PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

December 12, 2002 Agenda ID #1520

TO: PARTIES OF RECORD IN RULEMAKING 93-04-003 ET AL.

This is the draft decision of Administrative Law Judge (ALJ) Reed identified on the December 17, 2002 Commission Meeting Agenda as Item Number 14.

When the Commission acts on the draft decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Pursuant to Rule 77.7(f)(9) comments on the draft decision must be filed by noon, on December 24, 2002, and no reply comments will be accepted.

Parties to the proceeding may file comments on the draft decision as provided in Article 19 of the Commission's "Rules of Practice and Procedure." These rules are accessible on the Commission's website at http://www.cpuc.ca.gov. Pursuant to Rule 77.3 opening comments shall not exceed 15 pages. Finally, comments must be served separately on the ALJ and the assigned Commissioner, and for that purpose I suggest hand delivery, overnight mail, or other expeditious method of service.

/s/ CAROL BROWN
Carol Brown, Interim Chief
Administrative Law Judge

CAB:vfw

Attachment

Decision **DRAFT DECISION OF ALJ REED (Mailed 12/12/02)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks.	Rulemaking 93-04-003 (Filed April 7, 1993)
Investigation on the Commission's Own Motion into Open Access and Network Architecture Development of Dominant Carrier Networks.	Investigation 93-04-002 (Filed April 7, 1993)
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 On Motion Into Competition for Local Exchange Service.	Investigation 95-04-044 (Filed April 26, 1995)

FINAL DECISION ON THE PUBLIC UTILITIES CODE SECTION 709.2(C) INQUIRY

Summary

This decision concludes the California Public Utilities Commission's (Commission or CPUC) Public Utilities Code Section 709.2(c) inquiry. We establish some additional safeguards, and make the remaining three determinations under Section 709.2(c). We also authorize Pacific Bell (Pacific) to

provide intrastate interexchange telecommunications services upon receiving full authorization from the Federal Communications Commission (FCC) pursuant to Section 271 of the Telecommunications Act of 1996 (Section 271).

Background

On September 19, 2002, this Commission issued Decision (D.) 02-09-050, its advisory opinion to the FCC on Pacific's compliance with the fourteen checklist items of Section 271. The decision also included an overview of the Performance Incentive Plan adopted for Pacific and an assessment of Pacific's operations pursuant to California Public Utilities (Pub. Util.) Code Section 709.2(c) (Section 709.2(c)). Section 709.2(c) requires this Commission to make four specific determinations before implementing any "order authorizing or directing competition in intrastate interexchange telecommunications."[1]

D.02-09-050 determined, in accordance with Section 709.2(c)(1), that Pacific had demonstrated that competitors had "fair, nondiscriminatory, and mutually open access" to its exchanges. Pacific's strong showing of compliance with most of the fourteen checklist items substantiated its claim of fair and open access. However, the decision further found that, under Sections 709.2(c)(2) and (3), the existing record could not adequately support affirmative determinations of "no anticompetitive behavior" and "no improper cross subsidization," respectively. In addition, D.02-09-050 found that on the existing record Pacific's entry into competitive intrastate long distance telephone markets posed "a substantial possibility of harm" to those markets.

[1] Read as a whole, Section 709.2 directs the California Public Utilities Commission to facilitate fully open competition for intrastate intraLATA telecommunications service.

As noted in the decision, participating parties did not ask the Commission to bar Pacific's entry into the intrastate long distance market as a sanction or in recompense for Pacific's insufficient Section 709.2(c) showing. Instead, they urged the Commission to counter the potential harms to the market by applying several conditions to Pacific's long distance entry[2]. Pac-West Telecomm, Inc. (Pac-West) and Working Assets Long Distance (WA) asked the Commission to structurally separate Pacific into retail and wholesale focused entities, and divest the wholesale portion.[3] In consideration of that proposal, D.02-09-050 directed Pacific to file, no later than March 19, 2003, a "report or study detailing the cost of separating Pacific into two parts and divesting the segment covering wholesale network operations."[4]

Again, to lessen future harms, Pac-West/WA and AT&T Communications of California, Inc. (AT&T) proposed that a neutral third-party Primary Interexchange Carrier (PIC) administrator replace Pacific in the role of PIC administrator. In response, the Commission instructed the Telecommunications Division to prepare an Order Instituting Investigation to "examine the efficacy, feasibility, structural implementation, and selection criteria for selecting a competitively neutral third-party PIC administrator for California."[5]

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[2] *See* D.02-09-050 at 263-267, *mimeo.*

[3] Specifically, "wholesale network operations (Pacific Wholesale) and retail marketing service provision (Pacific Retail)". Id. at 264, footnote 416.

[4] *Id.* at 264; Ordering Paragraph (OP) 15.

[5] *Id.* at 265; OP 16.

To address several parties' concerns about the significant advantage that Pacific would have through the joint marketing of its affiliate's prospective long distance service with its local service, D.02-09-050 applied the limited marketing check of recently revised Tariff Rule 12 to Pacific's joint marketing ventures. The decision also stated the intention of closely monitoring Pacific's marketing activities to ensure compliance with federal and state requirements.

On October 4, 2002, the Assigned Commissioner issued a ruling (ACR) noting that although the Commission had favorably assessed Pacific's long distance application for the FCC, the status of Pacific's intrastate interexchange request was hampered by the Commission having affirmatively made only one of the four determinations required under Section 709.2(c). The ACR stated that upon reviewing the proceeding record after the issuance of the decision, the Assigned Commissioner believed that the outstanding Section 709.2(c) issues could and should be resolved promptly.

The Assigned Commissioner questioned how beneficial further proceedings and additional rounds of briefings would be in addressing the unfinished aspects of the Section 709.2(c) inquiry. In his view, the remainder of the proceeding should focus on strengthening the safeguards established in D.02-09-050, and establishing additional safeguards, if warranted, to mitigate the potential harms to the intrastate interexchange market. The ruling asked interested parties to consider and comment on four questions by October 14, 2002.[6] Fifteen parties commented on the issues.

