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Decision 02-02-025 February 7, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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 Own Motion into Competition for Local Exchange Service.	Investigation 95-04-044 (Filed April 26, 1995)

O P I N I O N

I. Summary

By today's decision, we deny, in part, and grant, in part, the Petition of Metro One Telecommunications, Inc. (Metro One) and InfoNXX, Inc. (InfoNXX) to modify Decision (D.) 98-01-022. The Petitioners seek an order to require that incumbent local exchange carriers (ILECs) offer to provide access to their Directory Assistance (DA) databases to all independent third-party DA service providers under the lowest rates that apply where such access is furnished to any other service provider. In order to ensure that such access is, in fact, nondiscriminatory, petitioners ask that the ILECs be required to immediately file, under Section 252 of the 1996 Telecommunications Act (the "1996 Act"), any agreements, memoranda of understanding, or similar documentation of the prices they charge for DA access by other providers, including their affiliates and competitive local carriers (CLCs.)

By this decision, we deny, in part, the Petition for Modification. Although we do not find sufficient justification to grant the modification sought by Petitioners, we recognize that some action is warranted to address the more fundamental concern raised by Petitioners. Specifically, Petitioners point to the continuing delay in resolution of DA database pricing issues as a major factor underlying their Petition for Modification. We recognize that resolution of this issue has been deferred for some time, and appreciate the need to move forward with timely resolution of DA costing and pricing issues. We shall therefore adopt in this order a plan to move forward with the review and adoption of cost-based prices for DA services in this proceeding.

Although we have previously designated that DA costing and pricing were to be determined in the Open Access and Network Architecture (OANAD) proceeding, we now believe that a more expeditious process results from transferring DA cost and pricing issues from OANAD to the Local Competition Dockets. Accordingly, we direct that the costing and pricing determination for DA services for Pacific and Verizon shall be hereafter addressed in the Local Competition Dockets, rather than in OANAD, as provided for in this order. Until we determine those cost-based rates, however, we find it unwarranted to adopt the modification as proposed by Petitioners. For the present time, therefore, the previously adopted memorandum accounting requirement should continue in force.

Although review of the cost studies will provide a basis to determine overall cost-based rates for DA listing service, we conclude that the per-query component of DA rates should be eliminated without further delay on a prospective basis. We thus order the elimination of the per-query charge effective immediately. Once cost studies have been concluded, a true up shall be performed comparing all prior charges with the cost-based rates we adopt. To the extent that prior charges paid, including any past per-query charges, exceed amounts due under cost-based rates, refunds shall be ordered at that time for the prior overcharges.

II. Background

In D.97-12-042, the Commission ordered the ILECs to furnish independent third-party DA providers, such as Metro One and InfoNXX,[1] with nondiscrimatory access to DA listings. The Commission stated that "access to database listings for DA purposes should be the same for and between all competing providers, including third-party database vendors." Just prior to the issuance of D.97-01-042, the Commission determined in arbitration proceedings under § 252 of the 1996 Act that Pacific and Verizon should provide DA listings to CLCs "at the cost of the transfer media (electronic tape) plus reasonable costs for preparation and shipping of the media."[2] The Commission ordered that "the determination of appropriate cost recovery for the preparation and delivery of the information . . . be addressed in the [Open Access Network Architecture and Development] OANAD proceeding.[3]

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[1] In December 1999, InfoNXX's affiliate, InfoNXX Carrier, Inc., assumed responsibility for acquisition of data necessary for the provision of DA service. As a certificated competitive local carrier, InfoNXX Carrier has obtained such data from Pacific pursuant to an interconnection agreement rather than pursuant to D.97-01-042. Accordingly, InfoNXX's interest at this juncture is simply in obtaining a true-up of amounts paid prior to December 1999.

[2] D.97-01-042, fn. 13.

[3] D.97-01-042, Ordering Paragraph (OP) 8.

Following the issuance of D.97-01-042, both InfoNXX and Metro One sought to negotiate interim rates for access for Pacific and Verizon's DA databases. Pacific initially indicated that the rate would be $0.0059 per listing, which InfoNXX and Metro One indicated was acceptable.[4] However, before formal agreements could be established, the Commission allowed Pacific's Directory Assistance Listing Information Service (DALIS) tariff to go into effect, and Pacific thereafter insisted that it would furnish InfoNXX and Metro One with access to DA listings only in accordance with that tariff. The DALIS tariff had been proposed in an advice letter filed before D.97-01-042 was issued and established pricing in excess of the rate that Pacific had promised to InfoNXX and Metro One.

By D.98-01-022, the Commission determined that Pacific's tariff rates should be used on an interim basis, however, subject to true-up, notwithstanding the tariff's differences from the rates that Pacific was charging CLCs for access to the same data. The Commission concluded that this interim arrangement would not constitute undue discrimination because rates included in the interconnection agreements between Pacific, on the one hand, and MCI WorldCom Network Services, Inc. and AT&T Communications of California, Inc., on the other, were "part of an integral package of terms and conditions specifically negotiated by the parties," and [i]t would not be appropriate to arbitrarily single out one term of such interconnection agreements and apply that term to other competitors that were not bound by the comprehensive terms of

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[4] Comments of Metro One to OP 9 of D.97-01-042 Concerning Directory Listing Issues, August 15, 1997, at p. 4.

any one interconnection contract."[5] Moreover, the Commission concluded that while "the parties have raised valid questions over the reasonableness of the ILEC's directory-access rate," third-party DA service providers would not be harmed because amounts collected from them would be recorded in a memorandum account and then subject to a true-up, with any excess refunded with interest at the three-month commercial paper rate, once permanent rates were established.[6]

Petitioners now seek a modification of D.98-01-022 to require that within 30 days after the effective date of the order for modification, Pacific and Verizon be required to re-compute charges for DA data previously furnished to third-party DA service providers based on the lowest rate, in effect at the time such data was provided, that they charged any other provider, including without limitation, the ILEC itself, its affiliates, and CLCs, and to refund to third-party DA providers the difference between the re-computed charges and the amounts actually paid by them

The Petitioners claim that the requested modification of D.98-01-022 is warranted because it has now been three years since D.98-01-022 was issued and four years since D.97-01-042 was issued while no resolution of the DA database pricing issue appears on the horizon. In the meantime, Pacific has had full use of the funds paid by Metro One, InfoNXX, and other independent third-party DA service providers pursuant to D.98-01-022 and continues to charge such providers the same tariff rates for DA data. Unless D.98-01-022 is modified,

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5 D.98-01-022, mimeo., p. 5.

