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Decision 01-09-054 September 20, 2001

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)

TABLE OF CONTENTS

Title **Page**

OPINION APPROVING ARBITRATED INTERCONNECTION AGREEMENT... 2
1. Summary ... 2
2. Background ... 2
3. Negotiated Portions of Agreement ... 3
4. Arbitrated Portions of Agreement ... 4
A. Directory Assistance Listing Prices (Issue PRICE-31) ... 5
Pacific's Comments: ... 5
Discussion ... 7
B. OS and DA as UNEs (Issues DA-7, OS-1, PRICE-22, PRICE-24, PRICE 25, PRICE-26, PRICE-31, PRICE-32) ... 11
Discussion ... 11
C. Resale Restrictions ... 13
Pacific's Position (Issues ALL-1, DEF-3, RES-2) ... 13
Discussion ... 14
D. Dark Fiber Prices (Issue Price-17) ... 16
Pacific's Position ... 16
Discussion ... 17
E. CNAM and LIDB as UNEs (Issue LIDB-1) ... 19
MCIm's Position ... 19
Discussion ... 20
F. Bulk Download of CNAM and LIDB databases (Issue LIDB-3) ... 21
MCIm's Position ... 21
Discussion ... 22
G. Unbundling of IDLC Loops ... 24
MCIm's Position ... 24
Discussion ... 24
5. Effective Date ... 26
6. Waiver of Public Review and Comment ... 26
Findings of Fact ... 26
Conclusions of Law ... 27
ORDER ... 29

OPINION APPROVING ARBITRATED INTERCONNECTION AGREEMENT

1. Summary

We affirm the results adopted in the Final Arbitrator's Report (FAR), as modified, and approve the resulting arbitrated Interconnection Agreement (ICA) between Pacific Bell Telephone Company (Pacific) and MCImetro Access Transmission Services, L.L.C. (MCIm). Parties shall each sign the adopted ICA, and file the signed ICA within five days of today. We congratulate the parties on their hard work and determination in negotiating their 500-page ICA, which includes general terms, interconnection, xDSL services, access to databases, access to unbundled network elements such as dark fiber and other provisions. The proceeding is closed.

2. Background

On January 8, 2001, Pacific filed an application for arbitration of an ICA with MCIm pursuant to Section 252(b) of the Telecommunications Act of 1996 (Act or TA96). Pacific's previous three-year ICA with MCIm 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, and during that period the parties continued their negotiations. The last of those agreements provided that the notice to commence negotiations would be deemed to have been sent by MCIm 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. Therefore Pacific's application and request for arbitration was timely filed.

On February 2, 2001, MCIm filed its Response to Pacific's application. In its Response, MCIm 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 Arbitrator Meeting (IAM) was held on February 6, 2001 to set the schedule for the case and to address various procedural issues.

Arbitration hearings were held on March 12-15, 2001 and March 20-27, 2001, and 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. Comments on the DAR were filed on June 14, 2001 by MCIm and on June 20, 2001 by Pacific. The comments were taken into account as appropriate in finalizing the FAR, and the FAR was filed and served on July 16, 2001. The conformed agreement was filed with the Commission on August 15, 2001, along with statements by both parties concerning the outcomes in the FAR.

3. Negotiated Portions of Agreement

Section 252(e) of the Act provides that we may only reject an agreement (or portions thereof) adopted by negotiation if we find that the agreement (or portions thereof) discriminates against a telecommunications carrier not a party to the agreement, or implementation of such agreement (or portion thereof) is not consistent with the public interest, convenience and necessity. No party or member of the public alleges that any negotiated portion of the agreement should be rejected. We find nothing in any negotiated portion of the agreement which results in discrimination against a telecommunications carrier not a party

to the agreement, nor which is inconsistent with the public interest, convenience and necessity.

4. Arbitrated Portions of Agreement

Section 252(e) of the Act, and Resolution ALJ-181, Rule 4.2.3, provide that we may only reject an agreement (or any portion thereof) adopted by arbitration if we find that the agreement does not meet the requirements of Section 251 of the Act, including the regulations prescribed by the Federal Communications Commission (FCC) pursuant to Section 251, or the standards set forth in Section 252(d) of the Act.[1]

One hundred issues were ultimately presented for arbitration, and those issues were resolved in the FAR. In statements filed with the conformed agreement, Pacific states that the arbitrated provisions regarding four issues: 1) Directory Assistance Listing (DAL) Prices; 2) Operator Services (OS) and Directory Assistance (DA) as unbundled network elements (UNEs); 3) Dark fiber prices; and 4) Resale restrictions, are inconsistent with the obligations contained in Section 251 of the Act and the FCC's regulations. MCIm asserts the arbitrated outcomes on three issues do not meet the requirements of the Act: 1) Calling Names (CNAM) and Line Information Data Base (LIDB) databases as UNEs; 2) Bulk download of CNAM and LIDB databases and 3) Unbundling of Integrated Digital Loop Carrier (IDLC) loops. MCIm also provided comments on why the outcomes on the four issues Pacific raised are consistent with the Act. The seven issues parties raised will be discussed and resolved below.

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[1] Section 251 describes the interconnection standards. Section 252(d) identifies pricing standards.

A. Directory Assistance Listing Prices (Issue PRICE-31)

Pacific's Comments:

Pacific states that the FAR impermissibly requires Pacific to provide DAL at rates that are below Pacific's costs. In its Third Report and Order, the FCC ordered carriers to provide subscriber list information to requesting directory publishers and set "presumptively reasonable" rates for that service. Specifically, the FCC Order held that "$0.04 per listing constitutes a presumptively reasonable rate for base file subscriber list information and that $0.06 per listing constitutes a presumptively reasonable rate for updated subscriber list information that carriers provide directory publishers."[2] The FAR rejects Pacific's proposal to adopt the same prices for the same listings when sold to DAL providers on the ground that the FCC does not support the use of subscriber listing information as a basis for pricing DAL. According to Pacific, this is incorrect. The FCC merely declined to adopt for DAL purposes, the rate methodology for subscriber list information at this time. (*Id.* at ¶ 37.)

According to Pacific, the similarities inherent in the provision of subscriber list information and DAL information in Pacific's territory make it appropriate for the Commission to adopt a similar pricing schedule for each. Directory publishers and directory assistance providers obtain from Pacific essentially the same information in the same formats. Moreover, says Pacific, the current competitive status of the DAL market indicates that market-based prices

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[2] In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Provision of Directory Listing information under the Telecommunications Act of 1934, As Amended, Third Report and Order in CC Docket No. 96-115, Second Order on Reconsideration of the Second Report and Order in

are appropriate. As the FCC has recognized, "competition in the provision of operator services and directory assistance has existed since divestiture—more than 30 competitive LECs [Local Exchange Carriers] presently provide their own OS/DA services or resell the services of non-incumbent LECs."[3] According to Pacific, this finding is true in California where some large CLECs who provide their own DA service no longer purchase listings from Pacific.

Pacific asserts that the prices adopted in the FAR are below Pacific's costs, which is a violation of Section 252(d) of the Act. The FAR adopts MCIm's proposed rates of $0.002023 per base file listing and $0.001785 per base file update. Since DAL is not a UNE under the FCC's UNE Remand Order, the cost-based pricing MCIm proposes is not appropriate. Cost-based pricing is reserved for UNEs. According to Pacific, the appropriate pricing standard for DAL is non-discriminatory market-based pricing.

Pacific continues to believe that prices for subscriber listings could apply equally to DA database access. However, if the Commission adopts alternative prices, those prices should not be below Pacific's costs. At the very least, MCIm should not be permitted to pay less than what AT&T was ordered to pay in last year's interconnection arbitration between Pacific and AT&T,[4] subject to true-up. Pacific asserts that the price adopted by the FAR would allow MCIm to pay one-tenth of what AT&T was ordered to pay.

CC Docket No. 96-98, and Notice of Proposed Rulemaking in CC Docket No. 99-273, 14 FCC Rcd. 1550, FCC 99-227 (rel. Sept. 9, 1999), ¶ 8.

[3] UNE Remand Order, FCC 99-238, ¶ 447 (released Nov. 5, 1999).

[4] The price set in the Pacific/AT&T arbitration was $0.02 per listing.

Discussion

We find that the arbitrator erred in requiring Pacific to charge rates for DAL that Pacific says are below its cost. However, we find merit with the FAR's arguments that it is not appropriate to use the subscriber listing price for DAL.

Even if DAL is 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,[5] 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 MCIm acknowledges the FCC has not adopted a specific pricing standard, MCIm 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 assistance service at the same rates, terms and conditions they impute to themselves."[6]

[5] 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").

[6] 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.

According to MCIm, 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."[7] According to MCIm, 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.

MCIm asserts that Pacific should not be permitted to charge prices for DAL that are above the cost Pacific "charges itself." According to MCIm, 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 are 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 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.

[7] *Id.* at fn 42.

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.
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> 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.

Therefore, we find that the rates Pacific proposes in this arbitration for DAL do not comply with the nondiscrimination requirements of Section 251(b)(3) of the Act 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. At the same time, we have rejected MCIm's proposed rate because Pacific asserts that it is below its cost providing the service.

Since we have rejected both parties' proposals, as a compromise we will adopt the same rate we adopted in the AT&T/Pacific arbitration, namely

$.02 per listing. That rate will remain in place until we adopt a final rate for DAL in OANAD.

B. OS and DA as UNEs (Issues DA-7, OS-1, PRICE-22, PRICE-24, PRICE 25, PRICE-26, PRICE-31, PRICE-32)

Pacific asserts that the FAR impermissibly orders Pacific to offer OS and DA as UNEs. Under the UNE Remand Order, an ILEC does not have to offer OS and DA as UNEs unless the ILEC declines to implement a technically feasible custom routing solution.[8] According to Pacific, the FAR concludes that MCIm's proposed solution has been found to be technically feasible and that Pacific has failed to implement it.

Pacific states that MCIm has no proposed solution to custom route MCIm's OS traffic on its Nortel switches. And a change would need to be made to each Nortel switch to accommodate DA functionalities. In addition to being able to actually route calls in the manner MCIm has proposed, technical feasibility also includes the ability to order and provision this custom routing, and to bill for the custom-routed calls. According to Pacific, there is no foundation for the FAR's conclusion that technical feasibility has been established.

Discussion

We have reviewed the FAR and dispute Pacific's conclusion that the FAR determined that technical feasibility has been established for the custom routing which MCIm requested. Instead, the FAR relied on ¶463 of the UNE Remand Order in support of its conclusion that the FCC clearly states that OS and DA are not to be treated as UNEs only in cases where ILECs provide customized routing. Paragraph 463, reads as follows:

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[8] UNE Remand Order, FCC 99-238, ¶ 463.

> We conclude that the interoperability issues identified in this 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. (Emphasis added.)

We agree with the FAR's conclusion that ¶463 refers to the same type of customized routing that MCIm 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 the requirement to offer OS and DA as UNEs. We will follow that rule in this arbitration as well.

Therefore, there was no need for the arbitrator to determine whether particular functions are technically feasible in particular switch types. We

support the arbitrator's decision to leave that issue to the parties. However, if Pacific does not provide custom routing of either OS or DA calls using Feature Group D, as MCIm requests, MCIm is entitled to receive either OS or DA, or both, at UNE prices.

C. Resale Restrictions

Pacific's Position (Issues ALL-1, DEF-3, RES-2)

According to Pacific, the FAR violates the Act by allowing MCIm to purchase telecommunications services from Pacific at wholesale rates for resale to MCIm's wholesale customers. Pacific asserts that the FCC explicitly stated that § 251(c)(4) does not require ILECs to make services available for resale at wholesale rates to parties who are not "telecommunications carriers."[9] 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…." Pacific does not dispute that MCIm is a telecommunications carrier, but when MCIm sells Pacific's telecommunications services to MCIm's wholesale customers, this is not an offer "directly to the public," and in that capacity, MCIm is not acting as a telecommunications carrier. Consequently, MCIm would not be entitled to purchase those telecommunications services from Pacific at wholesale rates to resell to other carriers.

Pacific finds this to be consistent with the policy objective of the Congress in enacting Section 251(c)(4) which was to encourage competition for retail customers—not wholesale customers. Pacific concludes that the only circumstance under which a CLEC may obtain an ILEC's services at wholesale rates is when the CLEC plans to sell those services directly to the public.

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[9] First Report and Order, ¶ 875.

Pacific asserts that the FAR's determination that MCIm is entitled to purchase services from Pacific for resale to other carriers is based on three flawed notions. First, the FAR asserts that Pacific impermissibly cobbled together various definitions of the Act in support of its position. According to Pacific, it is a basic tenet of statutory interpretation that all the parts of a statute must be read together. The definitions set forth in Section 153 are not superfluous.

Second, the FAR mistakenly concludes that MCIm can never step out of its role as a telecommunications carrier. When a carrier engages in certain activities that are inconsistent with the requirements for qualifying as a "telecommunications carrier," that entity is not entitled to avail itself of the rights and privileges reserved for "telecommunications carriers" under the Act. The FCC confirmed this principle in its First Report and Order when it concluded that carriers may not purchase telecommunications services from an ILEC at wholesale rates for its own use because self use does not involve the sale of telecommunications for a fee directly to the public.

Third, the FAR mistakenly concludes that to impose a restriction on MCIm's ability to resell Pacific's wholesale services would be contrary to the intent of the Act in general and Section 251(b)(1) in particular. Pacific claims that Section 251(b)(1) does not prohibit all restrictions on resale, it prohibits unreasonable restrictions. According to Pacific, the resale restriction it is seeking is consistent with the intent of the Act, and therefore, presumptively reasonable. The policy objective of the Congress in enacting Section 251(c)(4) was to encourage competition for retail customers—not wholesale customers.

Discussion

We support the FAR's finding that MCIm should be permitted to purchase services from Pacific at wholesale prices for resale to other carriers. We

find Pacific's interpretation of the Act to be impermissibly narrow. Pacific, in citing above the definition of a "telecommunications service" omitted a key part of the definition found in the Act. The entire definition reads as follows:

> Telecommunications Service—The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, *or to such classes of users as to be effectively available directly to the public*, regardless of the facilities used. (Emphasis added.)

The portions of the definition that Pacific omitted could be construed to include selling services at wholesale for resale to end users. Those services are "effectively available directly to the public." If we take Pacific's position to an extreme, then *Pacific* is not a telecommunications carrier when it is selling services to other carriers, rather than directly to the public. That is certainly not the outcome the Congress contemplated when it developed the definition of a telecommunications carrier.

In addition, the FCC and the D C Circuit Court disagree with Pacific's reading of the Act.

> …the Commission [the FCC] noted in the Non-Accounting Safeguards Order that 'the definition of telecommunications services is intended to clarify that telecommunications services are common carrier services.' Non-Accounting Safeguards Order ¶263. It also stated that the term 'telecommunications service' created a distinction between 'common and private carriage.' *Id.* ¶265. It did observe that common carrier services 'include wholesale services to other carriers,' *Id.* ¶263, that the term 'telecommunications service' was not intended to create a retail/wholesale distinction,' *Id.* ¶265, and that 'neither the Commission nor the

courts…has construed 'the public' as limited to end-users of a service.' *Id.*[10]

In other words, the plain reading of the FCC's Non-Accounting Safeguards Order cited above demonstrates that the term "telecommunications service" was never intended to create a distinction between wholesale and retail services, as Pacific attempts to do. Rather, it was intended to emphasize that a telecommunications carrier is a common carrier, rather than a private carrier.

We uphold the FAR's conclusion that MCIm is entitled to purchase services at wholesale rates, for resale to other carriers.

D. Dark Fiber Prices (Issue Price-17)

Pacific's Position

Pacific claims that the FAR violates Total Element Long Run Incremental Cost (TELRIC) pricing requirements and the Commission's own Consensus Costing Principles in excluding investment costs from the price for dark fiber. According to Pacific, both the FCC's TELRIC rules and the Commission's Consensus Costing Principles require that all costs be included in the cost of an element.

Pacific asserts that the FAR's conclusion not to include investment costs is insupportable for three reasons. First, the sole basis for MCIm's proposal to exclude investment costs from dark fiber was because MCIm's witness Murray defined dark fiber as an "excess capacity" UNE. But that can be said for all UNEs, since the Act does not require ILECs to build new facilities for CLECs.

Second, TELRIC studies scorch all existing facilities and rebuild the network from the ground up, and the resulting UNEs include the investment

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[10] Virgin Islands Telephone Corporation v. Federal Communications Commission, 1999 LEXIS 33133 *7 (D.C. Circuit December 21, 1999).

costs to do that rebuilding. Murray could not name a UNE that did not contain investment costs.[11]

Third, by limiting the UNE to just excess capacity, the total element increment of demand required for a TELRIC study would not be captured. Although MCIm's witness Murray acknowledged that the total element increment included all uses of a UNE, including Pacific's use, the increment she defined is not for all fiber, but only the demand for fiber coming from CLECs.

Pacific recommends adopting the approach taken by the Commission in the Interim Line Sharing Proceeding. There, the Commission permitted investment cost to be included in dark fiber and deferred any potential double counting concerns to be addressed in the Permanent Line Sharing (PLS) proceeding. The Commission should order that outcome here as well.

Discussion

MCIm made a convincing argument that Pacific's analysis results in double counting of investment costs. According to MCIm, 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 spare facilities 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 the 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

[11] Murray for MCIm, 8 RT 719.

currently utilize is, 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 MCIm at 23-34.)

Because the Commission assigned the cost of all outside plant facilities when it adopted TELRIC costs 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.

Pacific does not refute MCIm's argument that dark fiber costs are already being recovered in the loop and transport UNEs, but insists that the dark fiber element itself must recover all the costs of the UNE. If we were costing all UNEs today, we would do that. However, the costs for loop and transport have already been set. We agree that the TELRIC methodology requires that all costs be included in the cost of a UNE. However, this situation is somewhat unique because the dark fiber UNE was created after other UNEs were created and their costs and prices adopted.

Pacific suggests that we treat this the way we treated a similar issue in the Interim Line Sharing (ILS) proceeding. Pacific is not correct that the situation is identical because in the ILS proceeding we were not dealing with dark fiber or its investment component. Instead, we were dealing with the High Frequency Portion of the Loop (HFPL) which was created as a UNE, after we had established the cost of the loop. Thus, if Pacific could charge for the loop and for the HFPL, it would "double recover" some of the costs of the loop, since, presumably, the cost for the loop itself recovered all the costs. There the similarity between dark fiber and HFPL ends. In the ILS proceeding, we did choose to allow double recovery on an interim basis, but we established a

memorandum account, and determined that we would decide in the PLS Phase whether the money in the memorandum accounts should be distributed to ratepayers. The PLS phase was scheduled to begin immediately after completion of the interim phase, and the PLS phase is now underway.

In order to determine which costs should be allocated to loops, transport and dark fiber, we need to undertake a comprehensive review of the UNE costs we have adopted. No such comprehensive review of all UNE costs is scheduled or anticipated in the near future. Therefore, on an interim basis, we are not willing to allow Pacific to double recover the investment costs in both the loop/transport and in dark fiber, for some unknown and indefinite period of time. We uphold the outcome in the FAR that investment costs should not be included in the cost of the dark fiber UNE.

E. CNAM and LIDB as UNEs (Issue LIDB-1)

MCIm's Position

MCIm claims that the ICA does not comply with the requirements of the Act and Commission rules because it refers to a Pacific tariff to establish terms and conditions for the LIDB and CNAM UNEs. Allowing Pacific to dictate the terms and conditions deprives MCIm of certainty over the term of the ICA.

According to MCIm, Pacific has not given any good reason why LIDB and CNAM are so different from other UNEs that a tariff is necessary. Pacific's main reason cited in the FAR, namely achieving parity for all CLECs, is misleading. This merely allows Pacific to unilaterally impose restrictions and pricing on all CLECs uniformly while preventing any CLEC from negotiating a lower price during the arbitration process. In response to the FAR's comment that MCIm did not provide competing language in lieu of Pacific's tariff, MCIm

responds that its proposed language in the UNE appendix was all the language MCIm required.

Discussion

We affirm the FAR's outcome on this issue. While MCIm asserts that the proposed language in the UNE appendix was all the language MCIm required, we are not convinced that language in the UNE appendix provides enough detail on how the services are to be provisioned to prevent disputes among the parties. In approving an arbitrated ICA, it is our intention to ensure that terms and conditions and responsibilities are clearly delineated so that disputes as to the meaning of various contract clauses is minimized.

MCIm asserts that we are not complying with the requirements of the Act if an ICA refers to a tariff to establish terms and conditions for the LIDB and CNAM UNEs. We disagree. There is nothing in the Act to preclude reference to tariffs, and in this case, reference to the tariff was Pacific's litigation position. We have adopted other ICAs which refer to tariffs for certain provisions, in lieu of including those provisions in the ICA itself, and it is appropriate to do so in this instance as well. If MCIm had offered its own terms and conditions, we would have reviewed those terms as well as those contained in Pacific's FCC Tariff 128. However, in this case, the only robust set of terms and conditions before us are those contained in Pacific's tariff.

We acknowledge that in our Open Access and Network Architecture Development (OANAD) proceeding, we declined to tariff the UNEs. However, the Commission's decisions on costing and pricing themselves established various terms and conditions under which particular UNEs could be obtained. We have nothing similar for the CNAM and LIDB UNEs.

F. Bulk Download of CNAM and LIDB databases (Issue LIDB-3)

MCIm's Position

MCIm asserts that Pacific's argument, upon which the FAR relies, that the FCC unequivocally limits call-related databases to query only access, is flawed. It is such a narrow interpretation as to effectively discriminate against CLECs and preclude MCIm from using the databases to provide "any" telecommunications service it wishes to provide. The FAR relies on Pacific's flawed reasoning that "access to" the call-related databases constitutes the UNE rather than the database itself. The argument is flawed because access to UNEs in itself is not the network element.

Moreover, MCIm claims that the definition of network element contained in the Act does not include "access," but rather defines network elements as facilities or equipment used in the provision of telecommunications service, of which "databases" are specifically enumerated.

MCIm states that Pacific's argument that access to the DAL database is not the same as access to LIDB or CNAM because DAL is not a UNE is a red herring. The nondiscriminatory access provision required by § 251(b)(3) of the Act requires access to the DAL database in a readily accessible batch format. It could be argued that the nondiscrimination requirement of § 251(c)(3) is even stronger than the nondiscrimination requirement of § 251(b)(3).

MCIm notes that Georgia and Michigan already require ILECs in their respective states to provide MCIm batch access to the CNAM database. MCIm indicates that it provided ample evidence at hearing regarding the discriminatory effects of being limited to query-only access. Also, MCIm demonstrated that batch access was technically feasible.

Moreover, MCIm asserts that the FAR's argument that limiting MCIm to per-query access would protect customers' privacy is seriously flawed because it assumes that Section 222 of the Act prohibits the sharing of customer information to protect customer privacy. A close reading of Section 222 reveals that all telecommunications carriers are bound to protect customer privacy. Thus, Section 222 of the Act would apply to MCIm's use of LIDB and CNAM data. It is unreasonably discriminatory to presume that Pacific will comply with these requirements, but not MCIm, when there is no basis for such a finding.

Discussion

The arbitrator found that allowing MCIm to download the LIDB and CNAM databases would depart from the FCC definition of this UNE, and we concur with that finding.

A review of the rules promulgated by the FCC in its UNE Remand Order supports the outcome in the FAR. 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 [STP] linked to the unbundled databases.

In other words, the FCC defined this particular UNE narrowly to include access to databases at the STP. MCIm is correct that Section 251(c)(3) of the Act states unequivocally that Pacific may not restrict MCIm'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.

MCIm also rebuts the privacy concerns expressed in the FAR, saying that all carriers are covered by the mandate of Section 222 that customers' privacy be protected. 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.

This should be read in conjunction with the pertinent part of Section 222. Section 222(c)(1) read as follows:

> PRIVACY REQUIREMENTS FOR TELECOMMUNICATIONS CARRIERS.— Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.

In its Brief, MCIm states that it wants to use the databases to provide "any" telecommunications service it wishes. Our reading of this provision is that Pacific would be in violation of Section 222 if it provided the information to MCIm since the use of the CPNI information Pacific receives is limited to provisioning of "the telecommunications service from which such information is derived." We uphold the FAR's outcome on this issue.

G. Unbundling of IDLC Loops

MCIm's Position

As noted in the FAR, MCIm directed the arbitrator's attention to two Commission orders for confirmation that the Commission previously determined that Pacific must provide DS-1 level connections to loops provided over IDLC. The arbitrator found that MCIm did not prove its contention because neither decision MCIm cited deals with the specific issue of IDLC loops.

MCIm does not dispute the arbitrator's conclusion that the referenced passages in the two Commission orders cited in MCIm's brief are not explicitly clear as regards to a potential distinction between IDLC and Universal Digital Loop Carrier (UDLC). However, MCIm asserts that in both cases, the Commission orders cited explicitly adopted the positions set forth by AT&T and (then) MCI Telecommunications Corp. that in turn were specifically based on obtaining access to loops over IDLC facilities at a DS-1 level. MCIm cites the discussions in the OANAD orders in support of its position. MCIm also includes the Reply Testimony of Ernest M. Carter on behalf of AT&T and MCI as an attachment to its comments.

Discussion

Pacific's proposed language is adopted, with modification to allow access to IDLC loops where technically feasible. Paragraph 175 in the FCC's UNE Remand Order 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.

As Pacific cited above, the FCC acknowledges that there are difficulties in unbundling IDLC loops. However, the FCC's acknowledgement in

footnotes 417 and 418 of the UNE Remand Order is a description of the limitations of unbundling over IDLC used to justify subloop unbundling. It is not a full discussion of how to access loops provisioned over IDLC.

In footnote 417 the FCC lists four methods MCI WorldCom presented that would allow competitive LECs to gain access to subscribers served over IDLC loops and some of the limitations of access. While the FCC does not endorse any of the methods, it does not deny their technical feasibility either. The FCC closes footnote 417 with the following comments, "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, MCI World Com's solutions are limited and do not alleviate the need for subloop unbundling.

While we recognize that these methods of access have limitations which may prevent their widespread deployment, we believe that where access by these methods is technically feasible, it should be available. Therefore, we modify the FAR's outcome and amend Pacific's proposed language in § 3.1.1 to read as follows:

> MCIm is entitled to utilize loops provisioned through the use of Digital Loop Carrier (DLC), channel bank, multiplexer or other equipment at which traffic is encoded and decoded, multiplexed, or concentrated. If MCIm requests one or more unbundled loops serviced by Integrated Digital Loop Carrier (IDLC), Pacific shall provide the loops unless no technically feasible unbundling solution is available. If the IDLC loop cannot be unbundled, Pacific will, where available, move the requested unbundled loop(s) to a spare, existing physical digital loop carrier unbundled loop at no additional charge to MCIm. if however, no spare unbundled loop is available, Pacific will within two

(2) business days, excluding weekends and holidays, of MCIm's request, notify MCIm of the lack of available facilities.

5. Effective Date

The Agreement provides that it is effective upon approval by the Commission. We approve the Agreement, as modified, today. However, the Agreement has not been signed by the parties. Parties should sign the approved Agreement, and file it with the Commission, within 5 days from today. The Agreement should be determined to be approved by the Commission on the date that the signed copy is filed with the Commission.

6. Waiver of Public Review and Comment

Pursuant to Rule 77.7(f)(5) of our Rules of Practice and Procedure, the otherwise applicable 30-day period for public review and comment is being waived.

Findings of Fact

1. On August 15, 2001, parties filed an arbitrated Agreement for Commission approval. Also, Pacific and MCIm filed statements on August 15, 2001 regarding whether or not the Agreement should be approved by the Commission.

2. The parties negotiated the entire Agreement, with the exception of the 100 items presented for arbitration.

3. No party or member of the public alleges that any negotiated portion of the Agreement is not in compliance with Section 252(e)(2)(A) of the Act.

4. No negotiated portion of the Agreement results in discrimination against a telecommunications carrier not a party to the Agreement, or is inconsistent with the public interest, convenience and necessity.

5. In its August 15, 2001 statement, Pacific asserts that the arbitrated outcomes on four issues do not comply with the Act or the FCC's implementing rules.

6. In its August 15, 2001 statement, MCIm asserts that the arbitrated outcomes on three issues do not comply with the Act or the FCC's implementing rules.

7. The Act requires that the Commission approve or reject an arbitrated interconnection agreement within 30 days after the agreement is filed. (47 U.S.C. Section 252(e)(4).)

8. The Commission generally may not act on a proposed decision any sooner than 30 days after it is filed and served for public comment. (Pub. Util. Code §§ 311(d) and (g).)

9. The Commission's 30-day period before acting on a proposed decision may be reduced or waived for a decision under the state arbitration provisions of the 1996 Telecommunications Act. (Pub. Util. Code § 311(g)(3).)

10. Parties have agreed in writing that the time requirement for a Commission decision under the Act may be extended to September 20, 2001.

Conclusions of Law

1. Nothing about the result of this arbitration is inconsistent with governing federal law.

2. All amendments to agreements must be submitted by advice letter, and approved pursuant to Rule 6.2 of Resolution ALJ-181.

3. No arbitrated portion of the Agreement fails to meet the requirements of Section 251 of the Act, including FCC regulations pursuant to Section 251, or the standards of Section 252(d) of the Act.

4. No provision of the Agreement conflicts with State law, including compliance with intrastate telecommunications service quality standards, or other requirements of the Commission.

5. The price adopted for DAL should not be below Pacific's cost of providing the service.

6. If Pacific does not provide the custom routing MCIm requests using FGD, OS and DA should be priced as UNEs.

7. MCIm should be permitted to purchase services from Pacific at wholesale prices for resale to other carriers.

8. The prices for dark fiber should not include investment costs since those costs are already being captured in the costs for other UNEs.

9. It is appropriate for the Agreement to refer to Pacific's tariff for the terms and conditions associated with LIDB and CNAM.

10. Allowing MCIm to download the LIDB and CNAM databases would depart from the FCC definition of the UNE.

11. MCIm is entitled to unbundled access to IDLC loops, to the extent that such access is technically feasible.

12. This matter comes before the Commission pursuant to Rule 77.7 (f)(5), which allows the 30-day period to be reduced or waived.

13. The Agreement between Pacific and MCIm should be approved.

14. Commission approval of the Agreement should be determined to be the date the signed Agreement is filed with the Commission.

15. The parties should sign the modified Agreement and file it with the Commission within 5 days from today.

16. This order should be effective today because it is in the public interest to implement national telecommunications policy as accomplished through the

Agreement, and to replace the existing Agreement with this new Agreement, as soon as possible.

O R D E R

IT IS ORDERED that:

1. Pursuant to the Telecommunications Act of 1996, and Resolution ALJ-181, the Interconnection Agreement between Pacific Bell Telephone Company (Pacific) and MCImetro Access Transmission Services L.L.C. (MCIm) filed August 15, 2001 is approved, as modified. The parties shall sign, file and serve the approved Interconnection Agreement within five days of the date of this order, and the date of Commission approval shall be the date the signed Interconnection Agreement is filed.
2. The parties shall, within 10 days of today, serve on the Director of the Telecommunications Division a copy of the approved Interconnection Agreement.
3. The January 8, 2001 motion of Pacific to file under seal portions of its application for arbitration is hereby granted.
4. The February 2, 2001 motion of MCIm to file under seal portions of its Response to Pacific's application for arbitration is hereby granted.
5. The August 15, 2001 motion of Pacific to file under seal the proprietary portion of its statement regarding whether the interconnection agreement resulting from this proceeding should be approved or rejected, is hereby granted.
6. This proceeding is closed.

This order is effective today.

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

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