitrator there relied on the Court of Appeals conclusion that the Act imposes no "duty on the

¹⁷ US West Communications v. MFS Intelenet, 193 F.3d 1112, 1121 (9 Cir. 1999), cert denied 120 S. Ct. 2741 (2000); MCI Telecomms. v. US West Communications, 204 F.3d 1262, 1268 (9th Cir. 2000), cert denied, 121 S.Ct. 504 (U.S. Nov. 13, 2000).

incumbent LECs to do the actual combining of elements...the plain meaning of the Act indicates that the requesting carriers will combine the unbundled elements themselves.” (Iowa Utilities Board v. FCC 120 F.3d 753 (8th Cir. 1997) at 813.) The Level 3 arbitrator did not explore the option of whether the state has independent authority to order combinations. Clearly, the decisions in the 9th Circuit which MCI^m cited address the specific issue we are concerned with here, namely whether the state commission does have the authority to order the ILEC to combine UNEs. The 9th Circuit upheld that right, and the Supreme Court declined to review those cases further, so the 9th Circuit decisions are final.

MCI^m's position that Pacific be required to combine UNEs on its behalf is adopted. However, we still need to resolve the issue of what constitutes an existing UNE. FCC Rule 315(b) states:

Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines.

The parties dispute the meaning of the word “currently.” MCI^m relies on Paragraph 296 of the Local Competition Order in support of its argument that “currently” equates to “ordinarily.” Paragraph 296 reads as follows:

We decline to adopt the view proffered by some parties that incumbents must combine network elements in any technically feasible manner requested. This proposal necessarily means that carriers could request incumbent LECs to combine elements that are not ordinarily combined in the incumbent's network. We are concerned that, in some instances, this could potentially affect the reliability and security of the incumbent's network, and the ability of other carriers to obtain

interconnection or request and use unbundled elements. Accordingly, incumbent LECs are required to perform the functions necessary to combine those elements that are ordinarily combined within their network, in the manner in which they are typically combined. Incumbent LECs are also required to perform the functions necessary to combine elements, even if they are not ordinarily combined in that manner, or they are not ordinarily combined in the incumbent's network, provided that such combination is technically feasible.

It is clear that in ¶ 296, the FCC is discussing the combinations which would be performed under Rule 315(c)-(f). Therefore, MCIIm's attempt to conclude that "currently" equates to "ordinarily" does not have merit. The simple language in the FCC's rule 315(b) states that "existing" combinations shall not be separated, and the ICA language adopted reflects that outcome. If a second line is not totally connected, it does not constitute an "existing" combination. However, Pacific is still obligated to combine those second line facilities on MCIIm's behalf. But at the same time, any connected residential customer line should be considered "existing," regardless of whether the customer moves out and someone else moves into the house. The change in subscriber has no bearing on whether that line remains connected. And, as MCIIm points out, California law requires that those lines remain connected so that a new or existing customer can access 911. If Pacific later decides to run a shorter jumper for that customer, it is Pacific's option to do so. However, changing the jumper cable, at Pacific's sole option, cannot be used as justification that it is no longer an "existing" line.

Section 1.1: Pacific's proposed language for "existing" combinations is adopted. MCIIm's language which requires Pacific to combine UNEs for MCIIm is adopted.

Section 1.9: MCIIm's language, which requires Pacific to combine UNEs at MCIIm's request, is adopted.

Section 1.14: MCIIm's proposed language is adopted. It requires Pacific to make available all combinations specified in the ICA.

Sections 4.4.2.2 and 4.4.2.3: Pacific's language which refers to Section 2 for the methods for MCIIm to combine UNEs is deleted since Pacific is required to combine UNEs for MCIIm. Pacific's proposal to use "currently" combined rather than MCIIm's "ordinarily" combined is adopted, as discussed above.

Section 4.4.3: This issue should be treated the same as Sections 4.4.2.2 and 4.4.2.3 above. In its Comments on the DAR, MCIIm provided clarification on why it included references to dedicated and common transport in § 4.4.3. According to MCIIm, traffic carried over the UNE-P can be either local or long distance. When the traffic is going to an IXC, it will be going over common transport, necessitating the combination of the UNE-P switch port and common transport. Regarding dedicated transport, when there is sufficient traffic (a T1's worth) between the UNE-P switch of the ILEC and an MCIIm switch, it is more cost effective to get dedicated transport from the originating to terminating switch rather than pay for shared transport. MCIIm's proposed language is adopted.

MCIIm's proposed language is adopted at the end of the final sentence in § 4.4.3. In the case where UNEs are currently combined, MCIIm should not be required to purchase any cross connection facilities.

Section 6.1: Pacific's proposed language is rejected. The disputed language reads: "Nothing in this section is a commitment to connect or leave connected any two or more UNEs." Pacific does not have the right to disconnect UNEs at its sole discretion.

- b) MCIIm's position is adopted. This is consistent with the requirement that Pacific combine UNEs for MCIIm, at MCIIm's request.

Issue UNE-3

Should Pacific be required to combine UNEs and combine UNEs with Access Services?

Pacific's Position

As Pacific explained in Issue UNE-2, Pacific is not required per the UNE Remand Order to provide new combinations. Also, Pacific is not required to combine UNEs with access services, per the arbitrators' rulings in the AT&T/Pacific and Level 3/Pacific arbitrations, and applicable FCC rules.

MCIIm's Position

See MCIIm's position on UNE-2 above. MCIIm is entitled to existing and typical combinations in Pacific's network to provide access services under the terms and conditions set out in the FCC's Supplemental Order Clarification. MCIIm is not aware of any fundamental disagreement with Pacific on this point. Further, Pacific should combine network elements made available by Pacific with other contiguous Pacific network elements, without the need for "interconnection" through collocation, where technically feasible. The enhanced extended link or "EELs" is a perfect example of network elements, a combination of loop and dedicated transport, that Pacific can readily combine for its customers without requiring them to invest in collocation or other network facilities. Inefficient and unnecessary costs should not be imposed on competitors for access to the same ordinary combination of elements.

Discussion

The issue of whether Pacific should combine UNEs for MCIIm was decided in Issue UNE - 2 above and will not be addressed further here. MCIIm's proposed language in Section 1.1 which would allow MCIIm to combine UNEs

with "Pacific's Special Access Service" is rejected. This outcome is consistent with the AT&T/Pacific and Level 3/Pacific arbitrations, and with the FCC's Supplemental Order Clarification. In ¶22, the FCC indicates, "This option does not allow loop-transport combinations to be connected to the incumbent LEC's tariffed service." Access service is a service that Pacific tariffs so that prohibition would extend to the combination of UNEs with access service.

Issue UNE-5

Should Pacific be required to offer the information contained in its call-related databases by any form of delivery (e.g. magnetic tape, NDM [batch delivery]) or only access to its call-related databases and Service Control Point?

Pacific's Position

Pacific asserts it is only required to provide access to its call-related databases, not to provide the databases themselves.

MCIm's Position

The UNE Remand Order requires ILECs to provide information contained in call-related databases as UNEs and also requires that any form of delivery (e.g., magnetic tape, NDM (batch delivery)) of database information should be priced on a forward looking basis. This relates to DA, OS and call-related databases (LIDB, CNAM).