6 D.98-01-022, mimeo., pp. 5-7.

petitioners claim third-party DA service providers will continue to suffer undue economic hardship and be unfairly disadvantaged in the marketplace until such time if ever, that final costs and prices for DA database access are approved.

Petitioners also point to the Directory Listing Order issued by the Federal Communications Commission (FCC) on January 23, 2001[7] in support of their Petition. In the Directory Listing Order, the FCC held that third-party DA service providers who are acting as agents or independent contractors for CLCs, or who provide call completion services, are entitled to receive access to DA database listings under the same rates, terms, and conditions that apply to CLCs. ILECs are also required to file agreements establishing rates, terms, and conditions for DA data basis access pursuant to Section 252 of the 1996 Act and third-party DA service providers meeting the FCC's criteria are entitled to opt into such rates, terms, and conditions.[8] The FCC has not yet determined whether these same rules must be extended to include DA database access afforded to third-party DA service providers who are neither carriers nor acting on behalf of carriers. Nonetheless, Petitioners argue that it is discriminatory not to require that the same rates, terms, and conditions be extended to all DA service providers.

Pacific and Verizon California Inc. (Verizon) filed responses in opposition to the Petition on March 19, 2001. With the approval of the ALJ, Petitioners filed a third-round reply on March 28, 2001. On June 12, 2001, a draft decision on the

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[7] *Provision of Directory Listing Information under the Telecommunications Act of 1934, as Amended,* CC Docket No. 99-273, First Report and Order, FCC 01-27 (released January 23, 2001).

[8] *Id.* at para. 36.

petition was mailed to parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules and Practice and Procedure. The draft decision declined to grant the full modification sought by Petitioners, namely to reduce ILEC charges for services furnished to third-party DA providers to a level equal to the lowest rate charged to any other provider. Instead, the draft decision found that a more limited modification in DA rates was warranted. This more limited modification provided for some reduction in DA rates, but not as much as was sought by Petitioners. The draft decision held that Pacific should be required to amend its tariff to exclude the five-cents-per-query charge. Comments on the draft decision were filed on July 2, 2001, and reply comments were filed on July 9, 2001. LSSI Corp. (LSSI)[9] filed separate comments on the draft decision on July 18, 2001.

On June 28, 2001, Pacific filed a motion for permission to file detailed comments on a proposal in the draft decision served on June 12, 2001, regarding the Petition for Modification of D.98-01-022. Pacific argued that although the draft decision proposed to order Pacific to modify its tariffed rate for access to DA listings to remove the five-cents-per-query charge based on the Arbitrator's Report in Pacific's arbitration with AT&T, this holding was not requested as part of the Petition. Pacific argued, therefore, that it had no opportunity to comment on this proposal.

Pacific, therefore, requested to file detailed comments on the draft decision's proposal to modify Pacific's tariff. Specifically, Pacific sought to brief

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[9] LSSi concurrently filed a motion to enter an appearance and to file comments on the draft decision. LSSi is a switchless reseller of telecommunications services that purchases DA listings from Pacific, and therefore has a continuing material interest in the outcome of this proceeding. No party objects to LSSi's motion to enter an appearance and file comments. Accordingly, the motion is granted.

related findings of this Commission and the Federal Communications Commission (FCC), including the FCC's findings that directory listing information is not an Unbundled Network Element (UNE), and that fair prices for subscriber listings are $.04 for base file listings, and $.06 for updates.

Pursuant to an Administrative Law Judge (ALJ) Ruling issued July 3, 2001, granting Pacific's motion, parties were permitted to file further comments on the issue of whether Pacific should be required to amend its tariffs to exclude the per-query charge from its tariffs. Comments were filed on July 18, 2001. The draft decision was withdrawn from the Commission's agenda pending review of parties' supplemental comments on this issue. A revised draft decision has now been prepared, incorporating a review of parties' further comments filed on July 18. Parties were also provided the opportunity to file comments on revised draft decision.

Pacific claims that the modifications Petitioners have requested are contrary to law. Pacific argues that the FCC did not hold that ILECs must give a DA provider acting as an agent for a CLEC access to DA listing information at the lowest price charged to any other CLC. Instead, the FCC held that the DA provider-agent is entitled to access only at the price contained in its carrier-principal's interconnection agreement. Pacific claims that Petitioner's requested modification to D.98-01-022 is, therefore, contrary to the FCC's January 23 Order, and should be denied. Moreover, Pacific argues that since petitioners are not entitled to the lowest rate charged any other CLC, their request for a refund using such a number as a benchmark is improper, and should be rejected as well.

Pacific also claims it is impossible for the Commission to determine whether Petitioners even fall within the scope of the FCC's January 23 Directory Listing Order because Petitioners have failed to present any evidence that they are in fact DA provider-agents, that their carrier principals have authorized them to obtain DA listing information on their behalf, or that Petitioners have paid different rate than their carrier-principals.

Both Pacific and Verizon also claim that Petitioners here have failed to comply with Rule 47(b) requiring factual allegations to be supported with citations to the record. For example, Petitioners allege that at some point Pacific "indicated that the rate [for DA access] would be $0.0059 per listing."[10] Later, Petitioners allege that they are "third-party DA service providers who are acting as agents or independent contractors for CLCs."[11] Pacific claims that bare allegations such as these are insufficient to support a petition for modification.

Verizon argues that Petitioners have failed to explain why they waited until over three years after the issuance of D.98-01-022 to file the petition. Rule 47(d) requires that if more than a year has elapsed since the effective date of the decision to be modified, the Petitioner must explain why the petition could not have been brought within one year of the effective date. Ordinarily, petitions allege factual or legal circumstances which have changed since the issuance of the decision and which support the requested modification. Verizon claims, however, that other than the passage of time, Petitioners here allege no such circumstances. Not only have Petitioners waited over three years from the issuance of the decision they seek to modify, but they have waited well over a

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[10] Petition for Modification, p. 2. Pacific claims that not only is this allegation unsubstantiated, but is contrary to the prices included in Pacific's advice letter establishing the DALIS tariff.

[11] *Id.*, p. 4.

year after submission of cost studies and commentary in the process intended to set permanent rates to replace the interim rates they now find objectionable.

Verizon also opposes the Petition, arguing that it ignores subsequent events and rulings which have taken place and misapplies existing decisions. Verizon believes D.98-01-022 already provides substantially the same lawful relief that Petitioners seek (i.e., a true up of interim rates). Verizon claims the true up mechanism already provides adequate protection to DA providers and that mere delay does not justify making the changes the Petitioners seek.

III. Discussion

A. Procedural Compliance

We conclude that Petitioners satisfy the procedural requirements of Rule 47 as a basis to have their Petition considered on its merits. Rule 47(d) requires that if a petition is filed more than one year after the effective date of the decision proposed to be modified, petitioners must explain why they couldn't file within the one-year period. Although the Petition was filed over one year after the effective date of D.98-01-022, Petitioners have provided an explanation why the Petition was not filed within that one-year period. As noted in their pleading, Petitioners explain that during that first year, it was not expected that the ultimate duration of delay in adopting final OANAD rates would exceed three years. Also, Petitioners point to the more recent issuance of the FCC Listing Order as having changed the relative positions among competitors, thereby claiming further reason to justify a modification to D.98-01-022.

We also find the Petitioners have met the requirements of Rule 47(b) in terms of providing citations to the record. Although Pacific challenges the accuracy of the DA rate cited by Petitioners, the Petition does nonetheless provide a citation from its filed comments for the claimed rate. To determine procedural compliance, we need not resolve what the correct rate actually is on a substantive basis. It is enough that we confirm that a citation was provided, albeit subject to challenge on a substantive basis.

Regarding the other disputed allegation, whether Petitioners are DA agents of CLCs, the Petitioners provided a relevant citation in their reply to the opposition of Pacific and Verizon, referencing their filed 1997 comments in this proceeding. In any event, the question of whether the Petitioners are DA agents of CLCs is not directly relevant to the proposed modification sought in their petition. Petitioners expressly state that they are not seeking relief under the federal rules. Therefore, it is not necessary to confirm whether or not the Petitioners are agents of CLCs in order to adjudicate the Petition. We shall therefore proceed to evaluate the petition for modification on its substantive merits.

B. Substantive Merits

Petitioners present two general arguments to support their claim that D.98-01-022 should be modified. First, Petitioners claim the continued passage of time with no final rates has led to a cumulative burden on DA providers that has become excessive. Second, Petitioners claim there are discriminatory effects on DA providers that are not covered by an agent/principal relationship with a CLC as prescribed in the FCC 's Directory Listing Order. We address these arguments below.

1. Interim Arrangement is Not Discriminatory

First, Petitioners point to the continuing passage of time since we first adopted the memorandum accounting requirement in January 1998, arguing that the Commission never anticipated that more than three years would elapse with no final rates in place. We recognize that the continuing passage of time with no final DA rates in place increases the risk that third-party providers are paying rates that may be overstated. The competitiveness of the marketplace for DA services will best be promoted in an environment where rates are aligned with costs. The ultimate solution to the problem posed by Petitioners will be for the Commission to adopt final rates for DA provisioning based upon cost studies in the OANAD proceeding. We remain committed to conducting these cost study proceedings in the interests of promoting a competitive marketplace for DA services. Unfortunately the Commission's resource constraints have precluded moving forward with proceedings on those cost studies and adoption of final rates for DA services up to the present time. Nonetheless, although we are sympathetic to the general concerns expressed by Petitioners, we find that the remedy proposed by Petitioners is not appropriate for the reasons set forth below. As an alternative to the Petitioners' proposed solution, we shall address the underlying concern which give rise to the Petition, namely, the delay in setting cost-based DA rates.

We originally adopted the requirement for memorandum accounting of revenues collected under the ILECs tariffed rates for DALIS, subject to true up, to address the uncertainty as to what rates would ultimately be adopted in the OANAD and as to when those rates would be established. By making the rates provisional and subject to true up, we provided protection to DA providers that they would be made whole for any charges that were subsequently determined to be excessive.

When we adopted the memorandum accounting requirement, however, we made no predictions concerning how long the interim rates would last or when final rates would be adopted. The uncertain duration of the interim arrangement was taken into account in adopting D.98-01-022, and we did not set any time limit on how long the interim arrangement would have to remain in effect. We do not consider the interim arrangement to be discriminatory because it makes provision for a true up and refund of any overcharges to DA providers once final rates are established.

The modification sought by Petitioners would not resolve the uncertainty that continues to exist regarding the ultimate level of rates that will be adopted. In its UNE Remand Order,[12] the FCC relieved ILECs from the obligation to offer DA as a UNE and further ruled that the Act's cost-based UNE pricing standards do not apply to DA. These developments, if anything, create further uncertainty regarding what final levels of DA prices will be set, and how much they will differ from current interim rates. The Petitioners have failed to provide any alternative interim rate that would lessen the uncertainty as to what final rates will be. Therefore, the passage of time since the issuance of D.98-01-022 does not provide a basis to justify changing interim rates in the manner proposed by Petitioners.

Moreover, the Petitioners' proposed change in the interim rate would not be consistent with the requirements of recent court decisions. Petitioners propose that the ILECs should establish a new interim rate equal to the lowest amounts that were charged to any other provider for DA access, including without limitation, an ILEC affiliate or a CLC during any period since January 1997 when the Commission issued D.97-01-042. Yet, such an approach would be inconsistent with recent court decisions interpreting the "pick-and-choose" provisions of interconnection agreements. Under recent court decisions, an ILEC is entitled to require a requesting carrier to accept all terms that are "legitimately related" to the desired term. (AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 119 S.Ct. 721, 738 (1999).) Petitioners' proposed change, however,

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[12] *Implementation of the Local Competition Provisions of the Telecommunications Act*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3891-92 (1999) (UNE Remand Order).

ignores the requirement to link lower rates to other "legitimately related" terms contained in the pertinent agreements with CLCs prescribing those rates. Instead the Petitioners seeks to obtain the lowest rates offered any provider "without limitation." Therefore, we cannot adopt the proposed modification, since it would remove necessary limitations linking "legitimately related" terms to any rates that might be available to DA providers.