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[6] 1) "Are further proceedings required before the Commission concludes its Section 709.2(c) appraisal? If so, what outstanding issues need to be addressed? 2) Can the performance incentives as well as the existing and specifically crafted Section 709.2(c) safeguards mitigate present and potential competitive harms? If not,

Footnote continued on next page

On November 6, 2002, the Assigned Administrative Law Judge (ALJ) and the Assigned Commissioner convened a prehearing conference (PHC) on Section 709.2(c). The purpose of the PHC was: (1) to advise the interested parties that the Commission wanted to resolve the remaining Section 709.2(c) issues as promptly as possible; (2) to urge the parties to collaborate on an Expedited Dispute Resolution (EDR) process in order to address the ongoing operational conflicts between Pacific and the competitors; (3) to ask Pacific to work as closely as possible with staff to keep it fully briefed and ready for any and all post authorization regulatory tasks; and (4) to allow the parties an opportunity to further express their views and concerns on the resolution of the Section 709.2(c) open issues.[7]

Responses of the Parties

In response to the ACR, Pacific asserts that no further proceedings are required because no outstanding Section 709.2(c) issues exist. It declares that there is no anticompetitive conduct, cross subsidization or substantial possibility of competitive harm. Pacific argues that sufficient state and federal safeguards exist to protect the intrastate long distance market. It disagrees that any benefits will come from the Section 709.2(c) directives established in D.02-09-050; and that such "continuing safeguards" should have a definitive sunset date. Alternatively,

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what additional measures are needed? 3) How long should continuing safeguards, such as the joint marketing protections, be applied to Pacific? 4) Do the determinations that the Commission makes pursuant to Section 709.2(c) constitute discrete findings at the point of Pacific's entry into the intrastate interexchange telecommunications market or ongoing obligations?"

[7] Parties were invited to supplement their oral remarks with written comments by November 14, 2002.

Pacific asks the Commission to clarify that the Section 709.2 safeguards shall remain in effect until they are discontinued on further order of the Commission, based on a motion by it demonstrating that the safeguards are no longer necessary or appropriate, or that the burden of compliance is outweighed by the potential benefits. (Pacific Comments at 19-20.)

Pac-West Telecomm, Inc., Working Assets Long Distance and XO California, Inc. (Joint Commenters) strongly oppose the ACR's proposal. They maintain that with the issuance of D.02-09-050, the Commission's Section 709.2 appraisal was complete: Pacific failed to meet three out of the four statutory requirements. The Joint Commenters claim that the ACR is an improper reconsideration or rehearing of Section 709.2, and neglects to give interested parties a true opportunity to be heard on the issues by soliciting written comments in a condensed period of time. They further contend that the resolution of any outstanding Section 709.2 issues requires the reopening of the proceeding and the full development of a new record.

Joint Commenters insist that "disputed issues of fact" continue to exist, and envision that there will be a need for discovery, the submission of additional evidence, and "public" hearings. Regarding safeguards, they urge the Commission to accelerate consideration of the feasibility of implementing a neutral PIC administrator, and ask that Pacific's marketing scripts be submitted to all interested parties. In conjunction with other competitors, they support performance measures and incentives for Pacific's provisioning of special access services. The Joint Commenters also argue that the Commission should direct Pacific to resubmit its application for a Certificate of Public Convenience and Necessity, and determine the application before Pacific may begin offering long distance service in California. Finally, the Joint Commenters state that the

effectiveness of the safeguards cannot be ably evaluated until after they are implemented.

The Greenlining Institute and Latino Issues Forum comment that they have repeatedly stated three ways in which Pacific can ensure that its entry into the long distance market is in the public interest. They ask Pacific to: (1) address the importance of protecting ratepayers from consumer fraud in the long distance transition; (2) develop a strategic plan to increase telephone penetration for low-income communities; and (3) create a viable residential market competitor to ensure local competition. (Greenlining Institute and Latino Issues Forum Comments at 3.) They assert that the Commission should use its authority to compel Pacific to comply with public interest provisions that protect the poor.

WorldCom, Inc. (WorldCom) also considers the ACR to be an improper attempt to rehear or reconsider D.02-09-050, citing the limited set of issues posed and the limited opportunity that parties have to be heard on the overall issue of Section 709.2. It contends that the Commission lacks record support or any other reasonable basis for concluding that protections to be implemented in the future will be sufficient to overcome the anti-competitive problems already found in the record. (WorldCom Comments at 3.) Thus, WorldCom urges the Commission to strengthen the safeguards adopted in D. 02-09-050, and to establish and implement additional protective measures. It insists that the Commission promptly approve switched access charge reform; establish performance measures and incentives for special access services; and finalize the collocation terms, conditions and rates. WorldCom asserts that the regulatory safeguards should remain in place as long as Pacific retains market power.

AT&T asserts that the ACR does not present either a legal or factual basis to justify reassessing the existing Section 709.2 record. AT&T offers several incidents as examples of new evidence of Pacific's anti-competitive conduct that the Commission should receive into the record and consider. It contends that an ongoing Section 709.2 inquiry is needed to establish and enforce the safeguards that the Commission plans to impose pursuant to D.02-09-050. AT&T wonders whether the ACR's desire to expeditiously resolve the Section 709.2 portion of the proceeding implies that the Commission has abdicated its responsibilities to regulate Pacific and competition in California. (AT&T Comments at 4.) It urges the Commission to include the findings of the 2002 "PacBell Audit Report" in this proceeding.

AT&T also questions the efficacy of performance measurements and incentives when Pacific evades regulatory performance monitoring by moving functionality away from organizations or processes that the existing performance measures cover. Additionally, the company continues to criticize the accuracy of the data on which Pacific's performance is measured. With regard to the safeguards, AT&T proposes specific alternative language for Pacific's joint marketing scripts which could lessen the "significant undue advantage" that the incumbent has over competing long distance providers before a customer has requested or authorized Pacific to market its affiliate's services. Finally, AT&T insists that, at a minimum, the existing safeguards and additional stronger safeguards should remain in place so long as Pacific is a dominant local service provider.

The Office of Ratepayer Advocates (ORA) and The Utility Reform Network (TURN) contend that Section 709.2(c) requires further proceedings. They state that parties' fundamental rights at issue here are inadequately

protected where only limited comments are entertained under a tight timeline. ORA and TURN argue that in further proceedings, parties "must be allowed to address the question of whether the reaffirmed safeguards can establish that Pacific has met the requirements of Section 709.2(c)."

They caution the Commission against changing D.02-09-050 "well in advance of the thirty days allowed for parties to apply for rehearing on any matter determined therein." (ORA and TURN Comments at 4.) They also list several "bad acts" that they maintain further illustrate Pacific's anticompetitive conduct, and prevent this Commission from either ultimately making the outstanding determinations or finding Pacific to be acting in the public interest under Section 271 of the Federal Telecommunications Act of 1996.

ORA and TURN urge the Commission to indeed implement a "workable, expedited dispute process" for operational problems between Pacific and the competitors. They note that the process is critical to ensure that the requirement that SBC/Pacific's entry into the California long distance market does not harm competition, "and that it does not harm customers of competitors." (ORA and TURN Comments at 7-8.) ORA and TURN call for the creation of a schedule that accommodates "appropriate discovery," filing of testimony, and evidentiary hearings addressing the Section 709.2 issues.

Telscape Communications, Inc. (Telscape) asserts that the current safeguards are not effective to ensure a competitive telecommunications market in California, or to mitigate potential harms. It advises the Commission to quickly restrict Pacific's existing win-back activities, and adopt rules preventing the recurrence of win-back practices that are anticompetitive. Additionally, Telscape asks for the establishment of new procedures that will expeditiously resolve business-to-business issues and other disputes between competitive local

exchange carriers (CLECs) and Pacific in a manner that also promotes the interests of competitive telecommunications markets. It insists that further Section 709.2 proceedings are necessary.

Several parties[8] comment that additional hearings need not be held, and this inquiry should be concluded swiftly. Specifically, the Communications Workers of America (CWA) argues that the Commission should reconsider the Section 709.2 portion of D.02-09-050 because the necessary findings could be made immediately if analyzed under "the correct standard." CWA further asserts that the joint marketing safeguard established in the decision inappropriately addresses future actions, does not apply to competitors, and should be removed as quickly as possible.

Discussion

Those parties most adamant in declaring that we should hold further proceedings in this matter propose that such actions be hearings that either focus on myriad major telecommunications policy issues or scrutinize numerous allegations of state and federal statutory and regulatory violations against Pacific. Many object to the expressed desire to quickly resolve the outstanding Section 709.2 issues because a quick resolution conflicts with their requests for extensive discovery, filing of testimony, evidentiary hearings and briefing cycles. The Joint Commenters and other parties argue that there are no continuing Section 709.2 issues since D.02-09-050 denied Pacific's motion for an order stating that it had satisfied the requirements of Section 709.2(c), and no party appealed

[8] The CWA, District 9; California Small Business Roundtable/California Small Business Association, Americans for Competitive Telecommunications, California State Conference of the National Association for the Advancement of Colored People.

the decision. We disagree that the only recourse regarding Section 709.2(c) is the path the Joint Commenters have set forth in their October and November comments. We have not required Pacific to re-file its motion because we do not believe that restarting the Section 709.2(c) inquiry from the beginning will ultimately be productive.

Further Proceedings

On September 19, 2002, while presenting the Section 271 draft decision to the full Commission for a vote, the Assigned Commissioner remarked that appropriate safeguards could best mitigate existing anticompetitive conduct and cross subsidization as well as significant future harms to competitors. In support of that view, his October 4 ruling stated that it was imperative to assess the record developed in this proceeding and determine whether or not there was a need to further augment it in order to conclude the Section 709.2 inquiry. He advised the parties that his preliminary evaluation after reviewing the record was that "the beneficial effect" of further proceedings or additional rounds of extensive briefing would be significantly outweighed by the time and resources that would be consumed in the process. Moreover, he reasserted that safeguards would be key to making the remaining determinations under Section 709.2(c).

The questions posed in the ACR solicited parties' views on how to go forward. Most parties vehemently disagree that focusing on adequate safeguards is the approach that we should take. They argue that we cannot determine, pursuant to Section 709.2(c)(2), that there is no anti-competitive behavior until we examine every action SBC has taken since the Assigned ALJ submitted the case last December. Therefore, they ask for the opportunity to try each of their operational and business rule grievances against SBC and Pacific in full-blown evidentiary hearings.

When confronted with the prospect of responding to the numerous allegations presented by the competitors last year, Pacific opted to demonstrate that it met the requirement of Section 709.2(c)(2) by citing to Commission holdings in D.99-02-013 and its overall showing pursuant to Section 271(c)(i)-(xiv). It chose not to refute the allegations through evidentiary hearings. As a result, with specific competitor allegations, substantiating offers of proof, and Pacific's failure to directly respond to the bulk of allegations, we found that the record did not support an affirmative Section 709.2(c)(2) finding. Pacific neither appealed that finding nor sought leave to address the unanswered accusations. Consequently, we are not persuaded that compelling evidentiary hearings on these ongoing and increasing allegations would benefit the public interest more than finding a method of resolving Pacific-competitor disputes quickly and more efficiently.

Although urging additional full-scale preparatory proceedings and hearings, ORA, TURN and Telscape also point out the crucial need for an effective EDR process. The parties have jointly presented here a plan in response to the charge the Assigned Commissioner and ALJ gave them at the November 4, 2002 PHC. We believe that the public interest is better served by resolving the competitors' disputes with Pacific than by simply cataloguing them.

Parties also insist that Section 709.2(c)(3) can only be properly considered if we fold the Pacific Audit Report and the record of Rulemaking (R.) 01-09-001[9] into this proceeding. They declare, with respect to Section 709.2(c)(4), that

[9] The current NRF proceeding.

nothing but the prophylactic measures they again propose will stave off the impending competitive harm. However, we stated in D.02-09-050 and reaffirm here that just as we could not base the determination of Pacific's Section 271(c) on the resolution of every major telecommunications policy case before the Commission, we can not adjudge Section 709.2(c) on the basis of the policy demands of the competitors.

We do not lightly decline to pursue a number of the "further proceedings" that the parties vigorously propose. But we note that a number of the proposed proceedings are already before us. Others that the competitors have identified as imperative, such as switched access charge reform and special access performance incentives must be considered with full appreciation of the effects on the overall industry and the impacts on Commission resources. Certain parties highlight how these issues affect their economic well-being, but this Commission must consider and weigh how the issues affect all parties as well as California ratepayers.

Safeguards

Pacific contends that there is no need for the safeguards set forth in D.02-09-050; the other parties claim that the adopted protections are diluted and will be ineffective. The Joint Commenters declare that the Commission should immediately implement the structural separation of Pacific and the appointment of a neutral PIC administrator. They maintain that under the timeline directed by D.02-09-050 both safeguards will take too long to set up to be effective. We disagree. While the individual theories behind both structural separation and a neutral PIC administrator were articulated in the parties' proposals last year, no implementing details were presented. Some time must be devoted to fully fleshing out the costs and ramifications of what would be the first such

approaches adopted in the country. Our order requires that. To proceed hastily on either would ill serve the people of California.

Review of Joint Marketing Scripts

The parties continue to urge us to go back to the joint marketing proposals discussed in the draft of D.02-09-050. We remain unpersuaded that those proposals, if adopted, could withstand legal scrutiny. Instead, we believe that including the requirements of Tariff Rule 12 to the joint marketing of Pacific's long distance affiliate's services will properly balance the competitive concerns of the intrastate interexchange carriers with the convenience and informational needs of the ratepayer.

Pursuant to OP 19, the Telecommunications Division's staff (Staff) reviewed samples of Pacific's joint marketing scripts. Following a number of meetings that included Pacific as well as the Commission's Communications and Public Information Division, Staff advised the Assigned Commissioner and ALJ[10] that it had recommended several changes to the sample joint marketing scripts, which Pacific had accepted. Staff also outlined some specific regulatory concerns.

During review of the scripts, Staff and Pacific discussed the problem both anticipated could occur if Pacific included the language set forth in OP 17[11] in its

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[10] By motion December 10, 2002, Pacific requested that the advisory document and its December 5 responsive letter be placed under a protective order in accordance with General Order (G.O.) 66-C because the materials contain extremely sensitive and proprietary internal marketing information. Pacific asks that the materials be disclosed only to Commission personnel subject to G.O. 66-C and parties in this proceeding who have signed a non-disclosure agreement. For good cause shown, we grant the motion and protect the documents for two years from the date requested.

[11] "Who would you like as your long distance carrier and local toll carrier."

scripts for new service connections. Pacific expressed concern that the language might migrate some new customers to SBC Long Distance for local toll when Pacific's service might best meet their needs. Staff indicated that the language might unnecessarily link a customer's decision to purchase long distance and local toll service. In actuality, a customer may select different carriers for these services, and Pacific must obtain separate third party verifications for each carrier decision. Given the problem the specific language of OP 17 unintentionally creates, we find that separating the one question into two provides the best solution. We shall modify OP 17 accordingly.

Staff noted that there could be significant revenue impacts in the future as a result of Pacific's open and clear intent to encourage its existing customers to switch their local toll business from Pacific to SBC Long Distance, whenever such customers call Pacific for any business reason. Staff states that the customer migration could cause a systematic erosion of Pacific's revenue base that could eventually push up local rates.

Staff also cautioned that the marketing of SBC Long Distance's bundled interLATA and intraLATA toll packages could have some customers purchasing toll services that might not be cost-effective for them. In response to these advisory comments, Pacific asserted that neither of the two was an appropriate issue for script review. We do not regard Staff as having overstepped its bounds by highlighting these additional comments. In fact, we expect to address these issues either in a later phase of the NRF case, R.01-09-001, or in another yet-to-be-identified future proceeding.

Pac-West and Working Assets ask that competitors be allowed to monitor and review Pacific's joint marketing scripts. Marketing documents tend to be submitted to the Commission in tandem with requests for proprietary treatment.

We are not aware of any reason why competitors cannot inform Staff of script concerns so that Staff can review them from a comprehensive perspective. We think that Staff 's review of the marketing scripts was beneficial for the Commission and competitors as well as Pacific. Going forward, we find that Staff's review of any substantial changes (i.e. new approach, major language changes or provision of new products) in the joint marketing scripts could help Pacific avoid potential confusion and conflicts with competitors and ratepayers. Therefore, Staff shall review any substantial changes made in the future to the sample scripts submitted pursuant to OP 19, until the Commission orders otherwise. Staff's continuing review of Pacific's joint marketing scripts should assist Pacific and us in discovering and eliminating the possibility of anticompetitive behavior that might be reflected in the scripts.

Expedited Dispute Resolution Process

Pursuant to OP 3 of D.02-09-050, the Assigned ALJ directed the parties to work together to develop an EDR Process that could be used to resolve operational disputes more quickly than under currently available procedures. On November 20, 2002[12], nine parties[13] filed a proposed set of rules detailing procedures for a Commission-based arbitration process. (See Appendix A.) The process includes a procedure that sets out a schedule that is more compressed than the Commission's current schedule for Adjudicatory matters. It also

[12] The parties jointly submitted the original version of the proposed process on November 15, 2002. On December 3, 2002, Allegiance Telecom of California, Inc. (Allegiance) moved to be included as a submitting party to the joint proposal. The ALJ granted Allegiance's late-filled request.

[13] Pacific, AT&T, Telscape Communications Inc., U.S. TelePacific Inc., Pac-West, The Greenlining Institute, ORA, TURN and WorldCom joined to submit the document.

proposes expedited as well as interim ruling schedules. We appreciate the time and effort that the parties have put into working together and agreeing upon this process. An approach addressing operational and interconnection disputes in a timely manner is crucial for these parties.

While the parties have made tremendous progress by agreeing upon and submitting this proposal, some brief period of time must be spent conforming the process and its rules to the Commission's Rules of Practice and Procedure. For example, certain terms appear in the proposed rules that do not appear in the Commission's rules. Accordingly, it is important that there not be ambiguities in the EDR process because of these differences in terminology. In addition, we must confirm that the Commission resources necessary to implement and support this process exist. We ask parties to include in their comments on this draft decision why they believe the existing expedited dispute process established in the Local Competition docket[14]is inferior to the proposed process. Parties shall also advise if they would be willing to operate under a modification[15] of the process that they submitted, for a twelve-month trial period. Using the EDR process proposal submitted as the focal point, we direct the Assigned ALJ, in conjunction with the parties, to conform and modify it so that the process can be implemented as quickly as possible.

[14] In D.95-12-056.

[15] After consultation with the parties.

Special Access Performance Measures

Several CLECs[16] commented that special access[17] Operations Support System (OSS) services should be subject to the same performance incentive mechanisms as other OSS services in the Commission's performance incentives plan. The CLECs submitted a proposal to adopt special access OSS performance measures created by a national CLEC coalition.[18] The coalition's document is attached as Appendix B. In addition to the performance measures, the CLECs propose that monetary performance-improvement incentives be generated by poor special access OSS performance. (WorldCom Comments, November 14, 2002 at 16; AT&T Comments, November 14, 2002 at 7 – 10; PacWest, et al., Comments, October 15, 2002 at 16.)

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[16] AT&T, PacWest, WorldCom, Working Assets, and XO. TR 1694-1697; Comments of AT&T Communications of California, Inc. (U-5002-C) in Response to the Administrative Law Judge's Request for Comment on Expedited Dispute Resolution and Competitive Safeguards, November 14, 2002; Comments of Pac-West Telecomm, Inc. (U 5266 C), Working Assets Long Distance (U 5233 C) and XO California, Inc. (U 5553 C) Opposing the Ruling Issued by Assigned Commissioner Brown, October 15, 2002; Comments of WorldCom, Inc. on Assigned Commissioner's Ruling on Concluding the California Public Utilities Code Section 709.2 Inquiry, October 15, 2002; Comments of WorldCom, Inc. November 14, 2002.

[17] Special access services are defined as " a dedicated, non-switched, loop (circuit) connecting an end user with a CLEC's services or interexchange carrier's point of presence." FCC Notice of Proposed Rulemaking (NPRM), 01-339, Docket 01-321, *In the Matter of Performance Measures and Standards for Interstate Special Access Services*, released November 19, 2001, at 1.

[18] Joint Competitive Industry Group Proposal, ILEC Performance Measurements & Standards in the Ordering, Provisioning, and Maintenance & Repair of Special Access Service, Version 1.1, issued January 18, 2002.

Pacific opposes any Commission special access oversight. (TR 1721.) It asserts that special access should not be regulated because it is adequately competitive. (*SBC Pacific Bell Telephone Company's (U 1001 C) Comments Regarding Issues Raised at November 6, 2002 Prehearing Conference,* at 23 - 24.) Pacific also asserts that any special access oversight should be addressed at the federal level. (*Id.* at 24 - 25.)

In late 2001, the FCC initiated a rulemaking to consider both measurement and enforcement issues for *interstate* special access services.[19] In the initiating NPRM, the FCC stated, "To be sure, state commissions have jurisdiction over *intrastate* special access services" (emphasis added).[20] The states of Texas, New York, Pennsylvania, Minnesota, and Illinois, filed comments to the NPRM asserting the importance of state special access regulation.[21] At this writing, the FCC has neither drafted a proposed rule nor resolved the issues presented in the NPRM.

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[19] NPRM 01-339.

[20] NPRM at ¶ 11.

[21] *Comments of the Public Utility Commission of Texas,* NPRM CC Docket No. 01-321, et al., December 19, 2001; *Comments of the Minnesota Department of Commerce,* NPRM CC Docket No. 01-321, et al., January 8, 2002; *Reply Comments of the Pennsylvania Utility Commission in the Matter of Performance Measurements and Standards for Interstate Special Access Services, et al., CC Docket Nos. 01-321, et al.,* February 12, 2002; *CC Docket No. 01-321 / Notice of Proposed Rulemaking for evaluating a select group of wholesale performance measures for special access. Initial Comments of the Illinois Commerce Commission,* January 9, 2002; *Comments of the New York State Department of Public Service In The Matter of Performance Measurements and Standards for Interstate Special Access Services, et al., CC Docket No. 01-321, et al.,* January 18, 2002.

The topic of special access services performance measurement has generated widely diverse opinions among the parties. At this point we have neither sufficient time nor information to definitively resolve these disputes. However, we will adopt a minimal, but most important safeguard. We will require that a special access services OSS performance database be created for the Commission and the parties to monitor. This information will become the critical building block for future decisions, such as whether such measurement is at all necessary, or on the other hand, whether special access services OSS performance should be integrated into the Commission's performance incentives plan as an incentive-generating service type.

To begin building this safeguard today, we initiate the adoption of any existing Pacific special access measures and any additional measures in the CLEC proposal for special access OSS performance measurement. Except for those measures currently operational, these measures will not go into effect until the parties have collaboratively reviewed them for any duplication and modified them to the conditions in California if necessary, or have made other mutually agreeable modifications. We will direct the parties to begin work on these measures immediately after their work is complete on the current Joint Partial Settlement Agreement (JPSA) review.

We expect that the parties should be able to accomplish this task in six months and will direct them to present a settlement or at least a partial settlement at that time. If no agreements have been reached, or if some issues remain unresolved, we direct the parties to submit written proposals for each unresolved issue, including supporting arguments and evidence. In the interim, we direct Pacific to report current special access OSS performance measurement

results in the same time and manner as current "diagnostic" results are reported.[22]

We will not adopt an incentive mechanism for special access OSS performance today. At this point we will only require performance monitoring. We ask that the parties monitor Pacific's special access OSS performance through these measures and report to us any performance problems no later than six months after the new measures are adopted, and sooner if problems arise needing immediate Commission attention.

Conclusion

At the issuance of D.02-09-050, we did not consider our job with respect to Section 709.2(c) to be over. Our focus then and now is with the development of adequate competitive safeguards for the intrastate interLATA market. While acknowledging that D.02-09-050 was not appealed, most of the parties insist that we have further Section 709.2(c) proceedings and urge us to revisit issues that we have repeatedly declined to entertain. Notwithstanding the demands, we do not consider it appropriate to transplant the bulk of the major telecommunications policy matters to this proceeding. We believe that specific allegations should be pursued in a case dedicated to examining those allegations, not assembled with a vast assortment of past and recent accusations.

Anticompetitive conduct by Pacific that is substantiated will not be sanctioned. Any improper cross subsidization will be uncovered and remedied. Last December, Pacific chose to address Section 709.2(c) through its overall

[22] By "diagnostic" we refer to performance measures that are not included in the performance incentive plan as credit-generating measures, such as PM nos. 8, 12, and 13.

demonstration of compliance with Section 271. We were not persuaded that that showing sufficiently enabled us to make the determinations required under our state law. We reject the notion that extensive discovery and exhaustive hearings are the only way to fulfill our obligations under Section 709.2(c)(2)-(4). We also decline to indefinitely delay Pacific's entry in the intrastate long distance market until all the disputed issues before us are resolved. We believe the better approach is to erect competitive protective measures so that illegal conduct is prevented, revealed and punished.

Continuing Staff's review of the joint marketing scripts when substantial changes are made will inform the Commission about any anticompetitive conduct that emerges in the scripts, and enable us to immediately address it. The EDR process, once promptly conformed to our rules, will be a significant competitive safeguard against any unfair conduct or operational disputes. Additionally, requiring Pacific to make existing special access performance measure results available to Staff as well the competitors will allow us to monitor the data and discuss the issues from a common source of information. With the assurance of these added safeguards, we find in accordance with Section 709.2(c)(2) that there is no anticompetitive behavior by the local exchange telephone corporation.

The current NRF proceeding, R.01-09-001, will determine in one of its phases whether or not Pacific has cross subsidized its operations. We need not replicate that case here. Federal and California law requires separate accounting records "to allocate costs for the provision of intrastate interexchange telecommunications service." As stated in D.02-09-050, we directed that an audit of SBC Long Distance take place once it is operating, pursuant to OP 8 in D.99-02-013. That audit shall include an examination of the methodology of

allocating intrastate interexchange telecommunications service costs. We affirm the satisfaction of these requirements under Section 709.2(c)(3), and find that there is no cross subsidization by Pacific.

The Staff review of the marketing scripts, the EDR process, and the availability of special access performance measure results together provide a significant safeguard against potential harm to the intrastate interexchange market. The competitors insist that delaying Pacific's entry into the intrastate long distance market until the Commission resolves various policy questions is an appropriate response to future harm to the market. We consider such an approach to be resource-intensive and unproductive. For our part, we expect these safeguards to mitigate projected damage. Thus, with the safeguards we adopt today and those set out in D.02-09-050, we find that possibility of harm to the competitive intrastate long distance market to be less than substantial. In accordance with Section 709.2(c)(4), we find that there is no substantial possibility of harm to the competitive intrastate interexchange telecommunications markets.

In making the remaining determinations under Section 709.2(c), we find that it is appropriate that Pacific shall have the authority to operate and provide intrastate interexchange telecommunications services provided that it has received full authorization from the FCC pursuant to Section 271 of the Telecommunications Act of 1996. Thus, we grant Pacific the authority to provide interexchange telecommunications services within state of California.

Comments on Draft Decision

The draft decision of ALJ Jacqueline A. Reed in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Commission's Rules of Practice and Procedure. Comments were filed on _____.

The Commission finds that in light of scheduled action by the Federal Communications Commission in Washington, D.C. on December 19, 2002, to act on Pacific's application for interstate long distance service, pursuant to § 271 of the Telecommunications Act of 1996 (47 U.S.C. § 271), it is necessary for this Commission to take action by the effective date of Pacific's long distance service granted by the FCC's action, in order to provide guidance to Commission staff as to what to do with the California tariff filings permitted by the FCC's action. In order to allow the Commission to consider the matter in an expedited manner, the comment period is shortened and comments are due at noon, on December 24th.

The public necessity of deciding California's concurrent jurisdiction pursuant to Public Utilities Code § 709.2 over intrastate InterLATA long distance service in a manner that addresses issues of sovereignty and comity contemporaneous with Pacific's service offering permitted by the FCC's action, outweighs the public interest in having the full 30-day period for review and comment on the proposed decision. The Commission further finds that the normal public interest in a 30-day comment period is here somewhat diminished by the fact that a significant proportion of the disputed factual issues are coextensive with those previously decided in D.02-09-050, and have been addressed and commented upon by parties.

Assignment of Proceeding

Geoffrey Brown is the Assigned Commissioner and Jacqueline A. Reed is the Assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. On September 19, 2002, this Commission issued D.02-09-050, its advisory opinion to the FCC on Pacific's compliance with the fourteen checklist items of Section 271.

2. On October 4, 2002, the Assigned Commissioner issued an ACR noting that although the Commission had favorably assessed Pacific's long distance application for the FCC, the status of Pacific's intrastate interexchange request was hampered by the Commission having affirmatively made only one of the four determinations required under Section 709.2(c).

3. The ACR stated that upon reviewing the proceeding record after the issuance of the decision, the Assigned Commissioner believed that the outstanding Section 709.2(c) issues could and should be resolved promptly.

4. The Assigned Commissioner questioned how beneficial further proceedings and additional rounds of briefings would be in addressing the unfinished aspects of the Section 709.2(c) inquiry.

5. In his view, the remainder of the proceeding should focus on strengthening the safeguards established in D.02-09-050, and establishing additional safeguards, if warranted, to mitigate the potential harms to the intrastate interexchange market.

6. The November 6, 2002 PHC was convened to: (1) to advise the interested parties that the Commission wanted to resolve the remaining Section 709.2(c) issues as promptly as possible; (2) to urge the parties to collaborate on an Expedited Dispute Resolution (EDR) process in order to address the ongoing

operational conflicts between Pacific and the competitors; (3) to ask Pacific to work as closely as possible with staff to keep it fully briefed and ready for any and all post authorization regulatory tasks; and (4) to allow the parties an opportunity to further express their views and concerns on the resolution of the Section 709.2(c) open issues.

7. Most parties oppose the ACR's proposal, and urge the Commission to hold further proceedings.

8. A number of parties comment that the existing safeguards established under D.02-09-050 should be strengthened and implemented immediately, and new safeguards added.

9. No party appealed D.02-09-050.

10. Restarting the Section 709.2(c) inquiry from the beginning ultimately will not be productive.

11. The Assigned Commissioner remarked at the September 19 Commission Conference that appropriate safeguards could best mitigate existing anticompetitive conduct and cross subsidization as well as significant future harms to competitors.

12. The public interest is better served by resolving the competitors' disputes with Pacific than by simply cataloguing them.

13. A number of the proceedings that parties propose be considered in Section 709.2 are already before us.

14. Other proceedings identified as imperative, such as switched access charge reform and special access performance incentives, must be considered with full appreciation of the overall industry and the impacts on Commission resources.

15. While the individual theories behind both structural separation and a neutral PIC administrator were articulated in the parties' proposals last year, no implementing details were presented.

16. The language set forth in OP 17 of D.02-09-050 unnecessarily links a customer's decision to purchase long distance and local toll service.

17. Marketing documents tend to be submitted to the Commission in tandem with requests for proprietary treatment.

18. Competitors can inform Staff of script concerns so that Staff can review the joint marketing scripts from a comprehensive perspective.

19. Staff 's review of the marketing scripts has been beneficial for the Commission as well as Pacific.

20. The EDR process submitted by the parties includes a procedure that sets out a more compressed schedule than the Commission's current schedule for adjudicatory matters, and it proposes expedited as well as interim ruling schedules.

21. While the parties have made tremendous progress by agreeing upon and submitting the EDR proposal, some brief period of time needs to be spent conforming the process and its rules to the Commission's Rules of Practice and Procedure.

22. The CLECs state there is a need for special access services OSS performance measurement and incentives.

23. Pacific responds that there is no need for special access services OSS performance measurement and incentives.

24. The CLEC – Pacific Bell dispute over the need for special access services OSS performance measurement can be more easily resolved with objective performance results from special access services OSS services.

25. Continuing Staff's review of the joint marketing scripts when substantial changes are made will inform the Commission about any anticompetitive conduct that emerges in the scripts, and enable us to immediately address it.

26. The EDR process, once promptly conformed to Commission rules, will be a significant competitive safeguard against any unfair conduct or operational disputes.

27. Requiring Pacific to make existing special access performance measure results available to Staff as well as the competitors will allow us to monitor the data and discuss the issues from a common source of information.

28. At the issuance of D.02-09-050, the Commission did not consider its job with respect to Section 709.2(c) to be over.

29. The Commission's focus then and now is with the development of adequate competitive safeguards for the intrastate interLATA market.

30. While acknowledging that D.02-09-050 was not appealed, most of the parties insist that the Commission entertain further Section 709.2(c) proceedings and urge it to revisit issues that it has repeatedly declined to entertain.

31. We reject the notion that extensive discovery and exhaustive hearings are the only way to fulfill our obligations under Section 709.2(c)(2)-(4).

32. We also decline to indefinitely delay Pacific's entry in the intrastate long distance market until all the disputed issues before us are resolved.

33. We believe the better approach is to erect competitive protective measures so that illegal conduct is prevented, revealed and punished.

34. Continuing Staff's review of the joint marketing scripts when substantial changes are made will inform the Commission about any anticompetitive conduct that emerges in the scripts, and enable us to immediately address it.

35. The EDR process, once promptly conformed to our rules, will be a significant competitive safeguard against any unfair conduct or operational disputes.

36. Additionally, requiring Pacific to make existing special access performance measure results available to Staff as well as the competitors will allow us to monitor the data and discuss the issues from a common source of information.

37. The current NRF proceeding, R.01-09-001, will determine in one of its phases whether or not Pacific has cross-subsidized its operations; we need not replicate that case here.

38. We affirm the satisfaction of these requirements under Section 709.2(c)(3), and find that there is no cross subsidization by Pacific.

39. The Staff review of the marketing scripts, the EDR process, and the availability of special access performance measure results together provide a significant safeguard against potential harm to the intrastate interexchange market.

40. With the safeguards we adopt today and those set out in D.02-09-050, we find the possibility of harm to the competitive intrastate long distance market to be less than substantial.

Conclusions of Law

1. Since Pacific neither appealed the D.02-09-050 determination that the record did not support an affirmative Section 709.2(c)(2) finding nor sought leave to address unanswered accusations, we are not persuaded that compelling evidentiary hearings on these ongoing and increasing allegations would benefit the public interest more than finding a method of resolving Pacific-competitor disputes quickly and more efficiently.

2. The Commission could not base the determination of Pacific's Section 271(c) on the resolution of every major telecommunications policy case before it, and cannot adjudge Section 709.2(c) on the basis of the policy demands of the competitors.

3. While certain parties highlight how various major telecommunications policy issues affect their economic well-being, this Commission must consider and weigh how the issues affect all parties as well as California ratepayers.

4. Some time must be devoted to fully fleshing out the costs and ramifications of structural separation and selection of a neutral PIC administrator; to proceed hastily on either would ill serve the people of California.

5. Including the requirements of Tariff Rule 12 into the joint marketing of Pacific's long distance affiliate's services should properly balance the competitive concerns of the intrastate interexchange carriers with the convenience and informational needs of the ratepayer.

6. Given the problem the specific language of OP 17 unintentionally creates, separating the one question into two questions provides the best solution.

7. Staff's review of any substantial changes in the joint marketing scripts, such as new approaches, major language changes or the offering of new products, could help Pacific avoid potential confusion and conflicts with competitors and ratepayers.

8. Staff's continuing review of Pacific's joint marketing scripts should assist Pacific and the Commission in discovering and eliminating the possibility of anticompetitive behavior that might be reflected in the scripts.

9. An approach that addresses operational and interconnection disputes in a timely manner is crucial for the parties in this proceeding.

10. It is important that there not be ambiguities in the EDR process due to differences in terminology.

11. The California Public Utilities Commission has jurisdiction over intrastate special access services.

12. The Commission should examine objective performance results from special access services OSS service before deciding to permanently incorporate special access performance measures and/or incentives into the Commission's performance incentives plan.

13. Pacific should report existing operational special access OSS performance measurement results and work with the parties in crafting a more complete set of measures.

14. Transplanting the bulk of the major telecommunications policy matters to this proceeding would be inappropriate.

15. Specific allegations should be pursued in a case dedicated to examining those allegations, not assembled with a vast assortment of past and recent accusations.

16. Anticompetitive conduct by Pacific that is substantiated will be sanctioned.

17. Any improper cross subsidization will be uncovered and remedied.

18. Extensive discovery and exhaustive hearings are not the only way to fulfill our obligations under Sections709.2(c)(2)-(4).

19. Instead of indefinite delay, the better approach is to erect competitive protective measures so that illegal conduct is prevented, revealed and punished.

20. With the assurance of the added safeguards, there is no anticompetitive behavior, pursuant to Section 709.2(c)(2), by the local exchange telephone corporation.

21. Federal and California law requires separate accounting records "to allocate costs for the provision of intrastate interexchange telecommunications service."

22. The existence of separate accounting records and the mandated audit testing costing allocation methodology satisfy the requirements of Section 709.2 (c)(3); thus, there is no cross subsidization.

23. The Staff review of the marketing scripts, the EDR process, and the availability of special access performance measure results together should provide a significant safeguard against potential harm to the intrastate interexchange market.

24. With the adopted safeguards, there should not be a substantial possibility of harm to the competitive intrastate interexchange telecommunications markets; thereby enabling the Commission to so determine under Section 709.2 (c)(4).

25. It is appropriate for Pacific to have the authority to operate and provide interexchange telecommunications services intrastate provided that it has received full authorization from the FCC pursuant to Section 271 of the Telecommunications Act of 1996.

26. The Commission should grant Pacific the authority to provide interexchange telecommunications services within the state of California immediately for public convenience.

O R D E R

IT IS ORDERED that:

1. Pacific Bell's (Pacific) motion, pursuant to General Order (G.O.) 66-C, for a protective order covering documents regarding the California Public Utilities Commission's (Commission) Telecommunications Division Staff's (Staff) review

of joint marketing scripts in accordance with Ordering Paragraph (OP) 16 of Decision (D.) 02-09-050 is granted. The documents shall be made available to Commission personnel subject to G.O. 66-C and all other parties to this proceeding who have signed a non-disclosure agreement, for no more than two years from the date of this order.

2. OP 17 of D.02-09-050 shall be modified to read:

> Pacific Bell (Pacific) shall state consumer's equal access right to a long distance carrier of ~~their~~ his/her choice prior to identifying its long-distance services and offer the customer the opportunity to select the carrier of ~~their~~ his/her choice. Pacific shall include in its customer service scripts for a new service connections the following: "You have many companies to choose from to provide your long distance and local toll service including (Pacific Bell Long Distance). If you like, I can read from a list of available carriers and provide their telephone numbers. Who would you like as your long distance carrier? and Who would you like as your local carrier?"

3. Staff shall review any substantial changes that Pacific makes in the future to the sample joint marketing scripts submitted pursuant to OP 19, until such time as the Commission orders otherwise.

4. Staff shall advise the Assigned Commissioner and Administrative Law Judge (ALJ) of its findings and recommendation, if Staff has concerns or discovers problems.

5. Using the Expedited Dispute Resolution (EDR) proposal submitted in this proceeding as the focal point, the Assigned ALJ shall conform and modify it, in conjunction with the parties, so that the EDR process can be implemented as quickly as possible.

6. Beginning with performance for the month of July 2002, Pacific shall report currently internally available performance measurement results for special access OSS services. These results shall be reported in the same time and manner as existing Joint Partial Settlement Agreement "diagnostic" Operational Support System (OSS) performance results.

7. Beginning no later than March 1, 2003, in the Rulemaking 97-10-016/ Investigation 97-10-017 performance measurement proceeding, parties shall review existing Pacific measures and any additional measures in the competitive local exchange carrier competitive local exchange carriers special access OSS performance measures proposal, and shall collaborate to produce a complete set of OSS performance measures for special access service types by modifying, amending, or integrating that proposal where appropriate.

8. No later than six months after the special access performance measurement collaboration has begun, parties shall submit to the Commission an agreement or partial agreement covering all the issues to which parties have agreed.

9. No later than six months after the special access performance measurement collaboration has begun, for any issue not resolved in the collaborations, parties shall submit any proposals to the Commission along with the justification for those proposals.

10. If no issues are resolved, no later than six months after the special access performance measurement collaboration has begun, parties shall submit their complete proposals to establish performance measures and shall include their justification for those proposals.

11. Pacific shall have the authority to operate and provide interexchange telecommunications services intrastate provided that it has received full authorization from the FCC pursuant to Section 271 of the Telecommunications Act of 1996.

12. The Section 709.2 safeguards shall remain in effect until they are discontinued on further order of the Commission, based on a motion by Pacific demonstrating that the safeguards are no longer necessary or appropriate, or that the burden of compliance is outweighed by the potential benefits.

This order is effective today.

Dated _____, at San Francisco, California.

APPENDIX A

FORMAL AND EXPEDITED DISPUTE RESOLUTION

APPENDIX B

Joint Competitive Industry Group Proposal
ILEC Performance Measurement & Standards

Appendix A to Reed Comment Decision (FORMAL AND EXPEDITED DISPUTE RESOLUTION)