KAJ/tcg 12/9/2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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

FINAL ARBITRATOR'S REPORT

1. Background

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

Pacific filed for arbitration for two reasons. First, because at the time of the request Vycera had not obtained limited facilities-based certification as a Competitive Local Exchange Carrier (CLEC), it could only legally exercise the resale portion of the AT&T Agreement. Second, Vycera did not agree with Pacific that a CLEC may not opt into provisions relating to reciprocal

compensation (and legitimately related terms in an existing ICA) after the FCC's ISP Remand Order.[1]

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

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

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

An informal telephonic Initial Arbitration Meeting (IAM) was held on October 17, 2002. In the conference call, parties acknowledged that there were no disputed factual issues, so arbitration hearings would not be necessary. Parties agreed to a schedule for the remainder of the proceeding. Concurrent briefs were filed and served on October 25, 2002. The Draft Arbitrator's Report (DAR) was filed on November 12, 2002 disposing of the contested issue. Comments on the DAR were filed on November 22, 2002, by Pacific and Vycera. The comments have been taken into account as appropriate in finalizing the Arbitrator's Report,

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

as set forth herein. This Final Arbitrator's Report (FAR) was filed and served on December 9, 2002.

2. The Act, FCC Regulations and Resolution ALJ-181

Section 252(i) of the Telecommunications Act of 1996 (Act) provides that:

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

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

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

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

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

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

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

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

3. The Issue: May Vycera Opt into the Reciprocal Compensation Provisions of the AT&T Agreement?

Pacific's Position:

Pacific states that the FCC's ISP Remand Order provides that for any ILEC who elects *not* to offer to exchange § 251(b)(5) traffic subject to the same rate caps the FCC adopted in its Order for ISP-bound traffic, the ILEC was ordered to exchange ISP-bound traffic at the state-approved or state-arbitrated reciprocal compensation rates reflected in its contracts. The FCC referred to this as the "mirroring rule" in its Order and found that such rule ensures that ILECs would pay the same rates for ISP-bound traffic that they would receive for § 251(b)(5) traffic. (ISP Remand Order ¶ 89.) Accordingly, as of the effective date of the FCC's ISP Remand Order, Pacific began to exchange all ISP-bound traffic at the same reciprocal compensation rates for which it exchanges Section 251(b)(5) traffic in California. Therefore, Vycera's assertions that Pacific is not exchanging ISP-bound traffic at the same rates it exchanges § 251(b)(5) traffic are simply untrue. In fact, Pacific asserts that the reciprocal compensation rates, terms, and conditions Pacific proposed to Vycera for use in California in conjunction with the other provisions adopted from the AT&T Agreement explicitly provided that Pacific would exchange ISP-bound traffic at the same rates Pacific exchanges Section 251(b)(5) traffic in the state.

According to Pacific, in its ISP Remand Order the FCC concluded that CLECs that opt into rates associated with the exchange and termination of ISP-bound calls (including any legitimately related terms) were cut off as of the date such Order was published in the Federal Register, i.e., May 15, 2001. The FCC

determined that to permit a carrier to opt into a reciprocal compensation rate higher than the caps it imposed in its Order "would seriously undermine [its] effort to curtail regulatory arbitrage and to begin a transition from dependence on intercarrier compensation and toward greater reliance on end-user recovery." (ISP Remand Order fn. 154.)

In reaching the decision to cut off carriers' ability to opt-in to rates paid for the exchange of ISP-bound traffic, the FCC in its ISP Remand Order relied at least in part on its determination that ISP traffic is regulated under an entirely new framework promulgated under § 201 of the Act—and not §§ 251 and 252 of the Act—and also concluded that state commissions no longer have authority to address the appropriate intercarrier compensation for ISP-bound traffic:

> Because we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic, however, state commissions will no longer have authority to address this issue. For this same reason, as of the date this Order is published in the Federal Register, carriers may no longer invoke section 252(i) to opt into an existing interconnection agreement with regard to the rates paid for the exchange of ISP-bound traffic.[2]

Pacific asserts that because § 201 does not contain a right to adopt intercarrier compensation arrangements, the FCC found that carriers may no longer exercise rights under § 252(i) of the Act or adopt any rates, terms, and conditions in an ICA associated with rates paid for ISP-bound traffic (including legitimately related terms). Therefore, Pacific concludes that Vycera is precluded from adopting the AT&T reciprocal compensation provisions it now seeks to adopt under § 252(i) since such request was made after the publication of the

[2] ISP Remand Order ¶ 82.

FCC's ISP Remand Order in the Federal register. Moreover, the AT&T reciprocal compensation provisions Vycera is seeking to adopt were negotiated prior to the FCC's ISP Remand Order and therefore, under the ISP Remand Order, have already been made available for a reasonable period of time and are no longer available for adoption.

In its comments, Pacific notes that in its ISP Remand Order, the FCC concluded that ISP-bound traffic is not subject to the reciprocal compensation provisions of § 251(b) of the Act because of the carve-out provisions in § 251(g), which excludes several enumerated categories of traffic from the "telecommunications" referred to in § 251(b)(5). Pacific points out that the United States Court of Appeals for the District of Columbia rejected the FCC's reliance on § 251(g) in WorldCom, Inc. v. FCC.[3] The Court, in remanding the case to the FCC, expressly did not vacate the FCC's rules.

Pacific states that although the ISP Remand Order did not squarely address the issue of a CLEC's ability to adopt reciprocal compensation provisions for non-ISP-bound traffic, all reciprocal compensation rates, terms and conditions (for ISP-bound traffic and non-ISP-bound traffic) are legitimately related, and thus, rights to opt into any and all of those terms were cut off by the ISP Remand Order. Pacific points out that both the FCC and the United States Supreme Court have found that an ILEC can require that a requesting carrier accept all terms that are "legitimately related" to the desired term that a carrier seeks to adopt under § 252(i) of the Act.[4] According to Pacific, non-ISP bound

[3] WorldCom v. FCC, 288F.3d (D.C. Cir. 2002).

[4] See *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,* CC Docket Nos. 96-98 and 95-185, First Report

Footnote continued on next page

reciprocal compensation rates are "legitimately related" to ISP-bound reciprocal compensation rates pursuant to the terms of the "mirroring rule" set forth in paragraph 89 of the FCC's ISP Remand Order. Under the mirroring rule, ILECs that have not elected to implement the FCC interim compensation plan (which Pacific has not elected to do) are required to exchange ISP-bound traffic at the state-approved or state-arbitrated reciprocal compensation rates for non-ISP-bound traffic. As such, the reciprocal compensation rates for non-ISP bound traffic are legitimately related to the reciprocal compensation rates for ISP-bound traffic since the FCC ordered that those rates be identical until such time as the ILEC elects to implement the FCC interim compensation plan.

Pacific states that because it offered Vycera provisions identical to the exempted AT&T provisions outside the process established pursuant to § 252(i) on a negotiated basis and Vycera would obtain an agreement that contains all AT&T provisions, Vycera's claims have no merit. According to Pacific, the negotiated amendment Pacific offered to Vycera reflects the FCC's requirement that, until Pacific elects the FCC's interim compensation plan, ISP traffic would be compensated at the same rate as § 251(b)(5) traffic.