As a second basis underlying their claimed justification for modification, Petitioners point to a purported deficiency in the Federal Listing Order. Petitioners claim the federal order has "left out" competitors that operate on a "stand-alone" basis without an agent-principal relationship with a CLC. Petitioners claim such stand-alone DA providers are not yet able to obtain data under the federal rules applicable to carriers' "agents."

Even assuming that federal rules did not provide sufficient authority for stand-alone DA providers to obtain access to DA data, our own state-adopted rules already mandate that all third-party DA providers must be granted access to DA databases of the ILECs. Our rules have not "left out" any DA providers in their coverage under our rules. We adopted the requirement in D.97-01-042 for all third-party DA providers to be granted access to DA data on a nondiscriminatory basis, and no further modification to a Commission decision is necessary simply to reiterate a requirement that already exists.

Petitioners provide no basis to conclude that our current interim treatment results in unfair discriminatory treatment of DA providers merely because they are not agents of CLCs. As noted above, the FCC Directory Listing Order issued on January 23, 2001 held that a third-party DA provider who acts as an agent for a CLC is entitled to receive access to DA database listings under the same terms contracted by its CLC principal. Petitioners' proposed modification to D.98-01-022 would appear to result in a conflict with the FCC Order in that the Order specifically limited a DA provider's rights to obtain the rate only of its CLC principal. Under the federal rules, a DA provider is not entitled to a lower rate that might be offered to any other DA provider with a different CLC principal. The Petitioners' proposed modification would ignore the relationship between the DA provider and its CLC principal, but instead would enable any DA provider to demand whatever rate was offered to any DA provider or CLEC, irrespective of whether there was any agent-principal relationship or not.

While we are not necessarily prevented by federal rules from adopting additional state rules, if warranted, we need not reach that issue here. Independent of federal rules, we find no basis to conclude that granting the petition is the proper course of action to achieve nondiscriminatory access to DA listings. We have already concluded in D.98-01-022 that the provision for ultimate true-up of interim rates reasonably protects the interests of all parties involved. The changes proposed in the Petition for Modification do not offer an alternative that results in a better balance of interests than the status quo.

Finally, there is no need to modify D.98-01-022 in order for DA agents to avail themselves of the contractual rate provisions of their CLC principal. The federal rules already provide for that. Petitioners have indicated that they are already DA agents of CLCs, and therefore already have rights to the same rate as their CLC principal. Petitioners expressly state they are not seeking any relief available to them under federal rules through the proposed modification of D.98-01-022. Accordingly, we find no basis justifying a modification of D.98-01-022 on the terms proposed by Petitioners.

2. Determination of Cost-Based Prices for DA Listing Services

One of the major concerns underlying Petitioners' requested relief is that fact that the determination of costs and prices for DA listing services has been significantly delayed beyond the time originally anticipated in D.98-01-022. While we deny the specific modification sought by Petitioners, we recognize the validity of Petitioners' underlying concerns regarding the need for cost-based DA rates. We shall therefore make provision in this order for moving forward with the determination of cost-based prices for DA services. By moving forward expeditiously to set cost-based prices for DA services, we will address the underlying concern voiced by Petitioners, namely that delay in setting cost-based DA prices has caused them competitive disadvantage.

We note that the most recent DA cost studies for Pacific and Verizon were last submitted to the Commission in 1999. Pacific filed its DALIS cost study on April 6, 1999, as revised on August 18, 2000, submitted in the OSS / NRC / Changeover Phase of OANAD. Verizon (then known as GTE California, Inc.) submitted a DA cost study on April 6, 1998, which it last updated on September 15, 1999. We recognize that some of the assumptions underlying the DA cost studies have no doubt grown inaccurate or outdated over the intervening period. Therefore, we shall make provision for parties to update those studies to reflect more contemporary conditions. We shall also make provision for parties to file comments in response to the updated cost studies. We shall direct the ALJ to issue a procedural ruling scheduling a process for the updated studies to be filed and for comments thereon. We shall then be positioned to adopt cost-based prices for DA services after the filing of comments. We can then determine the need for any true ups of past charges and promote a more competitive marketplace for DA services on a prospective basis.

3. Per-Query Charge

As noted above, the Draft Decision previously mailed in this matter included a provision to revise Pacific's DALIS tariff to immediately eliminate the per-query charge. As a basis for that revision, we took note of the Final Arbitrator's Report in A.00-01-022 in the matter of the interconnection agreement between Pacific and AT&T Communications, Inc. (AT&T).

The Final Arbitrator's Report, issued June 13, 2000, in A.00-01-022 noted that Pacific's DALIS tariff includes two elements: (1) a charge of two cents per listing for each separate listing that Pacific furnishes to the DA provider, plus (2) a charge of five cents per listing each time the provider gives out DA listing information to one of its customers. In the arbitration proceeding, AT&T stated that it had no mechanism in place to track the number of times that it gave out DA information from a listing provided through Pacific's DALIS tariff (which was one of hundreds of databases on which AT&T relied). AT&T stated that it had never paid the five-cents-per-query charge, and that the requirement for such a charge is entirely unworkable in practice. In its comments in the arbitration, Pacific offered nothing to refute AT&T's claim that it did not pay the five-cents-per-query charge. The Arbitrator adopted AT&T's position, excluding the five-cents-per-query charge in setting the amount that AT&T was to pay for access to Pacific's DA listings.

The exclusion of the five-cents-per-query charge in the arbitration was not based upon any offsetting tradeoffs or concessions by AT&T. The exclusion of the five-cent charge was not linked to any other "legitimately related" terms. Instead, the Arbitrator adopted the exclusion of the per-query charge based simply on the finding that this provision of the tariff was unenforceable.

