Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Bell Telephone Company for Arbitration of Advice Letter No. 57 Filed by Vycera Communications, Inc. f/k/as Genesis Communications International, Inc. Regarding Vycera's Request to Adopt the Interconnection Agreement between AT&T Communications of California, Inc. and Pacific Bell Telephone Company.	Application 02-09-018 (Filed September 18, 2002)

OPINION ADOPTING FINAL ARBITRATOR'S REPORT, WITH MODIFICATION

1. Summary

We affirm the results adopted in the Final Arbitrator's Report (FAR) with modification and approve the resulting arbitrated Interconnection Agreement (ICA) between Pacific Bell Telephone Company (Pacific) and Vycera Communications, Inc. (Vycera), as modified by this order. Within seven days of the date of this order, parties shall jointly file and serve a signed, complete ICA that conforms to the decisions herein. This proceeding is closed.

2. Background

On September 18, 2002, Pacific filed an application for arbitration with Vycera pursuant to the Commission's Rules relating to Section 252(i) of the 1996 Telecommunications Act (Act). On August 30, 2002, Vycera filed Advice Letter No. 57 requesting to adopt the interconnection agreement between Pacific and AT&T Communications of California Inc. (AT&T Agreement).

Pacific filed for arbitration for two reasons. First, because at the time of the request Vycera had not obtained limited facilities-based certification as a Competitive Local Exchange Carrier (CLEC), it could only legally exercise the resale portion of the AT&T Agreement. Second, Vycera did not agree with Pacific that a CLEC may not opt into provisions relating to reciprocal compensation (and legitimately related terms in an existing ICA) after the Federal Communications Commission's (FCC) ISP Remand Order.[1]

On October 8, 2002, Vycera filed its Response to Pacific's application.

In the period between Pacific's Response and the filing of post-hearing briefs, one issue was settled. At the time that Vycera filed its Advice Letter asking to opt into the AT&T Agreement, Vycera had not yet obtained limited facilities-based certification as a CLEC. Pacific acknowledges that Vycera obtained limited facilities-based certification on October 3, 2002 so that issue is moot.

The only issue to be resolved is whether Vycera may opt into provisions relating to reciprocal compensation (and legitimately related terms) in an existing ICA after the FCC's ISP Remand Order.

An informal telephonic Initial Arbitration Meeting was held on October 17, 2002. In the conference call, parties acknowledged that there were no disputed factual issues, so arbitration hearings would not be necessary. Parties agreed to a schedule for the remainder of the proceeding. Concurrent briefs were filed and served on October 25, 2002. The Draft Arbitrator's Report (DAR) was filed on

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[1] *See* In the Matters of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 [and] Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98 and 99-68, Order on Remand and Report and Order, FCC No. 01-131 (rel. Apr. 27, 2001), which was remanded in *WorldCom, Inc.* v. *FCC*, No. 01-1218 (D.C. Cir. 2002).

November 12, 2002 disposing of the contested issue. Comments on the DAR were filed on November 22, 2002, by Pacific and Vycera. The Final Arbitrator's Report (FAR) was filed and served on December 9, 2002.

The Pacific/Vycera conformed agreement was filed with the Commission on December 18, 2002. Both Pacific and Vycera filed statements on December 18, 2002, regarding whether the Commission should adopt or reject the conformed agreement.

On January 15, 2003, just two days before the Commission meeting at which we were to consider this arbitration and nearly a month after the December 19, 2002 date on which Pacific and Vycera filed their statements on whether the filed ICA should be approved or rejected by the Commission, Pacific sent a letter to the arbitrator and assigned Commissioner which challenged the contents of some of Vycera's statement contending that it contained new facts. Vycera responded on January 28,2003.

We note that the technical standard for submissions following the release of a final arbitrator's report is for parities to submit an ICA in conformance with the final arbitrator's report and a statement which (a) identifies the criteria in the Act and the Commission's Rules by which the arbitrated portions of the Agreement must be testes; (b) states whether the arbitrated portions pass or fail those tests; and (c) states whether or not the Agreement should be approved or rejected by the Commission. Both Pacific and Vycera went somewhat beyond this explicitly narrow focus and advised us of errors of law or fact they perceived in the final arbitrator's report for which there is no specific comment opportunity, but presumably offered to assist us in addressing the concerns raised.

In preparing the order adopting the final arbitrator's report, these concerns of both Pacific and Vycera were, as appropriate, considered. Arbitrations are, by their nature, very time sensitive.

We believe that the issues raised by both Pacific and Vycera are reasonably addressed. We note for both parties that filings with this Commission are made in conformance with Rule 1 of the Commission's Rules of Practice and Procedure and, to the extent, there has been any false statement of law or fact, remedies may be pursued to address that.

3. This Arbitration Was Filed in Compliance With the Act, FCC Regulations, and Resolution ALJ-181

Section 252(i) of the Act provides that:

> "A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this Section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." (47 U.S.C. § 252(i).)

The FCC adopted regulations implementing the Act. Regarding § 252(i) of the Act, the FCC adopted regulation § 51.809 (47 C.F.R. § 51.809), which states:

> **"Section 51.809 Availability of provisions of agreements to other telecommunications carriers under section 252(i) of the Act.**
>
> a. An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement. An incumbent LEC may not limit the availability of any individual interconnection, service, or network element only to those requesting carriers serving a comparable class of subscribers or providing the same service (i.e., local, access, or interexchange) as the original party to the agreement.

b. The obligations of paragraph (a) of this section shall not apply where the incumbent LEC proves to the state commission that:

1. the costs of providing a particular interconnection, service, or element to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or
2. the provision of a particular interconnection, service, or element to the requesting carrier is not technically feasible.

c. Individual interconnection, service, or network element arrangements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under section 252(f) of the Act."

State commissions may adopt procedures for making agreements subject to § 252(i) of the Act available to carriers on an expedited basis. (FCC 96-325, *First Report and Order*, adopted August 1, 1996, released August 8, 1996, in CC Docket Nos. 96-98 and 95-185, ¶ 1321.) To that end, the Commission adopted Resolution ALJ-178 on November 18, 1999, which was later modified by Resolution ALJ-181 on October 5, 2000.

Pursuant to Resolution ALJ-181, a CLEC wishing to adopt a previously approved ICA must file and serve an advice letter identifying the agreement and portions thereof it proposes to adopt. (Rule 7.1, Resolution ALJ-181.) The incumbent local exchange carrier (ILEC) upon whom the advice letter is served must, within 15 days after its receipt of the advice letter, either (1) send the requesting carrier a letter approving its request or (2) file an application for arbitration. The request for arbitration must be based solely on the requirements of § 51.809. If the ILEC does not act to either approve the request or file a request for arbitration, the CLEC's request is deemed effective on the 16th day. (Rule 7.2, Resolution ALJ-181.)

Pacific filed its request for arbitration pursuant to the above rules governing adoption of a previously approved agreement pursuant to § 252(i).

4. Arbitrated Portions of Agreement

Section 252(e) of the Act, and our Rule 4.2.3, provide that we may only reject an agreement (or any portion thereof) adopted by arbitration if we find that the agreement does not meet the requirements of § 251 of the Act, including the regulations prescribed by the FCC pursuant to § 251, or the standards set forth in § 252(d) of the Act.[2] At issue is whether Vycera may opt into the reciprocal compensation provisions of the AT&T ICA. The FAR determined that Vycera is entitled to opt into the entire AT&T Agreement, with the exception of the rates paid for the exchange of ISP-bound traffic. The FAR bases its finding on ¶ 82 of the FCC's ISP Remand Order.[3] The pertinent language in ¶ 82 reads as follows:

> [A]s of the date this Order is published in the Federal Register, carriers may no longer invoke section 252(i) to opt into an existing interconnection agreement with regard to the rates paid for the exchange of ISP-bound traffic.

The FAR determined that October 3, 2002, the date that Vycera obtained its partial facilities-based authority, should be the effective date of the ICA. Vycera would have been unable to exercise portions of the ICA relating to facilities-based service prior to that date. The FAR concurred with Pacific's position that the conversion of resale lines to the unbundled network element platform (UNE-P) should apply only on a prospective basis to those resold lines for which

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[2] Section 251 describes the interconnection standards. Section 252(d) identifies pricing standards.

[3] *See* In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 [and] Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98 and 99-68, Order on Remand the Report and Order, FCC No. 01-131 (rel. Apr. 27, 2001), which was remanded in *WorldCom, Inc.* v. *FCC*, No. 01-1218 (D.C. Cir. 2002).

Vycera submits Local Service Requests (LSRs) to convert to UNE-P after October 3, 2002. Pacific had indicated that it could not assume that Vycera would convert all its resale lines to UNE-P because resale lines may contain services and/or features, such as Wholesale Inside Wire Service, that are not available on UNE lines. Vycera may want to keep those services and features and thus may not want to convert resale lines with such features and services.

Pacific also states that the standard process for converting from resale to UNE-P requires CLECs to submit an LSR. Vycera has over 20,000 local service customers, which would require 20,000 LSRs. According to Pacific, it would take time for Vycera to prepare those LSRs, and for Pacific to process them.

In its statement filed at the same time as the conformed ICA, Pacific disputes one outcome in the FAR. According to Pacific, the DAR concluded that Vycera was entitled to adopt the entire AT&T Agreement, with the exception of the rates paid for reciprocal compensation. The DAR held that the reciprocal compensation rates are the same as the rates for ISP-bound traffic. In a proper application of the FCC's mirroring rule, the DAR held that both the rates for ISP-bound traffic and reciprocal compensation must be exempted. The FAR substitutes "reciprocal compensation rates" with "rates for ISP-bound traffic" and concludes that only rates for ISP-bound traffic are exempted from the adoption because they are stale pursuant to 47 C.F.R § 51.809. According to Pacific, the FAR's conclusion ignores the FCC's mirroring rule and contravenes the FCC's ISP Remand Order. Under the "mirroring rule," incumbent LECs that have not elected to implement the FCC interim compensation plan are required to exchange ISP-bound traffic at the state-approved or state-arbitrated reciprocal compensation rates for non-ISP-bound traffic. Pacific concludes that this demonstrates that the rates for non-ISP-bound traffic are legitimately related to the reciprocal compensation rates for ISP-bound traffic, since the FCC ordered

that those rates be identical until such time as the ILEC elects to implement the FCC's interim compensation plan. Pacific states that the practical result is that Vycera may opt into the entire ICA in contravention of the FCC's ISP Remand Order. Pacific asserts that the Commission should reverse the FAR to state that any rates, terms, and conditions associated with reciprocal compensation should be exempted from Vycera's adoption of the AT&T Agreement and the parties must negotiate such rates, terms, and conditions.

Paragraph 82 in the FCC's ISP Remand Order is clear that only the *rates for ISP-bound traffic* are excluded from the provisions of § 252(i). The FCC does not include all reciprocal compensation traffic under its prohibition, only ISP-bound traffic. That means that carriers are not precluded from opting in to rates for other reciprocal compensation traffic. Also, the FCC focuses exclusively on the *rates* for ISP-bound traffic and does not state that a carrier may not opt into the terms and conditions for ISP-bound traffic.

Also, the FCC's ISP Remand Order states as follows:

> For those incumbent LECs that choose *not* to offer to exchange section 251(b)(5) traffic subject to the same rate caps we adopt for ISP-bound traffic, we order them to exchange ISP-bound traffic at the state-approved or state-arbitrated reciprocal compensation rates reflected in their contracts. This "mirroring" rule ensures that incumbent LECs will pay the same rates for ISP-bound traffic that they receive for section 251(b)(5) traffic. (ISP Remand Order ¶ 89.)

Pacific made it clear that it has not adopted the FCC rate caps, and acknowledges that it is subject to the FCC's mirroring requirement. Under that rule, Pacific must charge the same rate for ISP-bound traffic as it charges for other § 251(b)(5) traffic. Pacific complains that, in effect, Vycera is receiving the entire AT&T ICA, including the rates for ISP-bound traffic, and asserts that is contrary to the ISP Remand Order. We disagree with Pacific's view. Vycera is, in effect receiving the rate for ISP-bound traffic that is in the AT&T Agreement,

but that outcome is clearly consistent with the FCC's mirroring rule since Pacific must charge the same rate for all Section 251(b)(5) traffic under the FCC's mirroring rule.

We disagree with Pacific's contention that all rates and terms and conditions relating to reciprocal compensation should be negotiated between the parties. The FCC's order is quite specific that only one element may not be covered by Section 252(i) opt-in provisions, namely the rates paid for ISP-bound traffic. A CLEC is entitled to opt into all other provisions relating to reciprocal compensation, and we have provided that outcome in this decision.

In its comments on the FAR, Vycera asserts that two changes should be made to the conformed agreement: (1) the effective date of the agreement should be changed to September 18, 2002; and (2) the word "sectionally" should be deleted from the third line of the Recitals on page 1 of the ICA. Although the DAR provided that Pacific should charge Vycera at UNE-P rates, rather than resale rates, from October 3, 2002, the FAR revised that earlier holding, and provides that the conversion of resale lines to UNE-P should apply only on a prospective basis to those resold lines for which Vycera submits LSRs to convert to UNE-P on or after October 3, 2002. Vycera states that the revision appears to be based upon statements made in Pacific's comments on the DAR, which Vycera asserts are not true.

Vycera states that it submitted its request to adopt the AT&T Agreement on September 3, 2002. Pursuant to California Rules 7.2 and 7.3.2, Pacific should have honored all provisions of the AT&T ICA that Vycera was adopting beginning on September 18, 2002, subject to retroactive price true-up based on the Commission's resolution of the arbitration of the contested provisions. Instead, Pacific refused to implement any portion of the AT&T Agreement and refused to take those actions necessary for Vycera to convert its resale customers

to UNE-P upon Vycera's receipt of partial facilities-based certification on October 3, 2002.

Vycera asserts that until December 5, 2002, Pacific refused to take any of the preliminary steps, such as processing "footprint" combination orders, establishing UNE-P billing account numbers for current Vycera customers, performing pre-conversion testing, necessary for Vycera to convert its embedded customer base to UNE-P. Vycera rebuts Pacific's assertion that providing LSRs is a time-consuming manual process, saying that the process is mechanized. For Vycera to submit thousands of LSRs for its current customers, who are already in its computer system, is a matter of a few keystrokes. Vycera also asserts that it has 12,500 customers in Pacific's territory, not 20,000 customers and that using mechanized processing, Vycera could easily submit 12,500 LSRs in a single morning. Vycera provided a sworn affidavit to that effect. And under the terms of the AT&T Agreement relating to conversion from resale to UNE-P, the CLEC begins to receive UNE-P pricing when the order is submitted, not when Pacific processes it.

Vycera requests that the Commission grant UNE pricing retroactive to October 3, 2002 for customers for whom it submits an LSR to convert to UNE-P within 60 days of the effective date of the order. Vycera also asks for retroactive UNE-P pricing for former customers who discontinued service with Vycera sometime between October 3, 2002 and the present.

Under the rules we adopted for implementation of § 252(i), we included Rule 7.3.2. That rule reads as follows:

> Rule 7.3.2 Effective Date of Arbitrated Agreement
>
> Should the ILEC file for arbitration, the ILEC shall immediately honor the adoption of those terms not subject to objection pursuant to Rule 7.2, effective as of the date of the filing of the arbitration request. Furthermore, to the extent the ILEC seeks arbitration of the

> costs of a particular interconnection, service or element, the ILEC shall immediately honor such provisions subject to retroactive price-true-up back to the date when the arbitration request was filed, based on the Commission's resolution of the arbitration. The effective date of other disputed issues will be set in the arbitration process and could be made effective retroactive to the date when the arbitration request was filed.

Pacific has asked to be released from this requirement, stating that it is not feasible to implement a partial agreement, where the key area of interconnection is being arbitrated. However, Vycera asserts that as of September 18, 2002, Pacific should have begun billing Vycera under the terms, conditions, and rates for resale services as provided for in the AT&T Agreement. And under Rule 7.3.2, it is clear that Pacific should have implemented the portions of the ICA that were not in dispute. We agree with that determination, and will order that the ICA be effective on September 18, 2002, so that Vycera can take advantage of the resale provisions.

Other elements of the ICA, such as the interconnection attachment, could not be exercised by Vycera until it received its partial facilities-based authority on October 3, 2002. As of that date, Vycera should have been able to convert its resale lines to UNE-P; and from the affidavit filed, submittal of LSRs is not the tortuous process Pacific described, but a simple mechanized process. Also, Attachment 6, section 2.13.4 of the AT&T ICA makes it clear that UNE-P pricing is to be effective upon receipt by Pacific of the LSR, and is not dependent on Pacific's processing of that LSR. We order that Vycera be granted UNE-P pricing retroactive to October 3, 2002, for all customers for whom it submits LSRs within 60 days of the effective date of this order to convert from resale to UNE-P service. We will not grant UNE-P pricing for prior customers who discontinued service with Vycera since we have no way of knowing whether those customers would have chosen to maintain their resale service.

Vycera does not explain why it wants to delete the word "sectionally" from the third line of the Recitals on page 1 of the ICA so we are unable to evaluate the merits of that request.

5. Preservation of Authority

Section 252(e)(3) of the Act provides that nothing shall prohibit a state Commission from establishing or enforcing other requirements of state law in its review of an agreement, including compliance with intrastate telecommunications service quality standards. Our Rules 4.2.3 and 4.3.1 provide that we may also reject agreements or portions thereof, which violate other requirements of the Commission, including but not limited to, quality of service standards. Other than the matters addressed and disposed of above, no party or member of the public identifies any clause in the ICA that potentially conflicts with any state law, or requirement of the Commission, including service quality standards, and we are aware of none.

6. Filing the Conformed ICA

Within seven days of the mailing date of this decision, parties shall file and serve an entire ICA which conforms with the decisions herein. Parties should also serve a copy on the Director of the Telecommunications Division. Parties should sign the conformed ICA before it is filed. The signed ICA is effective as of September 18, 2002.

7. Waiver of Period for Public Review and Comment

The Public Utilities Code and our Rules of Practice and Procedure generally require that draft decisions be circulated to the public for review and

comment 30 days prior to the Commission's vote.[4] On the other hand, the Act requires that the Commission reach its decisions to approve or reject an arbitrated agreement within 30 days after submission by the parties.[5] This establishes a conflict.

However, Rule 77.7(f)(5) provides that we may reduce or waive the period for public review and comment "for a decision under the state arbitration provisions of the Telecommunications Act of 1996." We consider and adopt this decision today under the state arbitration provisions of the Act.

8. Assignment of Proceeding

Carl Wood is the Assigned Commissioner and Karen Jones is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. No arbitrated portion of the ICA, as modified by this decision, fails to meet the requirements of § 251 of the Act, including FCC regulations pursuant to § 251, or the standards of § 252(d) of the Act.

2. No provision of the ICA conflicts with State law, including compliance with telecommunications service quality standards, or requirements of the Commission.

3. The Act requires that the Commission approve or reject an arbitrated ICA within 30 days after the agreement is filed (47 U.S.C. § 252(e)(4)), which in this case is within 30 days of the date statements in compliance with the FAR were filed.

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[4] See Pub. Util. Code § 311(g)(1), and Rule 77.7 of the Commission's Rules of Practice and Procedure.

[5] 47 U.S.C. Section 252(e)(4).

4. A draft decision must be subjected to 30 days' public review and comment prior to the Commission's vote; however Rule 77.7(f)(5) provides that the Commission may reduce or waive the period for public review and comment under Pub. Util. Code § 311(g)(1) for a decision under the state arbitration provisions of the Act.

5. This is a proceeding under the state arbitration provisions of the Act.

Conclusions of Law

1. The FAR and the ICA between Pacific and Vycera, which conforms to the decisions in the FAR, should be approved, as modified in this order.

2. The FCC's ISP Remand Order precludes carriers from opting into an existing agreement with regard to the rates paid for the exchange of ISP-bound traffic.

3. The ICA between Pacific and Vycera should be made effective on September 18, 2002, pursuant to Rule 7.3.2 in Resolution ALJ-181.

4. Vycera was not able to exercise the terms of the AT&T Agreement relating to facilities-based service until it received its partial facilities-based authority on October 3, 2002.

5. Pacific and Vycera should jointly file and serve within seven days of the date of this order a signed ICA which conforms with the outcomes herein.

6. The conformed, signed ICA should be effective on September 18, 2002.

7. The 30-day public review and comment period should be waived pursuant to Pub. Util. Code § 311(g)(3) and Rule 77.7(f)(5).

8. This order should be effective today because it is in the public interest to implement national telecommunications policy as accomplished through the ICAs which result from the decisions in the FAR and this order as soon as possible.

O R D E R

IT IS ORDERED that:

1. We affirm the results reached in the December 9, 2002, Final Arbitrator's Report (FAR) as modified herein, and, pursuant to the Telecommunications Act of 1996, and Resolution ALJ-181, we approve the Interconnection Agreement (ICA) between Pacific Bell Telephone Company and Vycera Communications, Inc., with modifications.

2. Within seven days of the mailing date of this order, parties shall sign and jointly file and serve an entire ICA that conforms with the decisions in the FAR, as modified by this order. The signed ICA shall be effective as of September 18, 2002.

3. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.