Discussion

This issue was resolved under Issue LIDB-3. Pacific's proposed language in Section 1.7 shall be adopted. This section clarifies that MCIm is entitled only to query access to Pacific's call-related databases.

Issue UNE-7

Should Pacific's or MCIm's proposed terms and conditions for sub-loops be adopted?

Pacific's Position

According to Pacific, a sub-loop unbundled network element is an existing spare portion of the loop that can be accessed at accessible terminals. A number of considerations apply to determine how Pacific provides sub-loops. It must be technically feasible to do so, and determining such feasibility varies depending on location and conditions. Each situation must be analyzed on a case-by-case basis. Sound engineering judgment will be utilized to ensure network security and integrity. Pacific's proposed language spells out these specific requirements to enable the parties to determine when sub-loops should be provided.

Pacific indicates that its sub-loop language was adopted in the Pacific/AT&T arbitration. There, Pacific defined a sub-loop as "portions of the loop that AT&T may access at terminals in Pacific's outside plant..." (AT&T/Pacific ICA, Attachment 6, Section 5.12.1.) Similarly in this arbitration, Pacific has proposed to define a sub-loop as "any portion of the loop from Pacific's central office Main Distribution Frame (MDF) to the point at the customer premise that can be accessed at a terminal in Pacific's outside plant."

MCI's Position

MCI indicates that it is entitled to the unbundling of any sub-loop at any point determined by any state to be technically feasible. Pacific should provide MCI with nondiscriminatory access to the sub-loop.

MCI states that its proposed language at § 3.4.1 through § 3.4.3 tracks almost verbatim, while paraphrasing, the FCC's rules at 47 C.F.R. §51.317(2). According to MCI, Pacific's proposed language contains overly restrictive language not supported by the FCC rule.

Discussion

Pacific's proposed language in Section 3.4 is adopted on an interim basis. MCI's list of subloops includes subloops over fiber facilities, as well as copper, and the technical feasibility of unbundling fiber subloops is being addressed in

the Permanent Line Sharing Phase (PLS) of OANAD. In that proceeding, the Commission will determine which subloops over fiber can be unbundled. Therefore, it is not appropriate to include a list of those subloops here.

Also, MCI_m, instead of relying on the PLS proceeding, would require Pacific to demonstrate to the CPUC in a 252 arbitration proceeding, that there are technical feasibility issues to unbundle the subloop at the requested point. Since PLS is addressing this specific issue, it is not a good use of Commission or party resources to duplicate that effort in an arbitration proceeding.

Although Pacific's proposed language is being adopted here, it must be updated to reflect the outcome in the PLS proceeding.

Pacific shall make the following changes to its Section 3.4.1: Remove section which refers to SNET and its Connecticut Service Tariff.

Issue UNE-12

Should SBC-13 State Technical Publications or industry standards govern the performance of UNEs?

Pacific's Position

Pacific indicates that its Tech Pubs are the appropriate documents that govern UNE performance in Pacific's network. Among other things, they detail the way equipment must be deployed to provide the capacity that CLECs may utilize as UNEs. They are periodically updated so that the deployment, use and maintenance of Pacific's network will remain in compliance with technical and engineering requirements.

Although Pacific's Tech Pubs do comply with national standards, MCI_m's proposed "industry standard" is too broad. As Pacific's witness Schilling testified, industry standards do not reach the level of detail necessary to operate the network. Pacific's witness stated: "Our tech pubs reflect, yes, industry standards, of course, because we are using equipment qualified under industry

standards, but it is also specific to Pacific's equipment and Pacific's network. We have to have them tailored to what is in our network so that we can maintain it and maintain a high quality network. (Schilling for Pacific, 6 RT 507-08.)

MCI's Position

MCI objects to Pacific's language that states that "each UNE will be provided in accordance with SBC-13STATE Technical Publications or other written descriptions, if any, as changed from time to time by SBC-13STATE at its sole discretion " because it is overbroad and would swallow up the terms of the contract because the SBC Tech Pubs can be changed unilaterally by SBC. Instead, MCI believes that UNEs should be provided in accordance with industry standards such as Bellcore Tech Pubs.

MCI states that Pacific's own witness Schilling testified with respect to equipment actually deployed in its network, Pacific would "absolutely" comply with national industry technical standards and that Pacific's technical publications "never" depart from those standards. (Schilling for Pacific, 6 RT 472-475.) MCI's position is that Pacific should meet industry standards when such standards are available. The language Pacific proposes does not obligate Pacific to modify their standards to comply with the industry as upgrades and changes are made. It is MCI's position that where Pacific is not in compliance with industry standards, Pacific should notify MCI of such exceptions.

Discussion

MCI's proposed language in Section 1.8.3.1 is adopted. Pacific says that it "absolutely" complies with national industry technical standards. MCI indicates that it would like to know of any instances where Pacific is not in

compliance with industry standards, and the MCI language would accomplish that.

Issue UNE-21

Is Pacific's procedure for unbundling loops where Integrated Digital Loop Carrier (IDLC) is present reasonable?

Pacific's Position

According to Pacific, loops provisioned over IDLC cannot be unbundled because they are integrated with the switch. The UNE Remand Order acknowledged the difficulty of unbundling IDLC-fed loops. Pacific's language obligates it to use spare existing physical or universal digital loop carrier (UDLC) unbundled loop at no additional charge to MCI.

As Pacific's witness Silver testified, IDLC, by definition, means that the loop is directly connected to the switch. (Silver for Pacific, Exh. 117 at 35-36.) In fact, the software that provides the intelligence for the IDLC is resident in the switch. Therefore, if a loop provisioned over IDLC is unbundled, it will no longer function. (*Id.*) The FCC acknowledged the difficulty of unbundling IDLC-fed loops in its UNE Remand Order.¹⁸

MCI's Position

According to MCI, Pacific either misreads or miscites the UNE Remand Order on this point. FCC Rule 51.319(a)(1) contains no exception disallowing access to loops with "attached electronics" (except certain advanced services equipment), such as IDLC. Paragraph 175 of the UNE Remand Order specifically addresses IDLC and concludes that access to loops attached to IDLC is required.

Discussion

¹⁸ UNE Remand Order, para. 217, fn. 418 (alternative methods of unbundling DLC loops "have not proven practical.")

Pacific's proposed language is adopted. Paragraph 175 does conclude that the description of an IDLC loop must include the multiplexing devices without which it cannot be used to provide service to end users. While Paragraph 175 deals with the definition of the IDLC loop, it does not deal with access to it, and how that might be accomplished. And as Pacific has cited above, the FCC acknowledges that there are difficulties in unbundling IDLC loops.

In its Comments, MCI points the arbitrator's attention to both D.98-12-079 at pages 70-72 and to D.99-11-050 at pages 107-108 for confirmation that Pacific has long been required to provide DS1 level connections as a standard solution to provisioning loops over DLC. Careful review of those decisions do not prove MCI's point. Neither decision deals with the specific issue of IDLC loops. The DS-1's over fiber could refer to UDLC loops.

To resolve this issue, I will rely on Paragraph 217 of the FCC's UNE Remand Order, which reads as follows:

"...carriers need unbundled subloops to serve subscribers currently served by IDLC loops. IDLC technology allows a carrier to "multiplex" and "demultiplex" (combine and separate) traffic at a remote concentration point, or remote terminal, and to deliver the combined traffic directly into the switch, without first separating the traffic from the individual lines. In such cases, competitors generally cannot access IDLC loops at the incumbent's central office. In order to reach subscribers served by the incumbent's IDLC loops, a requesting carrier usually must have access to those loops before the point where the traffic is multiplexed. That is where the end-user's distribution subloop can be diverted to the competitive LEC's feeder, before the signal is mixed with the traffic from the incumbent's IDLC feeder. Accordingly, we find that denying access at this point may preclude a requesting carrier from competing to provide service to customers served by the incumbent's IDLC facilities.

In footnote 417 which is tied to this paragraph, the FCC lists four methods MCI WorldCom presented that would allow competitive LECs to gain access to IDLC subscribers. The FCC closes footnote 417 with the following comment, "Thus, despite their future potential, these methods do not now substantially reduce the competitive LECs' need to pick up IDLC customers' traffic before it is multiplexed." In other words, there is currently no way to unbundle the IDLC loop. However, as ¶217 states, the portion of the customer's subloop from the premise to the feeder can be unbundled. However, in Issue UNE-21, we are discussing unbundling of the entire IDLC loop, not a subloop component. Pacific's language in Section 3.1.1 is adopted. However, I recognize that technology changes rapidly in the telecommunications industry, and today's "technically infeasible" can end up as tomorrow's hottest service. Therefore, a sentence should be added which allows the issue to be re-examined when an effective method is found for unbundling the IDLC loop.

Issue UNE-27

Is it reasonable to allow MCIm to combine unbundled switching to other UNEs solely via the Access to UNE Connection Methods outlined in Section 2 of this Appendix when those UNEs are not already combined?

Pacific's Position

Pacific indicates that it is obligated not to separate already combined UNEs; however, for elements which are not already combined, MCIm is required to combine those UNEs after purchasing all the necessary components. Three Methods of Access are viable means for CLECs to do this combining.

MCIm's Position

See UNE-2. However, MCIm has no objection to retaining Pacific's UNE connection methods, which consist basically of forms of collocation, as an option

for MCIIm to combine UNEs. Pacific should offer to combine UNEs that are ordinarily combined in its network, not just those UNEs that actually are combined.

Discussion

This issue was already addressed under Issue UNE-2. Pacific is required to combine UNEs on MCIIm's behalf. However, MCIIm indicates that it has no objection to retaining Pacific's UNE connection methods, as an option for MCIIm to combine UNEs.

Issue UNE-29

Should an MCIIm local service customer be permitted to choose Pacific as its intraLATA toll pre-subscribed carrier?

Pacific's Position

Pacific states that the requested retail service MCIIm seeks to obtain from Pacific is not a UNE and Pacific is not required by the Act or this Commission to offer such a product. Also, MCIIm argues that Pacific's proposed language "denies CLEC customers the option to choose among all of the intraLATA calling plans available in their service area." This emphasizes Pacific's point that what MCIIm is requesting is a retail service offering. To the extent that MCIIm customers want to be able to obtain Pacific services, that business relationship would exist between Pacific and the end user, and does not belong in the context of this ICA.

To provide such a product or not to provide such a product would be an internal retail marketing decision made by Pacific, not a requirement unilaterally provided by a CLEC. Pacific raises the issue of implementation costs, customer confusion, and billing concerns. Pacific would need to find a separate billing channel or generate a bill to the customer solely for the end-user's intraLATA toll calling.

MCIIm's Position

MCIIm asserts that Pacific should be required to permit an MCIIm local customer to choose Pacific as its intraLATA toll presubscribed carrier. It would be anti-competitive to allow Pacific to "tie" local and intraLATA toll service together.

Further, MCIIm states that Pacific is obligated to provide intraLATA equal access to carriers utilizing the two-PIC method. Two-PIC means that a local exchange customer of Pacific is entitled to choose either the same or a different intraLATA and interLATA carrier of choice. All LECs are subject to the FCC's intraLATA toll dialing parity requirements, including MCIIm.¹⁹ Therefore, MCIIm is required to allow its local exchange customers to choose the intraLATA toll provider of their choice.

According to MCIIm, Pacific's refusal to offer service to a consumer – a service that is offered pursuant to Commission-approved tariffs that are generally presumed available to the public generally--solely because that consumer chooses a CLEC as its local service provider is unduly discriminatory.

Discussion

MCIIm's position is adopted. It is blatantly discriminatory for Pacific to refuse to provide intraLATA toll service to MCIIm's local service customers. Those customers could then perceive the need to transfer local service back to Pacific in order to get the intraLATA toll dialing plan they want.

Pacific's arguments of "customer confusion" and "billing" concerns do not have merit. Since the passage of TA96 and implementation of its dialing parity provisions, customers could have three different carriers for local service,

¹⁹ 47 CFR § 51.209.

intraLATA toll, and interLATA toll. That situation exists today, and while it could cause some customer confusion, that is not a reason to refuse MCI's local customers the right to have Pacific as their intraLATA toll provider. Customers could receive three different bills for the three different services, and other carriers cope with billing for only one of those three services. There is no reason that Pacific should not be able to provide a bill which includes only intraLATA services.

In its Comments on the DAR, Pacific asserts that it has no legal obligation to provide intraLATA toll service to the local exchange customers of CLECs. According to Pacific, nothing in Rule 47 CFR § 51.209 mandates all LECs to make themselves available as intraLATA toll providers when a customer has chosen another carrier for local exchange service. I disagree with Pacific's conclusion. Pacific does have a legal obligation to provide intraLATA service to any requesting customer within its service territory. Pacific is authorized by this Commission to provide intraLATA toll service throughout its service territory. Since Pacific is holding itself out as an intraLATA carrier, it cannot deny service to a customer, merely because that customer receives its local service from another certificated carrier. Section 51.209(b) reads as follows:

A LEC shall implement toll dialing parity through a presubscription process that permits a customer to select a carrier to which all designated calls on a customer's line will be routed automatically. LECs shall allow a customer to presubscribe, at a minimum, to one telecommunications carrier for all interLATA toll calls and to presubscribe to the same or to another telecommunications carrier for all intraLATA toll calls.

This language makes it clear that the FCC intends that customers be able to choose three separate carriers: one for local service, one for intraLATA toll service, and one for interLATA toll service. Customers should be able to choose

any certificated carrier which offers intraLATA service in its area, without an associated requirement that intraLATA service be bundled with local service.

Issue UNE-31

Is it reasonable for MCIIm to utilize existing FGD trunks to implement Option B routing instead of incurring cross-connect charges for dedicated trunks?

Pacific's Position

Pacific states that MCIIm is free to send Option B routing to its FGD trunks, if that turns out to be technically feasible. If the routing over FGD trunks is implemented, then MCIIm will have to pay charges for the work Pacific performs in cross-connecting the FGD trunks to its OS/DA platform. MCIIm will not be required to pay the cross-connect charges associated with the separate trunk groups now required under switching Option B. Until that implementation occurs, these cross-connect charges will continue to apply if MCIIm orders the separate trunk groups. As Pacific's witness Silver testified, when Pacific cross-connects MCIIm's dedicated trunks used to transport the OS/DA traffic of MCIIm's customers to Pacific's frame that terminates the loop facilities, Pacific incurs costs in doing so. (Silver for Pacific, Exh. 118, pp. 20-22.) MCIIm should have to pay for the use of those cross-connects.

MCIIm's Position

MCIIm indicates that for Option B, MCIIm would prefer to utilize FGD trunks and does not wish to purchase additional dedicated trunks. Therefore, no cross connects are required.

Discussion

This issue is addressed under UNE - 68. Cross connects are not required if MCIIm uses its FGD trunks. Section 4.4.3.2.2 shall be deleted because the issue of

cross connects is adequately covered in the revised language Pacific's proposed for Section 4.4.3.2.

Issue UNE-32

Should Pacific be required to provide Operator Services as a UNE if Pacific does not provide customized routing as requested by MCIIm?

Pacific's Position

Pacific asserts that in negotiations, MCIIm requested language that would retain the UNE status of Operator Services if Pacific did not implement the specific (and non-standard) signaling protocol MCIIm wants to use. Per the FCC UNE Remand Order, Operator Services is not a UNE. An exception to that rule applies if an ILEC cannot accommodate a CLEC's technology for custom routing. MCIIm designates FGD as its signaling protocol. Pacific does not use FGD signaling protocol for its own Operator Services platform since this is not resident in all end offices. Where FGD signaling is resident, Pacific will send traffic to MCIIm's OS/DA trunks. MCIIm is capable of accepting current Pacific signaling and should be required to accept Pacific signaling protocol on OS/DA. MCIIm has refused to test the compatibility of the two systems since MCIIm wants to purchase these services at UNE rates rather than market-based rates.

MCIIm's Position

MCIIm has requested that Pacific route UNE-P OS and DA calls to MCIIm's existing FGD trunks. Until such time as Pacific routes such calls to MCIIm's existing FGD trunks, it is MCIIm's position that Pacific has not provided customized routing as defined by the FCC's UNE Remand Order and therefore Pacific must provide OS and DA as UNEs.

Discussion

This issue was resolved under Issue DA-7, where I determined that DA and OS are UNEs unless Pacific provides the custom routing MCIIm has requested. MCIIm's proposed language in § 4.4.3.2.1 is adopted.

Issue UNE-33

Is it reasonable to state that when MCIIm provides its own trunks to a Pacific DA or OS platform that a cross connect charge from Appendix pricing is applicable?

Pacific's Position

Pacific indicates that a cross connection between MCIIm's unbundled local switching element (ULS) and MCIIm's collocation cage, where they are terminating their own dedicated trunks is needed for this configuration. Pacific will incur costs to provide such a cross connection, and therefore is entitled to recover such costs.

MCIIm's Position

MCIIm states that this issue repeats issue UNE-31 and should be deleted. MCIIm does not need or want to establish dedicated trunks to Pacific's OS or DA to utilize Pacific's OS or DA. See issues OS-13 and UNE-68. If for some reason MCIIm was required to do so, it would pay any applicable charges approved by the Commission in OANAD for interconnection or access to UNEs necessary to establish such trunks.

Discussion

In order to address this issue, we need to look at the specific issue as framed by Pacific: "Is it reasonable to state that when MCIIm provides its own trunks to a Pacific DA or OS platform that a cross connect charge from Appendix pricing is applicable?" In its Comments, MCIIm raises the point that MCIIm would never provide its own trunks to a Pacific DA or OS platform in a UNE-P environment. MCIIm will either order UNE-P under Option A in which case,

DA and OS are provided by Pacific in the same manner as Pacific's customers already receive Pacific's OS/DA or MCIIm will order its requested customized routing to its own OS and DA platform. MCIIm's position is adopted. Section 4.4.3.2.2 shall not be included in the ICA. See also Issue UNE - 31, which also addresses this particular section in the ICA.

Issue UNE-36

Is it reasonable to include routing to an IXC in the description of tandem switching features and functions?

Pacific's Position

Pacific states that it is opposed to MCIIm's proposal to define local tandem switching as including the use of the local tandem functionality in order to originate a call to or terminate a call from an IXC. While Pacific does not dispute that the same central office switch may perform both local and long-distance tandem switching functionalities, those two processes are still two separate functions. While a UNE-P or Unbundled Local Switching (ULS) customer could have access to an IXC over Pacific's network, Pacific's witness Kirksey testified that they would not have access to an IXC through a local tandem function.

MCIIm's Position

MCIIm agrees with Pacific's language that tandem switching be provided without any customized routing. However, MCIIm believes that tandem switching can connect to FGD trunks provided to an IXC. Therefore, MCIIm does not understand Pacific's reluctance to add the term IXC to its description of tandem features and functions. This is consistent with the language MCIIm has adopted from the AT&T arbitration that defines common transport (see UNE-51).

Discussion

MCIIm's position is adopted. As MCIIm states, tandem switching can connect to FGD trunks provided to an IXC.

Issue UNE-55

Should Pacific's or MCIIm's definition of dark fiber be adopted?

Pacific's Position

Pacific asserts that there are three main points of disagreement between Pacific's and MCIIm's definition of dark fiber. The first point of disagreement is whether dark fiber should be defined as "fiber optic cable" as Pacific proposes, or as any "unused transmission media" as MCIIm proposes. Second, the parties dispute whether dark fiber must be "terminated." Third, the parties disagree whether fiber with equipment connections falls within the definition of the dark fiber UNE.

Pacific cites the results of the Pacific/AT&T arbitration to show that dark fiber must be "terminated" as follows:

Rather, as Pacific says, the fiber must be physically connected to ILEC facilities, but unlit. The FCC rule is clear that the fiber must be terminated. ...[T]o qualify as a UNE, dark fiber must be physically connected to the ILEC facilities. (D.00-08-011, mimeo at 41.)

MCIIm's witness Haroutunian conceded on cross-examination that the Commission specifically rejected the argument raised by AT&T in the Pacific/AT&T arbitration, and again raised by MCIIm in this proceeding, that the phrase "terminated" should be applied to the connection to the needed electronics. (Haroutunian for MCIIm, 7 RT 629.)

Further, says Pacific, in the UNE Remand Order, the FCC specifically defined the dark fiber UNE as consisting of fiber material:

Dark fiber is fiber that has not been activated through connection to the electronics that 'light' it, and thereby render

it capable of carrying communications services. (UNE Remand Order, ¶ 174.)

MCIIm seeks to use the term “unused transmission media” in lieu of the term “dark fiber” and to define that term as including not only dark fiber but also dark copper and dark coaxial cable. This is contrary to the FCC’s definition of dark fiber above.

MCIIm believes that fibers with equipment connections (which, by design, “light the fiber”) should be included in the definition of dark fiber. Under the FCC’s definition, if fiber has electronics attached, by definition it cannot be “dark.” Consequently Pacific asserts that MCIIm’s proposed language purporting to define dark fiber as including fiber with electronics attached should be rejected.

MCIIm’s Position

MCIIm proposes language on dark fiber adopted in the recently arbitrated AT&T/Pacific ICA (AT&T Attachment 6, Sec 8). MCIIm agrees with Pacific that dark fiber must be deployed and unlit under the FCC’s definition.

The additional requirement that fiber must terminate on a fiber distribution frame is not supported by the FCC’s order. (Haroutunian for MCIIm, Exh. 207, pp 13-14.) MCIIm points to paragraphs 174 and 325 in the UNE Remand Order to show that none of the language in the order states that fiber facilities must be terminated to be considered dark fiber.

MCIIm asserts that it is improper for Pacific to impose a termination requirement that is not set forth by the FCC. Nonetheless, Pacific ignores the clear intent of the FCC and focuses on a single phrase in a sentence of a footnote as support for its argument that dark fiber must be terminated. (Exh. 115 Schilling at 22-23.) In attempting to distinguish dark fiber from unused copper wire stored in a warehouse, the FCC stated that “[d]ark fiber is...distinct in that

it is unused loop capacity that is physically connected to facilities that the incumbent LEC currently uses to provide service. (UNE Remand Order, n. 323.)

It is clear from the FCC's later discussion that its focus in that footnote was to distinguish unused copper materials stored in a warehouse from facilities that have been installed and are capable of use. The footnote contains no discussion at all of the meaning of "connected" or "facilities." Thus the term could just as easily be interpreted to mean connections to the electronics used to derive loop transmission capacity on fiber as termination at a frame, as the ALJ in the AT&T arbitration concluded. (FAR at 135.)

According to MCI, strong public policy interests weigh in favor of rejecting Pacific's proposed language. Pacific's definition of dark fiber is a thinly veiled attempt to define away its legal obligations. Under Pacific's definition, spare installed fiber will only be considered as dark fiber if it is terminated on the fiber distribution frame. However, there is no requirement that Pacific has to terminate its spare fiber so that it will be considered dark fiber, and therefore, subject to the FCC's unbundling requirements. Pacific could bring spare fiber into the central office and leave it un-terminated indefinitely.

Discussion

MCI's definition is adopted with modification. In the AT&T/Pacific arbitration, the Commission determined that dark fiber should include all "unused transmission media," based on Paragraph 326 in the UNE Remand Order. There is nothing to change this interpretation of the language in the FCC's UNE Remand Order.

MCI disputes the Commission's conclusion that the dark fiber must be "physically connected" to the ILEC's network to be considered dark fiber for unbundling purposes, and MCI has removed that language which was adopted in the AT&T/Pacific ICA. The Commission relied on the FCC's specific

language in fn. 323 of the UNE Remand Order. That footnote says, in part that dark fiber “is unused loop capacity that is physically connected to facilities that the incumbent LEC currently uses to provide service.” MCI’s proposed definition in Section 12.1 shall be modified to include the specific language adopted in the AT&T ICA which requires that the dark fiber be “physically connected.”

In its Comments on the DAR, MCI rebuts Pacific’s claim that spare fiber must terminate on a fiber distribution frame in order to be defined as dark fiber. According to MCI, Pacific’s definition is contrary to federal law. MCI agrees that dark fiber must be deployed and unlit under the FCC’s definition of dark fiber, however the additional requirement that fiber must terminate on a fiber distribution frame is not supported by the FCC’s UNE Remand Order. Pacific’s definition is an attempt to define away its legal obligations. There is no requirement that Pacific has to terminate its spare fiber so that it will fall under the definition of dark fiber and therefore subject to the FCC’s unbundling requirements. Pacific’s witness Silver admitted that Pacific could bring spare fiber into the central office and leave it unterminated indefinitely. MCI attempted to get Pacific to agree on the length of time that any spare fiber within 300 feet of a central office would be left unterminated.

The Commission does not want to set a rule in place that would allow Pacific to evade its obligations to unbundle dark fiber for CLECs, as mandated by the FCC. Therefore, we will add a requirement that Pacific terminate any dark fiber within a central office on a fiber distribution frame so that the fiber clearly falls under the FCC’s requirement that dark fiber be physically connected to the ILEC’s network. I am not willing to require that any spare fiber within 300 feet of a central office be brought into the office and terminated on a fiber distribution frame, but any spare fiber within the central office itself should be

available to MCI and other CLECs. Parties shall add language to the ICA to that effect.

In its Comments on the DAR, Pacific indicates that the arbitrator did not appear to address a third disputed issue, namely, whether fiber with equipment connections may fall within the definition of the dark fiber UNE. The FCC has defined dark fiber as “fiber that has not been activated through connection to the electronics that ‘light’ it...”²⁰

MCI believes that fibers with equipment connections (which, by design, ‘light the fiber’) should be included in the definition of dark fiber. Specifically, MCI has proposed the following language:

Dark Fiber also includes strands of optical fiber existing in aerial or underground cables which may have lightwave repeater (regenerator or optical amplifier) equipment interspliced to it... (MCI’s proposed language in Appendix UNE, § 12.1.1)

Under the FCC’s definition, if fiber has electronics attached, by definition it cannot be dark. Pacific indicates that its definition correctly defines dark fiber as “fiber that has not been activated through connection to the electronics that ‘light it,’ and thereby render it capable of carrying communications services.” Pacific is correct that MCI’s definition goes beyond what the FCC requires. Pacific’s definition cited above, shall replace MCI’s proposed definition, which appears in the final sentence of MCI’s Section 12.1.1.

Issue UNE-56

²⁰ UNE Remand Order ¶ 174.

What is the correct definition of Interoffice Dark Fiber?

Pacific's Position

Pacific asserts that the correct definition is that contained in Pacific's contract language. Pacific's definition is consistent with the UNE Remand Order, and is technically feasible, unlike MCI's definition. Pacific states that dark fiber must be terminated in order to be available as a UNE. If the arbitrator agrees in Issue UNE-55 with Pacific on the termination requirement, then Pacific's definitions in Issues UNE - 56 and UNE - 57 should be adopted.

MCI's Position

MCI proposes language on dark fiber adopted in the recently arbitrated AT&T/Pacific ICA (AT&T/Pacific ICA, Attachment 6. Section 8.) See also Issue UNE - 55.

Discussion

MCI's position is adopted. The language MCI proposes, which was derived from the AT&T/Pacific ICA, includes a single definition of dark fiber, which would apply to either loop or interoffice dark fiber.

Issue UNE-57

What is the correct definition of loop dark fiber?

Pacific's Position

The correct definition is that contained in Pacific's contract language. Pacific's definition is consistent with the UNE Remand Order, and is technically feasible, unlike MCI's definition.

MCI's Position

MCI proposes language on dark fiber adopted in the recently arbitrated AT&T/Pacific ICA (AT&T Attachment 6, Sec. 8). See also MCI's position on Issue UNE - 55.

Discussion

MCIIm's position is adopted. The language MCIIm proposes, which was derived from the AT&T/Pacific ICA, includes a single definition of dark fiber, which would apply to either loop or interoffice dark fiber.

Issue UNE-59

Is it reasonable to describe spare fiber and to limit the availability of spare fiber to 25%?

Pacific's Position

According to Pacific, this limit was adopted in the Level 3/Pacific arbitration. Pacific places reasonable restrictions on CLEC purchases of dark fiber to remain consistent with its plans for growth and to ensure fairness to other CLECs. MCIIm would have Pacific overbuild its network to accommodate MCIIm. Not only does Pacific have no obligation to build for a CLEC, but also it would be grossly unfair to require Pacific to expend the resources necessary to "overbuild" its own network on behalf of one CLEC. (The problem would be compounded if the MCIIm Agreement were adopted by another CLEC pursuant to Section 251(i).)

Moreover, dark fiber is a limited commodity. MCIIm's language attempts to seize control of as much dark fiber as possible. If successful, MCIIm would usurp the rights of another carrier, possibly including Pacific, to use that fiber. To protect against such a possibility, Pacific's language provides that MCIIm may not request more than 25% of the spare dark fiber contained in the requested segment. Pacific's proposed language incorporates these reasonable requirements so that no one carrier can absorb all the dark fiber in an area at the expense of other carriers.

The FCC does not forbid limitations on CLEC use of dark fiber. In footnote 694 in the UNE Remand Order, the FCC explicitly approved the very limitations at issue here. The footnote reads as follows:

For example, the Texas Commission allows incumbent LECs, upon establishing need to the satisfaction of the State commission, to revoke leased fiber from competitive LECs with 12-months notice. The Texas Commission's dark fiber unbundling rules also allow incumbent LECs to take back underused (less than OC-12) fiber, and forbid competitors in any two-year period from leasing more than 25 percent of the dark fiber in a given segment of the network. We believe the measures established by the Texas Public Utilities Commission address the incumbent LECs legitimate concerns. We note that MGC, a competitive local exchange carrier that urges the Commission to unbundle dark fiber, also supports limitations such as those adopted in Texas.

MCI's Position

MCI proposes language on dark fiber adopted in the recently arbitrated AT&T/Pacific ICA (AT&T Attachment 6, Sec. 8). Pacific seeks to impose two conditions that will restrict the amount of dark fiber MCI may obtain. First, Pacific would restrict MCI's access to no more than 25 percent of spare dark fiber contained in the requested segment in any given two-year period. Second, Pacific has asserted the right to set aside spare fiber for maintenance for itself, while denying MCI the same right. The Commission already rejected this proposal as contrary to federal law in a recent arbitration between AT&T and Pacific. The arbitrator stated:

Pacific's proposed language is rejected. The FCC sets tight parameters around ILEC restrictions on access to dark fiber. If incumbent LECs are able to demonstrate to a state commission that unbundling dark fiber threatens their ability to provide service as a 'carrier of last resort,' states have the flexibility to establish reasonable limitations and technical parameters for dark fiber unbundling. Pacific has not met its burden of proof that its carrier of last resort obligations are jeopardized, without implementation of the limitations and technical parameters it has proposed. (FAR at 136.)

Pacific provides no evidence why the Commission should now adopt the very proposal it rejected as unlawful in the AT&T/Pacific arbitration. In fact, Pacific's own witness admitted that Pacific's ability to operate as a carrier of last resort has not been harmed by Pacific's inability to reclaim dark fiber from AT&T. (Schilling for Pacific, 6 RT at 512.)

Further, Pacific's proposal violates Pacific's nondiscrimination and parity obligations under the Act because neither of these restrictions was imposed on AT&T by Pacific. Were the Commission to apply federal rules to different carriers in a non-uniform manner, such conduct would likely be judged as arbitrary and capricious.

Discussion

In its Comments on the DAR, Pacific asserts that its COLR obligations will, in fact, be jeopardized without the adoption of the 25% limitation. According to Pacific, that allegation is implicit in the fact that Pacific is requesting this limitation. Without the 25% limitation that Pacific seeks, MCI (or any MFNing CLEC) could tie up all the dark fiber in a given segment. Obviously, if this were to occur, Pacific would be unable to ensure that its COLR obligations would continue to be met.

Pacific's proposed language to limit the availability of spare fiber to 25% is rejected. While Pacific indicates that without that limitation, its COLR obligations could be impacted, it is not clear how the two relate. It should not make a difference to Pacific's COLR obligations whether one or twenty CLECs use its available dark fiber. Also, the FCC addressed potential capacity constraints by noting that "with the addition of electronics such as Dense Wave Division Multiplexing (DWDM) equipment, incumbent and competitive carriers alike can expand the bandwidth of existing capacity without installing new dark

fiber.”²¹ This option would enable Pacific to expand fiber bandwidth without adding fiber.

Also, as MCIIm states, the Commission rejected the same provision in the AT&T/Pacific arbitration. The issue was not the same in the Level 3 arbitration, where both parties recommended limiting the availability of spare fiber, but differed as to the amount. Pacific proposed the 25% limitation it is proposing here, while Level 3 proposed that it be limited to 50% of the available fiber along a particular route. In light of the FCC’s tight parameters surrounding restrictions on access to dark fiber which MCIIm referenced above, I will adopt MCIIm’s position that its availability to spare fiber should not be restricted.

Also, Pacific complains that the DAR did not specifically address, but rejects, its proposed language in Section 12.5 through 12.9 concerning what constitutes spare fiber. Pacific excepts maintenance spares, defective spares, and growth fiber from the definition of available dark fiber. By contrast, MCIIm’s proposal contains no such language. According to Pacific, MCIIm has not provided any evidence establishing that the exclusion of maintenance spares, defective spares, and growth fiber is unreasonable. Pacific cites the transcript of the proceeding where Pacific’s witness Schilling explained why maintenance spares and defective spares are needed. (6 RT at 500, Schilling for Pacific.)

In its UNE Remand Order, the FCC acknowledges that unbundled access to dark fiber may adversely affect an ILEC’s ability to provide service, and states that if ILECs are able to demonstrate to the relevant state commission that dark fiber unbundling threatens their ability to provide service as a COLR, states may establish reasonable limitations and technical parameters for dark fiber

²¹ Id. at ¶ 352.

unbundling. “We conclude, however, that for a limitation of dark fiber to be reasonable, it must relate to a likely and foreseeable threat to an incumbent LEC’s ability to provide service as a carrier of last resort.” (UNE Remand Order ¶352.)

Pacific has justified the need for maintenance spares and defective spares, so Pacific’s proposed language in Sections 12.6 and 12.7 will be included in the ICA. However, Pacific has not provided adequate justification that its COLR position would be adversely affected without being able to reserve fiber for its own use for 12 months, so Section 12.8 will not be included. As mentioned above, available capacity on existing fiber can be expanded with the addition of electronics. Pacific’s proposed language in Sections 12.5 and 12.9 sets the parameters on the condition of dark fiber and how it will be supplied. Those sections will be included, with the following exceptions:

Section 12.5: delete the reference to spare fibers being saved for forecasted growth, and eliminate the 25% limitation.

Section 12.9.1: eliminate the second sentence which limits the number of fiber strands that MCI can order.

Issue UNE-60

Is it reasonable for Pacific to establish procedures for reclaiming dark fiber?

Pacific’s Position

Pacific asserts that the FCC in footnote 694 of the UNE Remand Order specifically approved SBC’s limitations on the amount of dark fiber any single CLEC can reserve to itself. These limitations are reasonable, says Pacific. Dark fiber is a limited commodity which needs to be actively managed so that it is available to the greatest extent possible. As Pacific’s witness Silver testified, Pacific’s policy of reclaiming fiber if Pacific can demonstrate it needs the fiber within 12 months or it goes unused by the CLEC for 12 months is a reasonable

procedure for balancing the needs of Pacific and CLECs. As the Commission recognized in the Pacific/Level 3 FAR: "On balance, making spare dark fiber available to more rather than less CLECs is reasonable." (Level 3/Pacific FAR, p. 42.) Pacific's basis for including such procedures are the same as those set forth in connection with issue UNE-59, which Pacific incorporates by reference.

MCIIm's Position

MCIIm's position is described under Issue UNE - 59 above.

Discussion

MCIIm's position is adopted, for the same reasons discussed in UNE-59 above.

Issue UNE-61

Is it reasonable to describe the inquiry and order request processes for dark fiber?

Pacific's Position

Pacific's language in Section 12.12 specifies the processes and timelines for dark fiber availability inquiry and ordering. The language proposed by MCIIm during negotiations was vague and lacks necessary detail.

MCIIm's Position

MCIIm proposes language regarding the inquiry and order process for dark fiber adopted in the recently arbitrated AT&T/Pacific ICA (AT&T Attachment 6, Sec. 8.2). AT&T does not have to undergo the cumbersome process outlined by Pacific but instead has a single point of contact for negotiating dark fiber lease agreements. (AT&T ICA, Attachment 6, § 8.2.2.) Pacific has presented no evidence to demonstrate that the same process outlined in AT&T's ICA will not work for MCIIm.

Discussion

MCIIm's position is adopted. MCIIm's proposed language mirrors that in the AT&T/Pacific ICA. As MCIIm says, that process is much simpler than the process Pacific proposes here. Also, there is no reason why MCIIm should have a different, and more complex, process in place than AT&T.

Issue UNE-62

By what methods should dark fiber be made available for lease to MCIIm?

Pacific's Position

Pacific believes that the submission of a facility request and an ASR will maintain the integrity of the existing order process and hence expedite the process. As Pacific's witness Silver noted, MCIIm proposed in its Response that the dark fiber language from the AT&T/Pacific arbitration be adopted. (Silver for Pacific, Exh. 118 at 32.) However, the AT&T arbitration language provided no specific guidance on the inquiry and ordering processes to be used for dark fiber provisioning. The better approach is to provide specific guidance on inquiry and ordering processes in the ICA, to prevent disputes later during implementation.

MCIIm's proposal of a 90 day "freeze" on fibers in which they may have interest would unfairly restrict the use of those fibers by other CLECs who may wish to order and deploy them during that time. Dark fiber should be available on a "first come - first served" basis.

MCIIm's Position

MCIIm proposes language on dark fiber adopted in the recently arbitrated AT&T/Pacific ICA (AT&T Attachment 6, Sec. 8). That language calls for Pacific to provide MCIIm with information regarding the location, availability and performance of dark fiber within five business days for a records-based answer and within 10 days for a field-based answer. In addition, Pacific must reserve

dark fiber requested by MCIIm for its use for 90 days from the time of MCIIm's request. Pacific has presented no evidence to demonstrate that the same process outlined in AT&T's ICA will not work for MCIIm, nor any evidence that the Commission should deviate from the language it found reasonable and lawful for AT&T.

Discussion

MCIIm's proposed language is adopted. It mirrors the language in the AT&T/Pacific ICA, and there is no good reason to adopt a different process for MCIIm. AT&T is allowed to ask Pacific to reserve dark fiber for 90 days from the date of AT&T's request. It would be discriminatory for MCIIm not to have the same reservation rights that AT&T has.

Issue UNE-64

Are Pacific's specified demarcation points reasonable?

Pacific's Position

As Pacific's witness Schilling testified, it is technically impractical to allow CLECs access to dark fiber at any location. (Schilling for Pacific, Exh. 115, pp. 26-29, 36.) Pacific has established reasonable demarcation points at customer premises, the central offices, and remote terminals. These demarcation points permit effective and non-intrusive testing.

According to Pacific, MCIIm's proposal for unlimited access is also contrary to the D.C. Circuit's decision in GTE v. FCC limiting CLECs' ability to dictate where they can access ILECs' networks.²² MCIIm has presented no testimony addressing the reasonableness of Pacific's specified demarcation points. Lacking any testimonial evidence showing Pacific's demarcation points to be

²² GTE v. FCC, 205 F.3d 416 (D.C. Cir. 2000).

unreasonable, MCIIm has provided no basis for the arbitrator to reject Pacific's language.

MCIIm's Position

MCIIm proposes language on dark fiber adopted in the recently arbitrated AT&T/Pacific ICA (AT&T Attachment 6, Sec. 8).

Discussion

Pacific's proposed language is adopted. MCIIm did not propose any language regarding demarcation points for dark fiber, and the AT&T/Pacific ICA does not address that issue.

Issue UNE-68

Should MCIIm be required to order separate trunk groups when using Pacific's OS Services?

Pacific's Position

According to Pacific, MCIIm should be required to order separate trunk groups, pending the feasibility and implementation of sending MCIIm's OS traffic over its FGD trunks. As Pacific's witness Kirksey testified, the MOSS signaling Pacific uses for its Operator Services calls, is currently incompatible with FGD. To be able to use Pacific's Operator services, dedicated trunk groups must be established between MCIIm and Pacific's Operator Services switch.

MCIIm's Position

According to MCIIm, Pacific has mischaracterized the issue. In a UNE-P environment, MCIIm would never order separate trunk groups because as Pacific has stated in Sec. 4.4.3.1., Pacific will be providing the interoffice transport for Pacific provided OS and DA calls. Pacific's discussion of MOSS signaling incompatibility with FGD is irrelevant to MCIIm use of Pacific's OS and DA.

MCIIm says Pacific is confused regarding its Issue UNE - 68. It appears that Pacific intended to address the same issue it raised in UNE - 32 regarding its insistence on separate trunk groups to custom-route calls to MCIIm's OS/DA, not

to Pacific's OS/DA. The contract section Pacific cites to in the Matrix is the UNE Appendix section that addresses custom routing. MCIIm says the Commission should simply note the confusion regarding the issue in UNE-68 and refer to UNE-32.

Discussion

Parties were asked to clarify this issue in their Comments on the DAR. In its Comments, Pacific proposes the following language to replace the proposed language in Section 4.4.3.2:

MCIIm may utilize existing FGD trunks which would not require cross-connects or order separate trunks for operator services provided by itself or a third party identified by MCIIm to provide such services. When ordering separate trunks, transport facilities may be purchased from Pacific, or connected to MCIIm's facilities through a collocation cage by obtaining a cross connection from Pacific.

This language makes it clear that MCIIm has the option of using its FGD trunks or of ordering separate trunks. It also clarifies that cross connects would not be required with FGD trunks but would be required if Pacific's network is connected to MCIIm's facilities through a collocation cage. Pacific's proposed language in Section 4.4.3.2 above shall be adopted.

Issue MCIIm UNE-72

Should the UNE appendix contain a definition section to enable the user to understand how the contract language should be applied?

Pacific's Position

According to Pacific, these terms are defined in the Act and the FCC's orders, and MCIIm's definitions are not consistent with those authorities. For example, there is no legal basis for defining UNE-P as including all vertical features as MCIIm proposes. UNE-P only includes the vertical features that a

customer has ordered. Similarly, the definition of combinations is disputed and discussed further in UNE-3.

MCIIm's Position

MCIIm asserts that this added language clarifies Pacific's obligation to combine UNEs.

1.1.1. Definition.

- 1.1.1.1 "Combination" means the provision and interconnection by Pacific of two or more Network Elements ordered by MCIIm, including, but not limited to, Loop or Network Elements Platform. A Combination may consist of Network Elements that were or were not previously or currently combined or connected on Pacific's network.
- 1.1.1.2 "UNE-Platform" or "UNE-P" means the Combination of a Loop, NID, Local Switching, Shared Transport, databases and signaling (e.g., LIDB), the vertical features resident in Pacific's Switch or in adjunct platforms, and (at MCIIm's option) Operator Systems and Directory Assistance without separately ordering or disconnecting and reconnecting any aspect of a Customer's service. UNE-P supports both migrating and new subscribers.

Discussion

Pacific's position is adopted, and MCIIm's proposed definitions in Sections 1.1.1.1 and 1.1.1.2 are deleted from the ICA. As Pacific states, the Act and the FCC provide definitions, and MCIIm's proposed definitions are problematic. As Pacific indicates, this Commission has determined that vertical features are to be priced separately in California, and are not part of the price for switching so they would not routinely be included in the UNE-P. Also, MCIIm's language which indicates that the UNE-P would be accomplished "without separately ordering

or disconnecting and reconnecting any aspect of a Customer's service" is ambiguous. MCIIm does not explain how the migration would be accomplished without performing those functions described.

Issue MCIIm UNE-81

Should MCIIm's proposed language on combinations be accepted?

Pacific's Position

Pacific asserts that MCIIm's language would require Pacific to provide new combinations upon request, which is not required with the exception of extended loop and promotional offerings for new UNE Platform combinations for residential and ISDN-BRI customers.

MCIIm's Position

MCIIm proposes the recently ordered AT&T language on types of combinations available. (AT&T Attachment 6, Sec. 3.) The ICA should make clear the combinations Pacific is required to provide. It would be discriminatory for the Commission to approve language for AT&T that specifies the combinations Pacific is required to provide, while at the same time refusing MCIIm's request for the same provisions.

Discussion

MCIIm's proposed language is adopted. The list of UNE combinations mirrors that in the AT&T/Pacific ICA. As MCIIm says, the ICA should make clear the combinations that Pacific is required to provide.

Issue MCIIm UNE-85

Should MCI's proposed language describing what is included in the local loop element be adopted?

Pacific's Position

Pacific asserts that MCI's proposed language is vague and contradictory. Pacific acknowledges its obligation to provide loops where digital loop carrier (DLC) is deployed, but also clarifies MCI's obligation to pay for any special construction charges associated with providing a loop where the deployed DLC is integrated. MCI's vague language appears to attempt to shift the burden to Pacific to provide loops "regardless of transmission technology," which is in direct contradiction with the FCC's Local Competition Order on this point.²³

Additionally, MCI's proposed definition of the local loop network element is not an accurate interpretation of the UNE Remand Order, as MCI claims. For example, MCI proposes to define the local loop network element as consisting of, among other things, loop conditioning. Loop conditioning is not a function, feature or capability of the loop; rather it is an activity performed on the loop.

MCI's Position

MCI claims that its proposed language implements the requirements of the UNE Remand Order, paragraph 167. Specifically, MCI's proposed language tracks almost verbatim the FCC definition promulgated in 47 CFR §51.317(a)(1).

Discussion

MCI's proposed definition of the local loop in Section 3.1.2 is adopted. MCI is correct that it tracks almost verbatim the FCC's definition. The FCC's

²³ First Report and Order, para. 384.

Rule 317(a)(1) includes loop conditioning so it is appropriate to include it here as well.

Issue MCIIm UNE-86

Should Pacific make new advances in loop technology available?

Pacific's Position

Pacific states that it has made new advances available; for example Pacific is making OC levels loops available in this agreement for the first time. However, with respect to Pacific's Project Pronto overlay, these are packet switching elements which the FCC has found not to be UNEs. MCIIm should not be able to receive an unbundled DSLAM functionality under the guise of it being loop technology.

MCIIm's witness Haroutunian states that MCIIm proposed "the recently ordered AT&T language regarding advances in technology." (Haroutunian for MCIIm, Exh. 207, p. 21.) However, on cross-examination, she admitted that MCIIm had not proposed all the relevant language from the Pacific/ AT&T ICA. The relevant language is found in Attachment 6, §§ 5.1.4.1 and 5.1.4.2. However, MCIIm has proposed only the language in Section 5.1.4.2. If the arbitrator rules in MCIIm's favor, Pacific asks that she order the inclusion of the AT&T language in its entirety.

MCIIm's Position

MCIIm proposes the recently ordered AT&T language on yet unknown equipment for loops. (AT&T. Attachment Sec. 5.1.4.2.) MCIIm says it should have access to improvement in the loop's voice or data transmission capabilities when Pacific elects to deploy new technological advancements in its network. Pacific should make this technology available to MCIIm as part of the unbundled loop element.

Discussion

Pacific's position that MCI be required to incorporate all of the language from the AT&T/Pacific arbitration is adopted. AT&T's section 5.1.4.1 (which MCI did not include as part of its proposed language) makes it clear that Pacific is not required to unbundle DSLAMs, except in one limited circumstance.

Issue MCI UNE-102

Under what terms and conditions should Pacific provide dedicated transport to MCI?

Pacific's Position

Pacific states that MCI has proposed only partial sections from the AT&T/Pacific ICA. As a compromise, Pacific is willing to accept the entire Section 7.2 from the Pacific/AT&T ICA exactly as that language appears in said ICA. The sections MCI omitted and that need to be included are: 7.2.10, 7.2.11.2, and 7.2.11.4.

MCI's Position

MCI proposes the recently ordered AT&T language on industry standards, redundant power supply, parity, physical diversity, transmission rates, and ANSI guidelines for transport (AT&T, Attachment 6, Section 7.2).

Discussion

Pacific's position is adopted. The sections MCI omitted from the AT&T/Pacific ICA shall be included in this ICA. Those sections are: 7.2.10, 7.2.11.2 and 7.2.11.4. The entire language set should be taken as a whole.

Issue MCI UNE-106

Should Pacific provide MCI CNAM and LIDB database information by query or in bulk?

Pacific's Position

MCI is seeking a download of the entire LIDB/CNAM database, in bulk, separate from the associated signaling, which is outside the requirements of the

Act. MCI's proposal has been specifically rejected by the FCC, since it overreaches obligations imposed by the Act with respect to call-related database and associated signaling. There is no obligation to provide contents of a call-related database apart from the associated signaling.

MCI's Position

See LIDB-3.

Discussion

This issue was resolved in LIDB - 3 and UNE - 5. MCI's proposed language in Section 13.3 is rejected.

O R D E R

IT IS ORDERED that, within 30 days of today, the parties shall file and serve:

1. An entire Interconnection Agreement, for Commission approval, that conforms with the decisions of this Final Arbitrator's Report.
2. A statement which (a) identifies the criteria in the Act and the Commission's Rules (e.g., rule 4.3.1, Rule 2.18, and 4.2.3 of Resolution ALJ-181), by which the negotiated and arbitrated portions pass or fail those tests; and (c) states whether or not the Agreement should be approved or rejected by the Commission.

Dated July 16, 2001, at San Francisco, California.

/s/ KAREN JONES
Karen Jones, Arbitrator
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Draft Arbitrator's Report on all parties of record in this proceeding or their attorneys of record.

Dated July 16, 2001, at San Francisco, California.

/s/ Antonina V. Swansen
Antonina V. Swansen

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.