Not only was AT&T unable to track DA queries that it accessed from Pacific's database listings, but Pacific was likewise found to be unable to enforce compliance based on the number of DA queries made by AT&T's customers from Pacific's database.

In its comments on the draft decision mailed on July 12, 2001, Pacific expressed objections to the Commission's reliance on the AT&T Arbitration proceeding as a basis to adopt generic rules for all DA providers. Pacific claims that there is no evidence that the facts that were applicable to AT&T are applicable to other telecommunications carriers or to purchasers of DA listings that are not telecommunications carriers. Pacific also argued that it may very well have changed its strategy in the AT&T arbitration had it known that the result would be applied so broadly to all parties that contract with Pacific for DA listings. Pacific argued that the draft decision's reliance on the Final Arbitrator's Report from the AT&T arbitration was arbitrary and improper.

By ruling dated July 3, 2001, we placed Pacific and other parties on notice of our intention to consider revising DA charges on a generic interim basis to exclude the five-cents-per-query charge as a way to address the concerns raised by Petitioners. In order to determine if there were any valid reasons not to eliminate the per-query charge for other third-party providers, the ruling provided Pacific, as well as other parties, an opportunity to offer comments on this issue.

In its comments on the revised draft decision issued on November 8, 2001, Pacific continued to object to the elimination of the five cents per query charge. Pacific argued that the revised draft decision applied an improper legal standard by placing the burden of proof on Pacific to show why the current practice should be continued, rather than placing the burden on the Petitioners to show why the current practice should be changed.

If Pacific is unable to independently track a per-query charge in the case of AT&T, there is a question concerning the extent to which Pacific can identify any cost or independently track per-query transactions for other DA providers utilizing listings under the terms of Pacific's DALIS tariff.

As previously noted, third-party DA providers acting as agents for CLCs, or providing call completion services, are entitled to the same rates, terms, and conditions for DA service as applies to the CLCs pursuant to the FCC's January 23, 2001 Directory Listing Order. Accordingly, to the extent that CLCs such as AT&T have been relieved of paying a per-query charge for DA services, the same relief from the per-query charge applies to any other DA provider that is an agent of such a CLC. Likewise, any DA provider that is also a telecommunications carrier is subject to the nondiscrimination provisions of the January 23, 2001 FCC order. Thus, such a DA competitor that was also a telecommunications carrier could not be charged a different rate for Pacific's DA listing service, including the payment of a per-query charge, than was charged other telecommunications carriers on a discriminatory basis.

Yet, for DA providers that are not telecommunications carriers or agents thereof, the ability to eliminate the per-query charge under the provisions of the FCC's January 23, 2001 order would not automatically apply. This Commission has the independent authority, however, to suspend the per-query charge for such DA providers that are not otherwise covered under the provisions of the January 23, 2001 Directory Listing Order, and we hereby exercise that authority, as we prescribe below.

Since we have made provision to move forward with consideration of the costs of DA database access, that cost review process is the appropriate forum in which to determine what cost, if any, is associated with the usage of the DA database, including per-query costs, if any. Past arbitrations have examined the per-query charge in the context of transactions between the specific carriers involved, but we intend to conduct a generic DA cost inquiry. As part of this inquiry, we shall examine Pacific's ability to track costs of querying the database in relation to DA service providers, generally. In view of Pacific's failure to show that it was able to track the charge for AT&T, we believe that a valid question has been raised concerning the extent to which Pacific can track and document any per-query costs for other vendors. We intend to develop a record on this question as part of our determination of cost-based DA rates in this proceeding.

Nonetheless, even though we shall review the costs of provisioning DA services on a generic basis, we believe an immediate suspension of the per-query charge is warranted on a generic prospective basis applicable to all DA vendors. We therefore direct Pacific to amend its DALIS tariff to remove the per-query charge, effective within 10 business days of this order.

Through the true up process, Pacific will still be able to recover valid costs for providing DA services ultimately found to exist. Yet, a reasonable balance of the competing interests of the parties warrants a suspension of the per-query charge on a prospective basis pending the completion of cost studies. Up until now, the continued passage of time with no cost studies has worked to the competitive disadvantage of third parties that have had to pay DA rates that have not been tested on a cost basis. The time has now come for some of this risk of delay to be shouldered by the ILECs, pending the finalization of costs and prices. The prospective suspension of Pacific's per-query charge serves this purpose. The suspension of the per-query charge will leave charges in place only for the two-cents per listing allowance.

We will examine whether there is a cost basis for a per-query charge, as well as other claimed costs, in reviewing the costs of DA service. To the extent that past costs paid by DA providers exceed the cost-based rates that we subsequently find to be justified for DA service, we shall at that time promptly order Pacific to refund any overpayments, including past per-query charges, that third parties have paid in prior periods for DA service retroactive to the date of the Act.

By limiting DA charges only to the two cents per-listing allowance in Pacific's tariff, competitors for DA listing access will be able to obtain the same rate that was obtained by AT&T, a major CLEC. Thus, DA providers will only have to pay a two cents per listing charge, but entirely avoid the five-cents-per-query charge that was previously required under Pacific's DALIS tariff. We believe that an interim lowering of the DA rates to remove the per-query charge will constitute a positive step in the direction of competition for DA services, providing interim relief to DA providers until final DA rates can be determined.

4. Price Categorization of Directory Assistance Listing Services

As a context for moving forward with costing and pricing of DA services, it is appropriate to confirm the status of such services for purposes of competitive pricing flexibility. The provision of DA database listings service to third parties was determined to be a Category II service in D.96-03-020.[13] Yet, on August 21, 1996, Advice Letter 18443 was filed by Pacific in which it sought to file draft tariff sheets for a “new service” referred to as “Directory Assistance Listing Service.” Under this service, Pacific would sale customer records contained in its DA database to third parties for their provisioning of DA service.

[13] Under the Commission’s pricing rules, Category II services are considered to be partially competitive, subject to cost-based price caps, while Category III services are considered to be fully competitive, and not subject to cost-based price caps.

In its advice letter, Pacific proposed to treat this service as an above-the-line Category III service. The Commission's Telecommunications Division Director sent a letter to Pacific dated December 1, 1996, informing them that their advice letter was approved.

