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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

EX PARTE OR LATE FILED

December 13, 2002

**Ex Parte Presentation**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20551

Re: *Application by SBC Communications Inc., et al. for Provision of In-Region,  
InterLATA Services in California, WC Docket No. 02-306*

Dear Ms. Dortch:

On behalf of SBC Communications Inc. ("SBC"), I am writing to inform you that representatives of SBC spoke on the telephone yesterday with FCC staff to discuss Pacific's test environment and billing. John Stanley, Renée Crittendon, and Brad Koerner participated on behalf of the FCC. Stephen Huston, Brian Letson, Carol Chapman, Cheryl Wilkes, Ginger Henry, Michael Flynn, John Scarborough, Martin Grambow, Kelly Murray, Becky Sparks, Jan Price, Jared Craighead, Nina Nickolich, and Colin Stretch participated on behalf of SBC. At the request of Commission staff, Attachment 1 to this letter contains information discussed during the meeting. This attachment contains confidential information. Accordingly, pursuant to the

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NO CHANGE MADE J.L.H.  
USE ABOVE

Commission's rules governing confidential communications, I am enclosing one copy of this letter with the confidential material. Inquiries regarding access to the confidential material should be addressed to Jamie Williams, Kellogg, Huber, Hansen, Todd & Evans, PLLC, 1615 M Street, N.W., Suite 400, Washington, D.C., 20036, (202) 367-7819.

In addition, representatives of SBC met today with Commissioner Michael Copps and his senior legal advisor, Jordan Goldstein, to discuss the public interest, the state of competition in California, and Pacific's compliance with the competitive checklist. James Smith, Paul Mancini, Cynthia Marshall, Becky Sparks, and Geoffrey Klineberg participated on behalf of SBC. During that meeting, SBC made reference to a draft decision issued yesterday by the California PUC. In that draft decision – which is included as Attachment 2 to this letter – the CPUC proposes to “conclude[] the . . . Public Utilities Code Section 709.2(c) inquiry” by “establish[ing] some additional safeguards, and mak[ing] the remaining three determinations under Section 709.2(c).”<sup>1</sup> Specifically, in addition to the safeguards outlined in the CPUC's final decision on Pacific's section 271 application (released September 19, 2002), the draft decision proposes to require ongoing review of Pacific's joint marketing scripts, to complete development of an expedited dispute resolution process, and to monitor Pacific's special access performance.’ With these requirements, the CPUC proposes to find that (1) “there is no anticompetitive behavior by [Pacific];” (2) “there is no cross-subsidization by Pacific;” and (3) SBC's interLATA entry poses “no substantial possibility of harm to the competitive intrastate interexchange telecommunications markets.”<sup>3</sup> The draft decision further notes that “it is necessary for [the CPUC] to take action by the effective date” of any FCC order approving SBC's application for 271 relief, and it accordingly requires parties to file comments on the draft decision by December 24, 2002. In addition to being discussed at the meeting with Commissioner Copps, the draft decision was the subject of two separate telephone conversations today: the first was among Jared Craighead, Colin Stretch, and John Stanley; and the second was between Geoffrey Klineberg and Chris Killion of the FCC's Office of General Counsel.

Finally, at the request of Commission staff, I am including as Attachment 3 to this letter the Accessible Letter announcing Pacific's voluntary reduction to its interim DS-3 UNE rate, along with the contract amendment between Pacific and XO California, Inc. incorporating that reduced rate

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<sup>1</sup> Draft Final Decision on the Public Utilities Code Section 709.2(c) Inquiry at 2, R.93-04-003, *et seq.* (Dec. 12, 2002). The decision the CPUC initially distributed includes the decision **itself**, as well as proposed findings of fact, conclusions of law, ordering paragraphs, and two appendices. Subsequently, the CPUC distributed an errata replacing the proposed findings of fact and conclusions of law. At the meeting with Commissioner Copps, SBC distributed the draft decision in its entirety as initially distributed, along with the errata containing the subsequently distributed proposed findings of fact and conclusions of law. Subsequent to that meeting, the CPUC distributed a single, replacement decision incorporating the errata. It is this latest distribution that is included as Attachment 2 to this letter.

<sup>2</sup> *Id.* at 17-22

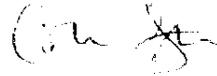
<sup>3</sup> *Id.* at 23-24.

Marlene H. Dortch  
December 13, 2002  
Page 3

**Ex Parte Presentation**

In accordance with this Commission's Public Notice, DA 02-2333 (Sept. 20, 2002), SBC is filing the original and two copies of the redacted version of this letter and its attachments. Thank you for your assistance in this matter.

Yours truly,



Colin S. Stretch

Attachments

cc: John Stanley  
Renee Crittendon  
Tracey Wilson  
Lauren Fishbein  
Brianne Kucerik  
Phyllis White  
Qualex International

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# **ATTACHMENT 1**

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## Test Environment

In its December 10, 2002 ex parte, AT&T argues – once again – that Pacific’s test environment does not adequately mirror the production environment. In doing so, AT&T – once again – provides incomplete facts, and from them reaches an incorrect conclusion.

Pacific’s joint test environment has been available for years in California, and it has been used by more than 20 CLECs in the state. *See* Huston/Lawson Joint Aff. ¶¶ 242-250 (App. A, Tab 11). In fact, since January 2002, the test environment has processed more than 2600 test case LSRs from unaffiliated CLECs. AT&T is the only party to complain in this proceeding that the test environment does not mirror production, and it bases those complaints on two separate problems it experienced resulting from one test case scenario. As discussed in greater detail below, AT&T’s problems with the test scenario in question result in large part from its own failure to provide Pacific with a complete and accurate description of what it intended to test.

The ordering scenario discussed in AT&T’s December 10 ex parte involves the conversion of a customer from UNE-P service to an xDSL-capable UNE Loop with LNP. Critically, however, AT&T’s test case worksheet contained no information indicating it intended to test this particular type of conversion. Instead, AT&T’s test case document simply stated that AT&T intended to test the migration of an “existing UNEP Voice only Account” to “UNE-L Residence customer and port the number.”<sup>1</sup> The test case document makes no mention at all of provisioning xDSL capability over the UNE loop.<sup>2</sup> Nor did AT&T indicate in interactions with the Pacific test team prior to the test that it intended to submit a test scenario involving a conversion to an xDSL capable loop.

Although the type of order Pacific’s test team was expecting – the conversion of an existing UNE-P end user to a voice grade UNE loop with LNP – can be accomplished with a single LSR,<sup>3</sup> because such orders do not flow through Pacific’s systems, they are manually processed by the LSC.<sup>4</sup> Thus, the single LSR submitted by AT&T for this test case fell out for manual processing in the test environment, just as it would in the production environment.

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<sup>1</sup> *See* AT&T’s Willard Supp. Decl. Attach. 3 (Test Case No. 5.1) (filed Nov. 27, 2002). This is the same test case worksheet and test scenario for which AT&T also failed to clearly indicate its intent to test changing an existing **main** directory listing. *See* Ex Parte Letter of Geoffrey M. Klineberg on behalf of SBC to Marlene Dortch, FCC, Attach. at 4-5 (FCC filed Nov. 13, 2002). At the time AT&T submitted the test case in question, the listings gateway (in both the test and production environments) would return an automatic reject to a CLEC using the LSOR 3.06 version if the CLEC’s LSR included new main directory listing information without also including a request to remove the existing directory listing. Because AT&T failed to specify that it intended to test the migration of a UNE-P line with an existing directory listing to UNE loop service with new main listing information, the test environment was not loaded with the appropriate information (*i.e.*, an existing directory listing), and the test case did not receive a listings gateway reject. With Pacific’s removal of the edit in question from the listings gateway for CLECs on the LSOR 3.06 version (effective November 13, 2002), no such rejects currently are returned in either the test or production environment.

<sup>2</sup> In fact, AT&T has acknowledged that the “test case does not appear to be xDSL UNE-L.” *See* the attached e-mail dated December 4, 2002 from Walter Willard of AT&T to Arthur Wehl of Pacific.

<sup>3</sup> *See* *The CLEC Handbook, Forms & Exhibits/LSR Examples*, at <https://clec.sbc.com/clec>.

<sup>4</sup> *See* Huston/Lawson Joint Aff. ¶ 192 & Attach. W at 36 (App. A, Tab 11).

That single LSR, however, should have been rejected in the test environment, just as it would be in the production environment. Unlike the conversion to a voice-grade UNE loop with LNP, the conversion of a UNE-P line to an xDSL capable loop with LNP requires two LSRs (one to convert the UNE-P line to LNP, and one to order the xDSL capable UNE-Loop).<sup>5</sup> If such a request is submitted on a single LSR it will fall out for manual handling and should be rejected by the LSC. Because AT&T's test case worksheet did not indicate that it intended the test loop to be xDSL capable, Pacific's test team anticipated an order for a voice grade loop and missed AT&T's request for xDSL capability. If the test team had caught the xDSL request, it would have rejected the order – which, as AT&T explains, is exactly what occurred in the production environment.

AT&T claims that, until it attempted to submit orders for conversion from UNE-P to an xDSL capable UNE Loop with LNP in the commercial environment, SBC “never made clear” that two LSRs would be required.<sup>6</sup> Further, AT&T states that it intended to introduce a UNE-P to xDSL UNE Loop with LNP offering in California in January 2003, and it suggests that the use of a two-order process will delay that roll out.<sup>7</sup> In view of the fact that AT&T itself cancelled a March 2002 meeting to discuss the development of a single-order process for the type of offering in question, *see supra* note 5, AT&T's complaints are plainly disingenuous. Indeed, in July 2002 – and then again in September – in response to an inquiry from AT&T directly on this point, Pacific expressly advised AT&T that two LSRs would be required for a UNE-P to xDSL-capable UNE loop with LNP migration.<sup>8</sup>

### **Billing**

In its *ex parte* dated December 11, 2002, Vycera claims that SBC's Flynn/Henry/Johnson Reply Affidavit (Reply App., Tab 5) incorrectly represented that Vycera's double billing and resale discount complaints were “finally resolved in September/October 2002.” *See* Vycera December 11, 2002 *Ex Parte* at 1. Paragraph 34 of the Flynn/Henry/Johnson Reply Affidavit correctly states that the mechanized adjustments for these errors appeared on CLEC bills in March 2002. Paragraph 35 states that “manual adjustments for Vycera's double billing errors were completed

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<sup>5</sup> SBC has developed a regionwide single LSR process for a conversion from an existing UNE-P line to a stand-alone xDSL capable loop and stand-alone switch port for a line splitting arrangement. *See* Accessible Letter CLECC02-240 (Aug. 1, 2002) (App. G, Tab 56). On May 13, 2002, a meeting was scheduled at AT&T's request to discuss developing a single LSR process for UNE-P to xDSL capable loops with LNP. That meeting was cancelled by AT&T.

<sup>6</sup> *See* Ex Parte Letter from Frank Simone, AT&T, to Marlene Dortch, FCC (filed Dec. 13, 2002).

<sup>7</sup> *See* AT&T December 10 Ex Parte at 4.

<sup>8</sup> *See* the attached email string between Pacific's Arthur Wehl and AT&T's Eva Fettig. Mr. Wehl's July 10, 2002 responses to Ms. Fettig appear in bold on the second page of that email string, interlineated with Ms. Fettig's questions. Mr. Wehl's September 11, 2002 email to Ms. Fettig confirms those responses. Due to limited ordering volume, Pacific has not published ordering requirements for UNE-P to xDSL capable UNE loop with LNP migrations. CLECs with questions about placing an order of this type – or, for that matter, of any type that is not among the orders for which Pacific has published ordering requirements – should contact their account team representative, just as AT&T did.

in September 2002,” and that “manual credits for the resale discount error posted to Vycera’s account in October 2002.” Upon further investigation, Pacific has determined that the manual credits for both errors, totaling \*\*\* \*\*\*, were posted to Vycera in its September 2002 billing. Vycera subsequently contacted the LSC billing team, claiming it was entitled to additional credits of \*\*\* \*\*\* as a result of these two errors. Pacific now is in the process of re-validating the manual adjustments made to Vycera’s bill. Because this involves examination of over 185,000 individual resale billing accounts, Pacific anticipates it will take until the end of December to complete the process. Pacific will continue to work with Vycera on a business-to-business basis to resolve this issue.

-----Original Message-----

From: Willard, Walter W (Walt), NCAM [<mailto:wwillard@att.com>]

Sent: Wednesday, December 04, 2002 12:49 PM

To: WEHL, ARTHUR A (PB); TEMPLE, MELONIE (SWBT)

Subject: RE: P to L migration

Arthur,

Your are correct. The test case does not appear to be xDSL UNE-L. So, the questions then become:

1. Is a UNE-P (POTS) to UNE-L (POTS) conversion allowed in production?
2. Is a UNEP (POTS) to UNE-L (xDSL) conversion allowed? If not, what is the functional difference that causes one to be **ok** and not the other?

Thanks,

Walt

-----Original Message-----

From: WEHL, ARTHUR A (PB) [<mailto:aw2329@sbc.com>]

Sent: Wednesday, December 04, 2002 10:39 AM

To: Willard, Walter W (Walt), NCAM; TEMPLE, MELONIE (SWBT)

Subject: RE: P to L migration

Walt, Just a question to make sure that we are talking apples to apples. **Is** there anything on this matrix that supports a request to migrate from UNE-P to UNE-L (DSL)? My contacts are **only** seeing UNE-P to UNE-L (8db).

Thanks,

Arthur Wehl  
SBC Pacific Bell Industry Markets  
(415) 545-7477

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that you have received this message in error, please notify the sender at 415-545-7477 and delete this message immediately from your computer. Any other use, retention, dissemination, forwarding, printing or copying of this e-mail is strictly prohibited.

-----Original Message-----

From: Willard, Walter W (Walt), NCAM [<mailto:wwillard@att.com>]  
Sent: Wednesday, December 04, 2002 10:21 AM  
To: WEHL, ARTHUR A (PB); TEMPLE, MELONIE (SWBT)  
Subject: P to L migration

Arthur,

Not to put any pressure on you (**Ok**, maybe I'm sharing the pressure I'm getting with you), AT&T would like an explanation as to why the UNE-P to UNE-L test case (5.1) on the attached test plan was successfully passed in the test environment if this type of conversion isn't allowed in production. **As** the test plan indicates, this is clearly a REQTYP B ACT=V and on 10/8 the test case was FOC'd and SOC'd. So, as you help us understand the details behind why this migration type is not being allowed in production, can you also be sure that SBC/Pacific Bell can explain why this test scenario successfully completed?

This issue is getting lot's of attention because type of conversion is integral to a new market entry. We are currently in what we call 'service readiness testing' and have not yet successfully passed a single production order. Our plans call for this new offering to be generally available in early January of 2003. **As** you can imagine, forecasts have been made, revenue commitments established, marketing collateral developed, etc, etc. This issue has jeopardized all of that and thus your speediest response is needed.

Thanks,

Walt

<<3.06 Oct Release Test Plan - Completed.doc>>

\* \* \*

-----Original Message-----

From: WEHL, ARTHUR A (PB)  
Sent: Wednesday, September 11, 2002 8:15 AM  
To: 'Eva Fettig'  
Subject: FW: California Orders - One LSR UNE-P to LNP to DSL

Eva,

have double checked with my internal contacts and what was stated below is still correct

*Arthur Wehl*

**SBC Pacific Bell**  
**Industry Markets**  
**(415) 545-7477**

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-----Original Message-----

From: WEHL, ARTHUR A (PB)  
Sent: Wednesday, July 10, 2002 11:28 AM  
To: 'Fettig, Eva, NCAM'  
Subject: RE: California Orders

Eva,

Please see my comments below.

Arthur Wehl

**SBC Pacific Bell**  
**Industry Markets**  
**(415) 545-7477**

This e-mail and any files transmitted with it are the property of SBC Communications and/or its affiliates, are confidential, and are intended solely for the use of the individual or entity to whom this e-mail is addressed. If you are not one of the named recipients or otherwise have reason to believe that you have received this message in error, please notify the sender at 415-545-7477 and delete this message immediately from your computer. Any other use, retention, dissemination, forwarding, printing or copying of this e-mail is strictly prohibited.

-----Original Message-----

From: Fettig, Eva, NCAM [<mailto:fettig@att.com>]  
Sent: Monday, July 08, 2002 4:58 PM  
To: WEHL, ARTHUR A (PB)  
Subject: California Orders

Arthur,

I bet you never thought you would be this popular.....I am just wrapping up a bunch of stuff so that's why we have so many questions right now.

We are moving forward with a project that will find us sending orders that will convert a California UNE-P customer to our own switch by sending in UNE-L with LNP orders. These orders also will change the loop type from 2 wire analog (i.e.POTS) to ADSL.

Every document on the SBC website says that the standard interval for this conversion order is 3 days, but I wanted to double check with SBC because it seems rather short to me, especially given that ordering a regular DSL capable loop takes 5 days.

AT&T will not be able to convert a UNE-P to a DSL loop with LNP on a single LSR. Two **LSRs** would be needed. While work is being done on migrations from POTS (retail) to DSL w/ LNP on one LSR, this does not include going from UNE-P to DSL with LNP. You will need to issue a Req. Type C to go from UNE-P to LNP. This is a 3 day process. Then you need to issue a new connect LSR for the DSL piece. This would be a **5** day interval. You would probably want to hvc the due dates for the LNP and the DSL orders be the same to minimize any down time.

**REDACTED**

I would appreciate it if you would double check with your **SMEs**.

thanks,

Eva

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## **ATTACHMENT 2**

## PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3298



December 12, 2002

Agenda ID #1520

TO: PARTIES OF RECORD IN RULEMAKING 93-04-003 ET AL.

This is the draft decision of Administrative Law Judge (ALJ) Reed identified on the December 17, 2002 Commission Meeting Agenda as Item Number 14.

When the Commission acts on the draft decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Pursuant to Rule 77.7(f)(9) comments on the draft decision must be filed by noon, on December 24, 2002, and no reply comments will be accepted.

Parties to the proceeding may file comments on the draft decision as provided in Article 19 of the Commission's "Rules of Practice and Procedure." These rules are accessible on the Commission's website at <http://www.cpuc.ca.gov>. Pursuant to Rule 77.3 opening comments shall not exceed 15 pages. Finally, comments must be served separately on the ALJ and the assigned Commissioner, and for that purpose I suggest hand delivery, overnight mail, or other expeditious method of service.

/s/ CAROL BROWN  
Carol Brown, Interim Chief  
Administrative Law Judge

CAB:vfw

Attachment

Decision DRAFT DECISION OF ALJ REED (Mailed 12/12/02)**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks.	Rulemaking 93-04-003 (Filed April 7,1993)
Investigation on the Commission's Own Motion into Open Access and Network Architecture Development of Dominant Carrier Networks.	Investigation 93-04-002 (Filed April 7,1993)
Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service.	Rulemaking 95-04-043 (Filed April 26,1995)
Order Instituting Investigation on the Commission's On Motion Into Competition for Local Exchange Service.	Investigation 95-04-044 (Filed April 26,1995)

**FINAL DECISION ON THE  
PUBLIC UTILITIES CODE SECTION 709.2(C) INQUIRY****Summary**

This decision concludes the California Public Utilities Commission's (Commission or CPUC) Public Utilities Code Section 709.2(c) inquiry. We establish some additional safeguards, and make the remaining three determinations under Section 709.2(c). We also authorize Pacific Bell (Pacific) to provide intrastate interexchange telecommunications services upon receiving full

authorization from the Federal Communications Commission (FCC) pursuant to Section 271 of the Telecommunications Act of 1996 (Section 271).

### **Background**

On September 19, 2002, this Commission issued Decision (D.) 02-09-050, its advisory opinion to the FCC on Pacific's compliance with the fourteen checklist items of Section 271. The decision also included an overview of the Performance Incentive Plan adopted for Pacific and an assessment of Pacific's operations pursuant to California Public Utilities (Pub. Util.) Code Section 709.2(c) (Section 709.2(c)). Section 709.2(c) requires this Commission to make four specific determinations before implementing any "order authorizing or directing competition in intrastate interexchange telecommunications."

D.02-09-050 determined, in accordance with Section 709.2(c)(1), that Pacific had demonstrated that competitors had "fair, nondiscriminatory, and mutually open access" to its exchanges. Pacific's strong showing of compliance with most of the fourteen checklist items substantiated its claim of fair and open access. However, the decision further found that, under Sections 709.2(c)(2) and (3), the existing record could not adequately support affirmative determinations of "no anticompetitive behavior" and "no improper cross subsidization," respectively. In addition, D.02-09-050 found that on the existing record Pacific's entry into competitive intrastate long distance telephone markets posed "a substantial possibility of harm" to those markets.

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<sup>1</sup> Read as a whole, Section 709.2 directs the California Public Utilities Commission to facilitate fully open competition for intrastate intraLATA telecommunications service.

As noted in the decision, participating parties did not ask the Commission to bar Pacific's entry into the intrastate long distance market as a sanction or in recompense for Pacific's insufficient Section 709.2(c) showing. Instead, they urged the Commission to counter the potential harms to the market by applying several conditions to Pacific's long distance entry<sup>2</sup>. Pac-West Telecomm, Inc. (Pac-West) and Working Assets Long Distance (WA) asked the Commission to structurally separate Pacific into retail and wholesale focused entities, and divest the wholesale portion.' In consideration of that proposal, D.02-09-050 directed Pacific to file, no later than March 19,2003, a "report or study detailing the cost of separating Pacific into two parts and divesting the segment covering wholesale network operations."<sup>4</sup>

Again, to lessen future harms, Pac-West/WA and AT&T Communications of California, Inc. (AT&T) proposed that a neutral third-party Primary Interexchange Carrier (PIC) administrator replace Pacific in the role of PIC administrator. In response, the Commission instructed the Telecommunications Division to prepare an Order Instituting Investigation to "examine the efficacy, feasibility, structural implementation, and selection criteria for selecting a competitively neutral third-party PIC administrator for California."<sup>5</sup>

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<sup>2</sup> See D.02-09-050 at 263-267, *mimeo*

<sup>3</sup> Specifically, "wholesale network operations (Pacific Wholesale) and retail marketing service provision (Pacific Retail)". *Id.* at 264, footnote 416.

<sup>4</sup> *Id.* at 264; Ordering Paragraph (OP) 15

<sup>5</sup> *Id.* at 265; OP 16.

To address several parties' concerns about the significant advantage that Pacific would have through the joint marketing of its affiliate's prospective long distance service with its local service, D.02-09-050 applied the limited marketing check of recently revised Tariff Rule 12 to Pacific's joint marketing ventures. The decision also stated the intention of closely monitoring Pacific's marketing activities to ensure compliance with federal and state requirements.

On October 4, 2002, the Assigned Commissioner issued a ruling (ACR) noting that although the Commission had favorably assessed Pacific's long distance application for the FCC, the status of Pacific's intrastate interexchange request was hampered by the Commission having affirmatively made only one of the four determinations required under Section 709.2(c). The ACR stated that upon reviewing the proceeding record after the issuance of the decision, the Assigned Commissioner believed that the outstanding Section 709.2(c) issues could and should be resolved promptly.

The Assigned Commissioner questioned how beneficial further proceedings and additional rounds of briefings would be in addressing the unfinished aspects of the Section 709.2(c) inquiry. In his view, the remainder of the proceeding should focus on strengthening the safeguards established in D.02-09-050, and establishing additional safeguards, if warranted, to mitigate the potential harms to the intrastate interexchange market. The ruling asked interested parties to consider and comment on four questions by October 14, 2002.<sup>6</sup> Fifteen parties commented on the issues.

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<sup>6</sup> 1) "Are further proceedings required before the Commission concludes its Section 709.2(c) appraisal? If so, what outstanding issues need to be addressed? 2) Can the performance incentives as well as the existing and specifically crafted Section 709.2(c) safeguards mitigate present and potential competitive harms? If not,

*Footnote continued on next page*

On November 6, 2002, the Assigned Administrative Law Judge (ALJ) and the Assigned Commissioner convened a prehearing conference (PHC) on Section 709.2(c). The purpose of the PHC was: (1) to advise the interested parties that the Commission wanted to resolve the remaining Section 709.2(c) issues as promptly as possible; (2) to urge the parties to collaborate on an Expedited Dispute Resolution (EDR) process in order to address the ongoing operational conflicts between Pacific and the competitors; (3) to ask Pacific to work as closely as possible with staff to keep it fully briefed and ready for any and all post authorization regulatory tasks; and (4) to allow the parties an opportunity to further express their views and concerns on the resolution of the Section 709.2(c) open issues.<sup>7</sup>

### **Responses of the Parties**

In response to the ACR, Pacific asserts that no further proceedings are required because no outstanding Section 709.2(c) issues exist. It declares that there is no anticompetitive conduct, cross subsidization or substantial possibility of competitive harm. Pacific argues that sufficient state and federal safeguards exist to protect the intrastate long distance market. It disagrees that any benefits will come from the Section 709.2(c) directives established in D.02-09-050; and that such "continuing safeguards" should have a definitive sunset date. Alternatively,

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what additional measures are needed? 3) How long should continuing safeguards, such as the joint marketing protections, be applied to Pacific? 4) Do the determinations that the Commission makes pursuant to Section 709.2(c) constitute discrete findings at the point of Pacific's entry into the intrastate interexchange telecommunications market or ongoing obligations?"

<sup>7</sup> Parties were invited to supplement their oral remarks with written comments by November 14, 2002.

Pacific asks the Commission to clarify that the Section 709.2 safeguards shall remain in effect until they are discontinued on further order of the Commission, based on a motion by it demonstrating that the safeguards are no longer necessary or appropriate, or that the burden of compliance is outweighed by the potential benefits. (Pacific Comments at 19-20.)

Pac-West Telecomm, Inc., Working Assets Long Distance and XO California, Inc. (Joint Commenters) strongly oppose the ACR's proposal. They maintain that with the issuance of D.02-09-050, the Commission's Section 709.2 appraisal was complete: Pacific failed to meet three out of the four statutory requirements. The Joint Commenters claim that the ACR is an improper reconsideration or rehearing of Section 709.2, and neglects to give interested parties a true opportunity to be heard on the issues by soliciting written comments in a condensed period of time. They further contend that the resolution of any outstanding Section 709.2 issues requires the reopening of the proceeding and the full development of a new record.

Joint Commenters insist that "disputed issues of fact" continue to exist, and envision that there will be a need for discovery, the submission of additional evidence, and "public" hearings. Regarding safeguards, they urge the Commission to accelerate consideration of the feasibility of implementing a neutral PIC administrator, and **ask** that Pacific's marketing scripts be submitted to all interested parties. In conjunction with other competitors, they support performance measures and incentives for Pacific's provisioning of special access **services**. The Joint Commenters also argue that the Commission should direct Pacific to resubmit its application for a Certificate of Public Convenience and Necessity, and determine the application before Pacific may begin offering long distance service in California. Finally, the Joint Commenters state that the

effectiveness of the safeguards cannot be ably evaluated until after they are implemented.

The Greenlining Institute and Latino Issues Forum comment that they have repeatedly stated three ways in which Pacific can ensure that its entry into the long distance market is in the public interest. They ask Pacific to: (1) address the importance of protecting ratepayers from consumer fraud in the long distance transition; (2) develop a strategic plan to increase telephone penetration for low-income communities; and (3) create a viable residential market competitor to ensure local competition. (Greenlining Institute and Latino Issues Forum Comments at 3.) They assert that the Commission should use its authority to compel Pacific to comply with public interest provisions that protect the poor.

WorldCom, Inc. (WorldCom) also considers the ACR to be an improper attempt to rehear or reconsider D.02-09-050, citing the limited set of issues posed and the limited opportunity that parties have to be heard on the overall issue of Section 709.2. It contends that the Commission lacks record support or any other reasonable basis for concluding that protections to be implemented in the future will be sufficient to overcome the anti-competitive problems already found in the record. (WorldCom Comments at 3.) Thus, WorldCom urges the Commission to strengthen the safeguards adopted in D. 02-09-050, and to establish and implement additional protective measures. It insists that the Commission promptly approve switched access charge reform; establish performance measures and incentives for special access services; and finalize the collocation terms, conditions and rates. WorldCom asserts that the regulatory safeguards should remain in place as long as Pacific retains market power.

AT&T asserts that the ACR does not present either a legal or factual basis to justify reassessing the existing Section 709.2 record. AT&T offers several incidents as examples of new evidence of Pacific's anti-competitive conduct that the Commission should receive into the record and consider. It contends that an ongoing Section 709.2 inquiry is needed to establish and enforce the safeguards that the Commission plans to impose pursuant to D.02-09-050. AT&T wonders whether the ACR's desire to expeditiously resolve the Section 709.2 portion of the proceeding implies that the Commission has abdicated its responsibilities to regulate Pacific and competition in California. (AT&T Comments at 4.) It urges the Commission to include the findings of the 2002 "PacBell Audit Report" in this proceeding.

AT&T also questions the efficacy of performance measurements and incentives when Pacific evades regulatory performance monitoring by moving functionality away from organizations or processes that the existing performance measures cover. Additionally, the company continues to criticize the accuracy of the data on which Pacific's performance is measured. With regard to the safeguards, AT&T proposes specific alternative language for Pacific's joint marketing scripts which could lessen the "significant undue advantage" that the incumbent has over competing long distance providers before a customer has requested or authorized Pacific to market its affiliate's services. Finally, AT&T insists that, at a minimum, the existing safeguards and additional stronger safeguards should remain in place so long as Pacific is a dominant local service provider.

The Office of Ratepayer Advocates (ORA) and The Utility Reform Network (TURN) contend that Section 709.2(c) requires further proceedings. They state that parties' fundamental rights at issue here are inadequately

protected where only limited comments are entertained under a tight timeline. ORA and TURN argue that in further proceedings, parties "must be allowed to address the question of whether the reaffirmed safeguards can establish that Pacific has met the requirements of Section 709.2(c)."

They caution the Commission against changing D.02-09-050 "well in advance of the thirty days allowed for parties to apply for rehearing on any matter determined therein." (ORA and TURN Comments at 4.) They also list several "bad acts" that they maintain further illustrate Pacific's anticompetitive conduct, and prevent this Commission from either ultimately making the outstanding determinations or finding Pacific to be acting in the public interest under Section 271 of the Federal Telecommunications Act of 1996.

ORA and TURN urge the Commission to indeed implement a "workable, expedited dispute process" for operational problems between Pacific and the competitors. They note that the process is critical to ensure that the requirement that SBC/Pacific's entry into the California long distance market does not harm competition, "and that it does not harm customers of competitors." (ORA and TURN Comments at 7-8.) ORA and TURN call for the creation of a schedule that accommodates "appropriate discovery," filing of testimony, and evidentiary hearings addressing the Section 709.2 issues.

Telscape Communications, Inc. (Telscape) asserts that the current safeguards are not effective to ensure a competitive telecommunications market in California, or to mitigate potential harms. It advises the Commission to quickly restrict Pacific's existing win-back activities, and adopt rules preventing the recurrence of win-back practices that are anticompetitive. Additionally, Telscape asks for the establishment of new procedures that will expeditiously resolve business-to-business issues and other disputes between competitive local

exchange carriers (CLECs) and Pacific in a manner that also promotes the interests of competitive telecommunications markets. It insists that further Section 709.2 proceedings are necessary.

Several parties<sup>8</sup> comment that additional hearings need not be held, and this inquiry should be concluded swiftly. Specifically, the Communications Workers of America (CWA) argues that the Commission should reconsider the Section 709.2 portion of D.02-09-050 because the necessary findings could be made immediately if analyzed under "the correct standard." CWA further asserts that the joint marketing safeguard established in the decision inappropriately addresses future actions, does not apply to competitors, and should be removed as quickly as possible.

### **Discussion**

Those parties most adamant in declaring that we should hold further proceedings in this matter propose that such actions be hearings that either focus on myriad major telecommunications policy issues or scrutinize numerous allegations of state and federal statutory and regulatory violations against Pacific. Many object to the expressed desire to quickly resolve the outstanding Section 709.2 issues because a quick resolution conflicts with their requests for extensive discovery, filing of testimony, evidentiary hearings and briefing cycles. The Joint Commenters and other parties argue that there are no continuing Section 709.2 issues since D.02-09-050 denied Pacific's motion for an order stating that it had satisfied the requirements of Section 709.2(c), and no party appealed

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<sup>8</sup> The CWA, District 9; California Small Business Roundtable/California Small Business Association, Americans for Competitive Telecommunications, California State Conference of the National Association for the Advancement of Colored People.

the decision. We disagree that the only recourse regarding Section 709.2(c) is the path the Joint Commenters have set forth in their October and November comments. We have not required Pacific to re-file its motion because we do not believe that restarting the Section 709.2(c) inquiry from the beginning will ultimately be productive.

### ***Further Proceedings***

On September 19, 2002, while presenting the Section 271 draft decision to the full Commission for a vote, the Assigned Commissioner remarked that appropriate safeguards could best mitigate existing anticompetitive conduct and cross subsidization as well as significant future harms to competitors. In support of that view, his October 4 ruling stated that it was imperative to assess the record developed in this proceeding and determine whether or not there was a need to further augment it in order to conclude the Section 709.2 inquiry. He advised the parties that his preliminary evaluation after reviewing the record was that "the beneficial effect" of further proceedings or additional rounds of extensive briefing would be significantly outweighed by the time and resources that would be consumed in the process. Moreover, he reasserted that safeguards would be key to making the remaining determinations under Section 709.2(c).

The questions posed in the ACR solicited parties' views on how to go forward. Most parties vehemently disagree that focusing on adequate safeguards is the approach that we should take. They argue that we cannot determine, pursuant to Section 709.2(c)(2), that there is no anti-competitive behavior until we examine every action SBC has taken since *the* Assigned ALJ submitted the case last December. Therefore, they ask for the opportunity to try each of their operational and business rule grievances against SBC and Pacific in full-blown evidentiary hearings.

When confronted with the prospect of responding to the numerous allegations presented by the competitors last year, Pacific opted to demonstrate that it met the requirement of Section 709.2(c)(2) by citing to Commission holdings in D.99-02-013 and its overall showing pursuant to Section 271(c)(i)-(xiv). It chose not to refute the allegations through evidentiary hearings. As a result, with specific competitor allegations, substantiating offers of proof, and Pacific's failure to directly respond to the bulk of allegations, we found that the record did not support an affirmative Section 709.2(c)(2) finding. Pacific neither appealed that finding nor sought leave to address the unanswered accusations. Consequently, we are not persuaded that compelling evidentiary hearings on these ongoing and increasing allegations would benefit the public interest more than finding a method of resolving Pacific-competitor disputes quickly and more efficiently.

Although urging additional full-scale preparatory proceedings and hearings, ORA, TURN and Telscape also point out the crucial need for an effective EDR process. The parties have jointly presented here a plan in response to the charge the Assigned Commissioner and ALJ gave them at the November 4, 2002 PHC. We believe that the public interest is better served by resolving the competitors' disputes with Pacific than by simply cataloguing them.

Parties also insist that Section 709.2(c)(3) can only be properly considered if we fold the Pacific Audit Report and the record of Rulemaking (R.) 01-09-0019 into this proceeding. They declare, with respect to Section 709.2(c)(4), that

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<sup>9</sup> The current NRF proceeding