Vycera rejected Pacific's position that the reciprocal compensation provisions from the AT&T agreement are no longer available for adoption. Pacific offered Vycera the AT&T reciprocal compensation provisions because the reciprocal compensation terms of the pre-ISP Remand AT&T agreement are still consistent with Pacific's current policies and are thus acceptable on a negotiated basis. According to Pacific, a comparison of the provisions, including the transit

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and Order, Paragraph 1315 (rel. August 8, 1996) ("First Report and Order") and *AT&T Corp. v. Iowa Utilities Bd.* 525 U.S. 366 (1999) and on remand, *Iowa Utilities Board v. FCC*, 219F.3d 744(8th Cir. 2000)).

rates, of the proposed AT&T Amendment and the exempted AT&T reciprocal compensation provisions reveals that the language of such provisions is identical. Pacific acknowledges that the AT&T amendment and the Generic Reciprocal Compensation Amendment contain slightly different rate structures. For example, while the AT&T Amendment contains lower transit traffic rates, the provisions for compensation of foreign exchange traffic require the CLEC to pay for tandem switching and transport. The Generic Reciprocal Compensation Amendment does not require payment for tandem switching and transport but it includes higher transit rates.

Vycera's Position:

According to Vycera, Pacific, which bears the burden of proof in this proceeding, has failed to carry that burden by any showing that would overcome Vycera's right to opt-in to the AT&T agreement. Under this Commission's rules, the only two grounds that can overcome a CLEC's right to adopt a previously approved ICA are:

(1) The ILEC proves that the costs of providing a particular interconnection, service, or element to the requesting carrier are greater than the costs of providing it to the carrier that originally negotiated the ICA, or

(2) The ILEC proves that the provision of a particular interconnection, service or element to the requesting carrier is not technically feasible.[5]

According to Vycera, the Commission should not consider arguments by Pacific on any other grounds.

Vycera rebuts Pacific's reliance of the FCC's ISP Remand Order stating that the optional compensation regime for ISP-bound traffic is not in effect in

[5] Resolution ALJ-181, California Rules, Rule 7.2.

Pacific's territory because Pacific has not agreed to exchange all § 251(b)(5) traffic at the rate caps set by the FCC in its ISP Remand Order. Pacific had the option to elect this scheme, but it has not done so. Vycera states that as part of its interim regime, the FCC in its ISP Remand Order said:

> "carriers may no longer invoke section 252(i) to opt in to an existing interconnection agreement with regard to the rates paid for the exchange of ISP-bound traffic." (ISP Remand Order ¶ 82.)

The FCC allowed an ILEC to choose, on a state-by-state basis, whether to avail itself of the interim compensation regime for ISP-bound traffic, as set out in the FCC's order. Since Pacific has not offered to exchange all § 251(b)(5) traffic within California at the rate caps set by the FCC in the ISP Remand Order, the FCC's interim compensation regime for ISP-bound traffic, upon which Pacific's proposal is predicated, has no relevance in Pacific's territory in California.

Vycera asserts that even if the FCC's interim compensation regime for ISP-bound traffic did apply, Vycera would still be entitled to opt in to all provisions of the AT&T Agreement, as is, because all that the application of the FCC's interim compensation regime for ISP-bound traffic would do is reduce reciprocal compensation payments between Vycera and Pacific for the exchange of ISP-bound traffic to zero (such traffic would be exchanged on a bill-and-keep basis). The AT&T Agreement by its terms already excludes reciprocal compensation payments for ISP-bound traffic to the extent that ISP-bound traffic is exempt pursuant to FCC or CPUC order, so no amendment to the AT&T Agreement is required.

Vycera asserts that the language in the FCC's ISP Remand Order would not preclude opt-in to any part of the AT&T Agreement except for the "rates paid for the exchange of ISP-bound traffic." If the FCC had intended to make the

provision any broader than "rates paid for the exchange of ISP-bound traffic," it would have done so. That language certainly does not support Pacific's interpretation that allows it to delete seven pages from the AT&T Agreement and add a twenty-one page amendment to the Agreement.

According to Vycera, the AT&T agreement already says that "[t]he compensation arrangements set forth in this Attachment are not applicable to…any other type of traffic found to be exempt from reciprocal compensation by the FCC or the Commission."[6] Thus, if the FCC's interim compensation regime for ISP-bound traffic applied in California, the rate for ISP-bound traffic would be $0.00 (bill and keep), since Vycera operated only as a reseller and did not exchange traffic pursuant to ICAs prior to the adoption of the FCC order.

Vycera states that Pacific's theory that Vycera is precluded from adopting terms and conditions that address the payment of ISP-bound traffic because they are legitimately related to the rates paid for the exchange of ISP-bound traffic turns the "pick and choose" rule upside down. Pacific argues that a seven page deletion, and a twenty-one page addition, must be made to the AT&T agreement because the terms are "legitimately related" to the rates paid for the exchange of ISP-bound traffic. Pacific cites the FCC's pick and choose" rule 47 C.F.R. § 809(a), which states in relevant part:

> [a]n ILEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to Section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement.

[6] AT&T Agreement, Attachment 18, Section 3.4.

The "pick and choose" rule allows CLECs to choose to adopt less than an entire agreement on the same terms and conditions as those contained in any agreement approved under section 252. However, this arbitration does not involve "pick and choose." Vycera has not asked to adopt any individual interconnection, service, or network element, rather, it has asked to adopt an entire agreement. Vycera asserts that if Vycera were prohibited from adopting any part of the AT&T Agreement, it would only apply to the rates paid for the exchange of ISP-bound traffic.

In any event, the terms of the ISP Remand Order would merely preclude the adoption of "the rates paid for the exchange of ISP-bound traffic." Pacific, however, required that Vycera replace seven pages of the AT&T Agreement because, according to Pacific, all seven pages are "legitimately related" to the rates paid for the exchange of ISP-bound traffic.

Vycera rebuts Pacific's assertion that Vycera cannot adopt the terms of the AT&T agreement mandating the payment of inter-carrier compensation for ISP-bound traffic because those terms are stale within the meaning of 47 C.F.R. § 51.809(c). Pacific bases its argument, that the terms in the AT&T Agreement are "stale,"on Footnote 155 of the ISP Remand Order. Footnote 155 says:

> In any event, our rule implementing section 252(i) requires ILECs to make available "[I]ndividual interconnection, service, or network element arrangements' to requesting telecommunications carriers only "for a reasonable period of time." 47 C.F.R. § 51.809(c). We conclude that any "reasonable period of time" for making available rates applicable to the exchange of ISP-bound traffic expires upon the Commission's adoption in this Order of an intercarrier compensation mechanism for ISP-bound traffic.

Vycera believes that Footnote 155 was tossed in to the ISP Remand Order as an additional legal basis for one piece of the FCC's interim regime. Vycera

posits that this ended up in a footnote because the FCC recognized the difficulty inherent in rationalizing a statement that rates applicable to the exchange of ISP-bound traffic entered into even one day prior to publication of its order were "stale." Vycera states that the language in the main text that the regime for ISP-bound traffic applies within a state "only if an ILEC offers to exchange all traffic subject to section 251(b)(5) at the same rate" in the state takes precedence over any language in a footnote. (Vycera states that it is clear from the context that by "at the same rate," the FCC meant at the rate caps set by the FCC in the ISP Remand Order.)

Vycera accuses Pacific of wrongfully delaying the effective date of Vycera's adoption of the AT&T Agreement. According to Vycera, which has been a California CLEC since 1996, it filed its application to expand its authority to include partial facilities-based certification on June 11, 2002. Under the California rules, Vycera, having filed its application for CPCN, was clearly entitled to opt in to the AT&T agreement prior to finally receiving its partial facilities-based authorization from the CPUC. In that way, Vycera would have the ICA in place prior to certification so that Vycera could offer service via Unbundled Network Element-Platform (UNE-P) rather than resale, immediately after its expanded certification was granted.

According to Vycera, Pacific delayed the process, saying it should not be required to allow Vycera to opt in to any part of the AT&T Agreement because it "should not be asked to implement the entire agreement" in view of the fact that "[a]n interconnection agreement that does not contain critical reciprocal compensation provisions is not a comprehensive agreement that can be implemented because it lacks the mechanism for payment of traffic exchange between the parties. Pacific argues that until Vycera negotiates a reciprocal compensation amendment to the AT&T Agreement, and until the CPUC

approves that negotiated amendment, Pacific cannot be required to implement any portion of the AT&T Agreement (Application for Arbitration at 7). However, as Vycera stated previously, Pacific has no basis under California Rule 7.2 to object to the adoption. Vycera asserts that Pacific should be ordered to honor the terms of the entire AT&T Agreement effective the date of filing of this arbitration and to begin billing Vycera at UNE-P rates rather than resale rates, effective the date Vycera received its partial facilities-based certification.

Discussion

Both Pacific and Vycera make the point that the FCC's ISP Remand Order has been remanded by the D.C. Circuit because the Court found that the FCC could not use § 251(g) as a legal basis for its authority to "carve out" from U.S.C. § 251(b)(5) calls made to ISPs. However, while the court remanded the order to the FCC, it did not vacate the order, which continues in effect until the FCC issues a further order. While a revised FCC order could result in a different outcome in this arbitration, that eventuality is covered in an ICA's change in law provisions. The rules governing interconnection are a moving target as a result of federal and state regulators and the courts, and I must base my findings on the rules currently in effect, and not speculate about what the FCC may do in an upcoming order.

Pacific has taken an expansive view of ¶ 82 in the FCC's Order, and used that to justify changing all the terms and conditions relating to reciprocal compensation, as well as some other elements which Pacific says are closely associated, such as the rate for transit traffic. The FCC's ISP Remand Order limits carriers' ability to opt in to an existing ICA only with regard to the *rates* paid for the exchange of ISP-bound traffic. The FCC does not base this rule on whether a carrier has chosen to adopt its interim compensation regime, however.

Instead, because the FCC is exercising its authority under section 201, rather than sections 251-252, it is no longer appropriate to invoke section 252(i).

The AT&T agreement treats all local traffic the same and does not differentiate between ISP-bound, and non-ISP bound traffic. However, since the time when the AT&T Agreement was implemented, Pacific has found particular elements that it would like to include in any ICA concerning reciprocal compensation. The FCC's statement in ¶ 82 does not open the door for Pacific to introduce a new addendum that includes all those elements it would like to see in an ICA. Pacific will have that opportunity when it renegotiates the AT&T ICA, and this agreement with Vycera.

As Vycera states, they are not asking to opt-in to one particular type of interconnection, service or network element, rather they are asking to opt in to the entire AT&T ICA. With the language in ¶ 82 of the ISP Remand Order, Vycera is entitled to opt-in to the entire agreement, with the exception of the rates paid for the exchange of ISP-bound traffic. Pacific makes the argument that the amendment is stale, pursuant to § 51.809(c). Pacific bases its staleness argument on the fact that the AT&T Agreement predates the ISP Remand Order. However, the "reasonable period of time" the FCC refers to in footnote 155 refers only to the *rates* paid for the exchange of ISP-bound traffic, so that footnote cannot be used to justify changing other provisions of the AT&T Agreement. Pacific has not met its burden of proof under Rule 7.2 of Resolution ALJ-181 that Vycera should not be able to opt in to Attachment 18 of the AT&T Agreement. There is no reason why Vycera should not be able to opt in to the entire AT&T Agreement, with the exception of the rates to be paid for the exchange of ISP-bound traffic. I concur with Pacific that the rates paid for the exchange of ISP-bound traffic compensation under the AT&T Agreement are stale pursuant to § 51.809(c).

The FCC is clear that carriers may not opt into the rates paid for ISP-bound traffic. Pacific proposes reciprocal compensation rates in its Appendix Pricing based on the interim rates the Commission adopted in D.02-05-042. Pacific indicates that, consistent with the FCC's mirroring rule, these are the same rates it currently charges to exchange § 251(b)(5) traffic. It is appropriate to use those rates for reciprocal compensation under the agreement with Vycera. However, I am not adopting Pacific's revised transit rates, which are separate charges from the reciprocal compensation charges. Those rates will remain the same as in the AT&T Agreement.

Vycera charges Pacific with dragging its heels in implementation of this agreement and asks that it be made effective back to the date (October 3, 2002) when Vycera received its facilities-based authority. In its comments on the DAR, Pacific disagrees with the arbitrator's determination that this agreement should become effective October 3, 2002, and that Pacific charge Vycera at UNE-P rates, rather than resale rates, from that date.

In its comments, Pacific asserts that UNE-P recurring rates for resale lines should only apply on a prospective basis following the effective date of the ICA. Pacific disagrees with Vycera's allegation that Pacific purposefully delayed Vycera from obtaining UNE-P rates by not allowing Vycera to implement any portion of the AT&T agreement during the pendency of the arbitration proceeding.

Pacific references Rule 7.3.2 that requires the ILEC to honor immediately the adoption of terms not subject to objections pursuant to Rule 7.2, effective as of the date of the filing of the arbitration request. In its brief, Pacific argued that it cannot be forced to implement a partial agreement before an arbitration proceeding has been completed and the final, conforming language has been approved by the state commission, and requested that the Commission exempt it

from complying with the first sentence of Rule 7.3.2. Pacific states it would not be appropriate for provisions of a partial ICA to be implemented, particularly when the ICA contains interconnection provisions, before the reciprocal compensation provisions have been finalized for the agreement, which would govern the exchange and termination of traffic associated with the parties' interconnection under such agreement. According to Pacific, the interconnection provisions should not be deemed effective until the reciprocal compensation provisions have been finalized.

Pacific states that it could not be assumed that Vycera would convert all its resale lines to UNE-P because resale lines may contain services and/or features, such as Wholesale Inside Wire Service, that are not available on UNE lines. Vycera may want to keep those services and features and thus may not want to convert resale lines with such features and services.

Also, Pacific states that the standard process for converting from resale to UNE-P requires CLECs to submit a Local Service Request (LSR). Vycera has over 20,000 local service customers, which would require 20,000 LSRs. It would take time for Vycera to prepare those LSRs, and for Pacific to process them.

Pacific states that if the Commission orders any adjustments, the holding should be clarified to state that it applies only to the appropriate recurring rates, because Vycera would have incurred any non-recurring rates such as service order changes, even if the ICA had become effective October 3, 2002.

Based on our Rule 7.3.2, the rates adopted in this arbitration should be subject to retroactive price true-up back to the date when the arbitration request was filed. However, Vycera did not obtain its partial facilities-based authority until October 3, 2002, and would have been unable to exercise portions of the ICA relating to facilities-based service prior to that date. Therefore, it is appropriate to make October 3, 2002 the effective date of this ICA. I concur with

Pacific that the conversion of resale lines to UNE-P should apply only on a prospective basis to those resold lines for which Vycera submits LSRs to convert to UNE-P on or after October 3, 2002. And Vycera is subject to any non-recurring rates, such as service order changes, which are specified in the ICA to convert lines from resale to UNE-P.

O R D E R

IT IS ORDERED that, by December 18, 2002, the parties shall file and serve:

1. An entire Interconnection Agreement, for Commission approval, that conforms with the decisions of this Final Arbitrator's Report.

2. A statement which (a) identifies the criteria in the Act and the Commission's Rules by which the arbitrated portions of the Agreement must be tested; (b) states whether the arbitrated portions pass or fall those tests; and (c) states whether or not the Agreement should be approved or rejected by the Commission.

Dated December 9, 2002, at San Francisco, California.

/s/ KAREN A. JONES
Karen A. Jones
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Final Arbitrator's Report on all parties of record in this proceeding or their attorneys of record.

Dated December 9, 2002, at San Francisco, California.

/s/ TERESITA C. GALLARDO
Teresita C. Gallardo

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

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