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Decision 02-11-032 November 7, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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| Application of AT&T Communications of California, Inc. (U 5002 C), et al., for Arbitration of an Interconnection Agreement with Pacific Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996. | Application 00-01-022<br>(Filed January 24, 2000) |

# ORDER MODIFYING DECISION 00-08-011 AND DENYING REHEARING OF THE DECISION AS MODIFIED

## I. SUMMARY

Decision (D.) 00-08-011 approved an interconnection agreement between AT&T Communications of California, TCG-San Francisco, TCG-Los Angeles, TCG-San Diego, and TCI Telephony Services of California (collectively referred to as AT&T) and Pacific Bell (Pacific). AT&T claims the Decision contains legal error in its resolution of two issues: Issue 229 "reciprocal compensation components" and Issue 266 "treatment of calls when CPN (Calling Party Number) not available." We find that the Decision erred by performing the "functional equivalency test" in determining whether AT&T could receive reciprocal compensation at the tandem switch rate. However, we also find that our separate factual determination of the "geographic scope test" may still stand despite this error. We will accordingly modify the Decision to clarify that we are basing our determination only on the application of the geographic scope test to the current record. In so modifying the Decision, we find that it complies with the 1996 Telecommunications Act and the FCC's implementing regulations, and we deny AT&T's application for rehearing.

# II. DISCUSSION

## A. Reciprocal Compensation at the Tandem Interconnection Rate

AT&T contends that D.00-08-011 errs by denying AT&T reciprocal compensation for the call transport and termination service it provides to Pacific at the tandem interconnection rate. By doing so, AT&T argues that the Decision violates §252(d)(2)(A) of the Act and 47 CFR § 51.711(a).

The Act requires that parties to interconnection agreements pay each other reciprocal compensation -- each party must pay the other for transporting and terminating its network calls that originate on the other's network. 47 U.S.C. §§ 251(b)(5) & 252(d)(2)(A). The compensation must be based on the cost of transporting and terminating the call. Id. The cost of transporting a call through a tandem switch and then to an end office switch is more than the cost of transporting a call directly to an end office switch.

The following FCC regulation applies in determining when a carrier is entitled to the tandem rate:

> 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.
>
> 47 CFR § 51.711(a)(3).

AT&T argues that the Commission misapplied the FCC's rule in two respects. First, AT&T claims that the Commission required a showing that its switches perform switch functioning similar to Pacific's tandem switches. AT&T argues that proof that its switches function similarly to Pacific's tandems is not necessary where there is evidence that AT&T's switch serves a comparable geographic area. AT&T asserts that under Rule 51.711, the only condition for AT&T to receive the tandem rate is that AT&T's switch cover a geographic are comparable to that covered by Pacific's tandem switches.

The FCC in its First Report and Order determined that where a CLEC's switch or other technology serves a geographic area comparable to the incumbent's tandem switch, then the CLEC is entitled to be compensated at the higher tandem rate:

> States may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to an end office switch. In such cases, states shall also consider whether new technology (e.g. fiber rings or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all of the calls terminated on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch. Where the interconnection carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate.

First Report and Order ¶1090; 47 C.F.R. § 51.711(a)(3).

Based on this language, a number of state commissions, including this one, have interpreted Rule 51.711(a)(3) as requiring separate inquiries into whether the CLEC's network functions as a tandem switch and whether it covers a comparable geographic area as an ILEC's tandems. This Commission's interpretation and application of this rule was recently reviewed and deemed incorrect by the U.S. District Court for the Northern District of California in MCI WorldCom Communications v. Pacific Bell, et al., 2002 U.S. Dist. LEXIS 4789 (2002) (MCI v. Pacific). The District Court relied on a Ninth Circuit decision in US West Communs. v. Washington Utilities and Trans. Comm'n, 255 F.3d 990 (9th Cir. 2001) in stating that the functional equivalency test is irrelevant to whether a CLEC is entitled to charge the tandem switch rate. In interpreting the Rule as only requiring the geographic equivalency test, the District Court placed "significant deference" on a letter from FCC staff that stated:

> Although there has been some confusion stemming from additional language in the text of the Local Competition Order regarding

functional equivalency, section 51.711(a)(3) requires only a geographic area test.[1]

