Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of Application of Pacific Bell Telephone Company (U-1001-C) for Arbitration with Pac-West Telecomm, Inc. (U5266-C) Pursuant to Section 252(b) of the Telecommunications Act of 1996.	Application 02-03-059 (Filed April 18, 2002)

DECISION APPROVING ARBITRATED AGREEMENT PURSUANT TO SECTION 252, SUBSECTION (e), OF THE TELECOMMUNICATIONS ACT OF 1996 (ACT)

Summary

In this decision we approve the arbitrated interconnection agreement (ICA) filed by Pacific Bell Telephone Company (Pac Bell) and Pac-West Telecomm, Inc. (Pac-West), under Rule 4.2 of our Revised Rules Governing Filings made Pursuant to the Telecommunications Act of 1996 (Rules), pursuant to Subsection 252(e) of the Act. We find that the ICA does not violate the requirements of Section 251 of that Act, the Federal Communications Commission's (FCC) implementing regulations therefor, or the pricing standards set forth in Subsection 252(d) of the Act.

Application (A.) 02-03-059 is closed.

Background and Procedural History

As required by Subsection 252(e)(1) of the Act, in this decision we approve in its entirety the proposed ICA between Pac Bell and Pac-West, following

arbitration of certain issues the parties could not resolve through negotiation. Pac-West's previous ICA with PacBell expired on June 29, 2001.

The history of the dispute, and a complete discussion of the parties and disputed issues, are set forth in detail in the Final Arbitrator's Report (FAR), which was filed on November 19, 2002. Rule 4.2.1 required the parties to file the entire agreement conforming to the FAR, and respective statements concerning approval or rejection of the proposed ICA, within seven days after issuance of the FAR. Both parties timely complied with these filing requirements, thus placing before us the task of approving or rejecting the ICA in its current form.[1]

Rule 4.2.1 specifies that each party's statement must indicate:

a. the tests the Commission must use to measure an agreement for approval or rejection,

b. whether the party believes the agreement passes or fails each test, and

c. whether or not the agreement should be approved or rejected by the Commission.

Pac Bell's comments state that under the Act an arbitrated ICA may be rejected by this Commission only if:

> The agreement does not meet the requirements of section 251 [thereof], including the regulations prescribed by the [Federal Communications Commission]…or the standards set forth in [Section 252(d)].

This test is mirrored by our Rule 4.2.3.[2]

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[1] No comments were filed by any member of the public within ten days after the filing of the agreement, as permitted under Rule 4.2.1.

[2] Pac-West's comments state that a different standard applies to negotiated portions of an ICA than to arbitrated portions, but this approach is incorrect: Rule 4.3.1 specifies a

Footnote continued on next page

Pac-West's comments do not state that there is any material flaw in the ICA, and Pac-West indicates that the Commission should approve the ICA in its current form. Pac Bell's comments argue that the resolution of a single arbitrated issue, Issue 14, fails the test for Commission approval. Pac Bell urges us to modify the outcome of this issue so that the ICA will comport with the requirements of the Act, and then adopt it. Pac Bell argues that the ICA must be rejected if this change is not made.

Discussion

a. Disputed Issue

Issue number 14, as cast by the parties, asks whether PacBell should be allowed to collect transport charges on calls destined to Pac-West customers with disparate rating and routing points. In the FAR the Arbitrator adopted Pac-West's resolution of the issue, denying Pac Bell compensation for such so-called Virtual FX (or VNXX) traffic, subject to revision during the term of the ICA on the basis of changes occasioned by future decisions of the FCC or this Commission.[3] Pac Bell objects that this outcome is contrary to a previous Commission decision, Decision (D.) 99-09-029, and three Commission arbitration decisions based upon that rulemaking.

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different and much simpler process for Commission approval of a negotiated ICA, reflecting a clear distinction between a completely voluntary agreement and one that has been the subject of arbitration or mediation, in whole or in part. Simply put, insofar as arbitration is involved, an ICA is either virginal or it is not; there is no middle ground under our rules.

[3] We note that this issue has been raised in the pending ratemaking concerning reciprocal compensation, Rulemaking (R.) 00-02-005.

In its comments Pac-West defends the result reached in the FAR on this issue, principally because Pac Bell cannot differentiate local from VNXX calls when they are handed off to Pac-West, and—more importantly—because Pac Bell essentially incurs the same cost to originate calls of either type. The reason lies in the specific nature of the network interconnection design, which requires Pac Bell to long-haul virtually all calls to Pac-West in order for Pac-West's switch in one of three locations to route the call over its system to its customer. Consequently, claims Pac-West, the destination of calls originated by Pac Bell is immaterial from the cost standpoint, and any differences are *de minimis*, because they represent only the cost differential between two alternative intra-LATA long-haul routings.

We agree with Pac-West, and we will not overturn the result reached by the Arbitrator on this issue. If there is any cost impact resulting from different routings that may be involved for traffic delivered under Pac-West's VNXX arrangement rather than as local traffic, Pac Bell has failed to quantify it. We can only award compensation for traffic before it is turned over to Pac-West on the basis of substantial evidence in the record as to what the amount of that compensation should be. The absence of such evidence constitutes a failure of proof. On the other side of the interconnection, for purposes of intercarrier compensation, what Pac-West does with a call once it is handed off for delivery is Pac-West's concern alone. Handling of the call on Pac-West's side has no cost consequences for Pac Bell; even if Pac Bell carries the traffic over its system after the hand-off, it does so under entirely separate compensation arrangements that are not in controversy.

In the specific context of these carriers' interconnection arrangement, the VNXX issue is a classic "red herring." Pac-West has developed this product

largely to serve its ISP customers, a lucrative part of its business. With its legacy switching network Pac Bell offers such service as foreign exchange service, which is more costly from the customers' standpoint. We understand that this places Pac Bell's service offerings at a competitive disadvantage, but such competitive rivalries characterize today's communications marketplace. This situation creates precisely the incentive for innovation that the Act promotes. It is similar, for example, to the competitive rivalry between cable and satellite television systems, each of which offers distinct advantages, creating a choice for consumers and vigorous efforts to expand programming options. We will not intervene by increasing intercarrier compensation to Pac Bell in the name of "leveling the playing field" in circumstances that should instead provide an impetus for consistent improvement of its network to meet the competitive challenge.[4]

We have previously recognized that the issue of intercarrier compensation for VNXX calls should be explored in a broader context, and pursuant to Ordering Paragraph 6 of Decision (D.) 99-09-029 anticipated that we would hold hearings on this specific issue. However, the Federal Communications Commission (FCC) initiated its own investigation into the VNXX issue two years ago in its Intercarrier Compensation NPRM.[5] We see no point in duplicating the FCC's effort, when the FCC's ruling would take precedence over a determination

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[4] Our intention, however, is to approve the ICA subject to possible amendment by the parties under change of law provisions, with the expectation that the parties will implement any different resolution of the VNXX issue in a future Commission decision issued within the term of the ICA.

[5] Notice of Proposed Rulemaking, In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, FCC 01-032 (Re. April 27, 2001).

made by this Commission on the VNXX issue. Once the FCC issues an order addressing the VNXX issue, that policy will be reflected in this ICA through the change in law provision.

b. Approval of the Agreement

Rule 4.2.2 specifies that our approval or rejection of an arbitrated ICA must be "pursuant to [Telecommunications Act Subsection] 252 (e) and all of its subparts." Rule 4.2.3. articulates standards under that statute for conducting our review: we may reject the ICA if it does not meet the requirements of Section 251; specific pricing standards set forth in that section; the FCC's implementing regulations prescribed under that section; or other requirements of this Commission, including quality of service standards we have adopted. Taken together, this means that we must examine the ICA to ascertain that it comports with Section 252 (d) and (e), Section 251 and the FCC rules thereunder, and our own regulatory requirements, but that we may also exercise our discretion in applying the standards and granting approval.

We have examined the conformed agreement filed by the parties, and have determined that approval should be granted. The pricing provisions comply with the standards for interconnection and network element charges, as well as the charges for transport and termination of traffic, under Section 252(d). The ICA does not discriminate against nonparties, and is consistent with the public interest, convenience and necessity, and thus comports with Section 252 (e)(2)(A). It also satisfies the requirements of Section 251 and the FCC's implementing rules, and thereby satisfies Section 252(e)(2)(B). Lastly, the agreement satisfies our own regulatory requirements. In making these determinations we have

considered the controversy concerning Issue 14, as discussed above. We will approve the ICA.

Rule 4.2.4 requires a decision approving or rejecting an arbitrated ICA to contain written findings.[6] Consistent with this rule, we include findings in support of our order.

Comment on Draft Decision

Under Rule 77.7(f)(5), we are not required to provide this Draft Decision for public review and comment.

Assignment of Proceeding

Carl Wood is the Assigned Commissioner and Victor Ryerson is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. The Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996 by and between Pacific Bell Telephone Company d/b/a SBC Pacific Bell Telephone Company and Pac-West Telecomm, Inc. (ICA), filed by the parties on November 26, 2002, pursuant to Rule 4.2.1 conforms to the Final Arbitrator's Report in this proceeding.

2. The pricing provisions of the ICA comply with the standards for interconnection and network element charges, and the charges for transport and termination of traffic, under Section 252(d) of the Act.

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[6] Section 252(e)(1) of the Act only requires us to include written findings as to any deficiencies in the ICA.

3. The ICA does not discriminate against nonparties, and is consistent with the public interest, convenience and necessity, and thus comports with Section 252 (e)(2)(A) of the Act.

4. The ICA satisfies the requirements of Section 251 of the Act and the FCC's implementing rules, and thereby satisfies Section 252(e)(2)(B).

5. The ICA satisfies the Commission's regulatory requirements, as reflected in its rules, decisions, and orders.

Conclusion of Law

The Commission should approve the ICA.

O R D E R

IT IS ORDERED that:

1. The Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996 by and between Pacific Bell Telephone Company d/b/a SBC Pacific Bell Telephone Company and Pac-West Telecomm, Inc., filed by the parties on November 26, 2002, is approved.

2. Application 02-03-059 is closed.

This order is effective today.

Dated _____, at San Francisco, California.