Discussion of Issues

911 and E911

First, because of the possibility for error, staff is concerned about the lack of pre-ordering/ ordering integration when provisioning E911 service to competitors. Aside from this general concern, the record indicates the following specific issues:

MCI states that the E911 listing is changed "on all orders when resale customers migrate their service from Pacific to a CLEC (or from one CLEC to another). The act of changing the E911 listing for every resale customer, even when there are no changes to the customer's underlying service or location, creates an opportunity for errors to occur during the process, thus placing the customer unnecessarily at risk." (MCI Appen. B Resp, p 56.) Pacific responds that, "far from increasing database errors, this procedure prevents them, by ensuring that the customer record is current." (Pacific Resp. to Comments, p 67.) Staff does not find Pacific's logic reasonable; it seems logical that additional manual inputs may result in more errors, rather than less. This concern is reflected in FCC guidance expressing concern with manual intervention for processing 911 orders. (SC Order ¶ 230.)

Pacific documents that it provides a "real-time verification system" for 911 listings and states that CLECs can use this to ensure the accuracy of Pacific's listings. Pacific states "(i)f CLECs wish to confirm the accuracy of E911 database entries, they can do so directly. Facilities-based carriers are able to check their listings using the MS Gateway ... and resellers now are able to do the same via TN Query." (Pacific 5/20, p 67.) Staff is concerned that many CLECs are not using these systems, either because they are not aware of them or for some other reason.

Pacific's Affiant Nipps reports that, in June of 1997 Sprint "initiated a complaint regarding 22 telephone numbers that had not delivered correct information to emergency services providers." (Nipps Affidavit, ¶ 53.) Sprint raised the issue with Pacific and, as a result, Pacific initiated a process to reconcile discrepancies through comparisons between separate databases (namely CABS billing system and the E911 database). This process includes a weekly comparison and synchronization of the CABS, CRIS, and E911 databases. (Pacific, Nipps Aff., ¶ 55.)

While Pacific appears to have responded quickly to reported problems with inaccurate 911 entries, staff is concerned about Pacific's ability to maintain this necessary, but seemingly cumbersome comparison between the separate databases, especially when faced with increased competition. Staff would like to explore, in the collaborative process, options for upgrading or streamlining Pacific's E911 system so that additional comparative steps

are not necessary. This recommendation is in the spirit of FCC guidance stressing preventative, rather than remedial, measures for 911/ E911 (as indicated above).

In its Brief, Pacific alleges that its "conversion to CRIS, scheduled for May 1998, will eliminate many potential errors by adding up-front edits; (sic) which will stop orders from being submitted without meeting the rules for certain fields." In addition, Pacific reports that "E911 data will flow directly to the E911 database from the SORD order further lowering the possibility of error." Staff finds that, per FCC guidance, a 271 evaluation cannot rely upon promises of future performance. Staff believes that Pacific's assertions of improved performance with the CRIS system is therefore moot for purposes of this evaluation.

Directory Assistance Services

Several CLECs (TCG, PacWest, Brooks, LCI, Nextlink, AT&T and MCI) cited problems with inaccurate information being inputted into Pacific's directory assistance (DA) database. They also assert that some customers that had been successfully inputted into the database were subsequently dropped from the database. The DA problems were experienced by both resale and facilities-based customers. Facilities-based carriers are responsible for inputting their own customers into the DA database, while information on resale customers is inputted by Pacific. In its April 30, 1998, filing, MCI included a chronology of problems with provisioning of directory listings which extended from September 1996 to March 1998[79] so the problem appears to have persisted over time. MCI's final entry on its chronology was a large business customer whose main listing had dropped out of Pacific's 411 database three times.

Pacific did not give any explanation for why customers were dropped from the 411 database. Rather, Pacific denies that it has dropped listings from the DA database after they were properly entered.[80] In his Rebuttal Affidavit, Pacific Affiant Nipps outlines various CLEC input errors which make it appear that listings have been dropped from the DA database.[81] None of the examples given explain the phenomenon of listings which have been successfully entered into the DA database, and their existence verified by the CLEC, but which later drop out of the database.

From Pacific's comments, it appears that CLECs make significant errors in inputting information into the DA database. Staff believes this could result from a number of

---

[79] Comments of MCI Communications Corporation (U5011 C) and MCI Metro Access Transmission Services, Inc. (U 5253 C) on Pacific Bell's Draft Section 271 Application, April 30, 1998, Attachment 7.1.

[80] Pacific Bell's (U 1001 C) Response to Comments on its Draft Application for Authority to Provide InterLATA Services in California, May 20,1998, p. 69.

[81] Rebuttal Affidavit of Lyndall Nipps, ¶3.

factors, including inadequate training by Pacific, inadequate training or internal communication on the part of the CLEC, etc., warranting further scrutiny of the process.

In his March 31, 1998, Pacific affidavit, Nipps reviewed DA listings over the September to December 1997 period and found that 69% of the listing errors were generated by CLECs. He also stated that 94% of the errors fell within three categories: listings sent with all capital letters, use of non-standard city names, and the lack of an end-user customer last name.[82] Staff believes that at least some of the type of formatting errors Nipps listed should be able to be overcome with clear instructions and adequate training, although the problem would be solved most effectively by an interface with up-front edits that allows CLECs to find errors before data is entered. Pacific does not indicate what the other 31% of the errors could be attributed to, but presumably many of them are due to system or human errors on Pacific's side, since they are not attributed to the CLECs. No information was proffered on whether Pacific experiences a similar 31% error rate in its retail operations. Therefore Pacific has made no showing of parity.