In MCI v. Pacific, the District Court determined that this Commission erred by relying on irrelevant factors in making a factual determination. Based on the Ninth Circuit and District Court's interpretation of Rule 51.711, we conclude that our reliance on the functional equivalency test was in error. However, in this Decision, we performed a separate inquiry into the geographic scope of AT&T's network. We find that our factual determination on the geographic scope test may still stand despite this error. In reviewing the record we find that even in just applying the geographic equivalency test, we reach the same conclusion that AT&T failed to demonstrate that it served a geographic area comparable to Pacific. As we explained at pages 21-22 of the Decision, the evidence AT&T offered to prove its case was not reliable. Moreover, AT&T presented no evidence of where its customers are located in order to show the geographic area its switches serve. Based on the evidence in the record, AT&T fails to meet the requirement of the FCC's Rule that its switch serve a geographic area comparable to Pacific's tandem switch. We find that our discussion of the geographic scope test in the Decision needs no further analysis or modification. However, we will modify the Decision to delete reference to the functional equivalency test so it will be clear that our analysis and conclusion rests solely on the geographic scope test.

This brings us to AT&T's second claim: that the Commission also erred in its application of the geographic scope standard. In the Decision, we noted that Rule 711(a)(3) indicates that a CLEC must currently be serving a geographic area, and that AT&T simply relied upon the geographic area that its switches could serve. We found that the ability to serve an area or plans for future customers does not satisfy the requirements of the Rule.

[1] Letter from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau of the FCC and Dorothy Attwood, Chief, Common Carrier Bureau of the FCC, to Charles McKee, Senior Attorney, Sprint PCS (May 9, 2001).

According to AT&T, our interpretation of Rule 711(a)(3) is faulty and the Decision errs by requiring proof of an existing customer base before a CLEC can be said to "serve" a given area. AT&T points to US West Comm. v. Minnesota Pub. Utils. Comm'n, 55 F.Supp.2d 968 (D.Minn. 1999) as support for its claim that the Rule focuses on the "capabilities and reach" of the CLEC's switches, not the number of customers. Id. at 979. Although AT&T admits that there is no definition of the term "serve" as used in Rule 711(a)(3), it argues that the Telecommunications Act defines "service" in terms of the ability and willingness to serve, rather than the current possession of customers. According to AT&T, the Act defines "telecommunications service" as "the *offering* of telecommunications for a fee directly to the public, or to such classes of users as to be *effectively available* directly to the public, regardless of the facilities used." AT&T App. at 9 citing 47 U.S.C. § 153(46) (emphasis added). AT&T also claims that the Decision requires AT&T to show that it already has a "significant customer base," and that this requirement turns the Telecommunications Act on its head, which allows CLECs to enter markets that have been traditionally monopolized by the ILECs. Therefore, according to AT&T the Commission erred in concluding that the *ability* to serve an area does not satisfy Rule 711(a)(3)'s requirement that a CLEC "serve" a geographic area.

AT&T's arguments fail for a number of reasons. First, the Commission did not focus on the *number* of customers AT&T possessed, but on the *location* of its customers. Thus, AT&T's claim that the Commission required it to demonstrate a "significant customer base" is false. Second, the concentration and location of customers are relevant factors in determining the geographic area a CLEC switch serves. See MCI v. Pacific Bell at *15. For example, as the court in MCI Technologies Corp. v. Illinois Bell, et al., 1999 U.S. Dist. LEXIS 11418 (N.D. Ill. 1999) explained:

> MCI's customers might have been concentrated in an area smaller than that served by an Ameritech tandem switch. Or MCI's customers might have been widely scattered over a large area, which raises the question whether provision of service to two different customers constitutes service to the entire geographical area between the customers. [Footnote

> omitted.] There are questions that MCI could have addressed, but did not.

Id. at *21-22. The court went on to find that the Illinois Commerce Commission's determination that 'MCI has not provided sufficient evidence to support a conclusion that it is entitled to the tandem interconnection rate' was not arbitrary and capricious. Id. at *23.

Third, case law does not support AT&T's view that future plans to serve customers or the ability to serve customers satisfies the Rule. The District Court in MCI v. Pacific Bell held that it was error for this Commission to rely on speculation about the future capabilities of MCI's network in applying the test. The District Court relied on the rationale in MCI Telecommunications v. Michigan Bell, 79 F. Supp. 2d 768, 791 (E.D. Mich. 1999) in holding that future events are not relevant to the geographic scope test, which asks only if the CLEC's switch serves the same geographic area as the incumbent's tandem switch. MCI v. Pacific Bell at *14-15. The court stated that the geographic scope test "focuses on the area currently being served by the competing carrier, not that area the competing carrier may in the future serve. To interpret the rule [in this manner] would require the state commission to speculate about the future." Id. at *14, citing MCI Telecommunications, 79 F.Supp.2d 768, 791.

Fourth, AT&T mischaracterizes US West Comm. v. Minnesota Pub. Utils. Comm'n, 55 F.Supp.2d 968 (D.Minn. 1999), which considered the "capabilities and reach" of the CLEC's network while performing a *functional equivalency* analysis. In any case, regardless of what that case states, this Commission is bound by the District Court of the Northern District of California, which has held that the geographic scope test focuses on the area currently being served.

Finally, AT&T ignores other factors that we relied upon in making our determination that AT&T did not meet the geographic comparability requirement of Rule 711(a)(3). We found that the maps provided by AT&T to demonstrate that it serves a larger geographic area than Pacific's tandems were not credible. For example, we found that according to AT&T's maps, much of San Francisco is not served by a Pacific

tandem. We found that the maps also suggested that AT&T serves large areas of unfiled territory, such as in Del Norte County, and that in other locations, AT&T showed cases where certain LATAs did not contain switches. Because of these problems, we questioned the reliability of the evidence AT&T relied upon to prove its case. So even if AT&T is correct in its interpretation that ability to serve an area satisfies the Rule, AT&T failed to even demonstrate that the geographic area it was able to serve was comparable to Pacific's. AT&T's evidentiary showing in this proceeding simply failed to demonstrate that it was entitled to receive the tandem rate. Accordingly, our determination that AT&T's network did not serve a geographic area comparable to Pacific's is reasonable and is supported by the record.

### B. Treatment of Calls When Calling Party Number (CPN) is Not Available

AT&T also alleges error in the way we resolved the issue of treatment of calls when the Calling Party Number (CPN) is not available. When AT&T is not able to provide CPN for calls, Pacific claims it is unable to determine whether the call is local or intraLATA. In that instance, the issue arises as to how Pacific is to bill that call –if the calls without CPN are local, then local reciprocal compensation rates would apply; if they are intraLATA, then intraLATA switched access rates would apply. The parties agreed that some calls without CPN are local and some are intraLATA. Pacific proposed billing the first 10% of calls without CPN at the same percentage as the traffic with CPN. If the percentage should exceed 10%, Pacific argued that access arbitrage could be taking place, and access rates should then apply.[2] This position was the same one taken by Pacific in an earlier arbitration with MFS WorldCom, which was adopted by the arbitrator in that case. The arbitrator in this case adopted Pacific's position and relied on the following reasoning provided in the Final Arbitrator's Report in the Pacific/MFS WorldCom case:

> Pacific's position is adopted. Pacific's rationale for its proposed treatment is that it should not be charged for something for which it

**2** Pacific estimated that four percent of calls are passed without CPN. However, Pacific proposed billing the first 10% of calls without CPN at the same percentage as the traffic with CPN, in order to offer a cushion in case the four-percent estimate is incorrect.

> has no control (i.e., traffic sent to Pacific with no CPN that is sent to MFSW). Pacific has no way to monitor CPN on a continuous basis for all traffic such that it could implement a billing process to designate all non-CPN calls as billed access. A portion of the calls without CPN are local calls and local reciprocal compensation should apply. Pacific's estimation of calls without CPN is approximately 4% on average, some of which are normally local calls. Pacific proposes billing the first 10% of calls without CPN at the same percentage as the traffic with CPN. If the percentage should exceed 10%, Pacific argues that access arbitrage could be taking place, and access rates should then apply.
>
> Even if CPN is passed with greater than 90% of the calls, Pacific's proposal would necessarily result in inaccurate billing. Neither party definitively proved that the ratio of local versus access is different for calls with and without CPN. Since at least some calls without CPN are local, applying access charges to <u>all</u> calls without CPN necessarily results in MFSW getting an overpayment. Thus, it is a fair outcome to bill calls without CPN in the same ratio as calls with CPN, as proposed by Pacific.[3]

In its Application for Rehearing, AT&T claims that if the Commission is going to resolve the issue by adopting the reasoning of the MFS WorldCom arbitration, "the Commission should, at a minimum, adopt that reasoning correctly."[4] (AT&T App. at 11.) AT&T focuses on the last sentence in the citation above which states: "Thus, it is a fair outcome to bill calls without CPN in the same ratio as calls with CPN, as proposed by Pacific." Apparently, AT&T takes this to mean that the outcome adopted in the MFS WorldCom arbitration is that <u>all</u> of the calls without CPN are to be billed in the same ratio as calls with CPN. AT&T states this is contrary to the outcome in this case, where just the first 10% of the calls without CPN are billed in the same ratio as calls with CPN,

[3] AT&T/Pacific Bell FAR, p. 454, citing MFS WorldCom/Pacific FAR, pp. 61-62.

[4] AT&T also states on page 11 of its Application: "In upholding the FAR's resolution of Issue 266 in Pacific's favor, the Decision notes that 'Pacific presented as its position in this arbitration, the outcome in the MFS WorldCom arbitration.' Decision at 29. AT&T has previously stated its disagreement with this failure on the part of the Commission to require Pacific to submit proof relating to Issue 266 specific to AT&T." The Commission addressed this disagreement in the Decision, but AT&T does not pursue this argument in its Application for Rehearing. Accordingly the Commission should argue that any argument concerning lack of evidence on this issue has been waived.

and if more than 10% of the calls are without CPN, then 100% of the calls without CPN are treated as intraLATA toll. AT&T argues that the arbitrator "misunderstood" the issue and asks that the contract language adopted by the Decision be modified on this point to reflect that all calls without CPN be billed in direct proportion to the minutes of use of calls with CPN.

There is no error. AT&T is mistaken in its assumption that the WorldCom/Pacific outcome provides that all calls without CPN are billed in the same ratio as calls with CPN. The interconnection agreement filed with the Commission on August 11, 1999, in the MFS WorldCom/Pacific case clearly provides that: "If the percentage of calls passed with CPN is less than ninety percent (90%), all calls passed without CPN will be billed as Switched Access."[5] The outcome in this case is the same as in the MFS WorldCom/Pacific case.

Nonetheless, AT&T argues that its position should be adopted because "it makes more sense than Pacific's." (AT&T App. at 13.) According to AT&T, billing all calls without CPN in direct proportion to calls with CPN is a better proxy for determining the ratio of local to intraLATA calls. This argument does not establish legal error in the Decision. AT&T's position was rejected by the Commission in favor of Pacific's explanation: that Pacific should not be charged for something over which it has no control, and that if the percentage of calls without CPN should exceed 10%, access arbitrage could be taking place, and access rates should then apply. AT&T's assertion, that the outcome mandates the payment of access charges on all traffic without CPN regardless of whether it is local or intraLATA, mischaracterizes the issue. The provision for payment of access charges applies only to situations where the inordinate rate of calls without CPN indicate that rate arbitrage is occurring. As explained in the FAR, this is a reasonable outcome, is based on the record, and avoids potential for arbitrage.

[5] Interconnection Agreement between Pacific Bell and WorldCom, Appendix Reciprocal Compensation § 2.3 (filed on August 11, 1999).

## III. CONCLUSION

Based on the above discussion, we find that reliance on the functional equivalency test was in error. However, in applying only the geographic scope test, we reach the same result that AT&T did not meet the requirements of Rule 711(a)(3), and therefore our separate factual determination that AT&T's switches do not serve a geographic area comparable to Pacific's tandems may still stand despite our erroneous reliance on the functional equivalency test. We shall modify the decision to clarify that our determination is based solely on the geographic scope test. As modified, we deny AT&T's application for rehearing of Decision 00-08-011.

Therefore **IT IS ORDERED** that:

1. Decision 00-08-011 shall be modified as follows:

   a. On page 20, the first full paragraph shall be deleted and the following paragraph shall be inserted: "This is a factual matter, which rests on the specific factual record relating to a particular carrier's network. In order to satisfy the requirements of Rule 711(a)(3), a CLEC must cover a geographic area comparable to the area served by the incumbent LEC's tandem switch. The FAR stated that a CLEC's switch must also perform functions similar to those performed by an incumbent LEC's tandem switch. However, this is not what the rule requires. Although the FAR improperly relied on this irrelevant factor, we correct this error by clarifying that our determination is based solely on application of the geographic scope requirement. In addition, the rule focuses on the area currently being served by the CLEC, not the area the CLEC may serve in the future."

   b. The second paragraph on page 20 and the third paragraph on page 20 which continues to page 21 shall be deleted.

   c. The first sentence of the first full paragraph on page 22 shall be deleted and the following sentence shall be inserted: "In summary, AT&T has failed to demonstrate that its switches serve a geographic area comparable to that served by Pacific's tandem switches, as required by the FCC's rule."

2. Rehearing of Decision 00-08-011, as modified herein, is denied.
3. This proceeding is closed.

This order is effective today.

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

LORETTA M. LYNCH
President
HENRY M. DUQUE
CARL W. WOOD
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners