Decision **DRAFT DECISION OF ALJ PULSIFER** **(Mailed 7/10/2003)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Petition of Pacific Bell for Arbitration of an Interconnection Agreement with MFS/WorldCom Pursuant to Section 252(b) of the Telecommunication Act of 1996.	Application 99-03-047 (Filed March 22, 1999)

O P I N I O N

I. Introduction

This decision resolves an outstanding question concerning the applicable reciprocal compensation rate for traffic termination in the interconnection agreement that was the subject of above-captioned arbitration matter. The arbitration was previously resolved by Decision (D.) 99-09-069. By Administrative Law Judge's ruling dated June 23, 2002, this docket was reopened for the purpose of reconsidering an issue in that arbitration that was remanded by the United States District Court, Northern District of California (Court) in the matter of MCI WorldCom Communications, Inc. (WorldCom) versus Pacific Bell Telephone Company (Pacific) (No. C-00-2171 VRW). The Court granted plaintiff WorldCom's motion for summary judgment, and remanded D.99-09-069 to this Commission for further proceedings on the issue of the appropriate compensation rate to be paid by Pacific to WorldCom for terminating traffic.

As discussed in D.99-09-069, one of the disputes in the arbitration related to the appropriate reciprocal compensation rate for termination by WorldCom of local traffic originated by Pacific. In the arbitration, WorldCom claimed that its

network of fiber rings, switching and transport nodes allowed WorldCom to serve a geographic area comparable in size to the areas served by Pacific's tandem switch. As such, WorldCom argued that it was entitled to compensation at the same tandem switch rate as it was charged by Pacific for transport and termination of calls. The Final Arbitrator's Report found that where WorldCom provides no tandem or common transport functions and thus incurs no such costs, it is not entitled to compensation for those functions and costs. The Final Arbitrator's Report concluded that WorldCom's switches do not serve the same or comparable geographic area as Pacific.

The Commission, in D.99-09-069, upheld the Final Arbitrator's Report, and thus denied WorldCom the higher "tandem switch" rate, and instead adopted the lower "end office switch" rate as reciprocal compensation for Pacific-originated traffic transported and terminated by WorldCom. In making its determination, the Commission applied Federal Communications Commission (FCC) Rule in Sec. 51.711(a)(3), which requires application of a "geographic area test" to determine whether the tandem interconnection rate applies. Sec. 51.711(a)(3) states:

> Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.

In D.99-09-069, the Commission also applied a "functional equivalency" test concluding that the tandem rate could only apply where the competitive local exchange carrier (CLEC) actually performs tandem switching functionality equivalent to that of Pacific. The functional equivalency test requires that a

CLEC's switch function like a tandem switch in order to qualify for the tandem switch rate.

The Court found, however, that the Commission erred when it required WorldCom to satisfy the "functional equivalency" test as a basis to qualify for the tandem switch rate. The Court also found the Commission's consideration of the geographic equivalency test in D.99-09-069 was based upon certain factors that were not relevant.

The Final Arbitrator's Report relied on three factors in finding that WorldCom did not serve an equivalent geographic area: (1) WorldCom forced Pacific to provide the bulk of transport by interconnecting only at one point, so it did not serve an equivalent geographic area; (2) Any similarity in geographic scope would soon disappear when WorldCom adds more switches to its network; and (3) the fact that WorldCom serves many of its customers directly at its interconnection point to Pacific, rather than via its fiber rings, limits the geographic scope of the customer base that it serves.

The Court found that although the first factor relied on in the Final Arbitrator's Report was not relevant to the geographic area test, there was no legal error since the Commission did not rely on this particular criterion in D.99-09-069. The Commission did, however, rely on the second and third factors cited in the Final Arbitrator's Report in D.99-09-069. The Court found that the second factor relied on by the Commission was not relevant to the geographic area test, and that speculation about the future geographic scope of WorldCom's network was improper and constituted legal error. The Court found that the third factor relied on by the Commission was in fact relevant to the geographic area test. The Court stated, however, that it would not "second guess what the Commission would have done if it had not improperly relied on irrelevant

factors in applying the geographic scope test." Therefore, the Court remanded the case to this Commission for proceedings consistent with its order.