Notwithstanding the December 1, 1996 letter sent by staff of the Commission, there was never any formal Commission resolution or decision reversing the Commission's determination in D.96-03-020 that the provision of DA services was properly classified as a Category II service. As we now move forward to set prices for DA services, we note that the treatment of DA services as a Category III service is at odds with the findings of the FCC in its DA First Report and Order, cited above, stating that ILECs "continue to maintain a near total control over the vast majority of local directory listings that form a necessary input to the competitive provision of directory assistance…"[14] Pacific's provisioning of services under its DALIS tariff thus is not a fully competitive service, consistent with the FCC determinations.

Accordingly, whatever previous assumptions may have been as to categorization of DA services for pricing purposes, we take this opportunity to clarify that DA provisioning by Pacific to third parties is appropriately classified as a Category II service, rather than as a Category III service. We hereby place parties on notice that we consider such DA service to be a Category II service, and shall proceed with costing and pricing of it on that basis. To the extent that Pacific's DALIS tariffs presently characterize the service as Category III, we

[14] FCC DA First Report and Order, para. 3

direct Pacific to file amended tariff sheets, clarifying that it is a Category II service.

IV. Pacific's Proposal to Apply Directory Publishing Listing Rates to DA Access

In its comments filed on July 18, 2001, pursuant to the July 3, 2001 ALJ ruling, Pacific offered an alternative proposal for adopting final DA access rates now in this proceeding rather than further deferral of the pricing issue to the OANAD proceeding. Pacific proposed that the Commission adopt final rates for the provision of DA listing service equal to the rates found “presumptively reasonable” by the FCC for access to subscriber list information in its "Third Report and Order Regarding the Provision of Directory Listing Information" issued on September 9, 1999.[15] “Subscriber list information” includes listed subscribers’ names, addresses and telephone numbers as well as the heading under which businesses are listed in the yellow pages. In its Order, the FCC directed carriers to provide subscriber list information to requesting directory publishers at the “presumptively reasonable” rates of $0.04 per listing for base file information and $0.06 per listing for updated list information. In determining that the $0.04/$0.06 per listing rates were presumptively reasonable rates for access to subscriber list information, the FCC considered both “the

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[15] In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Provision of Directory Listing Information under the Telecommunications Act of 1934, As Amended Third Report and Order in CC Docket No. 96-115, Second Order on Reconsideration of the Second Report and Order in CC Docket No. 96-98, and Notice of Proposed Rulemaking in CC Docket No. 99-273, 14 FCC Rcd. 15550, FCC 99-227 (rel. Sep. 9, 1999) (“FCC Order”).

directory publishers' interest in obtaining subscriber list information at prices that facilitate competition in directory publishing; and the carriers' interest in obtaining fair compensation for their subscriber list information."[16]

Pacific argues that there are similarities inherent in the provision of subscriber list information and DA listing information that make it appropriate for the California Commission to adopt a similar pricing schedule for each. Pacific also points to the FCC's finding that competition exists both in the provision of operator services and directory assistance as a basis to adopt market-based rates.

InfoNXX objects to Pacific's proposal to set rates for DA listings based upon the FCC rates for directory publishers, arguing that such an approach would be inconsistent with state law and policy. InfoNXX notes that the FCC's pricing determination only extends to listings used by directory publishers, but does not extend to listings for DA database access. LSSI also filed comments in opposition to the proposal of Pacific to set DA database access rates equal to the rates that the FCC found "presumptively reasonable" for accessing to listings provided to directory publishers.

We decline to adopt the recommendation of Pacific that the final rates for the provision of DA service be set at the same rates that were found "presumptively reasonable" by the FCC for access to subscriber list information in its Third Report and Order. The FCC has specifically declined to adopt the rate methodology for subscriber list information used for directory publishing as a basis for pricing DA services. The FCC concluded that the pricing structure for

[16] FCC Order § 84.

DA access services “should remain distinct from that of subscriber list information” developed pursuant to the rate methodology set forth in Section 222(e).[17]

[17] *In the Matter of Provision of Directory Listing Information Under the Telecommunications Act of 1934, As Amended*, CC Docket No. 99-273, First Report and Order, FCC 01-27, § 37 (rel Jan. 23, 2001) ("FCC DA First Report and Order").

As the FCC stated in its DA First Report and Order:

> "Essential to a competitor's ability to provide directory assistance is access to an accurate local directory assistance database. [footnote omitted] Because incumbent LECs derive their local directory assistance database through their service order processes, they continue to maintain a near total control over the vast majority of local directory listings that form a necessary input to the competitive provision of directory assistance…. The directory assistance market will not be fully competitive as long as incumbent LECs have the ability to leverage their monopoly control of their DA databases into market dominance." [18]

Accordingly, in the interest of assuring that DA competitors are not disadvantaged by the ILECs' ability to charge excessive rates for DA access, we decline to apply the rate structure as proposed by Pacific.

Moreover, while it is not precedential, we note that in the Pacific / MCI Arbitration application,[19] Pacific made a pricing proposal that is similar to the one it has offered in this proceeding. Yet, Pacific's proposal was rejected in the Final Arbitrator's Report in that proceeding, noting that the rates for directory publishing cannot be used to justify the rates for DA access because those services are statutorily separate and distinct. Consistent with the distinctions between directory publishing and DA provisioning as made in the FCC's DA First Report and Order, we likewise find no basis here to adopt Pacific's proposal to set DA rates equivalent to those for directory list information provided for published directory service.

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[18] *Id.*, § 3.

[19] Application by Pacific Bell Telephone Company for Arbitration of an Interconnection Agreement with MCImetro Access Transmission Services, LLC (A.01-01-010)

The fact that the FCC has determined that DA database access is not an unbundled network element does not preclude this Commission from independently proceeding to establish cost-based rates for DA database access as a matter of state law and policy. In conjunction with its comments filed on July 18, 2001, Pacific submitted confidential cost data under seal relating to its cost of providing DA listings previously filed in the OANAD proceeding as a reference for evaluating its pricing proposal.[20] Yet, since we have previously indicated that the costs and prices of DA provisioning will be addressed following further substantive review in this proceeding, it would be premature to draw any inferences at this juncture regarding PG&E's cost data. Accordingly, we make no judgment concerning the reasonableness or reliability of the data presented under seal by Pacific at this point, nor do we have any basis to rely on such data in disposing of the instant petition for modification.