Because Pacific denies that companies drop out of the DA database, it appears that the company does not know what is causing these documented errors. A root cause analysis of errors and drops must be undertaken to determine how both types of errors can be prevented by both Pacific and CLECs.

Pacific has not provided nondiscriminatory access to directory assistance systems. CLECs have experienced errors in data inputted into Pacific's directory assistance database, and companies which have been successfully entered into the directory assistance database are later dropped. Business customers must be able to rely on accurate listings at all times or they will lose business. Also, Pacific has presented no proof that its DA provisioning for CLECs is at parity with its retail operations.

Call Completion Issues

CLECs offered no evidence of call completion problems. Pacific is assumed to have passed this portion of checklist item seven.

Issues Selected for the Collaborative Process

- review the process for entry and re-entry of E911 listings;
- review the "real-time verification system" for 911 to determine ease of access for CLECs;
- additional clarification is needed on CLECs' abilities to verify orders in general, and "real-time" verification systems in particular;

[82] Affidavit of Lyndall W. Nipps, March 31, 1998, ¶58.

- determine a way to analyze the performance of the shift from CABS to CRIS and determine the impact on data in the 911 and DA systems;
- perform a root cause analysis of DA errors and drops to determine how to prevent the problem;
- prepare clear instructions/process for CLECs to use in inputting 911 and DA entries.
- Implement an interface with up-front edits which allows CLECs to correct errors before data is entered.

H. ITEM EIGHT – White Pages

Has Pacific provided white pages directory listings of customers of the other carriers' telephone exchange service, pursuant to section 271(c)(2)(B)(viii)?

Pacific has not demonstrated that white pages directory listings are being provided in accordance with the Act.

FCC Guidance in Prior 271 Filings

The FCC does not provide guidance on this checklist item in prior 271 decisions.

Discussion of Issues

According to Pacific, it has provided approximately 197,000 white pages directory listings to CLECs in California. However, although access to white pages directory listings is available, the record in this proceeding indicates that competitors have experienced problems in obtaining correct and complete listings from Pacific. CLECs assert that Pacific has not provided white pages directory listings for CLEC customers at parity with Pacific's retail operations. Specifically, CLECs assert that they do not have direct electronic access to directory listings for verification of their customers' listings that is equivalent to Pacific's retail operations. Prior to publication, CLECs are provided an extract of their customers' listings which CLECs must review and correct in a limited timeframe, using manual processes.[83]

Because the processes for validation and updating listings are manual, due to the unavailability of electronic flow through processes, CLECs assert that error rates in listings are compounded. In rebuttal, Pacific asserts that they use the equivalent manual systems for the extract review process, but Pacific does not describe if all of its systems

[83] Sprint, Nextlink, Brooks, AT&T Responses

used for white pages listings are manual.[84] Staff therefore recommends that the requirements for providing mechanized capabilities for CLECs to input and check white pages directory listings be addressed in the collaborative process.

Issues Selected for the Collaborative Process

Staff recommends that participants should::

- review the current system Pacific uses for its retail operations;
- provide mechanized capabilities for CLECs to input and check white pages directory listings.

I. ITEM NINE – Access to Telephone Numbers

Has Pacific provided nondiscriminatory access to telephone numbers for assignment to the other carriers' telephone exchange service customers, pursuant to section 271(c)(2)(B)(ix)?

Staff has determined that Pacific has met this checklist requirement. Competitors have presented no current or timely examples of noncompliance.

FCC Guidance in Prior 271 Filings

The FCC does not provide guidance on this checklist item in prior 271 decisions.

Discussion of Issues

The record on access to telephone numbers contains anecdotal incidents and allegations that Pacific manipulated the numbering process, both overtly and covertly. CLECs assert that because the code administrator is a Pacific employee, that relationship allowed the company access to information not available to all other parties.[85] The assertions against Pacific include: causing a shortage of telephone numbers by stockpiling NXX codes, manipulating the jeopardy process, and offering second line promotions to their own customers while CLECs were awaiting NXX assignments.

As the incumbent, Pacific has had access to the greatest number of NXX codes. But, despite apparent historical inequities, on a going forward basis because the function of

[84] Pacific's 5/20/98 Reply.
[85] TCG, AT&T Brooks and Cox, Response 3/31/98 and ELI Reply 4/30/98.

code administrator has been transferred to a neutral third party, any influence that Pacific may have over the process will be mitigated.

J. ITEM TEN – Access to Databases

Has Pacific provided nondiscriminatory access to databases and associated signaling necessary for call routing and completion, pursuant to Section 271(c)(2)(B)(x) of FTA96 and applicable rules promulgated by the FCC?

Pacific has not demonstrated compliance with this checklist item.

FCC Guidance in the First Report and Order

While the FCC has not provided guidance on access to databases and signaling in prior 271 proceedings, it does give direction in the First Report and Order on Interconnection ¶¶484-492. The FCC requires nondiscriminatory access to the Line Information Database (LIDB) and the Toll Free Calling Database and Number Portability databases, using Pacific's SS7 network. The FCC also concluded that access to call-related databases used in the ILEC's AIN (Advanced Intelligent Network) to be critical to competition in the local market and found such access to be technically feasible either through the use of the incumbent's unbundled switching element, or through the new entrant's own switch.

The FCC indicated that mediation mechanisms are needed to protect data in the incumbent's AIN Service Control Point (SCP). Parties are urged to resolve any outstanding mediation concerns. While allowing new entrants access to ILEC's software applications that reside in the AIN databases may reduce the ILEC's incentive to develop new and advanced services using AIN, the FCC found that it would be a significant burden on new entrants to require them to deploy a fully redundant network architecture, including AIN databases and their application software. AIN-based services are seen to be the cutting edge of telephone exchange services, and competitors would be at a significant disadvantage if they were forced to develop their own AIN capability immediately.

In ¶¶493-500, the FCC concluded that ILECs should provide access to the Service Management Systems (SMS) which allows competitors to create, modify or update information in call-related databases. Such access should be provided to new entrants in the same way the incumbent inputs its own information into the SMS. A CLEC seeking access to the SMS that is part of the ILEC's AIN would go through the ILEC's Service Creation Environment (SCE), an interface used to design, create and test AIN supported services. Once software is successfully tested in the SCE, it is transferred to the SMS where it is downloaded into an SCP database for active deployment on the network. The FCC concluded that such access is technically feasible, with no potential harm to the

network, because competitors accessing the SCE and SMS would not be communicating directly with the LEC's database or switch.

The FCC stated that this process may require some modifications, including appropriate mediation, to accommodate access by other carriers.

Discussion of Issues

AT&T complains that Pacific restricts access to its AIN capabilities. AT&T points to provisions in its ICA which allow access to Pacific's SMS and SCE. Under the terms of its ICA, Pacific was obligated to provide three options for accessing Pacific's SCE. Options 1 and 3 were to be available by March 31, 1997, says AT& T, but Pacific has not yet provided a procedure or method for ordering either Options 1 or 3. Similarly, Pacific has not yet partitioned the SCE database to enable Option 2 provisioning.

According to Pacific, AT&T inappropriately attempts to prejudge the outcome of the arbitration issue by raising the same issue in the instant 271 proceeding.[86] Staff does not agree that the issue should not be addressed in the 271 proceeding. The Commission has an obligation to examine any factors raised in this proceeding that could impact checklist compliance. Pacific does not refute AT&T's argument in either its April 30 or May 20 filings. While staff does not generally want to interfere in ICA implementation issues, AIN deployment is of general interest and critical to the development of the competitive market so staff will explore the issue of AIN implementation in the collaborative process.

Also, MediaOne and Nextlink both raised database-related concerns. Nextlink cited problems with gaining access to the signaling databases necessary for the provision of certain CLASS services. MediaOne's problem dealt with connecting to Pacific's SS7 network. Both problems have been resolved by Pacific, but staff is concerned that, without proper safeguards in place, problems could reoccur.

Issues Selected for the Collaborative Process

Based on staff's analysis, it appears that Pacific has not met federal performance guidelines for this checklist item. In the collaborative process, staff recommends that participants:

- review Pacific's deployment of AIN capabilities to determine if it is providing access to CLECs as required by the FCC;
- review how maintenance/trouble reports regarding SS7 are processed by the LOC.

[86] Curtis L. Hopfinger, Rebuttal Affidavit, May 20, 1998, ¶32.

K. ITEM ELEVEN – Number Portability

Has Pacific provided number portability, pursuant to section 271(c)(2)(B)(xi) of the FTA96, and applicable rules promulgated by the FCC?

Because of a significant indications in the record regarding problems with provisioning interim number portability, staff finds that Pacific has not demonstrated compliance with this checklist item.

Federal Rulings in Prior 271 Filings

Section 271 of the FTA96 requires that BOCs make number portability available to competitors. Number portability allows customers to retain their telephone number when switching from Pacific to a facilities-based competitor. Pending issuance of regulations for permanent number portability, the FCC mandated that interim methods be made available. To this end, section 271(c)(2)(B)(xi) requires a BOC to provide interim number portability (INP) through Remote Call Forwarding (RCF), direct inward dialing (DID), or other comparable arrangements.

Specific to 271 filings, in its Ameritech/Michigan 271 decision the FCC determined that it will carefully examine the BOC's implementation of permanent local number portability (LNP), and will "take very seriously any allegation that a BOC is failing to meet its current obligation to provide number portability through transitional measures pending deployment of a long-term number portability method." (¶341) The FCC also stated that the BOC must deploy permanent LNP within FCC deadlines. (Ameritech, ¶342)

Discussion of Issues

Pacific's tariffs make both of the INP options mandated by the Act available. Also, pursuant to CPUC arbitrations, Pacific provides INP through Route Indexing, a method some CLECs indicated they may prefer. (Pacific Brief, p 51.) All CLECs that ordered INP in California ordered Pacific's RCF-type offering, Directory Number Call Forwarding (DNCF). Pacific reports that, as of March 1, 1998, they had ported more than 19,000 telephone numbers to CLECs in California. (Pacific Brief, p 51.)

A number of facilities-based carriers (ICG, TCG, PacWest, NextLink, Cox, MediaOne) document service disruptions and other problems resulting from a lack of coordination in the DNCF installation process, and specifically the service cut-over portion of the process. Service disruptions are possible within DNCF process because DNCF requires a physical

transfer of service from Pacific to the CLEC. (Pacific Brief, p 52.) Disconnection of the end-user from Pacific must be followed immediately by a new connection to the CLEC; this is called a "DNCF cut-over." (Pacific Brief, p 52.)

As indicated above, the record indicates that significant problems have occurred within DNCF cut-overs. Pacific reports that these problems began in mid-1997, "when CLEC orders for INP started to increase, (and) some disconnections occurred prior to the scheduled due date." (Pacific Brief, p 53.) In an attempt to better coordinate the process, Pacific developed two provisioning processes: To Be Called Cut (TBCC), and Frame Due Time (FDT). Both processes are designed to allow better coordination within the cut-over part of the DNCF conversion. CLECs were also to receive a Firm Order Confirmation (FOC) for INP requests. The record indicates, however, that, in spite of these control procedures, DNCF problems continued, and included non-receipt of FOCs, problems with the TBCC process, and allegations that Pacific failed to follow FDT order processes.

Pacific's general response to problems with DNCF is that there has been "marked improvement" in this area and that it is instigating a number of steps to improve the INP process. (Pacific's 5/20/98 Response, p 75.) It is clear from competitors' filings, as well as from Pacific's admissions, that DNCF coordination problems have been severe, showing a clear lack of performance. It is also clear that Pacific's promises of future performance cannot – per FCC guidance in Ameritech – serve as checklist compliance. By not adequately providing interim methods, Pacific does not comply with FCC guidelines outlined above, specifically that the FCC "will take very seriously any allegation that a BOC is failing to meet its current obligation to provide number portability through transitional measures pending deployment of a long-term number portability method." (Ameritech, ¶341)

Staff recognizes that evaluating Pacific solely in terms of interim number portability is problematic because of the current conversion away from interim portability to permanent portability. Staff therefore recommends collecting data for both interim and permanent number portability. Staff recommends addressing both INP and LNP because, first, INP may continue for some time to be the process in place for some California consumers. According to Pacific, after the FCC mandated conversions of the largest MSAs, 6% of the access lines in California will not have access to LNP. Interim processes should therefore perform adequately for any consumers living in areas without access to LNP, and who will continue to use INP. Second, the best case scenario is that LNP conversion in the targeted MSAs will be complete by December 31, 1998. This means that, even if LNP rolls out exactly as planned, CLECs will be using INP for approximately six additional months (from the date of this report). Staff believes that INP should therefore be improved as soon as possible so that CLECs will not have to experience harm for the remaining months of INP.

Finally, staff notes that the conversion to permanent number portability has been rife with delays, in both California and other states. Further, there are reports of significant

problems in some east coast MSAs that have converted to LNP. In any case, if LNP in California is delayed for any reason, CLECs would be faced with using INP for longer than the six months already necessary. Given the complexity of the conversion process and the problems to date, staff believes delays are a reasonable concern and an additional incentive to improve interim methods.

Issues for the Collaborative Process

Based on staff's analysis, it appears that Pacific has not met federal performance guidelines for this checklist item. In the collaborative process, staff recommends that participants:

- review, in general, how to improve coordination in provisioning INP and, potentially, LNP;
- review the process used to install DNCF and determine how to minimize service disruptions for customers and administrative problems experienced by CLECs;
- determine a way to evaluate Pacific's deployment of LNP
- determine how to evaluate Pacific's processes for transferring customers from INP to LNP.

L. ITEM TWELVE – Dialing Parity

Has Pacific Bell provided nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of Section 251(b)(3) and pursuant to 271(c)(2)(B)(xii)?

Staff has determined that Pacific has met this checklist requirement.

FCC Guidance in Prior 271 Filings

The FCC does not provide guidance on this checklist item in prior 271 decisions.

Discussion of Issues

Dialing parity means that customers of CLECs must be able to dial the equivalent number of digits and expect the equivalent dialing delays as customers of Pacific when placing local and intraLATA toll calls. No evidence was presented that local customers of CLECs experience dialing delays or are required to dial additional digits to make local calls.

Both federal and state law requires that all local exchange providers must institute local dialing parity. FTA96 requires Pacific to institute intraLATA toll dialing parity coincident with being granted interLATA authority by the FCC.[87]

M. ITEM THIRTEEN – Reciprocal Compensation

Has Pacific provided reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2) of FTA96, pursuant to section 271(c)(2)(B)(xiii), and applicable rules promulgated by the FCC?

Staff believes that Pacific has not demonstrated compliance with this checklist item. Additional information on the availability of traffic studies must be provided before Pacific can prove compliance.

FCC Guidance in Prior 271 Filings

Although the FCC did not widely address reciprocal compensation, it noted that there must be "just and reasonable" reciprocal compensation between the ILEC's and CLEC's networks for transport and termination of calls. (Ameritech, ¶ 293.)

Discussion of Issues

CLEC complaints about issues covered in, or resulting from, voluntarily negotiated compensation arrangements (i.e. arrangements that are not cost-based or that are different from other CLECs' arrangements) will not be addressed in this 271 proceeding.

The following remains an area of concern:

Both AT&T and Brooks report that Pacific has not provided adequate traffic data reports. Although staff finds Pacific's May 20th response unclear, Pacific appears to allege that this is a simple billing dispute involving an incorrect billing of AT&T's local calls routed over existing access trunks, and is therefore not a valid 271 issue. (Pacific 5/20/98 Response, p

[87] Section 271(e)(2)(B) prohibits a state from ordering a Bell operating company to implement dialing parity before it enters the long distance market. But, states may adopt rules regarding the terms and conditions for implementing intraLATA dialing parity. In D.97-04-083, the Commission established the terms and conditions that California LECs, including Pacific, must meet when implementing intraLATA dialing parity.

80; Hopfinger Rebuttal Aff. ¶ 50.) Because more than one CLEC documented problems with receiving necessary reports, staff does not find Pacific's general response of "this is a simple AT&T/Pacific billing dispute" compelling. Staff believes that Pacific should provide appropriate traffic records to all CLECs to facilitate the payment of mutual compensation for calls.

Issues Selected for the Collaborative Process

Based on staff's analysis, it appears that Pacific has not met federal performance guidelines for this checklist item. In the collaborative process, staff recommends that participants:

- review the traffic data needs of CLECs, determine whether Pacific is providing parity treatment, and, if not, how it could provide adequate reports.

Issues Deferred to Other Proceedings

Many CLECs raised complaints related to Pacific's withholding compensation for traffic to Internet Service Providers (ISPs). While staff recognizes this as a significant issue, compensation for traffic to ISPs is pending before the Commission in three separate dockets: the Local Competition proceeding and two separate complaint cases, and therefore, will not be addressed here.

N. ITEM FOURTEEN – Resale

Has Pacific provided telecommunications services for resale in accordance with the requirements of Section 251(c)(4), 252(d)(3) and pursuant to 271(c)(2)(B)(xiv) and applicable rules promulgated by the FCC?

Based on staff review of the record and application of federal guidelines, it appears that Pacific has not met this checklist requirement.

FCC Rulings in prior 271 filings

In the Bell South/South Carolina and Louisiana orders the FCC cited the requirement that customer-specific contract service arrangements (CSAs) be subject to the resale requirement and available to CLECs at a wholesale discount.

Discussion of Issues

Nine commenters stated that OSS problems were significant in the resale area. Pacific responds that all previous OSS problems relating to resale have been resolved.

No commenters raised the issue of reselling CSAs, and since the CPUC in D.97-08-059 ordered resale of CSAs, this does not appear to be an issue in this case.

CLECs raised concerns about six resale issues, which are described below, along with staff's disposition of each issue:

1. Restriction on aggregation of toll volumes by the CLEC (AT&T, MCI). The toll aggregation issue has been remanded to the Commission in the AT&T/Pacific Bell arbitration case. The CPUC will address the issue in that context.
2. Need for final wholesale discounts based on avoided cost (TCG, MCI, ORA). The interim discounts set by the CPUC in March 1996 are based on an avoided cost methodology, which adjusts for avoided retail costs such as end-user billing, marketing and customer service expenses.[88] While the CPUC is currently in the process of setting final resale discounts based on a more refined methodology, the earlier methodology is compliant with 252(d)(3).
3. Several services not being available for resale, namely voice mail, inside wire, threshold blocking for 900/976, and calling card (Time Warner, Working Assets, ORA, Sprint, MCI). Voice mail, IW, call blocking, and calling card services are not telecommunications services as defined under the Act[89] and are therefore not subject to the Act's resale requirement.
4. Promotions of less than 90 days must be resold, but without an avoided cost discount (MCI). After reviewing the FTA 96 and the FCC's Rule 51.613(a)(2), the CPUC determined that the Act does not require or prohibit the resale of short-term promotions at retail rates.[90] Since it is not a requirement under the Act, it cannot be considered a requirement under §271(c)(2)(B)(xiv).
5. Pacific's notices of changes in retail services are not timely and are vague (AT&T). The issue of advance notice of retail offerings is not addressed specifically in either the Act or the FCC's First Report and Order on

---

[88] D.96-03-020, California Public Utilities Commission, March 13, 1996, p. 28.

[89] "Telecommunications service" is defined to mean "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." 47 U.S.C. § 153(46) "Telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43)

[90] Opposition in Support of Motion for Summary Judgment of Defendant Commissioners, GTE California Incorporated, Plaintiff v. Conlon, et. al, defendants and related cross-action, In the United States District Court Northern District of California San Francisco Division, No. C-97-1756 SI and related cases C-97-1757, C-97-0670, and C97-0080, April 9, 1998, p.14.

Interconnection and therefore staff does not believe that it should be made a requirement for compliance with section 271.

6. Private line service not available at an avoided cost discount (AT&T). In 1995 the CPUC merged the retail private line tariff into the wholesale special access tariff. As a result, private line customers now purchase the same services which Pacific sells to IXCs. Since special access is essentially wholesale in nature, the CPUC determined that CLEC resellers should pay the same rates as IXCs. This is consistent with the FCC's analysis in ¶874 of its First Report and Order on Interconnection.

One of the issues raised warrants further examination, namely AT&T's allegation that Pacific offers consecutive 90-day promotions.

Pacific does not address the merits of AT&T's argument that Pacific offers consecutive 90-day offerings to evade its resale obligations. Instead, Pacific responds that the issue of promotions does not relate to Pacific's resale obligations under the checklist, but arises under the parties' ICA.[91] According to Pacific, AT&T inappropriately attempts to prejudge the outcome of its open arbitration case on this issue by raising the same issue in the instant 271 proceeding.[92] Staff does not agree. The Commission has an obligation to examine any factors raised in this proceeding that could impact checklist compliance.

According to ¶950 in the FCC's First Report and Order on Interconnection, short term promotions of 90 days or less need not be offered at a discount to resellers, while promotions of greater than 90 days must be offered at a wholesale discount. The FCC cautions that ILECs should not offer consecutive 90-day promotions to circumvent their wholesale obligation. Pacific is ordered to provide copies of all documentation on its promotional offerings since August 8, 1996, to the 271 staff in the Telecommunications Division by July 27, 1998. This issue may be explored further in the collaborative process.

[91] Curtis L. Hopfinger, Rebuttal Affidavit, May 20, 1998, ¶32.
[92] Curtis L. Hopfinger, Rebuttal Affidavit, May 20, 1998, ¶32.

Issues Selected for the Collaborative Process

- Pacific should demonstrate that the OSS systems it develops for resale comply with the Act and FCC rules.
- Review additional information provided by Pacific to determine if the company is in compliance with §51.613(a)(2) regarding promotional offerings.

CHAPTER IV: OTHER TELECOMMUNICATIONS ACT REQUIREMENTS

A. SECTION 272

FCC Guidance in Prior 271 Filings

Section 271(d)(3)(B) requires that the BOCs' request for interLATA authority be carried out in accordance with section 272 of the Act.

Section 272 requires that a BOC (or its affiliate) must provide interLATA telecommunications services through a separate affiliate. It imposes five structural and transactional requirements upon the long distance affiliate. In evaluating the compliance of a BOC, the FCC determined that it may look to both the BOC's past and present behavior to make a predictive judgment concerning whether the BOC will comply with section 272. (Ameritech ¶ 347.)

Specifically, the BOC long distance affiliate must operate independently from the BOC; it must have books, records, and accounts which are separate from the BOC affiliate; it also must have separate officers, directors, and employees from the BOC affiliate; the BOC must treat the section 272 affiliates on an arms-length, nondiscriminatory basis. (Ameritech ¶¶ 349-353.) All transactions between the BOC and the section 272 affiliates must be publicly disclosed, and this disclosure must include the actual rates used to value the transactions, not simply stating the valuation method employed. If a BOC has transferred facilities and capabilities to any other affiliates, it must disclose transactions between those affiliates and its long-distance affiliate. (Ameritech ¶¶ 363-373.) Additionally, the section 272 affiliate may not obtain credit where upon default the creditor would have recourse against the assets of the BOC affiliate.

Issues Selected for the Collaborative Process

The Commission recommends the following, the details of which could be developed in the collaborative process.

- Provide documentation of company policies and procedures related to the access to and dissemination between affiliates and LEC operations of competitive carrier CPNI and other proprietary information. Specifically, Pacific should provide proof that it is not using competitors' proprietary information for its own use. A specific example provided by AT&T (Olsen Aff.) is an allegation that Pacific misappropriated IXC trade secrets by passing on exchange access data.

- Provide verifiable evidence of separate officers for Pacific and all of its 272 affiliates. It is staff's position that the independence and separation of Pacific's and PB Com's boards of directors and officers from SBC is not absolutely clear, based on the record to date. The record on this issue shall be further developed and clarified so that a determination can be made as to whether officers, directors, and employees (as defined by the FCC) of all Pacific's 272 affiliates are separate from Pacific.

- Staff believes that it is necessary to determine the appropriate level of detail for "adequate disclosure of transactions" as well as Pacific's compliance with providing the information in a timely, appropriate fashion. In the collaborative process, staff would like to examine whether the following issues are appropriate or accurate concerns:

    - There is insufficient information to evaluate if transactions are fairly and accurately valued. Staff believes that Pacific should fully explain its valuation procedures and methods, and develop a process to provide such additional information, as considered necessary by staff for the Commission to determine which of the posted services and assets are available, on an equal pricing, basis to a competitor of PB Com;

    - Pacific should post on the Internet a written description of the asset or service transferred along with all terms and conditions;

    - Pacific should identify all transactions between itself and its 272 affiliates between the effective date of FTA 96 and August 12, 1997 for staff review. If considered appropriate by staff, said transactions between February 1996 and the date of approval to initiate interLATA services shall be disclosed and made subject to "true-up";

    - Pacific should provide additional information, as considered necessary by staff, to enable the Commission to evaluate if transactions are arms-length between the affiliates;

    - The record should be developed on FCC requirements or guidelines regarding the use of "Confidential" and "Proprietary" classifications to provide a basis for evaluating Pacific's compliance with any requirements or guidelines applicable to the use of said terms;

    - The record should be developed further as to Pacific's practices regarding the use of "CONFIDENTIAL" and "PROPRIETARY" restrictions on documents;

    - Criteria, procedures, and processes should be developed to provide data to fully demonstrate that the section 272 affiliates are treated on an arms-length basis and that non-affiliated carriers are treated the same as, and under that same terms and conditions, as section 272 affiliates for the purchase of tarriffed services, and where determined by staff to be appropriate, for the purchase of non-tarriffed services;

- Develop a record on the need for the need to conduct periodic internal audits for ongoing evaluation of Pacific's, and all of its subsidiaries and affiliates, and continued compliance with all requirements of section 272.

Finally, staff is concerned about any possibility that Pacific is providing central office information to affiliates that it is not making available to third-parties. In particular, staff is concerned that affiliates may not have been required to adhere to the same collocation request process(es) required of CLECs. Pacific should fully explain the company policies for affiliate and non-affiliate collocation in central offices, and provide information to demonstrate that CLEC's have not been treated differently than Pacific's affiliates in the provision of collocation space.

On a preliminary basis, information that staff finds relevant includes, but is not limited to: a list of the central offices where affiliates are located and the related amount of space in each central office; when the affiliate first obtained collocation space in each central office; a full explanation of the actual process(es) employed to evaluate affiliate requests for space in each of the respective central offices; and a list of each central office where non-affiliated third parties have requested collocation space but were turned down and an indication of whether affiliates have collocation space in those central offices.

B. PRESENCE OF A FACILITIES-BASED COMPETITOR

Section 271(c)(1)(A) of FTA96 requires the presence of a facilities-based competitor. A BOC is seen to have met this requirement if it has entered into one or more binding agreements that have been approved under section 252 with one or more unaffiliated providers of telephone exchange service to residential and business subscribers. Such telephone service may be offered exclusively over the competing provider's own facilities or "predominantly" over its own facilities, in combination with the resale of telecommunications service provided by another carrier.

FCC Guidance in Prior 271 Filings

The FCC has provided significant direction to help determine the presence of a facilities-based competitor. The four major sub-issues the FCC has addressed are:

1. Has the BOC entered into one or more binding agreements under 252?
2. Has the BOC provided access and interconnection to unaffiliated competing providers of local exchange service?
3. Are competitors providing service to both business and residential customers?
4. Is service being provided exclusively or predominantly over the CLEC's own facilities?

In the Ameritech/Michigan application, Ameritech relied on three interconnection agreements: Brooks, MFS Worldcom and TCG to prove the presence of a facilities-based competitor. The FCC found that one of the interconnection agreements Ameritech had entered into—Brooks Fiber—met the requirements of this section. Brooks was serving both business and residential customers through a combination of fiber rings connected to its switches and unbundled loops. The FCC did not agree with Brooks' argument that the ICA was not binding because the rates were interim, and went on to state that the ICA defined rates and obligations as they currently existed.

Some parties contended that the Brooks agreement did not count because Brooks was serving primarily in the Grand Rapids area. Parties also criticized the small number of access lines served by Brooks, which was reported as 21,786 in the Grand Rapids area (15,876 business and 5,910 residential customers). In sum, most Michigan customers did not appear to have a choice of telephone provider.

In its SBC/Oklahoma order, the FCC addressed the degree of competition necessary to meet this requirement. The FCC determined that the competitor had to actually be in the market and providing service for a fee, providing an actual commercial alternative to the BOC. The FCC indicated that it does not interpret 271(c)(1)(A) to require a specified level of geographic penetration by a competing carrier, nor does the FCC require a particular market share to be considered a competing carrier. The FCC noted that the Senate and House had rejected language that would have imposed such a requirement. The FCC does not reach the *de minimis* lines issue. However, the FCC stated in ¶79 that its interpretation of 271(c)(1)(A) does not preclude considering the state of local competition as part of its review under section 271(d)(3)(C).

Parties argued that the FCC could not count the MFS or TCG agreements to satisfy the requirements of 271 (d)(3)(C) because those entities were serving only business customers. Ameritech responded that business and residential customers need not be served by the <u>same</u> competitor. The FCC concurred with Ameritech's position and pointed to the legislative record of FTA96 when the phrase "an" unaffiliated competitor was changed to "one or more." This was seen to give greater flexibility to the BOCs since they would not be required to rely on one competitor to support their applications.

In its Ameritech order, the FCC also provided guidance of what it means for a competitor to provide service over its "own telephone exchange service facilities." Parties wondered whether that phase should include service over UNEs which are leased from the BOC or only service provided exclusively over facilities owned by the competitor. In ¶99 the FCC interpreted the language to include UNEs, and indicated that this would provide the BOC with greater incentive to cooperate in the provisioning of UNEs.

Since the ICA between Brooks and Ameritech was found to meet the requirements of this section, the FCC determined that it did not need to make a determination about the MFS or TCG agreements.

Presence of A facilities-based competitor in Pacific's service territory.

In its initial brief in this proceeding, Pacific includes a figure which lists the facilities-based CLECs which operate in its territory [93]. The figure breaks the facilities-based category down between business and residential customers. In their comments, several CLECs pointed out errors in Pacific's statistics, especially for some companies that were shown to provide service to residential customers using their own facilities. Two of the companies on the list—MFS and PacWest—do not have 252 agreements with Pacific because their agreements were negotiated prior to FTA96.

After adjusting Pacific's data, there are still several unaffiliated entities which provide service to business customers either exclusively over their own facilities or using Pacific's unbundled loops. Those companies include: Brooks Fiber, Cox, ELI, First World, ICG, MCI, Nextlink, NorthPoint, TCG, Time Warner, and WinStar. In addition, three cable companies are currently providing telephone service over their own facilities in various parts of the state. Those companies include: Cox, Media One, and TCI Telephony.

The companies listed have tariffs on file with the Commission and are selling services to the general public. In the Executive Summary to its March 31, 1998 brief, Pacific indicates that CLECs provide service to at least 243,000 business and residential customers over their own networks. In response, some of the CLECs disputed the data provided for their companies. Staff therefore attempted to gather data from the CLECs' own filings. However, not every operating CLEC chose to participate in this proceeding, and some that filed comments did not include customer counts. Those companies which did provide customer data, did so under seal, so staff was unable to disclose data for individual companies. Instead, staff tabulated business and residence data for six facilities-based competitors[94] and found they serve about 60,000 access lines in California. Separate data for residential customers was not available because only one company, Cox, provided that information and it was provided under seal.

Based on the above information, staff finds that Pacific has met the requirements of Section 271(c)(1)(A) for providing service to a facilities-based competitor. Based on staff's review of prior FCC 271 orders, it appears that the FCC takes a narrow interpretation of this section, and does not incorporate any sort of geographic coverage or market share test. Therefore, staff did not examine issues of geographic coverage or market share analysis in determining the basis of a facilities-based competitor.

---

[93] Brief in Support of Application by SBC for Provision of In-Region, InterLATA Services in California, March 31, 1998, Figure 2, p. 8.

[94] Covad, NextLink, TCG, Brooks, Cox, and MCI.

C. STATE OF LOCAL COMPETITION

While staff found the requirements of 271(c)(1)(A) to be narrow in scope, it determined the public interest test in 271(d)(3)(C) to be much broader in scope. A key element of that public interest test is to determine the state of competition in California.

Many parties have presented comments on that issue. Generally, Pacific pointed to access lines won by competitors, unbundled loops provisioned, number portability deployed, and interconnection trunks installed as proof of the healthy state of competition. On the other hand, competitors pointed to OSS problems and other areas where Pacific's actions have thwarted competition rather than advanced it. Given staff's present assessment of Pacific's draft 271 application, any thorough evaluation of the state of competition should be undertaken at a later time when the deficiencies identified by staff to encompass Pacific's implementation of local competition have been resolved.

Decision No. C98-267

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 96S-331T

RE: THE INVESTIGATION AND SUSPENSION OF TARIFF SHEETS FILED BY U S WEST COMMUNICATIONS, INC. WITH ADVICE LETTER NO. 2617, REGARDING TARIFFS FOR INTERCONNECTION, LOCAL TERMINATION, UNBUNDLING AND RESALE OF SERVICES.

DECISION REGARDING COMMISSION AUTHORITY TO REQUIRE COMBINATION OF NETWORK ELEMENTS

RECEIVED
AT&T Corp. Legal - Denver
MS 3/16
MAR 16 1998
OV-+: ____ PRO SER ____
MESS ____ REG MAIL ✓
INTER-OF ____ FAX ____
OTHER ____ INITIALS MS

Mailed Date: March 13, 1998
Adopted Date: February 18, 1998

I. BY THE COMMISSION

A. Statement

1. In prior orders in this suspension docket,[1] we had ordered U S WEST Communications, Inc. ("USWC" or "Company"), to combine network elements for competing local exchange carriers ("CLECs") ordering service in this manner. In response to the court's decision in *Iowa Utilities Board v. F.C.C.*, 120 F. 3d 753

[1] As indicated in the caption, this case concerns U S WEST Communications, Inc.'s proposed permanent tariffs for the provision of certain services (i.e., interconnection, local termination, unbundling, and resale) to competing local exchange carriers. Generally, this proceeding concerns obligations imposed upon the Company by the Telecommunications Act of 1996 and §§ 40-15-501 *et seq.*, C.R.S.

(8th Cir. 1997),[2] however, we rescinded that requirement, but ordered USWC to file additional proposed tariffs in this proceeding indicating how it intended to make unbundled network elements available to CLECs. USWC made that filing as directed. As part of their response to the Company's proposals, AT&T Communications of the Mountain States, Inc. ("AT&T"), and Sprint Communications Company L.P. ("Sprint") suggested that, notwithstanding the Eighth Circuit Court's ruling, the Commission possesses authority under State law to order USWC to combine network elements for CLECs. In Decision No. C98-47 (Mailed Date of January 20, 1998), we set the Company's new proposed tariffs for hearing and directed that interested parties file briefs addressing the Commission's authority under State law to order USWC, as part of its interconnection and unbundling obligations, to combine network elements for competitors.

2. USWC filed a brief on this issue. In addition, AT&T, Sprint, MCImetro Access Transmission Services, Inc., Teleport Communications Group, Inc., and WorldCom, Inc. (collectively "the CLECs"), filed their Joint Brief in this matter. As expected, USWC contends that the Commission does not possess authority to order the Company to combine network elements for CLECs; the CLECs suggest that we do. Now being duly advised in the premises, we determine that the Commission is empowered under

---

[2] In *Iowa Utilities Board*, the Court ruled that, under the Telecommunications Act of 1996, the Federal Communications Commission lacked authority to order incumbent local exchange carriers to combine network elements for CLECs.

State law to require USWC to combine network elements for competitors as part of its obligations as an incumbent local exchange carrier ("ILEC").[3]

B. Discussion

1. Federal Preemption of State Law

a. The primary contention of USWC is that the Telecommunications Act of 1996 ("Act"),[4] as interpreted in *Iowa Utilities Board*, prohibits the Commission from requiring it to combine network elements for competitors. In *Iowa Utilities Board* the court vacated a Federal Communications Commission ("FCC") rule which imposed upon incumbents a duty to combine network elements for CLECs, based upon the provisions of 47 U.S.C. § 251(c)(3). That statute, in part, imposes upon ILECs such as USWC the duty:

> [T]o provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner *that allows requesting carriers to combine such elements in order to provide such telecommunications service.*

---

[3] The propriety of such a requirement is, as explained *infra*, dependent upon factual determinations to be made based upon the hearing on USWC's new proposals. Accordingly, we do not decide here whether the Company will be required to combine network elements for CLECs.

[4] Pub. L. No. 104-104, 110 Stat. 56 (codified at various sections of Title 47, United States Code).

(Emphasis added.) The Eighth Circuit interpreted § 251(c)(3), particularly the last sentence, as precluding the FCC from levying a duty on ILECs to do the actual combining of elements for competitors. *See Iowa Utilities Board*, page 813.

b. USWC, in reliance upon this ruling, argues that the Act "forbids" a State requirement that ILECs combine network elements for competitors. According to the Company, such a requirement would contravene the Act's intent to implement competition in the local exchange market through the alternative mechanisms of unbundling of network elements and resale. In USWC's view, a requirement that it combine network elements for CLECs would, as found by the Eighth Circuit with respect to the FCC rule, "obliterate" the distinction between resale and access to network elements. Such a rule, the Company contends, is preempted by the Act.

c. Recognizing that the Act preserved State authority to prescribe access and interconnection obligations for local exchange carriers (*see* discussion *infra*) USWC contends that any such State requirement must be consistent with the Act, especially as interpreted by the Eighth Circuit. The Act, according to the Company, prohibits any requirement that incumbents combine network elements for competitors. Therefore, a Commission decision mandating that USWC combine network elements for CLECs would be "in direct conflict with the Act as construed by the Eighth Circuit." USWC Brief, page 2.