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Decision 00-08-011 August 3, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application by AT&T Communications of California, Inc., et al, (U 5002 C) for Arbitration of an Interconnection Agreement with Pacific Bell Telephone Company (U 1001 C) Pursuant to Section 252(b) of the Telecommunications Act of 1996.

Application 00-01-022
(Filed January 24, 2000)

O P I N I O N

1. Summary

We affirm the results adopted in the Final Arbitrator's Report (FAR) and the Addendum to the FAR, with some modifications, and approve the resulting arbitrated Interconnection Agreement (ICA) between AT&T Communications of California, Inc., et al, and Pacific Bell Telephone Company (Pacific). Parties shall each sign the adopted ICA, and shall file the signed ICA within 5 days of today. The proceeding is closed.

2. Background

On January 24, 2000, AT&T Communications of California, Inc. (U 5002 C), TCG – San Francisco (U 5454 C), TCG – Los Angeles (U 5462 C), TCG – San Diego (U 5389 C), and TCI Telephony Services of California (U 5698 C) (collectively referred to as AT&T or applicant) filed an application for arbitration of an ICA with Pacific pursuant to Section 252(b) of the Telecommunications Act of 1996 (Act or TA96). AT&T's previous three-year ICA with Pacific which was approved in Decision (D.) 96-12-034, expired on December 19, 1999, but under the terms of Section 3.1 of the agreement, it continues in force and effect until a new agreement addressing all of the terms of the prior agreement becomes effective between the parties.

The parties wanted additional time for negotiations, so they stipulated that the date on which Pacific received a request from AT&T for negotiation of a new ICA was September 11, 1999. The 135th day after Pacific received AT&T's request for negotiation was deemed by the parties to be January 24, 2000. The arbitration window commenced on January 24, 2000 and continued until February 18, 2000. The petition for arbitration is therefore timely.

In its application, AT&T identified 130 unresolved issues with Pacific, as presented in its "Matrix of Disputed Issues." On February 18, 2000, Pacific filed

its Response to AT&T's application. In its response, Pacific summarized its position on the issues previously raised by AT&T. Pacific also raised a number of additional contract issues in dispute. Parties ultimately identified 280 disputed issues to be decided, but subsequently settled 51 issues. The arbitrator was left with 229 issues to decide.

An Initial Arbitration Meeting (IAM) was held on February 15, 2000 to discuss the schedule for the case and to address various procedural issues. The IAM was continued to February 23, 2000 to discuss the schedule for hearings. AT&T was allowed to file additional direct testimony to address the new issues and new positions on issues raised in Pacific's Response.

Arbitration hearings were held February 28, 2000 through March 10, 2000. Concurrent briefs were filed and served on April 3, 2000. The Draft Arbitrator's Report (DAR) was filed on May 10, 2000, disposing of the contested issues. AT&T and Pacific filed Comments on the DAR on May 26, 2000 and Reply Comments, on June 5, 2000. The comments were taken into account as appropriate in finalizing the Arbitrator's Report. The FAR was filed and served on June 13, 2000.

Because of the large number of issues to be resolved, the arbitrator established a further process to resolve issues which fit into one of the two following categories: 1) inconsistent determinations in the FAR on different issues or 2) certain issues that were not included in the Matrix of Disputed Issues or for some other reason were not resolved in the FAR. Parties were directed to file the conformed agreement with the disputed language marked and to file statements supporting their positions. The parties filed their statements on June 28, 2000. Those issues were resolved in an Addendum to the FAR, which was issued on July 17, 2000.

On June 27, 2000, parties filed an agreement which conforms with the decisions in the FAR. Concurrently, each party filed a statement which identified the criteria in the Act and the Commission's Rules by which the negotiated and arbitrated portions of the Agreement are to be tested, stated whether the negotiated and arbitrated portions pass or fail those tests, and stated whether or not the Agreement should be approved or rejected by the Commission.

During the course of the proceeding both AT&T and Pacific filed motions requesting that particular documents or portions of documents be placed under seal. In addition, Pacific filed two other motions, one to file corrected pages to John Lube's testimony¹, and the second, an amended Attachment 10 to Pacific's Response.

3. Summary of Findings in the FAR

Following is a summary of the outcome in the FAR on major issues that were decided in this arbitration. The discussion follows the organizational structure of the ICA.²

3.1. Preface/General Terms and Conditions

3.1.1. Issue 13: Intervening Law

The ICA is to be updated to incorporate any "legally binding" legislative, regulatory, judicial or other legal actions. The phrase "that materially affects any material terms of this agreement," is deleted. That language was included in the current agreement between the parties and has been the subject

¹ That motion is moot since the Exhibit in question was marked as Exhibit 205 and entered into evidence.

² For information on parties' positions or more detailed discussion on a particular issue, see the FAR.

of controversy. Also, the arbitrator deleted AT&T's proposed language that would have required that all network elements and combinations be available for the term of the agreement, independent of any state or federal action. The ICA is not above the law and should be subject to changes in the law.

3.1.2. Issue 14: Limitation of Liability.

The FAR adopts AT&T's proposed Limitation of Liability provisions. Pacific's proposed language would have limited both parties' liability to the dollar amount the other party would have charged for the affected services, regardless of whether the claim arises from willful or inadvertent negligent acts or omissions. This is similar to the liability provisions included in both parties' tariffs for their end users. The arbitrator determined that if one party causes significant damage to the other's property, it is not appropriate to limit liability to a minimal amount similar to the liability for damages which is due to end-user customers.

3.1.3. Issue 15: Indemnification.

The adopted indemnification clause requires each carrier to bear full responsibility for any unlawful acts and omissions that cause injury to others. The FAR incorporates Pacific's proposed indemnification provisions relating to intellectual property.

3.1.4. Issue 18: Implementation Schedule.

Pacific's proposed provision was deleted. This provision would have allowed Pacific to decide when a competitive local exchange carrier (CLEC) should begin offering service, even though it is the CLEC that is in the best position to develop its entry strategy and implementation schedule. This

section could have discouraged other carriers from opting into the agreement pursuant to Section 252(i)³.

3.2. Attachment 3: Alternative Dispute Resolution (ADR).

3.2.1. Issue 27

The FAR limits the ADR process to claims involving 1 percent or less of amounts charged to AT&T by Pacific under the ICA during a 12-month period.

3.2.2. Issues 31-33: Expedited Dispute Resolution process (EDR).

The EDR process is limited to disputes which cause disruption to an end user's service. AT&T's proposal to address "To Be Determined" prices and implementation of changes in law via the EDR process was rejected.

3.3. Attachment 4: Directories, Directory Assistance, Directory Assistance Listings and Subscriber List information

3.3.1. Issue 37: Rate for additional listings.

Pacific is required to provide additional listings for AT&T's customers at no charge as the *quid pro quo* for providing that information to third-party vendors. This outcome is consistent with Ordering Paragraph 2 in D.97-01-042 in the Local Competition Proceeding, which requires Pacific to compensate a CLEC before releasing that CLEC's directory-listing information to third-party database vendors.

³ Section 252(i) is also referred to as the "pick and choose" or "Most Favored Nation" (MFN) provision. It allows carriers to adopt all or portions of an agreement approved for another carrier.

3.3.2. Issue 44: Specific directory listing liability provisions.

Pacific's proposed liability provisions were adopted by the arbitrator. Both AT&T and Pacific have liability provisions in their retail tariffs to protect them specifically from errors in directory listings. AT&T should not be able to sue Pacific for errors in a printed directory, while being protected against legal action by its own end users for those errors.

3.4. Unbundled Network Elements (UNEs) and Combinations.

3.4.1. Issue 54: Combination of UNEs.

Pacific is required to combine network elements for AT&T. The arbitrator ordered this under the state's independent authority since the FCC's rules on combining UNEs are still under review by the Eighth Circuit Court of Appeals. In its adoption of D.99-11-050 [the Open Access and Network Architecture Development (OANAD) pricing order] the Commission articulated the intent to exert its state authority to order Pacific to combine UNEs for CLECs.