V. Beginning Point for True-Up

Parties indicate conflicting interpretations concerning the point in time when the true up of DA rates is to take effect. We disagree with Verizon that once a true up is ultimately made, it should only apply to revenues collected subsequent to January 1998, the issuance date of D.98-01-022. Verizon claims that rates in effect at the time that D.97-01-022 was issued in January 1997 are "presumptively reasonable" and cannot be subject to refund now. Yet, in D.97-01-022, we provided no basis to infer that then-existing DA rates were

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[20] Pacific concurrently filed a motion in accordance with Commission General Order 66-C for leave to file under seal certain cost information designated as proprietary included in its comments filed on July 18, 2001. No party objected to Pacific's motion to file the proprietary materials under seal. Accordingly, the motion is granted.

deemed presumptively reasonable. Instead, we noted that the Association of Directory Publishers (ADP) had raised questions concerning the reasonableness of Pacific's tariffed rate for directory access. We expressly stated that by permitting Pacific's tariff to become effective, we had not ruled out the opportunity for to pursue any remaining reasonableness issues over the tariff. We then provided an opportunity for parties to file comments on this issue. The fact that the actual decision adopting memorandum accounting was not issued until January 1998 did not resolve the reasonableness issues that had previously been raised by ADP. In OP 4, of D.98-01-022, we authorized the memorandum accounts to apply retroactively to the effective date of Pacific's directory access tariffs.

In D.98-06-027, the Commission modified OP 4 of D.98-01-022, to state that memorandum accounts should retroactively reflect revenue billed since the effective date of the 1996 Telecommunications Act rather than the effective date of carriers' tariffs. Pacific further interprets D.98-06-027 as holding that D.98-01-022 was not intended to authorize a retroactive true up. Pacific cites language from OP 4 of D.98-01-022 which states:

> "At the present time, we have simply ordered the establishment of memorandum accounts to record billings to third party vendors…. We have not issued any order regarding rates or the disposition of the money tracked in the accounts."

Pacific claims that nothing in D.98-01-022 authorizes the Commission to apply new rates retroactively. INFONXX disputes Pacific's interpretation, arguing that the ILECs never had the unilateral right to set rates, much less nonrefundable rates, for DA database access at any time following the date that D.97-01-042 was issued. LSSI likewise argues that Pacific ignores the fact that a true up is the exact function for which the memorandum account was established. LSSI claims that D.98-01-022 effectively provided notice to Pacific that the funds were subject to true up, and that a determination that existing rates are improper and unreasonable appropriately triggers the need for true-up.

We find that the language in D.98-06-027 is clear that DA rates were to be retroactively trued up to the effective date of the Act. The modification made in OP 1 of D.98-06-027 did not delete the language in D.98-01-022 indicating that DA charges would be subject to retroactive true up, but simply revised the starting point for the true up to begin with the effective date of the Act. Nothing in D.98-01-022 otherwise reversed or disturbed our previous findings in D.97-01-042 that the function of the memorandum account was to provide for a retroactive true up once final DA rates were determined. The fact that D.98-06-027 indicated that an order had not yet been issued regarding our disposition of the DA funds did not negate our prior holding in D.98-01-022 that that DA charges would be subject to true up once any such final disposition was made.

Accordingly, Pacific and Verizon shall be required to perform a true up of the amounts they have previously charged for DA access retroactive to the effective date of the Act, and to rebate DA providers for any overcharges that may result based on the cost-based rates that we shall subsequently adopt.

Findings of Fact

1. In D.98-01-022, the Commission required that memorandum accounts be established to track revenues billed for directory access services rendered to third-party competitors in order to permit a later true up and refund of any overcharges once final rates were established in the OANAD proceeding.

2. Almost four years have passed since the memorandum accounting requirement was adopted, and final rates have yet to be adopted in the OANAD proceeding.

3. The original reasons the Commission relied upon as a basis to establish the memorandum accounts and provisional rates have not changed.

4. The passage of almost four years since D.98-01-022 was adopted has not lessened the uncertainty as to what the level of final rates will be or when those rates will be adopted in OANAD.

5. The interim arrangement adopted in D.98-01-022 does not treat DA providers in a discriminatory manner, since provision is made for a true up and refund of any overcharges to DA providers once final rates are established.

6. Petitioners' proposed modification to D.98-01-022 ignores the legal requirement to link lower rates to other "legitimately related" terms contained in the pertinent agreements with CLECs prescribing those rates.

7. Although Petitioners have not justified the modifications sought through their petition, they have raised a valid concern regarding the adverse effects on competition of continued delay in adopting cost-based prices for DA listing service.

8. There is good cause for expeditiously moving forward with review and adoption of cost-based rates for DA listing service, and for transferring that issue from the OANAD to the Local Competition proceeding.

9. In OP 4, of D.98-01-042, the Commission expressly authorized the true up of amounts booked in the memorandum accounts to apply retroactively to the effective date of Pacific's directory access tariffs.

10. As noted in the arbitrator's report in A.00-01-022, Pacific's DALIS tariff calls for a charge of five cents per listing each time the provider gives out a listing to one of its customers through its own DA service.

11. As found in the A.00-01-022 arbitration proceeding, AT&T had no mechanism in place to track the number of times that it gave out DA information from a listing provided through Pacific's DALIS tariff.

12. Although the Commission eliminated the per-query charge applicable to AT&T in its arbitration proceeding with Pacific, the Commission did not conduct a generic inquiry to determine the cost-based applicability of a per-query charge on a generic basis.

13. The AT&T arbitration proceeding provided a basis to raise questions concerning whether there is a measurable cost basis for a per-query charge on a generic basis.

14. Pursuant to the FCC's January 23, 2001 Directory Listing Order, to the extent that telecommunications carriers such as AT&T have been relieved of paying a per-query charge for DA services, the same relief from the per-query charge applies to any other DA provider that is an agent of such a telecommunications carrier.

15. This Commission has the independent authority to set rates for DA listing service and to suspend the per-query charge for such DA providers that are not otherwise covered as a telecommunications carrier or agent thereof under the provisions of the January 23, 2001 Directory Listing Order.

16. Up until now, the continued passage of time with no cost studies has worked to the competitive disadvantage of third parties that have had to pay DA rates that have not been tested on a cost basis.

17. The prospective suspension of Pacific's per-query charge serves the purpose of transferring some of the risk of delay in conducting DA cost studies from the competitive DA providers to the ILECs.

18. The rates found presumptively reasonable by the FCC for purposes of pricing access to ILEC listings for directory publishing vendors are not applicable to the pricing of DA access by third parties.

19. The FCC has concluded that the pricing structure of DA access services should remain distinct from that of subscriber list information developed pursuant to the rate methodology set forth in Section 222(e) of the Act.

20. The FCC has concluded that the ILECs continue to maintain a near total control over the vast majority of local directory listings that form a necessary input to the competitive provision of directory assistance.

21. The cost data that Pacific has provided under seal has not been tested nor may it be relied upon as a basis for resolving this petition for modification.

22. The language in D.98-06-027 is clear that DA rates were to be trued up retroactive to the effective date of the 1996 Telecommunications Act.

23. Merely because D.98-06-027 indicated that no order had yet been issued regarding the disposition of DA funds, nothing in that decision negated prior holdings in D.98-01-022 that DA charges would be subject to true up once any such final disposition was made.

24. Nothing in D.97-01-042 indicates that then-existing DA rates were deemed presumptively reasonable, particularly since the decision acknowledged that questions had been raised concerning the reasonableness of Pacific's tariffed rate for directory access.

Conclusions of Law

1. Petitioners have satisfied the procedural requirements of Rule 47 relating to petitions for modification.

2. By making the ILECs' directory access rates provisional in D.98-01-022 and subject to subsequent true up, the Commission provided a reasonable safeguard against third-party DA competitors being subject to unfair discrimination in paying for access to DA databases.

3. Although nearly four years have passed without establishing final rates for DA access, there has been no change in the underlying rationale supporting the memorandum accounts as noted in COL 2 above.

4. D.97-01-042 has already adopted rules requiring that all third-party DA providers be granted access to DA data on a nondiscriminatory basis.

5. In the FCC's January 23, 2001 Order, the FCC held that a third-party DA provider who acts as an agent for a CLC is entitled to receive access to DA database listings under the same terms contracted by its CLC principal.

6. If a CLC is entitled to receive access to DA database listings without being required to pay a per-query charge, a third-party DA provider who acts as an agent to the CLC is likewise entitled not to be required to pay a per-query charge.

7. The Petitioners' proposed modification would ignore the relationship between the DA provider and its CLC principal, but instead would permit any DA provider to demand whatever rate was offered to any DA provider or CLC, irrespective of whether or not there was an agent-principal relationship.

8. Setting a new interim rate for all DA providers equal to the lowest amounts that were charged to any other provider for DA access during the

period since January 1997 would be inconsistent with recent court decisions interpreting the "pick-and-choose" provisions of interconnection agreements.

9. Under recent court decisions, an ILEC is entitled to require a requesting carrier to accept all terms that are "legitimately related" to the desired term, such as prices paid for DA access.

10. Petitioners claim is not supported that the current interim treatment adopted in D.98-01-022 results in discriminatory treatment to DA providers.

11. There is no need to modify D.98-01-022 in order for DA agents to avail themselves of the contract provisions of their CLC principal since the federal rules already independently provide for that.

12. The true-up of rates provided for in D.98-01-022, as modified by D.98-06-027, was intended to be applied retroactively to the date that the 1996 Telecommunications Act went into effect, rather than the effective date of D.98-01-022.

13. Further proceedings concerning the costing and pricing of DA listing services for third party providers should be transferred from the OANAD proceeding to the Local Competition proceeding.

14. The Commission should move forward expeditiously to conduct necessary review of DA costing and pricing data, to allow for the prompt adoption DA cost-based prices.

15. Pacific’s per-query DA charge should be eliminated on a generic basis without further delay in view of the passage of time without waiting for adjudication of DA cost studies.

16. The DA cost review and pricing process is the appropriate forum in which to determine what cost, if any, is associated with the usage of the DA database.

17. Following the determination of cost-based DALIS rates, any resulting refunds due to DA providers should be promptly remitted for the difference between actual past payments, including per-query charges and amounts that would have been paid under the adopted cost-based rates retroactive to the date of the Telecommunications Act.

18. The provision of DA listing service is appropriately classified as a Category II since it is not a fully competitive service.

O R D E R

IT IS ORDERED that:

1. The Petition for Modification of Decision (D.) 98-01-022 filed by Metro One Telecommunications, Inc. and InfoNXX, Inc. is hereby denied in part.

2. The designated proceeding for further review of costs and adoption of cost-based prices for Directory Assistance Listing Services shall be the Local Competition proceeding. Previous references in Commission decisions to the planned review of costs and adoption of prices for DA listing services in the OANAD proceeding shall hereafter refer to the Local Competition proceeding.

3. The assigned ALJ is directed to issue a procedural ruling setting forth a schedule for the DA listing service cost studies that were previously filed by Pacific Bell Telephone Company and Verizon California, Inc. in the OANAD proceeding to be filed in this proceeding and served on parties of record, after appropriate updating to reflect any relevant changes in circumstances since the studies were last prepared.

4. The review of DA listing service costs and determination of prices will proceed first with Pacific, to be followed by Verizon.

5. Pacific is directed to file an amendment to its DALIS tariff within 10 business days of the effective date of this order, removing the per-query charge, and identifying DALIS as a Category II service.

6. Following the determination of cost-based DALIS rates for Pacific, a true up of past DA listing service charges, including any per-query charges, shall promptly be performed. The assigned ALJ shall at that time issue a procedural order to implement any resulting refunds due to DA listing service providers for the difference between actual payments and amounts due under the adopted cost-based rates retroactive to the date of the Telecommunications Act. A similar process shall apply to Verizon following adoption of cost-based rates applicable to its DA listing service.

This order is effective today.

Dated February 7, 2002, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners