

Decision 12-03-055 March 22, 2012

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

XO Communications Services, Inc.
(U5553C),

Complainant,

vs.

Pacific Bell Telephone Company, d/b/a
AT&T California (U1001C),

Defendant.

Case 09-07-021
(Filed July 20, 2009)

**DECISION MODIFYING REHEARING DECISION (D.) 11-07-032
AND UNDERLYING D.10-07-005**

1. Summary

In this Decision, we dispose of the petitions for modification of Decision (D.) 11-07-032 filed by Pacific Bell Telephone Company d/b/a AT&T California (AT&T) and XO Communications Services, Inc. (XO) on August 16, 2011 and August 25, 2011, respectively. We modify D.11-07-032 (and the underlying decision, D.10-07-005) by ruling that the interconnection agreement (ICA) between XO and AT&T provides XO with the right to cross-connects between XO's and other competitive local exchange carriers' collocated equipment via AT&T's main distribution frame (MDF), and that the applicable rate for such

cross-connects via the MDF is the federal Total Element Long Run Incremental Cost rate set forth in the parties' ICA.

2. Background

The goal of the Telecommunications Act of 1996 (Act)¹ is to foster rapid development of competition in local telecommunications services. To achieve that goal, the Act requires that incumbent local exchange carriers (ILECs) share their networks with competitors seeking entry into the traditionally monopolistic local service market. Specifically, the Act requires that ILECs provide interconnection for competitive local exchange carriers' (CLEC) facilities and equipment.² ILECs also must provide CLECs with nondiscriminatory access to unbundled network elements (UNEs),³ and allow CLECs to collocate their equipment in ILEC wire centers as necessary to accomplish interconnection.⁴ Attendant to collocation is the ability of CLECs to cross-connect their equipment with that of other carriers also collocated within an ILEC's premises.⁵ The

¹ Pub. L. No. 104-104 (Feb. 8, 1996), 110 Stat. 56, codified at 47 U.S.C. §§ 151 *et. seq.*

² 47 U.S.C. §§ 251(a)(1) & (c)(2). The term ILEC is defined in 47 U.S.C. § 251(h).

³ 47 U.S.C. § 251(c)(3). UNEs include loops, switches, and transport facilities. To determine what network elements ILECs must make available under Section 251(c)(3), the Federal Communications Commission considers whether the failure to provide access to the network element would "impair" the CLEC's ability to provide telecommunications service. *Id.* § 251(d)(2). This impairment analysis applies only to the Section 251(c)(3) unbundling obligation. *Id.*

⁴ 47 U.S.C. § 251(c)(6); *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers (Local Competition Order)* (1996), 11 FCC Rcd 15499 ¶¶ 28, 594-95.

⁵ See *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability (Collocation Order)* (2001), 16 FCC Rcd 15435 ¶¶ 1, 2, 55-84. ILEC-provided

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Federal Communications Commission (FCC) has held that the Act imposes a general requirement that ILECs bill CLECs for cross-connects at Total Element Long Run Incremental Cost (TELRIC) rates, the same cost-based pricing that is applicable to the provision of Section 251(c)(2) interconnection and Section 251(c)(3) access to UNEs.⁶

Pacific Bell Telephone Company d/b/a AT&T California (AT&T) and XO Communications Services, Inc. (XO) are telecommunications carriers authorized to do business in California as an ILEC and a CLEC, respectively. Pursuant to the Act and the terms of an interconnection agreement (ICA), XO maintains physical collocation in several of AT&T's California wire centers.⁷ In addition, AT&T provides connections which allow XO to cross-connect with various other CLECs collocated in AT&T's premises.⁸ The type of cross-connect AT&T provides XO that is at issue here is cabling between XO's termination on AT&T's main distribution frame (MDF) and another CLEC's termination on AT&T's MDF (hereinafter referred to as cross-connects via the MDF).⁹ Initially, XO obtained these cross-connects by ordering them out of AT&T's federal

cross-connects are required and considered part of the terms and conditions of collocation. *Id.* ¶¶ 62, 79-80, 82.

⁶ See, e.g., *Local Competition Order*, 11 FCC Rcd 15499 ¶¶ 29, 618-629. See also 47 C.F.R. §§ 51.501, 51.503, and 51.505.

⁷ Joint Factual Stipulation, dated January 27, 2010, ¶¶ 4, 5. The applicable ICA was originally entered into between AT&T and XO's predecessor in interest, Nextlink California, Inc. See *id.* ¶ 3; Complaint of XO, filed July 20, 2009, Exh. A.

⁸ Joint Factual Stipulation, dated January 27, 2010, ¶¶ 6-8.

⁹ *Id.* ¶ 8. Another type of cross-connect is direct cabling between two CLECs' collocation spaces (hereinafter referred to as direct cross-connects). *Id.* ¶ 7.

special access tariff.¹⁰ As an example, the tariffed rate for so-called “cage-to-cage interconnection” via the MDF for a DS3 transport circuit can range as high as \$723.96 per month.¹¹

In approximately 2007, XO requested that AT&T convert its pricing for cross-connects via the MDF to lower TELRIC rates incorporated into the ICA.¹² AT&T did so for cross-connects in wire centers that are deemed “impaired” for UNE transport (*i.e.*, non-competitive). However, it continued to bill at the higher, federal tariff rate in “unimpaired” (*i.e.*, competitive) wire centers.¹³

On approximately January 1, 2008, XO began to withhold any cross-connect payments (for those cross-connects via the MDF in “unimpaired” wire centers) by the amount they were in excess of TELRIC prices incorporated into the ICA.¹⁴ XO and AT&T attempted, unsuccessfully, to resolve the billing dispute informally for over a year.¹⁵ On July 20, 2009, XO filed a formal complaint with this Commission seeking a determination that AT&T must bill for all disputed cross-connects at the TELRIC rate incorporated into the ICA rather than the federal special access tariff rate.

¹⁰ *Id.* ¶ 9. At the time XO placed the initial orders for cross-connects, both parties apparently believed that AT&T’s federal tariff applied to such orders. They subsequently have conceded that the federal tariff does not explicitly apply. *See* n.52 below.

¹¹ *Id.* [Showing the applicable charges as: \$61.98 (cross-connect); \$61.98 (cross-connect); \$600 (special access transport)].

¹² *Id.* ¶ 10 [Showing the applicable charges as: \$45.68 (cross-connect); \$45.68 (cross-connect); \$0 (UNE transport)].

¹³ *Id.* ¶¶ 10-11. *See* discussion of Section 251(c)(3) impairment analysis, *supra* n.3.

¹⁴ *Id.* ¶ 12.

¹⁵ *Id.* ¶ 13.

In D.10-07-005, we agreed with XO and directed AT&T to write off any portion of any bill in excess of TELRIC rates after January 1, 2008. (D.10-07-005 at 6-7 [Ordering Paragraphs 1 and 2].)

AT&T filed a timely application for rehearing asserting that D.10-07-005 is unlawful because: (1) it violates the “filed rate doctrine” by requiring AT&T to charge other than the federal tariff rate; and (2) the Commission impermissibly altered the terms of the ICA. XO filed a response.

In the rehearing decision D.11-07-032, we concluded that the parties may contract out of the regulatory regime under the Act to negotiate different terms and rates pursuant to an ICA, and in this instance the parties had an ICA covering collocation service (which includes cross-connects). We thus agreed with AT&T that these services are governed by Section XI of the ICA (entitled “Collocation and Mid Span Meets”), which in turn incorporates the rates set forth in AT&T's state tariff, Schedule Cal. P.U.C. Tariff 175-T, Section 16 (Tariff 175-T).¹⁶ Accordingly, we modified D.10-07-005 to require the disputed charges to be paid in accordance with Section XI of the ICA and simultaneously denied rehearing of D.10-07-005 as modified. Following the issuance of D.11-07-032, both parties belatedly discovered that Tariff 175-T did not in fact contain a rate for cross-connects via the MDF.¹⁷ They then filed timely petitions for modification of D.11-07-032.

¹⁶ Application of AT&T for Rehearing of D.10-07-005, dated August 11, 2010, (Reh'g App.) at 3; D.11-07-032 at 6.

¹⁷ Responses of AT&T to ALJ Ruling Directing Parties to Supplement Record, dated December 8, 2011 (AT&T Dec. 8 Responses) at 20; XO's Responses to ALJ's Request to Supplement the Record, dated December 8, 2011 (XO Dec. 8 Responses) at 27; AT&T Petition for Modification of Order Modifying D.10-07-005, dated August 16, 2011

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In their numerous and extensive filings in this docket, including the cross-petitions for modification, the parties – most particularly AT&T – have repeatedly shifted their legal arguments and made seemingly inconsistent references to portions of the record, detailed in Section 3 below.¹⁸ Accordingly, on November 15, 2011, the assigned Administrative Law Judge (ALJ) issued a ruling directing the parties to answer detailed questions designed to clarify the ambiguities in the parties' positions, especially with regard to their understanding of the meaning and operation of key terms of the ICA and its relation to the Act and related regulations of the FCC. The ALJ noted that the parties had failed to accurately and comprehensively address relevant legal and factual issues at an earlier stage in the proceeding, thus wasting Commission time and resources. On December 8, 2011 the parties filed responses to the ALJ ruling.

3. Discussion

3.1. AT&T's Position

AT&T argues that neither the ICA itself nor the state tariff covers cross-connects via the MDF.¹⁹ Despite conceding that cross-connects are a form of collocation,²⁰ AT&T simultaneously contends that the ICA's reference to

(AT&T Petition for Modification) at 4-5; Petition of XO for Modification of D.11-07-032, dated August 25, 2011 (XO Petition for Modification) at 2-3.

¹⁸ See *infra* nn. 20, 22, 47.

¹⁹ Reh'g App. at 2-3; AT&T Petition for Modification at 4-5.

²⁰ AT&T Dec. 8 Responses at 1, 25. AT&T initially argued that cross-connects between CLECs' collocated equipment were UNEs under Section 251(c)(3) of the Act. See, e.g., Answer of AT&T to the Complaint ¶¶ 16-17, 22-23. As we stated in our original decision, D.10-07-005, we reject that argument. Cross-connects are a form of

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"collocation" in Section XI.A (as well as the connections discussed in the definition of the term EISCC and the UNE Appendix, Sections 6.1 and 6.2) covers only connections between XO and AT&T, not between collocated CLECs.²¹

While apparently further conceding that UNE Appendix Section 6.3 addresses both CLEC-to-CLEC direct cross-connects and CLEC-to-CLEC cross-connects via the MDF, AT&T argues that the phrase "at its option" in Section 6.3 gives AT&T the unilateral right to choose what type of cross-connect it will allow, and that AT&T does not have to provide any cross-connect if AT&T allows the CLEC to provide its own.²² AT&T asserts that, because this is a negotiated rather than arbitrated ICA, Section 251 of the Act and the Collocation Order do not apply.²³ If that is so, there is nothing in the ICA for the Commission to enforce and, under the so-called "filed rate doctrine," the applicable rate must be the federal tariff rate under which XO originally ordered the service.²⁴ AT&T states that the \$45.68 rate it is currently charging XO for CLEC-to-CLEC cross-connects via the MDF is located in Attachment 1 of the 2005 amendment to the ICA, entitled

collocation under Section 251(c)(6), and Section 251(c)(3) and the FCC's orders implementing the Section 251(c)(3) unbundling obligation do not apply. D.10-07-005 at 3-4.

²¹ AT&T Dec. 8 Responses at 3-4, 8-9.

²² *Id.* at 10. AT&T originally argued that the ICA's UNE Appendix covered cross-connects via the MDF (*see, e.g.*, Opening Brief of AT&T, dated February 17, 2010, at 5-6), but now asserts the UNE Appendix is inapplicable. AT&T Reply in Support of its Petition for Modification of Order Modifying Decision (D.) 10-07-005, dated September 26, 2011 (AT&T Sept. 26, 2011 Reply) at 2; AT&T Dec. 8 Responses at 26.

²³ AT&T Sept. 26, 2011 Reply at 3-4; AT&T's Opposition to XO's Petition for Modification of Order Modifying Decision (D.) 10-07-005, dated Sept. 26, 2011 at 2-3.

²⁴ AT&T Petition for Modification at 6.

“Monthly Rec Rates,” under the heading “Expanded Interconnection Service Cross Connect (EISCC)” and at the line for a DS3 EISCC.²⁵

3.2. XO’s Position

XO argues that Section 6.3 of the UNE Appendix to the ICA gives XO the right to cross-connects via the MDF²⁶ and that the correct rate is the (TELRIC) rate for EISCCs from the ICA’s Appendix Pricing Attachment A, as amended in 2005, at lines 443-455 under the heading “EISCC Basic to Collocation.”²⁷ XO argues that the federal tariff rate is inapplicable because it addresses only collocation transport arrangements via direct connections, not cross-connects between CLECs via the MDF under Section 251(c)(6).²⁸ XO asserts that, even if the ICA did not provide an explicit right to cross-connects via the MDF or set forth a rate, the Commission must interpret the ICA consistently with the Act and the related FCC orders.²⁹ Although the ICA predates the FCC’s 2001 Collocation Order,³⁰ XO argues that the ICA explicitly recognizes that the FCC may act in the future to modify the parties’ arrangements memorialized in the

²⁵ AT&T Dec. 8 Responses at 25 and Attachment D thereto (last line).

²⁶ XO Petition for Modification at 10; Reply of XO in Support of its Petition for Modification of D.11-07-032, dated Oct. 6, 2011 (XO Oct. 6, 2011 Reply), at 2-5. XO also cites to §§ XXXVIII(D) and XVI of the ICA. XO Petition for Modification at 13-14.

²⁷ XO Dec. 8 Responses at 10, 17-18, 22. *See also* XO Oct. 6, 2011 Reply at 5 and Attachment 1 thereto.

²⁸ XO Dec. 8 Responses at 30. *See also* Response of XO to AT&T’s Petition for Modification of D.11-07-032, dated Sept. 15, 2011, at 9 n.34.

²⁹ XO Petition for Modification at 13-17.

³⁰ *Supra* n.5.

ICA (e.g., the phrase "to the extent required by the FCC" in UNE Appendix Section 6.3).³¹

3.3. Analysis of the Issues

Pursuant to Section 251(c)(6) of the Act, ILECs must allow CLECs to collocate their equipment on ILECs' premises, and must provide CLECs with cross-connects to connect the CLEC's equipment both with the ILEC's equipment and other CLECs' collocated equipment.³² ILECs must provide appropriate cross-connects "as requested" by a CLEC.³³ The FCC recognizes cross-connects via the MDF as one of the types of cross-connect configurations that ILECs must provide.³⁴ The rate for cross-connects under Section 251(c)(6) is TELRIC.³⁵

Parties may opt out of the Act's regulatory regime to negotiate different terms and rates, and instead may enter into an ICA.³⁶ The Commission has the authority to enforce the Act's Section 251 interconnection requirements,

³¹ XO Petition for Modification at 14; XO Dec. 8 Responses at 22.

³² Local Competition Order, 11 FCC Rcd 15499 ¶¶ 28, 594-95; Collocation Order, 16 FCC Rcd 15435 ¶¶ 79-80, 82.

³³ Collocation Order, 16 FCC Rcd 15435 ¶ 74.

³⁴ *Id.* ¶ 58.

³⁵ Local Competition Order, 11 FCC Rcd 15499 ¶¶ 29, 618-629.

³⁶ 47 U.S.C. § 252(a); Local Competition Order ¶¶ 66, 618; *Verizon California, Inc. v. Peevy*, 462 F.3d 1142, 1151 (9th Cir. 2006)

including interpreting and enforcing existing and approved ICAs.³⁷ The Commission cannot, however, effectively change the terms of the ICA.³⁸

Here, the ICA addresses AT&T's provision of collocation in general. Section XI.A, entitled "Physical Collocation," states, in pertinent part, that AT&T "will provide for physical collocation of transport and termination equipment necessary for interconnection of [XO's] network facilities to [AT&T's] network or access to unbundled network elements at its Wire Center premises." More particularly, the ICA also addresses cross-connects, including the cross-connects between XO and other collocated CLECs.³⁹ However, as the parties agree, the ICA does not explicitly use or differentiate between the types of cross-connects at issue here, direct cross-connects between CLECs' collocated equipment and cross-connects between CLECs' collocated equipment via the MDF.⁴⁰

Section XI.A of the ICA further states that AT&T must provide "such collocation . . . on a non-discriminatory basis according to the rates, terms and conditions" contained in AT&T's state tariff, Schedule Cal. P.U.C. Tariff 175-T, Section 16, "except as modified below [in Subsections XI.A.1 and A.2]." AT&T reads this sentence as limiting collocation to (a) only those cross-connects between AT&T and XO, not between XO and other CLECs (in direct conflict with

³⁷ See *Verizon Maryland, Inc. v. Global Naps*, 377 F.3d 364, 366 (4th Cir. 2004); *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1125 (9th Cir. 2003); Collocation Order, 16 FCC Rcd 15435 ¶ 84.

³⁸ See *Pacific Bell v. Pac-West*, 325 F.3d at 1127.

³⁹ See, e.g., ICA UNE Appendix § 6.3; ICA § XI.A.2(b) (both discussed below). See also ICA at 7, Definition No. 18 (defining cross-connect); ICA Appendix Pricing Attachment A (containing rates for "Cross Connects to Collocation") (attached to XO's Oct. 6, 2011 Reply).

⁴⁰ See AT&T Dec. 8 Responses at 13, 20; XO Dec. 8 Responses at 2-3, 7-8, 26-28.

its own concession that collocation includes cross-connects) and (b) only those services specifically identified in the tariff.⁴¹ We reject AT&T's argument that the state tariff limits XO's right to cross-connects via the MDF.

First, as AT&T has already conceded, collocation is a broad term that includes many different types of cross-connects, including those between CLECs' collocated equipment. Second, the ICA gives XO the right to collocate and to use cross-connects. As set forth above and discussed further below, it also contains rates for cross connects (EISCCs) in (1) the Appendix Pricing Attachment A under the heading "Cross Connects to Collocation" and (2) a March 17, 2005 "Monthly Rec Rates" Attachment 1 to the ICA, both of which conform with the rates AT&T has stipulated that it has charged and is currently charging XO for cross-connects via the MDF. Accordingly, we do not interpret the incorporation of the state tariff (and its failure to set a rate for this particular type of cross-connect) as the parties' deliberate omission of one type of cross-connect, *i.e.*, cross-connects via the MDF. Rather, we read the reference to the state tariff to mean that if the tariff sets a rate for a service provided for in the ICA, then that tariff rate applies; if it does not set a rate, then another rate applies.

AT&T's own course of conduct also supports a conclusion that the ICA includes the right to cross-connects via the MDF at TELRIC rates. Since roughly 2007 (in wire centers deemed "impaired" for dedicated intra-office transport under Section 251(c)(3)), AT&T has been providing XO with cross-connects via the MDF at a TELRIC rate for a DS3 EISCC pursuant to the ICA.⁴² That

⁴¹ AT&T Dec. 8 Responses at 4-5.

⁴² Joint Factual Stipulation ¶ 10.

DS3 EISCC rate appears to come from either the ICA's Appendix Pricing Attachment A or the subsequent 2005 Attachment 1.

AT&T, however, contends that the term "EISCC" does not include CLEC-to-CLEC cross-connection via the MDF (or, for that matter, CLEC-to-CLEC direct cross-connection).⁴³ It is true that the ICA's EISCC definition (No. 23) appears to only refer to cross-connects between a CLEC and AT&T. Yet ICA Section XI.A.2(b) uses the term EISCC to refer to the cross-connects "between [XO] and another party's [*i.e.*, another CLEC's] collocated network facility in [AT&T's] Wire Center." Moreover, AT&T's argument is inconsistent with its past and current conduct, *i.e.*, charging XO an "EISCC" rate for CLEC-to-CLEC cross-connects via the MDF.

In addition, Section 6.3 of the UNE Appendix (under the caption "Cross Connections") requires AT&T to interconnect XO's network with another collocating CLEC on AT&T's premises, without limiting those connections (*i.e.*, cross-connects) to any particular type or method. It states, in pertinent part:

To the extent required by the FCC, [AT&T] will at its option permit [XO] to interconnect its network with that of another collocating telecommunications carrier at [AT&T's] premises and to connect its collocated equipment to the collocated equipment of another telecommunications carrier within the same premises provided that the collocated equipment is also used for interconnection with [AT&T] or for access to [AT&T's] Unbundled Network Elements. Subject to the conditions above [AT&T] will provide the connection between the equipment in the collocated spaces of two or more telecommunications carriers . . . at the requesting competitive local carriers' expense, unless [AT&T] permits one or more of the collocating

⁴³ AT&T Dec. 8 Responses at 3.

telecommunications carriers to provide this connection for themselves.

AT&T argues that the phrase “at its option” allows AT&T to determine the type of cross-connect.⁴⁴ Rather, that phrase refers to AT&T’s flexibility to provide the cross-connect or allow XO to construct its own cross-connect. AT&T fails to take into account the effect of the initial modifying phrase “[t]o the extent required by the FCC.” In the 2001 Collocation Order, the FCC required ILECs to provide CLECs with collocation (including cross-connects) as requested by the CLEC and concluded that an ILEC need not allow collocated CLECs to install their own CLEC-to-CLEC cross-connects.⁴⁵ AT&T’s second contention regarding Section 6.3 – that AT&T does not have to provide XO with a CLEC-to-CLEC cross-connect (of either type) if AT&T allows XO to provide its own – also fails. AT&T represents that it offers CLECs the option of installing its own direct cross-connect, not a cross-connect via the MDF.⁴⁶ In addition, Section 6.3’s second sentence states that its provisions are “subject to the conditions above,” which include the FCC’s requirement that ILECs provide cross-connects as requested by the CLEC, as discussed above.

Ultimately, both parties have relied on ICA rate sheets which link the TELRIC rate that AT&T has charged XO for cross-connects via the MDF (\$45.68 per month) to EISCC DS3 cross-connects.⁴⁷ Since case law suggests it is

⁴⁴ AT&T Dec. 8 Responses at 10-11.

⁴⁵ Collocation Order, 16 FCC Rcd 15435 ¶¶ 2, 12, 74. Although there does not appear to be any evidence in the record to explain why the drafters of the ICA put a discussion of Section 251(c)(6) collocation (i.e. CLEC-to-CLEC cross-connects) in the “UNE” Appendix, they did, and it is reasonable to interpret the language contained therein as written.

⁴⁶ AT&T Dec. 8 Responses at 10 & n.2.

reasonable to interpret an ICA based at least in part on the parties' own characterization of the provision of equipment and/or services,⁴⁸ it is reasonable here to also rely on the parties' own submission of these rate sheets to conclude the ICA contains a rate that does apply, and should be applied, to resolve this dispute.⁴⁹

⁴⁷ Despite multiple opportunities to do so, until recently the parties have failed to create a record (by citing to and/or providing specific ICA provisions/rate sheets and/or tariff provisions) which clearly identifies a rate that applies to cross-connects via the MDF. In its October 6, 2011 Reply, XO attached a rate sheet (the ICA's Appendix Pricing Attachment A) containing an EISCC DS3 rate for cross-connects comparable to the rate AT&T has been charging, and stated that the parties updated that EISCC DS3 rate in 2005. XO October 6, 2011 Reply, Attachment 1, at 9 of 15, lines 443-455; XO Dec. 8 responses at 10, 17 & n. 45, 18, 22. In its December 8 Responses AT&T also finally submitted a 2005 amended rate sheet containing the identical price that it has been charging XO, also tied to EISCC DS3 service. AT&T Dec. 8 Responses at 25 and Attachment D thereto. This 2005 amended rate sheet on which AT&T relies appears not to be part of the excerpted ICA XO attached to its complaint. Neither the Appendix Pricing Attachment A nor the 2005 amendment identifies or limits how XO is able to use the EISCC, *i.e.*, for interconnection with AT&T, for access to AT&T's UNEs, or to connect with another collocated CLEC. XO states that a 2007 ICA pricing update does not contain an amended rate for cross-connects via the MDF, such that the applicable rate remains the 2005 amended rate. XO Dec. 8 Responses at 17 n. 45. AT&T does not address the 2007 update. It is reasonable to conclude that if the 2007 update does not apply to cross-connects via the MDF, then only the 2005 pricing update is relevant for purposes of this determination.

⁴⁸ See, e.g., *Global Naps California, Inc. v. Public Utilities Commission of the State of California*, 624 F.3d 1225, 1232 (9th Cir. 2010).

⁴⁹ We note that this result is consistent with the ICA's TBD (to be determined) provision. See XO Oct. 6 Reply, Attachment 2, Appendix Pricing at 3 of 8 ("If no agreement on a rate is reached within thirty (30) days of [XO's] request for a meeting, the Parties shall propose rates for the Network Element or Collocation service in question to the Commission in an appropriate proceeding. The Parties agree that they will jointly seek an expeditious resolution and final decision from the Commission in the proceeding in which the rates in question will be set.").

In summary, we find that the terms of the ICA, read individually and as a whole, include the right to collocate, including use of cross-connects via the MDF.⁵⁰

There is no language in the ICA evidencing any intent or agreement to exclude the right to any particular type of collocation, including cross-connects via the MDF. That, in conjunction with AT&T's own conduct, supports a broad and inclusive interpretation of the ICA. The proper rate for cross-connects via the MDF that AT&T provides XO is the rate set forth in the ICA which AT&T has charged and continues to charge XO for cross-connects via the MDF in impaired wire centers, as set forth in paragraph 10 of the parties' Joint Factual Stipulation and the 2005 amendment to the parties' ICA.⁵¹

Finally, we reject the applicability of AT&T's federal tariff, as it contains no terms or rates that actually apply to the disputed service. It is irrelevant that XO originally ordered the cross-connects from that tariff since even the parties now agree and confirm that the federal tariff does not in fact address or apply to

⁵⁰ Even if we interpret the ICA as being silent on whether XO is entitled to cross-connects via the MDF, there is no language in the ICA indicating that the parties opted out of the Section 251(c)(6) collocation requirement, which includes the right to cross-connects. Thus, XO's right to cross-connects via the MDF would still exist under Section 251, the Commission would have to set a rate, and that rate should be the TELRIC rate. As the ICA contains a TELRIC rate that AT&T has charged and continues to charge XO for cross-connects via the MDF in impaired wire centers (the TELRIC rate from the ICA's 2005 amendment Attachment 1, entitled "Monthly Rec Rates," for DS3 EISCCs), it would be reasonable to look to that same TELRIC rate in the ICA for all cross-connects via the MDF.

⁵¹ AT&T Dec. 8 Responses at 25 and Attachment D thereto.

cross-connects via the MDF.⁵² Since the federal tariff does not explicitly apply, it is neither relevant nor necessary to address arguments regarding the applicability of the filed rate doctrine.

For the reasons stated above, D.11-07-032 (modifying D.10-07-005) is modified as set forth in the below Ordering Paragraphs of this Order.

4. Comments on the Proposed Decision

The proposed decision of the assigned ALJ was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on February 27, 2012 by AT&T and XO. Reply comments were filed on March 15, 2012 by AT&T and XO. We have reviewed the comments and reply comments and have made appropriate refinements in finalizing this decision, specifically by (1) clarifying Findings of Fact 14 and 15 and the associated text and (2) adding an additional Ordering Paragraph regarding AT&T's write-off of prior bills in excess of the rate ordered in this decision (discussed further below).

We also address here several specific comments by the parties. XO proposed that Conclusions of Law 8 and 9 be added to D.10-07-005. Although we understand XO's consistency concern, such a change is inappropriate. The ICA rate sheet discussed in Conclusions of Law 8 and 9 was not in the record during the underlying proceeding and thus was not before the ALJ and the Commission at the time the Commission issued D.10-07-005. XO also proposes to change Ordering Paragraph 1(a), which modifies section 3 of D.10-07-005. We

⁵² AT&T Dec. 8 Responses at 21; XO Dec. 8 Responses at 28-32.

reject XO's proposed changes to Ordering Paragraph 1(a) for the same reason as above and because the proposed changes go beyond what we set forth in this decision. XO also proposes to change Ordering Paragraph 1(f) to reinstate and modify Ordering Paragraph 2 of D.10-07-005 to require AT&T to adjust its past bills to XO pursuant to the decision. Once again, those proposed changes reference a rate set forth in an ICA rate sheet that was not in the record at the time of D.10-07-005's issuance. However, we recognize XO's concern regarding AT&T's write-off of past charges in excess of the rate ordered in this decision; thus, we have included an Ordering Paragraph to explicitly address AT&T's write-off and set a 60-day window for compliance.

AT&T contends that the decision improperly relies on AT&T's conduct to show that AT&T agrees with XO's interpretation of the ICA. AT&T misses the point. We draw no such conclusion. Rather, we rely on the fact – admitted by AT&T – that it did and does charge XO a rate out of the ICA for cross-connects via the MDF. As it has argued previously, AT&T also asserts that parties must affirmatively “opt in” to the section 251 requirements in their ICAs. Even if AT&T's argument had merit, we feel that the language in the ICA discussed above would satisfy AT&T's interpretation of section 252(a)(1). Finally, the remainder of AT&T's comments reiterated arguments considered and rejected in the proposed decision, and we accorded them no weight.

5. Assignment of Proceeding

Mark J. Ferron is the assigned Commissioner and Karl J. Bemederfer is the assigned ALJ in this proceeding.

Findings of Fact

1. AT&T is authorized to do business in California as an ILEC.
2. XO is authorized to do business in California as a CLEC.

3. AT&T and XO have an ICA pursuant to which XO maintains physical collocation in several AT&T wire centers.

4. AT&T provides XO with connections called cross-connects to allow XO to interconnect its collocated equipment with other CLECs' collocated equipment within an AT&T wire center.

5. One type of cross-connect is cabling between XO's termination on AT&T's MDF to another CLEC's termination on AT&T's MDF.

6. XO originally obtained such cross-connects via the MDF by ordering them out of AT&T's federal special access tariff.

7. The federal special access tariff does not contain terms or rates that apply to cross-connects via the MDF.

8. In 2007, XO requested that AT&T convert its pricing for cross-connects via the MDF to TELRIC prices under the parties' ICA.

9. AT&T converted its prices to TELRIC for cross-connects via the MDF in wire centers deemed "impaired" for UNE transport (i.e., in non-competitive wire centers).

10. AT&T refused to provide cross-connects via the MDF at TELRIC rates in its "unimpaired" (i.e., competitive) wire centers.

11. AT&T and XO have tried, but failed, to agree on a rate for cross-connects via the MDF.

12. The ICA addresses AT&T's provision of collocation, including cross-connects between XO and other collocated CLECs.

13. Nothing in the ICA expressly excludes the right to any particular type of collocation, including cross-connects via the MDF.

14. Section XI.A of the ICA provides that, except as modified by Section XI.A, the rates for collocation and cross-connects are set by AT&T's state tariff,

Schedule Cal. P.U.C. Tariff 175-T, which is incorporated by reference into the ICA.

15. Neither State Tariff 175-T nor the modifications set forth in Section XI.A of the ICA specify a rate for cross-connects via the MDF.

16. AT&T is currently providing XO with cross-connects via the MDF in impaired wire centers at a TELRIC rate for a "DS3 EISCC" as set forth in a 2005 amendment to the ICA.

17. The 2005 ICA rate sheet on which AT&T relies does not, on its face, identify or limit how XO is able to use an EISCC, i.e., for interconnection with AT&T, for access to AT&T's UNEs, or to connect with another collocated CLEC.

18. The ICA's Appendix Pricing Attachment A does not, on its face, identify or limit how XO is able to use an EISCC, i.e., for interconnection with AT&T, for access to AT&T's UNEs, or to connect with another collocated CLEC.

Conclusions of Law

1. Pursuant to Section 251(c)(6) of the Act, ILECs must allow CLECs to collocate their equipment in ILEC premises and must provide CLECs with cross-connects "as requested" by a CLEC to connect the CLEC's equipment both with the ILEC's equipment and other CLECs' collocated equipment.

2. Section 251(c)(3) of the Act and implementing FCC orders regarding the ILECs' Section 251(c)(3) unbundling obligation do not apply to CLEC-to-CLEC cross-connects, a form of collocation under Section 251(c)(6).

3. FCC orders provide that cross-connects via the MDF are a type of cross-connects that ILECs must provide.

4. Pursuant to the Act and implementing FCC orders, the rate for cross-connects is TELRIC.

5. Parties may opt out of the requirements of the Act pursuant to a negotiated ICA.

6. State commissions may lawfully interpret and enforce existing approved ICAs.

7. Pursuant to the parties' ICA, XO is entitled to cross-connect service, including cross-connects via the MDF.

8. The proper rate for cross-connects via the MDF that AT&T provides XO is the rate set forth in the ICA that AT&T has charged and continues to charge XO for cross-connects via the MDF in impaired wire centers, as currently set forth in the 2005 amendment to the ICA, Attachment 1, entitled "Monthly Rec Rates."

9. Even if the ICA were silent on whether XO is entitled to cross-connects via the MDF, XO would still have a right to cross-connects via the MDF under Section 251 of the Act, and it would be proper to apply a TELRIC rate as required by the Act.

O R D E R

IT IS ORDERED that:

1. Decision (D.) 11-07-032, modifying the underlying decision D.10-07-005, is modified to provide as follows:

- a. Delete Section 3 of D.10-07-005, beginning with the first full paragraph on page 4 through the end of Section 3 on page 5. Replace with the following language:

We note that neither AT&T nor XO directly address Section 252(a)(1) which operates to require that when there is an applicable negotiated ICA, that document will determine the rates, terms and conditions of service. In paragraph 66 of the *Local Competition Order*, the FCC specifically found that Section 252(a)(1) affords

carriers the ability to deviate from the preferred outcomes under the Act. Our review of the ICA between AT&T and XO reveals that Section XI.A applies to the service in dispute here. That Section of the ICA specifically states that the applicable rates, terms and conditions will be those in Section 16 of AT&T's P.U.C. Tariff 175-T, as adjusted by the modifications enumerated in Section XI.A.1. of the ICA. We recognize that ICAs have the binding force of law, and are aware of no circumstances which would defeat the ICA's application to resolve this dispute. Accordingly, we find that AT&T is required to charge XO the rates for collocation (including physical cross-connects such as cross-connects via the MDF) that are identified in the ICA.

b. D.10-07-005 Conclusion of Law 1 is modified to read:

Section 252(a)(1) of the Act applies to require that the ICA between AT&T and XO governs the rate to be charged for the disputed service.

c. D.10-07-005 Conclusion of Law 2 is modified to read:

AT&T California must provide cross-connection to XO, including cables between cages and main distribution frames at rates pursuant to the ICA.

d. D.10-07-005 is modified to delete Conclusion of Law 3.

e. D.10-07-005 Ordering Paragraph 1 is modified to read:

Pacific Bell Telephone Company d/b/a AT&T California is required to charge XO Communications Services, Inc. for providing physical cross-connects, including cross-connects via the MDF, at rates pursuant to the ICA.

f. D.10-07-005 Ordering Paragraph 2 is deleted.

2. Pacific Bell Telephone Company d/b/a AT&T California (AT&T) shall charge XO Communications Services, Inc. (XO) for CLEC-to-CLEC cross connects via the main distribution frame (MDF) (i.e., cabling between XO's

termination on AT&T's MDF to another competitive local exchange carrier's termination on AT&T's MDF) at the Total Element Long Run Incremental Cost rate which AT&T has charged and continues to charge XO for cross-connects via the MDF in impaired wire centers, as set forth in the 2005 amendment to the interconnection agreement, Attachment 1, entitled "Monthly Rec Rates."

3. From January 1, 2008, to the effective date of this order, XO Communications Services, Inc. (XO) shall pay Pacific Bell Telephone Company d/b/a AT&T California (AT&T) for the provision of cross-connects via the main distribution frame (MDF) at the Total Element Long Run Incremental Cost rate which AT&T has charged and continues to charge XO for cross-connects via the MDF in impaired wire centers, as set forth in the 2005 amendment to the interconnection agreement, Attachment 1, entitled "Monthly Rec Rates."

4. Within 60 days of the effective date of this order, Pacific Bell Telephone Company d/b/a AT&T California (AT&T) shall write off that portion of any bill rendered to XO Communications Services, Inc. (XO) for the provision of cross-connects via the main distribution frame (MDF) from January 1, 2008 to the effective date of this order in excess of the Total Element Long Run Incremental Cost rate which AT&T has charged and continues to charge XO for cross-connects via the MDF in impaired wire centers, as set forth in the 2005 amendments to the interconnection agreement, Attachment 1, entitled "Monthly Rec Rates."

5. Case 09-07-021 is closed.

This order is effective today.

Dated March 22, 2012, at San Francisco, California.

MICHAEL R. PEEVEY

President

TIMOTHY ALAN SIMON

MICHEL PETER FLORIO

CATHERINE J.K. SANDOVAL

MARK J. FERRON

Commissioners