3.4.2. Issue 55: Use restrictions on UNEs and UNE Combinations.

The Federal Communications Commission (FCC) has established temporary constraints on the use of combinations of UNEs to replace special access services, and those restrictions are adopted in the FAR. AT&T is permitted to convert special access service to combinations of unbundled loop and transport, as long as it provides a significant amount of local exchange service.⁴ Also, the FAR adopts the FCC's prohibition against combining UNEs with tariffed special access services.

⁴ The FCC defines what constitutes a "significant amount of local exchange service" in its Supplemental Order Clarification, ¶ 22).

3.4.3. Issue 56: Routing of AT&T's intraLATA toll calls over Pacific's network.

AT&T cannot use Pacific's shared transport UNE to carry its intraLATA toll traffic, except in one instance. In its *UNE Remand Order*, the FCC acknowledges that shared transport is technically inseparable from unbundled switching⁵ so requesting carriers do not have the option of using unbundled shared transport without also using Pacific's unbundled local switching. AT&T can use Pacific's shared transport UNE only in those instances where AT&T buys unbundled switching from Pacific and implements custom routing Option C.

3.4.4. Issue 58: Access to dark fiber.

AT&T is allowed access to any unused transport capacity, including unused copper, fiber and coaxial cable transport facilities. Pacific is entitled to charge AT&T a "dark fiber inquiry charge."

3.5. Attachment 8: Pricing.

3.5.1. Issue 105: Geographic deaveraging of loop rates.

Pacific's three-zone proposal is adopted on an interim basis, pending resolution in the Commission's generic investigation on geographic deaveraging. The FAR expressed concern with the dataset that AT&T used to develop its four-zone proposal. The arbitrator also found that the policy consequences of AT&T's Zone One Business District warrants further Commission scrutiny prior to being adopted. The rigorous scrutiny needed can only be performed in the context of a generic Commission proceeding.

⁵ *UNE Remand Order* ¶ 371.

3.5.2. Issue 106: Digital Subscriber Line (DSL) loop qualification charge.

The FAR rejects Pacific's proposed DSL loop qualification charge, which had been approved in the MFS WorldCom arbitration. Pacific did not present its cost study in the AT&T arbitration, so AT&T had no opportunity to review the underlying cost study. The FAR concluded it would constitute legal error to adopt Pacific's proposed rate, based on a cost study that was never entered into evidence in this arbitration proceeding, and which AT&T did not have an opportunity to examine. AT&T had proposed that there be no loop qualification charge since AT&T asserts the forward-looking costs of providing loop qualification information would be close to zero. Therefore, on an interim basis, the loop qualification charge is set at zero, subject to true-up once the Commission adopts a final loop qualification charge.

3.5.3. Issue 109: Switching vertical features not included in price of switch-port UNE.

Pacific's cost study for the switch port does not include any vertical features. Pacific prepared separate cost studies for the 30 vertical features included in OANAD. Given the structure of Pacific's port cost studies, AT&T is not entitled to receive vertical features as part of the price of the port.

3.5.4. Issue 111: Transit rate.

AT&T's proposed transit rate, which is set at the tandem switching rate, is adopted. Pacific had advocated that the transit rate should be the same as adopted in the MFS WorldCom arbitration, but Pacific did not present its Total Element Long Run Incremental Cost (TELRIC) cost study in this arbitration, so AT&T had no opportunity to review it. (See Issue 106 above.)

3.5.5. Issue 112: Resale changeover charge.

The FAR endorses the interim changeover charges the Commission adopted in D.96-03-020. Those interim charges will remain in effect until the Commission adopts final charges in the Resale Phase of OANAD.

3.5.6. Issue 116: Collocation rates.

AT&T's proposed collocation rates were adopted on an interim basis. AT&T based its proposed rates on the Collocation Cost Model (CCM) which is being used in the Collocation Phase of OANAD to set final rates for collocation. While Pacific set some of its rates based on the CCM, other rates are those included in Pacific's collocation tariffs, which are not based on forward-looking costs. The FAR orders that the 19% shared and common cost allocator adopted in the OANAD pricing order⁶ be added to AT&T's proposed rates.

3.5.7. Issue 120: Ancillary equipment charges.

Pacific is required to provide whatever Ancillary Equipment is needed to make a UNE or UNE combination operate properly. Therefore, AT&T says the ICA already contains all necessary terms and conditions for such included Ancillary Equipment. On the same basis, the ICA already contains all pricing related to the Ancillary Equipment that AT&T seeks. Ancillary Equipment needed to make a UNE or Combination function is included in the price for the UNE or Combination.⁷ AT&T says it has no intention of ordering Ancillary Equipment that would be subject to the charges in the pricing appendix. There is no reason to include a price list for items AT&T does not intend to purchase.

⁶ D.99-11-050.

⁷ This is based on language the parties agreed to in Attachment 6, Sections 2.10 – 2.11.

3.6. Attachment 10: Ancillary Functions.

3.6.1. Issue 148: Collocation Terms and Conditions.

The FAR rejects AT&T's proposal to include its terms and conditions in the ICA. Some of AT&T's proposed terms would give AT&T preferential treatment over the CLECs covered by Pacific's tariff provisions. For example, AT&T proposes provisioning intervals for various types of collocation that are much shorter than the intervals in Pacific's collocation tariff. The FAR concludes that the issue of shorter provisioning intervals should be examined in a generic proceeding and adopted for all CLECs. The FAR acknowledges that Pacific's collocation rules are currently contained in various sources: its approved tariff, Accessible Letters, and an unapproved Advice Letter. However, ultimately collocation will be governed by a single, integrated set of rates, terms and conditions, once they are adopted in the Collocation Phase of OANAD.

3.6.2. Issue 152: Off-site adjacent collocation.

Pacific is required to provide this form of collocation. However, the FAR defers to the OANAD proceeding as the appropriate place to determine whether this off-site arrangement should be termed "interconnection" or "collocation."

3.6.3. Issue 197: Provisioning of E911 trunks.

AT&T is entitled to use UNE dedicated transport in lieu of ordering E911 trunks from Pacific's tariff. The dedicated UNE transport rate is adopted until a permanent TELRIC rate is adopted for E911 trunks. There is no issue of system integrity and reliability if Pacific installs the UNE trunks at the router. However, in the interest of maintaining system integrity and reliability, AT&T is not entitled to self-provision its own facilities to the 911 router.

3.6.4. Issue 199: Liability and indemnification for E911 arrangements.

Pacific's proposed section on E911 liability and indemnification is adopted. The unique service provided and the consequences of error associated with the service warrant special liability and indemnification provisions specifically for 911 service.

3.7. Attachment 13: Billing and Recording.

3.7.1. Issue 207: Withholding payment for disputed bills.

Pacific's proposed contract provision is adopted. An unscrupulous CLEC could take advantage of a contract provision that allows CLECs to withhold payment during a billing dispute. To the extent that other CLECs can "MFN" into this agreement, it is prudent to put provisions in place to protect Pacific. Pacific's provision requires that disputed amounts be placed in an interest-bearing third party escrow account. With that provision in place, there is no incentive for a carrier to dispute all charges.

3.7.2. Issue 209: Payment of deposits.

Pacific's proposed deposit section is adopted (with some modifications). Since other CLECs could MFN into this agreement, it is appropriate to add such a provision to protect Pacific's financial interests. AT&T will not be harmed by the deposit rules if it pays its bills on time. If AT&T does not timely pay its bills, it will be required to pay a deposit. That provision is appropriate for AT&T as well as any CLEC that MFNs into the ICA.

3.7.3. Issue 210: Termination of service for nonpayment.

Pacific's proposed language is adopted with modification. Disconnection is limited to those resale services or network elements with undisputed unpaid charges. Pacific may not disconnect other services provided

under the agreement. Pacific is required to continue to provide service to any of AT&T's customers which it transfers over to its own service as part of the disconnection process.

3.8. Attachment 18: Interconnection.

3.8.1. Issue 228: Interconnection on equitable basis.

AT&T's proposal for equivalent interconnection is adopted, at least in part. AT&T can save on its interconnection costs if it is not required to interconnect at each Pacific end-office. AT&T is in the best position to analyze its traffic volumes and decide, in specific circumstances, whether it is more economical to interconnect at the tandem or end office. The default Point of Interconnection (POI) will be at AT&T's switch and Pacific's tandem. Each party will pay its own cost of constructing and maintaining the trunks needed to carry its customers' traffic to the other carrier.