The ALJ ruling dated May 23, 2002 provided notice and an opportunity for parties to file comments regarding to the remanded issues. Comments were solicited as to whether the Commission erred in its adoption of the end-office rate in D.99-09-069 in view of the Court's findings, and whether the Decision should be modified as a result. As noted in the ALJ ruling, because the grounds upon which the Court remanded the case had only to do with the application of a legal test, there was no need to take further evidence on factual disputes. Therefore, parties' briefs were limited to argument, based on the existing record, as to whether the correction of the legal error found by the Court, and the proper application of the legal test, changes the reciprocal compensation rates that should have been adopted in D.99-09-069.

Parties filed opening comments in response to the ALJ ruling on June 14, 2002 and reply comments on June 25, 2002.

II. Position of WorldCom

WorldCom argues that the Commission committed reversible error in D.99-09-069 by its adoption of the end-office switching rate for purposes of reciprocal compensation when WorldCom was required to pay Pacific's tandem rate. WorldCom argues that Pacific should be required to pay reciprocal compensation to WorldCom at the tandem rate level, when WorldCom interconnects with Pacific at a Pacific tandem.

WorldCom argues that D.99-09-069 erred in disregarding the fact that the potential and intended physical reach of the switching facilities WorldCom has deployed in California, along with its transport facilities and loop facilities, is comparable to the geographic area covered by Pacific's tandems. WorldCom

claims that its state-of-the-art local telecommunications network in California enables WorldCom to serve from a single switch a geographic area "comparable" to that served by a Pacific tandem switch. The Remand Order allows the Commission to consider concentration and location of customers as one relevant factor when applying the geographic scope test. As a matter of law and sound public policy, however, WorldCom argues, it is the potential, intended physical reach of its network facilities deployed in California that should be the paramount factor. WorldCom believes it would provide a disincentive to competitors' investment in alternative local facilities, offer perverse incentives to the incumbent local exchange carrier (ILEC), and undermine the purpose of the Act to rely chiefly on the existing concentration and location of WorldCom customers to determine satisfaction of the geographic scope test.

WorldCom further claims that in D.99-09-069, the Commission committed error in relying on Pacific's characterization as to concentration and location of customers. WorldCom claims the record establishes, and if permitted, it would show with additional evidence, that WorldCom customers are widely dispersed over the physical reach of its switching, transport, and loop facilities. If the Commission is unclear of this conclusion based on the existing record, WorldCom asks the Commission to reopen the record to take additional evidence. Thus, WorldCom proposes that D.99-09-069 be amended to grant it tandem rate compensation.

III. Position of Pacific

Pacific argues that WorldCom had the burden of establishing: (1) the actual geographic areas served by its switches, (2) the geographic areas served by Pacific's tandems, and (3) that these areas are comparable. Pacific claims that WorldCom did not present facts showing where its customers were (other than

admitting some are collocated with its switches) or a map comparing the geographic areas served by its switches and Pacific's tandems. For three of its switches, there is not even a specific location in the record. Because of the lack of evidence in the record, Pacific argues that proper application of 47 C.F.R. § 51.711(a)(3) requires compensation at the end-office, not the tandem, rate.

Pacific points to the District Court Opinion in MCI Telecommunications v. Illinois Bell[1] as the basis for analyzing the sufficiency of evidence in this case to satisfy the geographic equivalency test. Pacific notes that the facts the court in MCI Telecommunications v. Illinois Bell found dispositive were: (1) While the record showed MCI had 50,000 customers in the area, there was no evidence of the location of the customers; (2) MCI's customers may have been concentrated in an area smaller than that served by an Ameritech tandem and, even if they were widely scattered, the question remained as to whether MCI just served the scattered areas or the entire area; and (3) MCI presented no map of its network.

Pacific claims that WorldCom failed to provide empirical evidence on these three points to show that WorldCom serves a geographic area equivalent to that of Pacific.

Pacific disputes WorldCom's claim that the geographic scope test should be applied by this Commission not by looking to the area WorldCom serves (or rather served at the time of the arbitration), but by looking at the "intended and potential physical reach of the competitive carrier's switch…." Pacific argues that the proper determinant of the geographic test is the area actually being served currently, not the area intended or potentially to be served. Pacific thus

[1] MCI Telecommunications v. Illinois Bell, 1999 WL 1893197 (N.D. III), p. 7.

argues that the Commission should uphold its adoption of the end-office rate and deny WorldCom's request for the tandem rate.

IV. Discussion

In view of the remand of the arbitration, we must reevaluate the soundness of our previous conclusions concerning the appropriate reciprocal compensation rate. The question of whether the end-office rate or tandem rate applies depends on whether WorldCom is found to serve a geographically equivalent area to that of Pacific. We must reevaluate our application of the geographic equivalency test, recognizing that certain factors that formed the basis for our conclusions in D.99-09-069 were found by the Court to not be relevant. In D.99-09-069, we found that WorldCom had not satisfied the geographic equivalency test. Although the Court struck certain of the factors we relied upon to reach this conclusion, it did not identify any additional positive evidence that would warrant a finding of geographic equivalency. Instead, the Court found that the factual testimony on geographic equivalency presented by WorldCom consisted primarily of conclusory statements that WorldCom's switch serves a geographic area comparable to a Pacific Bell tandem switch, and that little factual evidence was presented to the Court."

Moreover, the Court upheld the relevance of the Commission's reliance on evidence that WorldCom serves a number of its customers directly at its interconnection point to Pacific, rather than via its fiber rings. The Court found that this evidence relating to customer concentration was relevant in considering limitations in the geographic scope of the customer base served by WorldCom. In D.99-09-069, the Commission weighed this fact as evidence of a geographic service area for WorldCom that is not equivalent to that of Pacific. WorldCom did not present compelling evidence that was found to refute the conclusion that

its geographic reach was not equivalent to that of Pacific. Even by eliminating the factors that the Court found to be irrelevant in considering geographic equivalency, we still find the weight of evidence does not support the claim that WorldCom served an area geographically equivalent to that served by Pacific.

WorldCom presented three witnesses in the arbitration hearings that addressed the issue of tandem compensation. WorldCom presented evidence that its network technology and architecture differed substantially from that of Pacific. While Pacific employed an architecture using a large number of switches with relatively short copper-based loops, WorldCom employed equipment and design principles utilizing fiber optic rings and "SONET" transmission.[2] The difference in switch architecture between the two carriers makes it more difficult to assess geographic equivalency. Nonetheless, we engaged in a weighing of evidence and reached determinations in D.99-09-069 based on the information before us.

The testimony of WorldCom witnesses consisted primarily of conclusory statements asserting that WorldCom's switch serves a geographic area that is at least comparable to if not greater than the service area of any single Pacific tandem switch. WorldCom presented no evidence, however, concerning where its customers were physically located in relation to its switches, other than stating that some were collocated.[3] Under cross-examination, WorldCom witness Sigle was unable to provide information as to where other WorldCom customers were located in relation to switches serving them. WorldCom

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[2] Testimony of Sigle for WorldCom (Exh. 16 at 2-3).

[3] 5 RT at 312-313 (Testimony of Sigle for WorldCom). See also 5 RT 305-308.

presented no maps that would show comparable geographic areas served by WorldCom's switches with Pacific's tandem serving area. In D.99-09-069, we found the evidence that was presented failed support a finding that the WorldCom network architecture produces geographic equivalency to the serving area of Pacific Bell.

WorldCom argues that the "potential and intended reach" of its switches is equivalent to the geographic area of Pacific. Yet, if we were to base our determination merely on WorldCom's intentions or potential, there would be no point in inquiring into the actual concentration of WorldCom customers in relation to the switches serving them. Yet, the Court found relevant the fact that WorldCom serves a number of its customers directly at its interconnection point to Pacific, rather than via its fiber rings. Thus, it would at be odds with the standard of evidence found relevant by the Court if we were merely to focus on the potential or intended reach of switches rather than to consider evidence of actual concentration of customers served in relation to switch locations.

The evidentiary standard for evaluating geographic equivalency thus is not circumscribed merely by what WorldCom "intended" or what the "potential" for serving future customer growth could be. WorldCom does not sufficiently demonstrate that actual coverage of its switches during the period in question was equivalent to the geographic area served by Pacific.

WorldCom makes claims as to additional facts it would offer concerning the wide dispersion of its customers if it were allowed to present new evidence. Yet, there is no basis to reopen the record to hold additional evidentiary hearings at this point. Both parties had an opportunity to offer evidence during the arbitration hearings that led to D.99-09-069. The only reason that this issue is being revisited is because of the remand of the Decision from the Court. The

Court did not find that any additional factual evidence was required or improperly excluded from the record. Absent the Court remand, there would be no basis for reopening of the proceeding or opportunity for either side to present new evidence or to have additional hearings. The direction provided by the Court was merely to reconsider the Commission's previous conclusions concerning geographic equivalency in view of the revised scope of relevant factors.

On July 25, 2002, WorldCom filed a request for official notice of a Memorandum Opinion and Order issued by the FCC in connection with an arbitration before the Virginia State Corporation Commission, and provided attached pages from the FCC arbitration order relating to compensation for the transport and termination of calls. The excerpted pages from the document indicate that the order adopts the position that geographic equivalency as applied in that arbitration, did not require examination of the competitor's customer base, but merely a showing that the switch is capable of serving a geographically equivalent area.

Pacific filed a response on August 12, 2002, stating that while it does not object to official notice being taken, it does object to characterization of the document as an order of the FCC. Pacific states that the document is really a state arbitration handled by the Wireline Competition Bureau, but not a decision rendered by the full FCC out of a generic proceeding. Pacific further argues that while the document does address tandem compensation, the arguments and facts in the Virginia proceeding are distinctly different from those at issue here. Moreover, Pacific claims that concessions were made during that arbitration that are not present in this arbitration.

We shall deny the request of WorldCom to take official notice of the document attached to its pleading. In so doing, we recognize limited status of the document as a product of the Wireline Competition Bureau and not the full body of the FCC. As such we find that the Memorandum has little, if any, precedential value outside of the State of Virginia. While the reasoning articulated therein might be interesting in an illustrative context, the results reached in that order are not dispositive of this proceeding. Without a further detailed inquiry into the specific facts underlying the nature of the interconnection arrangements and network elements in the Virginia case, we cannot assume that the facts underlying that order would necessarily apply in the same fashion to the instant proceeding, or dictate a similar result.

In consideration of all of the factors discussed above, we conclude that the evidence found relevant by the reviewing court still provides sufficient basis to uphold our conclusion in D.99-09-069, finding that geographical equivalency has not been demonstrated. The weighing of relevant evidence in accordance with the Court remand does not change the overall result reached in D.99-09-069. The Court did not direct the Commission to consider any additional evidence in support of WorldCom's position nor did it find that the Commission erred in omitting consideration of any such evidence.

Thus because the record here does not support a change in the ultimate conclusion that WorldCom did not satisfy the geographical equivalency test during the period in question, WorldCom is not eligible for the tandem switching rate under the interconnection agreement. Thus, we uphold the findings and conclusions reached in D.99-09-069 that adopted the end office rate for purposes of reciprocal compensation payable to WorldCom under the interconnection agreement.

V. Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. No comments on the draft decision were filed.

VI. Assignment of Proceeding

Susan P. Kennedy is the Assigned Commissioner and Thomas R. Pulsifer is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. D.99-09-069 was remanded by the United States District Court, Northern District of California (Court) for further proceedings on the issue of the appropriate compensation rate to be paid by Pacific to WorldCom for terminating traffic.

2. The Court found that the Commission erred in D.99-09-069 when it required WorldCom to satisfy the "functional equivalency" test in order to receive the tandem switch rate, and that the Commission's consideration of the geographic equivalency test was based upon certain factors that were not relevant.

3. Although the Court struck down certain of the factors relied upon by the Commission with respect to geographic equivalency, it did not identify any evidence disregarded by the Commission that would prove geographic equivalency of service areas.

4. By ALJ ruling dated May 23, 2002, parties were provided notice of the reopening of the above-referenced docket and an opportunity to comment regarding whether the Commission should have reached a different result with respect to its adoption of the end-office switching rate in D.99-09-069, consistent

with proper application of the relevant legal criteria for adjudication as set forth in the Court's Remand Order.

5. For purposes of assessing geographic equivalency, the Court found relevant the fact that WorldCom serves many of its customers directly at its interconnection point to Pacific, rather than via its fiber rings; this service arrangement limits the geographic scope of the customer base that WorldCom serves.

6. WorldCom's network technology and architecture differed substantially from that of Pacific. While Pacific employed an architecture using a large number of switches, WorldCom fiber used optic rings and "SONET" transmission.

7. A determination of the geographic equivalency of the coverage of its switches based merely on WorldCom's intentions or potential would be at odds with inquiry into the actual concentration of WorldCom customers in relation to the switches serving them.

8. The Court remand, however, found that inquiry into WorldCom's customer concentration in relation to its switches was a relevant consideration in assessing geographic equivalency.

9. WorldCom presented no evidence concerning the actual physical distribution of its customer base in relation to its switches, other than stating that some were collocated.

10. In the evidentiary phase of the proceeding, WorldCom presented no maps that would show comparable geographic areas served by WorldCom's switches with Pacific's tandem serving area.

11. Even under a weighing of the evidence based on the relevant factors prescribed by the Court, surviving evidence supports the finding in D.99-09-069 that the two service areas were not shown to be geographically equivalent.

Conclusions of Law

1. In accordance with the standard prescribed by the Court, the findings reached in D.99-09-069 must be reevaluated in light of the remand and direction that certain factors relied upon in the Commission's decision were irrelevant in assessing the geographic equivalency test.

2. This Decision duly reconsiders the findings, conclusions, and order of D.99-09-069 concerning whether WorldCom's switches meet the geographic equivalency test, and as a result, whether reciprocal compensation should be based on the tandem or end-office switch rate.

3. Because the grounds upon which the Court remanded the case had only to do with the application of a legal test, there is no need to hold additional evidentiary hearings on factual disputes as to the geographic equivalency of the service area applicable to WorldCom's switches.

4. The pleadings filed by the parties in response to the ALJ ruling provide a sufficient basis on which to render a final decision on the appropriate reciprocal compensation rate to apply in accordance within the evidentiary standard articulated by the Court.

5. It would be speculative to assume geographic equivalency existed based merely on what might be intended or potentially possible without considering evidence of actual customer concentration.

6. Since WorldCom does not satisfy the geographic equivalency test consistent with the criteria articulated in the Court remand, there is no basis to amend the ultimate result reached in D.99-09-069. WorldCom should not receive

the tandem switch rate under the interconnection agreement, but rather, the end-office rate for purposes of reciprocal compensation.

O R D E R

IT IS ORDERED that:

1. Consistent with the U.S. District Court remand, the conclusions reached in Decision (D.) 99-09-069 are hereby upheld concluding that MCI WorldCom Communications, Inc. (WorldCom) switches fail to meet the geographic equivalency test for purposes of qualifying for the tandem switch rate.
2. WorldCom shall be entitled only to the end-office rate under the interconnection agreement that was arbitrated in Application 99-03-047 as determined in D.99-09-069.
3. The request is hereby denied to take official notice of the Memorandum Opinion and Order released July 17, 2002, by the Wireline Competition Bureau Chief of the FCC.
4. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.