3.8.2. Issue 229: Reciprocal compensation components.

The FAR found that AT&T is not entitled to receive tandem switching and transport in addition to end office switching for terminating calls from Pacific's customers under reciprocal compensation arrangements. FCC Rule 711(a)(3) states the carrier is eligible for the additional rate elements if it establishes that its switches serve geographic areas similar to those served by Pacific's tandem switches. The FAR determined that AT&T had not met its burden of proof that its switches cover a comparable geographic area. The transparencies AT&T provided in Exh. 114C show where AT&T's switches are located, but not their geographic coverage.

3.8.3. Issue 230: One-way interconnection trunks.

The FAR adopted AT&T's proposal for one-way interconnection trunks. The FCC in its *Local Competition Order* supports AT&T's

contention that the method of interconnection should be at the CLEC's option. Two-way trunks place a greater financial burden on the party originating less traffic, and Pacific originates significantly more traffic than AT&T. While there are some inefficiencies in the use of one-way trunks, one-way trunking allows each carrier to manage its own network.

3.8.4. Issue 237: Retroactive refund for reciprocal compensation payments for traffic to Internet Service Providers (ISPs).

The FAR reinforces previous Commission dictates that reciprocal compensation is due for traffic to ISPs. While the Commission has instituted a new rulemaking to re-examine issues relating to reciprocal compensation, it has not indicated that it intends to make any outcome retroactive. Therefore, the FAR rejects Pacific's proposal for a retroactive refund, in the event of a future policy change by the Commission.

3.8.5. Issue 239: Reciprocal compensation for customers physically located outside the rate center to which their number is assigned.

This issue relates to the use of prefixes or "NXX codes" to provide locally-rated calling to customers physically located beyond the local calling area for the designated NXX code. A customer in this circumstance has "disparate rating and routing points." The call is rated as though it originated in one NXX, even though the customer is actually physically located in a different geographic area. If those calls that originate in a different rate center traverse Pacific's network before being delivered to the POI for termination to the called customer, AT&T should pay tandem switching and transport for those elements of Pacific's network which are used to deliver the call from the switch serving the originating customer to the POI which serves the terminating customer. This is in compliance with the Commission's order in D.99-09-029. For calls with

disparate rating and routing points, AT&T will pay tandem switching and transport for calls routed across Pacific's network from distant exchanges, while Pacific will continue to pay AT&T reciprocal compensation for terminating those calls. This provides an interim solution. The Commission is slated to explore the issue in more depth in Rulemaking 00-02-005, and the outcome from that rulemaking on this issue will be incorporated into the ICA on a prospective basis.

3.9. Attachment 19: Ancillary Equipment

3.9.1. Issue 275: Ancillary Equipment Attachment.

This attachment is deleted. AT&T states emphatically it does not intend to purchase Ancillary Equipment under the terms in Attachment 19. (See also Issue 120.)

4. 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.

5. Arbitrated Portions of Agreement

Section 252(e) of the Act, and our 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 FCC pursuant to Section 251, or the standards set forth in Section 252(d) of the Act.⁸

A total of 229 items were presented for arbitration and were resolved in the FAR. In statements filed with the conformed agreement, AT&T states that the arbitrated outcomes on nine of the issues (or groups of issues) do not meet the requirements of the Act, while Pacific points to eight issues in which the arbitrated outcomes do not meet the requirements of the Act. Each of the issues raised by the parties will be addressed and resolved below.

5.1. Issues raised by AT&T

5.1.1. Issue 239: Reciprocal compensation for customers physically located outside the rate center to which their telephone number prefix (NXX) is assigned.

AT&T's Position: AT&T will take delivery at the POI serving the rate center to which the call is routed and will, itself, undertake transport to the distant customer location. Therefore, says AT&T, there is no need for language to address the issue. According to AT&T, Pacific made no showing that AT&T's method of providing disparate routing and rating points to its customers imposes any additional costs on Pacific.

The FAR's language⁹ could be read as entitling Pacific to tandem switching and transport rates on all traffic that AT&T terminates for Pacific, regardless of whether Pacific uses tandem switching and transport in

⁸ Section 251 describes the interconnection standards. Section 252(d) identifies pricing standards.

⁹ "PACIFIC is entitled to receive tandem switching and transport compensation for its facilities used in the carriage of traffic from the rate center where the calling party physically resides to the point of interconnection closest to the switch used for terminating calls to the NXX rate center where the call terminates." FAR at 445.

delivery of a call, and regardless of the fact that most traffic Pacific sends to AT&T is not “FX-like.” The FAR includes no language specifying that additional compensation obligations attach only to “FX-like” traffic. According to AT&T, the compensation the FAR orders is not “based on...cost” and therefore violates §252(d)(1) of the Act. Also, the FAR violates §252(d)(2) by not providing for the “mutual and reciprocal recovery by [the terminating] carrier [AT&T] of costs associated with the transport and termination on [the terminating] carrier’s network facilities of calls that originate on the network facilities of the other carrier.”

Discussion: We disagree with AT&T’s assertion that the adopted tandem switching and transport rates are not based on cost. They are the TELRIC-based rates for those network functions which we adopted in D.99-11-050. Pacific incurs additional costs if Pacific’s network is used to carry calls to a distant rate center for termination by AT&T. AT&T says it will “take delivery at the POI serving the rate center to which the call is routed,” and will then route the call to the distant customer location. By the time the call originated by Pacific’s customer arrives at the POI serving the rate center to which the call is routed, the call could well have traversed Pacific’s network to get to that POI where it is handed off to AT&T. To the extent that the call traverses Pacific’s network, Pacific should be compensated.

AT&T is incorrect that the FAR’s determination violates Section 252(d)(2) of the Act. Rather, subsection (A)(i) of that section requires that “such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier’s network facilities of calls that originate on the network facilities of the other carrier.” That is exactly what we are doing here. We are ensuring that

Pacific is compensated for the costs associated with transport and termination of traffic on its network.

Since AT&T finds some ambiguities in the language proposed in the FAR, we will modify the FAR's language to clarify that this section relates only to calls with disparate rating and routing points:

Neither party shall be prohibited from designating different rating and routing points for the delivery of telephone calls for purposes of providing customers a local presence within a foreign exchange. Calls shall be rated in reference to the rate center of the assigned NXX prefix of the calling and called parties' numbers. PACIFIC is entitled to receive tandem switching and transport compensation at TELRIC prices, for its facilities used in the carriage of traffic from the rate center where the calling party physically resides to the point of interconnection closest to the switch used for terminating calls to the NXX rate center where the call terminates. This section is applicable only to traffic with disparate rating and routing points.

5.1.2 Issue 229: Reciprocal compensation components.

AT&T's Position: AT&T asserts the FCC adopted its Rule 711(a)(3) to acknowledge that CLEC networks and network architecture were likely to differ from the traditional tandem-and-end-office architecture that ILECs like Pacific employ. The FCC's Rule requires that, wherever a CLEC shows that its switches cover geographical areas that are "comparable" to the areas covered by an ILEC's tandem switches, the CLEC is entitled to the tandem rate elements as part of reciprocal compensation, says AT&T.

According to AT&T, it showed that its switches cover the same or greater area than do Pacific's tandems. AT&T maintains two separate non-integrated networks in California that provide local service – AT&T

Communications' (AT&T-C) network and the TCG network. As AT&T's uncontroverted testimony shows, each of AT&T-C's 22 switches serves the entire LATA in which it is located. In almost every instance, this is a much larger geographic area than that covered by Pacific's tandems. Each of TCG's ten deployed switches covers geography that is equal to or greater than that covered by comparable Pacific tandems.

AT&T states that, notwithstanding this clear-cut showing of an entitlement to tandem compensation under FCC Rule 711(a)(3), the FAR rejects AT&T's request for tandem compensation. This ruling is inconsistent with other rulings in the FAR that clearly recognize the equivalence of AT&T's switches and Pacific's tandems. AT&T contends that it is inconsistent to rule on the one hand that Pacific's tandems and AT&T's switching centers are equivalent and serve as the "top" of each carrier's network, but then to rule that AT&T is not entitled to the tandem rate elements as part of reciprocal compensation.

AT&T's Comments (at 188-191) state that regulatory commissions all over the country have acknowledged that where, as in California, there are hundreds of ILEC end offices, but only a handful of CLEC switching centers, the CLEC switches are the equivalent of ILEC tandems – and CLECs should, thus, receive the tandem rate elements as reciprocal compensation.

Discussion: Both parties and the arbitrator agree that this issue is governed by FCC Rule 711(a)(3), but they disagree as to whether AT&T has met the requirements of the FCC's Rule.

At issue is whether AT&T has met the requirements of Rule 711(a)(3) which reads as follows:

“Where the switch of a carrier other than an incumbent LEC serves a geographic area

comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than the incumbent LEC is the incumbent LEC's tandem interconnection rate.”

This is a factual matter, which rests on the specific factual record relating to a particular carrier's network. In order to satisfy the requirements of Rule 711(a)(3), a CLEC's switch must “perform functions similar to those performed by an incumbent LEC's tandem switch”. (FCC's First Report and Order, paragraph 1090) The CLEC also must cover a geographic area comparable to the area served by the incumbent LEC's tandem switch. The rule focuses on the area currently being served by the CLEC, not the area the CLEC may serve in the future.

AT&T did not meet the burden of demonstrating that its switches performed functions similar to Pacific's tandems. AT&T's witness Talbott had difficulty identifying exactly how many switches AT&T has in California. Putting aside the inaccuracy of AT&T's switch count for the moment, there is still much doubt as to whether the switches function as tandems. For example, in the Los Angeles area, AT&T's 16 or 18 switches are in contrast to Pacific's 7 tandems. As Pacific states, AT&T's switches operate more like Pacific's end-office switches than its tandem switches.

More to the point, AT&T did little more than declare that its switches perform both end office and tandem functionalities. AT&T Witness Talbott explains that “the Pacific network is comprised of two switching layers (a tandem switching layer and an end office switching layer) and relatively short metallic loops, whereas the AT&T network consists of only a single layer of switches providing both tandem and end-office functionality with very long fiber-optic rings and, possibly, extensive hybrid fiber-coax distribution plant.”

(Direct Testimony of David Talbott, page 5) AT&T does not explain how a single layer of switches with long fiber-optic rings and/or a hybrid fiber-coax distribution plant can serve the same functions as two layers of switches. As noted in the FAR, Pacific criticizes AT&T's explanation by stating that AT&T's network does not involve functions similar to a tandem. Pacific argues that AT&T's claim of "transport" (which refers to the transport between a tandem and end office) is in reality non-traffic sensitive loop plant.

AT&T claims that it serves a larger geographic area than Pacific's tandems. AT&T presented transparencies to prove its case. For example, AT&T's witness Talbott sponsored several attachments intended to demonstrate comparable serving areas in various LATAs in California. For example, Attachment 114C graphically shows the area that Pacific's tandems cover in LATA 722 (also referred to as LATA 1 in California). The Attachment also shows AT&T coverage area in LATA 722. The Attachment has been marked proprietary. However, in general, the maps do not appear credible. According to AT&T's Attachment 114C, much of San Francisco is not served by a Pacific tandem; this is not true, Pacific's tandems serve all of San Francisco. Equally suspicious is that the Attachment suggests that AT&T serves large areas of unfiled territory, such as in Del Norte County. In other locations, AT&T showed cases where certain LATAs did not contain switches. Apparently, AT&T would have to use facilities outside of those LATAs to serve customers. AT&T did not explain how this would occur. These problems call into question the reliability of the evidence AT&T relied upon to prove its case.

AT&T presented no evidence of where its customers are located. Rule 711(a)(3) states "Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than

the incumbent LEC is the incumbent LEC's tandem interconnection rate.” (emphasis added) This rule indicates that a CLEC must currently be serving a geographic area. Instead, AT&T simply relied upon the geographic area that its switches could serve. Indeed, AT&T's Witness Talbott states that “AT&T Communications has the ability to offer local exchange services across virtually all of the geographic area served by Pacific using fewer switches than Pacific uses tandems.” “Moreover, in general, TCG is able to connect virtually any customer in a LATA to the TCG switch serving that LATA ...” (Direct Testimony of David Talbott, pages 25 and 26, emphasis added). The ability to serve an area or plans for future customers does not satisfy this requirement.

In summary, AT&T has failed to meet any of the elements required by the FCC's rule. Therefore, AT&T is not eligible to receive the tandem interconnection rate.

5.1.3 Issue 148: Collocation terms and conditions.

AT&T's Position: AT&T asserts that Pacific's collocation terms and conditions, which were adopted in the FAR, fail to meet the requirements of the FCC's *Advanced Services Order*. For example, Pacific's tariffs do not address certain forms of collocation, e.g., cageless and shared cage or adjacent collocation, which are required under the terms of the FCC's order.

According to AT&T, the arbitrator mistakenly viewed AT&T's tariff proposal as an attempt to gain an advantage over other CLECs. Any CLEC can gain the alleged “advantage” by using § 252(i) to adopt the collocation terms and conditions in AT&T's ICA.

Discussion: In the FAR's resolution of Section 4.3 in Attachment 10, the arbitrator directed that the sentence relating to Advice Letter

No. 20412 should be deleted because the Advice Letter has not been approved, and its security provisions and pricing are not applicable. However, we find that sentence must be reinstated in the ICA because the Advice Letter in question contains the interim terms and conditions for certain forms of collocation, e.g., cageless and shared cage or adjacent, which, as AT&T says, are required under the terms of the FCC's *Advanced Services Order*. We order that Pacific's proposed sentence in Section 4.3 of Attachment 10 be replaced in the ICA. However, we reiterate the FAR's finding in issues 116 and 223 that the pricing and security provisions of Advice Letter 20412 do not apply to this ICA. Even though we are replacing the reference to the Advice Letter, we are not approving that Advice Letter.

We find no merit to AT&T's claim that any other CLEC can obtain the same collocation provisions as AT&T by opting in to those provisions in AT&T's ICA under Section 252(i). A carrier should not be required to opt in to the terms of another carrier's ICA in order to receive nondiscriminatory treatment. If, for example, shorter provisioning intervals are warranted, the issue should be addressed in one of our generic proceedings, where the outcome will be applicable to all carriers.

5.1.4 Issue 65(a): Unbundling of the splitter.¹

AT&T's Position: AT&T states the FAR's ruling to reject AT&T's proposed clause which requires Pacific to provision a UNE loop with a splitter violates § 251(c)(3) of the Act, that requires Pacific to provide nondiscriminatory access to the local loop including all the features, functions

¹ Both AT&T and Pacific raise issues relating to issue 65(a), so both parties' positions are discussed here.

and capabilities. (47 C.F.R. § 51.307(c).) According to AT&T, the FCC's *UNE Remand Order* (at ¶ 175) makes it clear that the loop element is defined to include all attached electronics, with the exception of the DSLAM. This includes the splitter, whether or not the splitter is currently on a particular loop.

Pacific's Position: The FAR requires Pacific to unbundle the splitter where it has a splitter on the line, says Pacific. While recognizing that the Line Sharing Arbitration did not require unbundling, the FAR, nevertheless orders unbundling where Pacific currently has a splitter on the loop, pursuant to general unbundling language regarding attached electronics cited by AT&T from ¶ 175 of the *UNE Remand Order*. Pacific asserts that the actual rules adopted in the *UNE Remand Order* specifically excepts from "attached electronics" those electronics used for the provision of advanced services, such as DSLAMs." (47 CFR § 51.319(a)(1)). Splitters are precisely "electronics used for the provision of advanced services," asserts Pacific.

In addition, says Pacific, in its subsequent *Line Sharing Order*, the FCC specifically addressed the unbundling of splitters. The *Line Sharing Order* requires unbundling only where the ILEC retains control of splitter functionality. Consequently, the question is not whether there is an ILEC splitter currently on the line, rather, it is who controls the functionality. In Pacific's case, the ILEC is not retaining that control. CLECs can install their own splitters if they choose.

Discussion: We have reviewed the FCC's Rule 319(a)(1) and find that we agree with Pacific's interpretation.

"The local loop network element includes all features, functions, and capabilities of such transmission facility. Those features, functions, and capabilities include, but are not limited to, dark fiber, attached electronics (except those electronics used for the provision

of advanced services, such as Digital Subscriber Line Access Multiplexers)....” (47 CFR §51.319(a)(1).)

As Pacific states, splitters are electronics used for the provision of advanced services and therefore excluded from the FCC’s loop definition. The FCC’s rule does not limit the attached electronics to DSLAMs, as AT&T suggests. The rule excludes *any* attached electronics used to provide advanced services. DSLAMs are just one example. Pacific is not required to provide splitters, and we modify the FAR to reflect this outcome.

5.1.5 Issues 27 and 28: Dollar limit for Alternative Dispute Resolution (ADR).

AT&T’s Position: AT&T states that it had proposed to increase the limit on claims subject to ADR from the \$25 million in the 1996 ICA to \$50 million. Pacific, by contrast, sought to reduce the number and scope of claims by limiting it to one percent or less of any amounts paid by one party to the other in the preceding twelve-month period. The sole reason the arbitrator gave for her reversal of her position in the FAR was a Pacific claim that “the Commission is legally precluded from ordering Pacific to participate in ADR regarding claims it hasn’t voluntarily agreed to submit to ADR...” (Pacific Comments at 10.)

AT&T asserts the Commission should reject Pacific’s argument, since Pacific would not lose its right to take any claimed violations of federal law to the FCC or any other court of competent jurisdiction. Since Pacific does not, under AT&T’s language, lose its right to pursue such claims outside of the arbitration process, the legal precedent cited in its Brief is inapplicable.

According to AT&T, Pacific’s claim that the arbitrator exceeded her jurisdiction in agreeing to decide whether and under what circumstances the parties should resort to arbitration to resolve disputes does not

have merit. That power is granted to this Commission by § 252(b) of the Act. The arbitrator's power resides in this Commission's well-established power to control its own docket, as well as the mandates of §§ 252(b) and (c) of the Act that the Commission resolve "any" open issues through this arbitration, including the issue of alternative dispute resolution.

Discussion: We are not persuaded that the FAR's resolution of this dispute accomplishes the Commission's goal to have ICAs arbitrated under the Act operate more like commercial agreements between the parties. We do not have the staff resources to adjudicate minor disputes between the parties, which would result if Pacific's proposed language were adopted. Those disputes are better addressed in the forum of a private arbitration.

Pacific's proposal to limit the ADR process to disputes involving 1 percent or less of the amounts paid by one party to the other sets too low a threshold. We will increase that threshold to 10% of the amounts paid by one party over a 12-month period. We prefer to set the ceiling on a percentage basis, which is more meaningful if other CLECs opt-in to this ICA under the terms of § 252(i). The flat dollar amount AT&T proposed could be excessive for smaller CLECs.

We find no merit in Pacific's argument that we do not have the authority to decide any and all open issues presented to the Commission for resolution in the course of an arbitration. The core of Issue 27, which was presented to this Commission for resolution, is the dollar amount for claims subject to the ADR process. Section 252(b) of the Act gives the Commission the authority to resolve "any open issues" in an arbitration. Therefore, our determination that the ceiling for ADR should be 10% is within our authority to decide and in no way conflicts with the Act.

5.1.6 Issue 70: Is Digital Cross Connect System (DCS) a feature of the dedicated transport UNE or ancillary equipment?

AT&T's Position: AT&T opposes the FAR's conclusion that DCS is ancillary equipment rather than a feature of the dedicated transport UNE. In the OANAD proceeding, the Commission approved specific rates for DCS, based on the TELRIC methodology the FCC requires for use in setting prices for UNEs. This is consistent with the FCC's finding that, although not a UNE itself, DCS is necessary in order to make other UNEs function properly. (*UNE Remand Order* at ¶¶ 178-179.) According to AT&T, the arbitrator was incorrect in concluding that the FCC's failure to designate DCS as a distinct UNE precludes adoption of AT&T's language. AT&T states that the Commission set DCS prices based on TELRIC, and Pacific has not shown any reason why the arbitrator should have overturned this determination.

Discussion: We support the arbitrator's conclusion that DCS is ancillary equipment and cannot be required to be priced at TELRIC. Only UNEs which have passed the rigorous test the FCC imposed and which the FCC determined have met the Act's "necessary and impair" standard are to be priced at TELRIC. D. 99-11-050 priced at TELRIC those items which were included in the first round of ICAs, and DCS was one of those items. However, since DCS is not a UNE under the FCC's rules, it does not warrant TELRIC pricing.

AT&T cites ¶¶ 178-179 of the *UNE Remand Order* in support of its position, but those paragraphs do not deal with DCS at all. Rather they discuss cross connects used in conjunction with *unbundled loops*, not digital cross connects used in conjunction with *dedicated transport*, and therefore have no bearing on our determination.

The FCC's intent with regard to DCS is clearly articulated in its *First Report and Order*, as cited in the FAR. Pacific is obligated to offer DCS capabilities "in the same manner that they offer such capabilities to IXCs that purchase transport services." (*First Report and Order* at ¶ 444.) Our ruling on this issue is in compliance with the FCC's order.

5.1.7 Issue 266: Treatment of calls when Calling Party Number (CPN) not available.

AT&T's Position: AT&T asserts that the arbitrator's proposal on this issue violates § 1701.2(a) of the Public Utilities Code, which requires that decisions be based the record developed in this case. Pacific proposes that, whenever more than 10% of the traffic AT&T delivers to it for termination is delivered without CPN, access charges would apply to those calls delivered without CPN. The arbitrator approved this language based on evidence submitted in Pacific's arbitration with MFS WorldCom, but which was not submitted in this arbitration.

Moreover, says AT&T, approval of Pacific's language would result in the imposition of exchange access charges on top of end-office termination charges, which is precisely what the US District Court for the Northern District of California forbade in adjudicating this Commission's decision in the 1996 arbitration between Pacific and AT&T. (*AT&T v. Pacific Bell*, No. C.97-0670 SI, (N.D.Cal. Sept. 29, 1998.))

Discussion: We reiterate the FAR's finding that there is no violation of § 1701.2(a) of the Public Utilities Code. Pacific presented as its position in this arbitration, the outcome in the MFS WorldCom arbitration. AT&T was given an opportunity to challenge Pacific's position. AT&T did not choose to address the CPN issue in hearings, and therefore, the issue was not subject to cross-examination. Many of the 229 issues included in the arbitration

were not addressed in hearings, but instead, were only argued in the parties' Briefs. AT&T had ample opportunity to comment on Pacific's proposal in its Post-Hearing Brief. In its Brief, AT&T did not take the opportunity to challenge the basis of Pacific's position or question the data Pacific relied on in developing its recommendation. AT&T clearly had an opportunity to be heard, but did not take advantage of it.

We see no merit in AT&T's assertion that Pacific's language would be contrary to the decision of the US District Court which AT&T cites above. AT&T is trying to mix apples and oranges. The US District Court addressed an entirely different issue: namely whether switched access charges could be imposed on leased UNEs. Issue 266 deals with *all* traffic which Pacific receives from AT&T, not just traffic which uses UNE switching. In its Post-Hearing Brief, AT&T does not raise the UNE issue, but instead states that it intends to offer access tandem and other services to third-party carriers and that it cannot control whether the traffic other carriers pass to AT&T arrives with CPN information. (Brief at 416.)

The issue AT&T now raises regarding access charges being imposed when AT&T uses unbundled switching was resolved in Issue 236. When AT&T buys unbundled switching from Pacific, it is Pacific, not AT&T, that has access to the call information recorded by the switch. No detailed call record is created where the call terminates to an AT&T end-user served with unbundled switching. The FAR adopts Pacific's proposed solution in Issue 236, namely that since a call record cannot be created, the UNE charges for the unbundled switching should be waived as an offset. Since Issue 236 disposes of the issue of how to treat calls which terminate to AT&T's customer served via unbundled switching, those calls are not subject to the terms of Issue 266.

5.1.8 Issue 112: Retail changeover charge.

AT&T's Position: According to AT&T, the FAR's adoption of Pacific's language violates this Commission's precedent, as well as the Act. AT&T cites to the prior arbitration between the two parties which, it asserts, "remains binding on the parties." The FAR improperly relies on D.96-03-020's adoption of "interim" changeover charges for Pacific, since the subsequent action in the 1996 arbitration takes precedence over the earlier action.

Moreover, says AT&T, Pacific's proposed language allows Pacific to over recover since it is clear that the mechanized service order charge set in D.99-11-050 recovers the cost Pacific incurs when a Pacific customer migrates from Pacific to AT&T.

Discussion: AT&T is re-litigating the issue, without taking into account the FAR's lengthy discussion of this issue. We reiterate the FAR's finding that the 1996 arbitration decision between AT&T and Pacific does not constitute binding precedent. We have stated before, and will do so again in this context, that we are not bound by a provision we adopted in the 1996 arbitration decision, or any other prior arbitration.

AT&T ignores the language in the FAR which expresses our intent to adopt a resale changeover charge. We first adopted an interim charge in D.96-03-020. In a subsequent decision in our Local Competition docket, we reaffirmed the interim changeover charges adopted in D.96-03-020. (See D.97-08-059 *mimeo* at 74.) We reviewed changeover cost models in the OSS/NRC² Phase of OANAD, and in D.98-12-079, we adopted Pacific's changeover cost model with some modifications. In that decision, we also stated that we would

² Operation Support Systems/Nonrecurring Charge.

determine proper cost recovery for the changeover costs in the Resale Phase of OANAD. (D.98-12-079, *mimeo* at 37.) AT&T ignores all of this procedural history which was laid out in the FAR. (FAR at 234-235.)

Instead, AT&T points to the mechanized service order charge set in D.99-11-050 in our OANAD proceeding, asserting that the mechanized service order charge set in D.99-11-050 clearly recovers the cost Pacific incurs when a Pacific customer migrates from Pacific to AT&T. Once again, AT&T is confusing apples and oranges. The mechanized service order charge adopted in D.99-11-050 applies only to *UNEs*, not to *resale services*. Resale services were not addressed in that particular decision at all.

We uphold the FAR's decision to assess the interim changeover charge adopted in D.96-03-020, until we adopt a final rate in the Resale Phase of OANAD.

5.1.9 Issue 108: Adopted switch usage and port rates.

AT&T's Position: The Commission has an obligation under the Act not to permit Pacific to charge rates for UNEs that exceed their TELRIC. (47 CFR §§ 51.503, 51.505.) AT&T made an evidentiary showing that the investment cost of switching infrastructure has declined dramatically since the cost studies used to set rates in OANAD were created. That means that adoption of the OANAD rates in this contract will not comply with the Act.

Discussion: In D.99-11-050, we recognized that UNE cost studies could become stale and require updating. In that decision we established a process which carriers could use to update those cost studies. AT&T seeks to circumvent that process by asserting that those costs should be updated as part of this arbitration. We prefer to address the need to update cost studies in our

generic proceeding where all interested parties can be represented, and not in the context of an arbitration between only two parties.

We affirm that the cost studies we adopted in D.99-11-050 were based on TELRIC principles. We also affirm our authority to manage our dockets and determine a fair and equitable process for updating those cost studies. AT&T should follow the dictates of D.99-11-050 and file its request on February 1, 2001 to update the switching cost study.

5.2 Issues raised by Pacific.

5.2.1 Issue 105: Unbundled dedicated transport.

Pacific's Position: Pacific asserts that the FAR's requirement that Pacific provide OC 48 violates the FCC's conclusion that ILECs should not be required to construct new facilities to accommodate new entrants. This outcome violates the rules and regulations prescribed by the FCC and violates Section 252(e)(2)(B) of the Act, says Pacific. Pacific states that, in its *First Report and Order*, the FCC limited the provision of unbundled interoffice facilities to existing ILEC facilities. (*First Report and Order* ¶ 451). The FCC reiterated this limitation in its recent *UNE Remand Order* and also rejected the obligation of ILECs to unbundle SONET rings. (*UNE Remand Order* ¶ 324). The FCC has created two exceptions to an ILEC's obligation to unbundle interoffice transport facilities, namely ILECs need not (1) unbundle their SONET rings, or (2) construct new point-to-point transport facilities to accommodate CLEC's requests.

Discussion: Pacific is correct that ILECs cannot be required to construct new point-to-point facilities. However, if Pacific already has fiber deployed between two points, Pacific can provide the capacity requested by a

CLEC by upgrading the electronics. That is clearly the FCC's intent, as can be seen in the following citation:

We reaffirm that the definition of dedicated transport set forth in the *Local Competition First Report and Order* includes all technically feasible capacity-related services such as DS1-DS-3 and OC3-OC96 dedicated transport services. We clarify that this definition includes all technically feasible capacity-related services, including those provided by electronics that are necessary components of the functionality of capacity-related services and are used to originate and terminate telecommunications services. (*UNE Remand Order* at ¶ 323.)

We find that Pacific should be required to provide unbundled high capacity transport where it has already deployed fiber. If fiber has not been deployed, Pacific is not required to construct new facilities to meet AT&T's request. We modify the FAR to reflect this outcome.

5.2.2 Issues 60, 65(a), 65(c): Unbundling obligations exceed requirements under Ameritech Merger Decision.

Pacific's Position: Pacific states that in its decision approving the merger of SBC and Ameritech, the FCC ordered SBC's ILECs to create separate advanced service affiliates and to transfer to those affiliates certain advanced services equipment. The FCC determined, however, that those affiliates would not be deemed successors to the ILECs nor inherit the ILECs' responsibilities under the Act. However, the FCC carved out the following exception: if the affiliate acquires facilities deemed to be network elements from the ILEC, the affiliate will have to abide by any unbundling requirements with respect to those facilities. (47 CFR §53.207).

Pacific asserts that in Issues 60, 65(a) and 65(c), the FAR goes beyond the FCC's mandates and orders Pacific's advanced services affiliate to comply with the FCC's unbundling obligations in all circumstances, irrespective of whether the affiliate has acquired facilities deemed to be network elements from Pacific. The Commission does not have the authority to preempt the FCC's express determination on the circumstances under which Pacific's affiliate shall inherit the unbundling obligations of the Act. In order to remedy this violation, says Pacific, the Commission should modify the FAR's determinations in Issues 60, 65(a) and 65(c) to limit the obligation of Pacific's data affiliate to abide by the Act's unbundling requirements only where the affiliate acquires from Pacific facilities which constitute unbundled network elements under § 251(c)(3) and only insofar as concerns those facilities.

Discussion: We concur with Pacific's assertion that the FAR goes beyond the requirements in the FCC's SBC/Ameritech merger decision. It is not our intent to expand the conditions imposed on Pacific or its data affiliate. As the FCC concludes in 47 CFR §53.207, the unbundling requirement applies only to those facilities transferred to the data affiliate from Pacific.

The FAR includes all facilities owned by the data affiliate, regardless of whether or not those facilities were transferred to the affiliate from Pacific. We hereby amend the outcome in the FAR with regard to Issues 60, 65(a) and 65(c) to clarify that the unbundling obligation pertains only to those facilities transferred from Pacific to its data affiliate.

5.2.3 Issue 57: Direct Access to Feeder Distribution Interface (FDI).

Pacific's Position: Pacific asserts that in Issue 57, the FAR rejects Pacific's proposal to provide access to the FDI via cross connects and, instead, orders Pacific to provide AT&T with "direct" access where space is

available to do so. The FAR cites to ¶ 221 of the FCC's *UNE Remand Order* in support of this proposition, but says Pacific, nothing in ¶ 221 entitles a CLEC to "direct" access.

Furthermore, says Pacific, in the *UNE Remand Order*, the FCC defined subloops as "portions of the loop that can be accessed at terminals in the incumbent's outside plant. (*UNE Remand Order* at ¶ 206). The FCC then defined an "accessible terminal" as a "point on the loop where technicians can access the wire or fiber within the cable without removing a splice case to reach the wire or fiber within." (*Id.* at fn 395). Pacific states the FCC further clarified the definition of "accessible terminals" as follows:

"[a]ccessible terminals contain cables and their respective wire pairs that terminate on screw posts. This allows technicians to affix cross connects between binding posts of terminals collocated at the same point." (*Id.*)

According to Pacific, the foregoing language makes clear the FCC contemplated that points of access to subloops would occur at points where cross connects are made from one part of the loop to another part of the loop. In concluding that the FDI constituted a feasible point at which to unbundle subloop elements, the FCC intended that technicians would be provided with cross-connect access, not direct access, to the FDI in order to access the resulting subloop elements, says Pacific.

Pacific asserts direct access to the FDI is not mandated by the Act or the FCC. Permitting CLECs to have "direct" access to Pacific's equipment could compromise the integrity of Pacific's network. There is no reason to risk network integrity, particularly when providing access to the FDI via cross-connects would not cause AT&T any impairment or service degradation.

Discussion: We have reviewed ¶¶ 206 –229 in the FCC’s *UNE Remand Order* regarding subloop unbundling and find that while the FCC requires access to the FDI, it does not define what it means by “access.” The FCC does not specify that a CLEC is entitled to direct access to the FDI, rather than access via cross connects. The FAR improperly relies on ¶ 221 in concluding that AT&T is entitled to direct access to the FDI. That particular paragraph does not require direct access to the FDI, but does require collocation at any feasible point, including the FDI, where space is available. However, even in a standard collocation arrangement, the CLEC does not have direct access to the Pacific’s equipment. CLECs access the Master Distribution Frame and other equipment via cross connects. It is appropriate that access to the FDI be accomplished in a similar manner.

Pacific raises network reliability concerns associated with direct access to the FDI, and we share those concerns. By providing AT&T access to the FDI via cross connects, we are providing the “access” required by the FCC in its *UNE Remand Order*. We reverse the FAR’s determination that AT&T be allowed direct access to the FDI and order access via cross connects.

5.2.4 Issue 64: Local Circuit Switching Exemption.

Pacific’s Position: Pacific states the FCC created an exception to eliminate the switching unbundling obligation in density zone 1 within the top 50 MSAs based upon the line count and the availability of the enhanced extended loop (EEL). Specifically, says Pacific, the FCC concluded the exemption would apply where end-user customers had “four lines or more.” (*UNE Remand Order* at ¶ 294).

According to Pacific, the FAR impermissibly narrows the FCC’s exemption by requiring that the exemption apply only where the AT&T

end-user customers had four or more lines at a single customer location. The FAR provides no authority for this narrowing of the exemption, but instead concludes it is a reasonable outcome because “[I]t would be difficult to track its customers’ facilities throughout an Exception Territory.” (FAR at 150.)

According to Pacific, if the FCC had intended the line count threshold to apply only where an end-user had four lines at a single customer location, it would have said so. As a practical matter, asserts Pacific, it is not difficult to track customers’ lines throughout an Exception Territory, as business customers typically consolidate the billing of their various lines, regardless of location, under a single billing telephone number. The FAR’s narrowing of the FCC’s exemption regarding unbundled switching is a violation of the FCC’s rules and regulations and Section 252(e)(2)(B) of the Act.

Discussion: We have reviewed the *UNE Remand Order* and find the FCC was silent on this particular issue. Contrary to Pacific’s statement, the FCC does not state its intent that the four lines apply to the entire Exception Territory. While Pacific minimizes the difficulties associated with keeping track of a customer’s access lines over the area of the Exception Territory, we are not convinced that it would be easy to determine lines on that basis. Even those customers that aggregate their lines for billing purposes have no reason to aggregate billing records by “Exception Territory” so it could be time-consuming to determine which lines were located in the Exception Territory.

On the other hand, reviewing records by customer location is simple and straightforward. In light of the FCC’s silence on this issue, the FAR’s interpretation cannot be termed to be in conflict with the FCC’s order. Also, the FAR presents a logical interpretation of the FCC’s intent, and we uphold the outcome in the FAR. We understand the FCC intends to issue a clarifying order on this particular issue. If the FCC’s decision is at odds with our determination

here, the parties can make use of Preface § 8.3 “Changes in Law” to update the terms of the ICA.

5.2.5 Issue 64: Prohibition on breaking apart combinations.

Pacific’s Position: As mentioned above, the FCC created an exception to the unbundled switching obligation in density zone 1 within the top 50 MSAs based upon line count and the availability of the EEL. Where Pacific demonstrates that it meets this exemption, the switching element does not constitute a UNE. Nevertheless, asserts Pacific, the FAR orders the inclusion of language in the ICA that would appear to prohibit Pacific from tearing down existing combinations, even where the FCC’s exemption applies and the switching element portion of the combination does not constitute a UNE. The Commission does not have the authority to impose UNE obligations on elements and combinations that Pacific is not required to unbundle.

Discussion: AT&T’s proposed language in Section 6.1.3.5 of Attachment 6 reads as follows: “PACIFIC shall not disturb or discontinue pre-existing combinations and orders for 2-wire voice-grade local Loops, connected to the line-side port of the unbundled local circuit switching elements.” We recognize that in some circumstances Pacific will be eligible to discontinue its offering of Local Switching Network Element (LSNE) as a UNE. However, if AT&T purchases LSNE at market prices from Pacific, there is no reason to tear down an existing combination that includes that element.

We disagree with Pacific’s assertion that we do not have the authority to prohibit Pacific from tearing down existing combinations. Regardless of the FCC’s rules relating to UNE obligations, we have authority under state law to prohibit behavior that would be discriminatory or anti-competitive. Pacific has not stated any legitimate purpose it has in tearing apart

combinations that are already connected, especially since it would simply need to reconnect the elements—and charge AT&T for the reconnection-- in order for AT&T to provide service to its customer. In D.99-11-050, we articulated our conclusion that pre-existing combinations of UNEs should not be separated. The same logic applies here.

However, Section 6.1.3.5 of Attachment 6 should be clarified to indicate that Pacific will not disconnect pre-existing combinations, as long as AT&T is purchasing all the elements in the combination. The outcome in the FAR shall be modified to reflect this change.

5.2.6 Issue 58: Access to dark fiber.

Pacific's Position: According to Pacific, the FAR impermissibly expands the FCC's definition of dark fiber to include "copper," "coaxial cable," or "unused transmission media." Since the FCC did not conduct a necessary and impair analysis of dark coaxial cable, the Commission must conduct this analysis before ordering it to be unbundled. The FAR broadens the scope of Pacific's unbundling requirements without conducting any such analysis to determine whether dark media other than fiber meets the unbundling requirements of the Act.

Pacific states the FAR also ignores the FCC's determination that only dark fiber that has been "terminated" must be unbundled. Specifically, the FCC defined dark fiber as being:

physically connected to the facilities that the incumbent LEC currently uses to provide service; was installed to handle increased capacity and can be used by competitive LECs without installation by the incumbent. (*UNE Remand Order*, fn 323).

Pacific alleges the FAR ignores this definition and instead concludes that Pacific must unbundle dark fiber whether or not it has been terminated. The FAR's rationale appears to be that, "if the dark fiber is in place, it should not be difficult to terminate it." The FAR is mistaken, says Pacific. Terminated fiber is fiber that has been physically tied down on a panel or frame where a CLEC could gain access to it to use it, even in an unlit condition. If it is not terminated, then work must be done in order to terminate it. The FCC explicitly stated that only dark fiber that has been terminated must be unbundled.

Discussion: We rely on Section 153(29) of the Act which defines a network element as a facility or equipment used in the provision of a telecommunications service, including "features, functions, and capabilities that are provided by means of such facility or equipment." The FCC also provides some guidance on this issue:

Because dark fiber is unused transport capacity, we find that it is "a feature, function, and capability of facilities used to provide telecommunications services."
(*UNE Remand Order* at 326.)

In other words, the determining element is whether a particular item (in this case dark fiber) constitutes *unused transport capacity*, which can be used to provide a telecommunications service. Because dark fiber is unused transport capacity, it falls within the above definition. However, the FCC makes it clear that other forms of unused transport capacity fall within the scope of the transport UNE. The FCC reiterates that in Paragraph 330: "Whether located in the loop plant or in the transport network of an incumbent LEC, both copper and fiber represent unused capacity."

The FCC reaches the same conclusion in its discussion of unused loop plant: “We...conclude that both copper and fiber alike represent unused loop capacity. We find, therefore, that dark fiber and extra copper both fall within the loop network element’s “facilities, functions, and capabilities.” (*UNE Remand Order* at ¶ 174.) It is not the medium that is at issue—fiber, copper, or coaxial cable—it is whether that item represents unused capacity which could be used to provide a telecommunications service. Dark fiber, vacant copper, and unused coaxial cable all meet that requirement. The FCC clearly intends that all forms of unused capacity fall within the scope of the loop and transport UNEs and shall be made available to CLECs. We uphold the FAR’s finding that Pacific must provide all three forms of unused media to AT&T.

Contrary to Pacific’s assertion, the FCC could not have made these determinations unless it included unused loop and transport capacity in the “necessary and impair” test performed on each element. Therefore, there is no need for this Commission to make that determination.

We find that Pacific’s argument that dark fiber must be “terminated” has merit. Pacific cites to footnote 323 in the *UNE Remand Order* as requiring that dark fiber be “physically connected to facilities that the incumbent LEC currently uses to provide service.” We find that the FAR erred in its determination that the FCC’s requirement that dark fiber be “terminated” should be applied to the connection to the electronics needed to “light” the fiber. 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. We reverse the finding in the FAR and conclude that to qualify as a UNE, dark fiber must be physically connected to ILEC facilities.

5.2.7 Issue 65(b): IDLC³ loops should not be unbundled.

Pacific's Position: According to Pacific, the FAR errs in its reliance on paragraph 175 of the *UNE Remand Order* when it orders Pacific to provide AT&T access to integrated digital loop carrier (IDLC) electronics. However, says Pacific, that language is inconsistent with other language in the *UNE Remand Order* that specifically found that, notwithstanding the FCC's position on the matter in its *First Report and Order*, the unbundling of IDLC loops currently is technically infeasible. (*UNE Remand Order* at ¶ 217). There, the FCC cited to this infeasibility to justify ordering sub-loop unbundling.

Given the technical feasibility issues, this latter formulation of the issue is the correct one, that access to IDLC electronics is better categorized with sub-loop unbundling rather than loop unbundling. Sub-loop unbundling is already listed as an option in Section 5.10 for handling the IDLC problem. As written, the FAR violates the FCC's rules and appears to order the unbundling of IDLC electronics. AT&T's proposed Section 5.10.1.1 should be deleted, or at least, the language "where technically feasible" should be added to reflect the FCC's findings.

Discussion: While Pacific cites to sections of the *UNE Remand Order* to prove that IDLC unbundling is not technically infeasible, that may not be true during the life of this ICA. The telecommunications industry has crafted creative solutions to other feasibility problems, and they may do so in this case as well. Therefore, we decline to delete AT&T's Section 5.10.1.1, but will add the language "where technically feasible." We modify the FAR accordingly.

³ Integrated Digital Loop Carrier

6. Effective Date

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

Findings of Fact

1. On June 27, 2000, parties filed an arbitrated Agreement for Commission approval, along with statements whether or not the Agreement should be approved by the Commission.

2. The parties negotiated the entire Agreement, with the exception of 229 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. AT&T had an opportunity to be heard on the issues surrounding the treatment of calls when Calling Party Number (CPN) is not available.

6. In their June 27, 2000, statements, parties assert that the arbitrated outcomes on 17 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 in an unforeseen emergency situation. (Pub. Util. Code § 11(g)(2).)

10. An unforeseen emergency situation includes deadlines established for Commission action by legislative bodies. (Rule 81(g).)

11. Parties in writing have agreed that the time requirement for a Commission decision under the Act may be extended to July 20, 2000.

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-178.

3. As required by Resolution ALJ-178, the interim rates adopted herein must be revised on a going forward basis to incorporate the rates adopted in OANAD.

4. 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.

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

6. Pacific is entitled to receive compensation for the costs associated with the use of its network to transmit traffic with disparate rating and routing points.

7. AT&T is entitled to receive the tandem switching rate because its switches cover the same or greater geographic area as Pacific's tandems.

8. The adopted collocation terms and conditions are in compliance with the FCC's *Advanced Services Order*.

9. The FCC's Rule 51.319(a)(1) does not require unbundling of the splitter.

10. Under Section 252(b) of the Act, the Commission has the authority to resolve any open issues brought before it in an arbitration.

11. It is appropriate for the Commission to set the ceiling for Alternative Dispute Resolution at 10 percent of the amounts paid by one party to the other over a 12-month period.

12. Digital Cross Connect Systems are ancillary equipment, and as such, should not be priced according to Total Element Long Run Incremental Cost (TELRIC) principles.

13. The adopted outcome on the treatment of calls when CPN is not available does not violate the decision issued by the U.S. District Court for the Northern District of California. (AT&T v. Pacific Bell, no. C.97-0670 SI, (N.D.Cal. Sept. 29, 1998).)

14. AT&T is incorrect in its assertions that the outcome in the 1996 ICA between AT&T and Pacific constitutes binding precedent, and as such, precludes the Commission from adopting a resale changeover charge in this arbitration.

15. The switch prices adopted in D.99-11-050 are compliant with TELRIC principles.

16. Pacific is required to provide unbundled high capacity transport where it has already deployed fiber facilities.

17. The unbundling obligations adopted here do not exceed the requirements in the FCC's SBC/Ameritech merger decision.

18. The FCC does not require direct access to the Feeder Distribution Interface.

19. The FAR's determination that the four-line exemption applies to a single customer location, rather than to the entire Exception Territory, presents a logical interpretation of the FCC's intention.

20. It is anti-competitive for Pacific to tear apart combinations that are already connected, even in those instances where Pacific is not offering unbundled local switching as a UNE.

21. The FCC has determined that any unused capacity falls within the scope of the loop and transport UNEs.

22. It is appropriate to require unbundling IDLC loops if it is technically feasible.

23. AT&T's motions titled "Motion to Compel Pacific Bell to Respond to Data Requests of AT&T Communications of California, Inc.," and "Motion to Place under Seal Confidential Attachments to Motion to Compel," both dated December 30, 1999, relate to this docket and should be filed in this docket. The Motion to Compel is now moot.

24. This matter comes before the Commission as an unforeseen emergency situation pursuant to Rule 81 due to the conflict between Pub. Util. § 311 and § 252(e)(4) of the Act.

25. The Agreement between AT&T and Pacific should be approved, with the modifications described herein.

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

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

28. 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-178, the Interconnection Agreement between AT&T Communications of California, Inc. (U 5002 C), TCG – San Francisco (U 5454 C), TCG – Los Angeles (U 5462 C), TCG – San Diego (U 5389 C), and TCI Telephony Services of California (U 5698 C) (collectively referred to as AT&T), and Pacific Bell Telephone Company (Pacific) filed June 27, 2000, is approved, with the modifications ordered herein. 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 December 30, 1999, motion of AT&T to place under seal Attachments B and D to its “Motion to Compel Pacific Bell to Respond to Data Requests of AT&T Communications of California, Inc.,” is hereby granted.

4. The February 3, 2000 motion of AT&T to place under seal confidential portions of the pre-filed testimony of Catherine Petzinger, is hereby granted.

5. The February 18, 2000 motion of Pacific to place under seal the proprietary version of "Testimony of Scott P. Pearsons on Costs on Behalf of Pacific Telephone Co. (U 1001 C)," is hereby granted.

6. The March 6, 2000 motion of Pacific to file amended Attachment 10 to Pacific's response to the application of AT&T, et al. for arbitration, is hereby granted.

7. The April 3, 2000 motion of Pacific for leave to file portions of post-hearing brief under seal, is hereby granted.

8. The April 3, 2000 motion of AT&T for leave to file portions of its post-hearing brief under seal, is hereby granted.

9. The May 26, 2000 motion of AT&T for leave to place under seal certain portions of its comments on the Draft Arbitrator's Report, is hereby granted.

10. This proceeding is closed.

This order is effective today.

Dated August 3, 2000, at San Francisco, California.

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

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