BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application by Pacific Bell Telephone Company d/b/a SBC California (U 1001 C) for Arbitration of an Interconnection Agreement with MCImetro Access Transmission Services LLC (U 5253 C) Pursuant to Section 252(b) of the Telecommunications Act of 1996.	Application 05-05-027 (Filed May 26, 2005)

DRAFT ARBITRATOR'S REPORT

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1. Summary

Pacific Bell Telephone Company, doing business as SBC California (SBC-CA), and MCImetro Access Transmission Services LLC (MCIm) have an existing Interconnection Agreement (ICA) negotiated and arbitrated under the provisions of the Telecommunications Act of 1996 (TA 96). Parties have negotiated parts of a successor ICA, and here present portions for arbitration. With submission of this proceeding, 80 issues are before the Commission for arbitration. The issues and outcomes are summarized in Attachment A.

Within seven days from today [i.e., the date of the Final Arbitrator's Report], SBC-CA and MCIm shall jointly file an ICA which conforms to the orders herein. Parties shall each separately file a document identifying the tests to be used by the Commission in considering approval or rejection of the conformed ICA, and stating whether the Commission should approve or reject the ICA.

2. Background

The current ICA between SBC-CA and MCIm expired on September 24, 2004. Parties agreed to extend the window for negotiation and arbitration several times. The last extension was effective May 4, 2005, and provided that: (a) negotiations were deemed to have commenced on December 17, 2004, (b) MCIm was deemed to have requested the commencement of negotiations, and (c) the window for petitioning the Commission to arbitrate unresolved issues would be from May 1, 2005 through May 26, 2005.

On May 26, 2005, SBC-CA applied for Commission arbitration of 175 issues. On June 20, 2005, MCIm responded, adding 19 issues, for a total of 194 issues.

An Initial Arbitration Meeting (IAM) was held on June 23, 2005. Parties agreed to a schedule which included SBC-CA serving limited proposed rebuttal testimony on September 2, 2005, and arbitration hearings from September 19 through September 30, 2005.

On June 30, 2005, SBC-CA filed a motion to strike one of MCIm's proposed additional issues (i.e., Pricing Schedule Issue No. 51). On July 12, 2005 MCIm filed a response in opposition to SBC-CA's motion. On August 1, 2005, SBC-CA filed a reply in support of its motion. By ruling dated August 18, 2005, SBC-CA's motion was granted.

A second IAM was held on September 6, 2005. Parties there agreed to transfer several issues from this arbitration to Application (A.) 05-07-024 (the generic Triennial Review Order (TRO) and Triennial Review Remand Order (TRRO) proceeding). Parties also agreed to a schedule with the following incremental intervals starting at the conclusion of hearing: opening briefs in 30 days, reply briefs in 14 days, a Draft Arbitrator's Report (DAR) in 60 days, comments in 10 days, reply comments in 5 days, the Final Arbitrator's Report (FAR) in 10 days, the conformed ICA in 7 days, the proposed decision in about 15 days, a shortened comment cycle, and a Commission decision in mid-March or early April 2006.

Arbitration hearings began September 19, 2005, and lasted through September 30, 2005. Testimony was given by 13 witnesses, and 44 exhibits were received as evidence. Parties agreed to transfer 31 issues to the TRO/TRRO proceeding. On September 29, 2005, MCIm moved to transfer two additional issues from this arbitration proceeding to the TRO/TRRO proceeding. SBC-CA opposed the motion. On October 6, 2005, MCIm's motion was granted by joint ruling of the Arbitrators in these two proceedings.

Parties continued to negotiate, and resolved about 78 additional issues. On October 11, 2005, parties jointly filed a revised statement of unresolved issues identifying 82 issues left for arbitration. On October 28, 2005, a motion was granted for a 4 day extension in filing opening briefs, with concurrent extension of other dates.

Opening briefs were filed on November 4, 2005. In opening briefs, parties report settlement of two more issues. Reply briefs were filed on November 18, 2005, and the proceeding was submitted for decision on that date.

On January 13, 2006, parties moved for deferral of issuance of the DAR for 60 days, with the remaining schedule similarly extended to allow for further negotiation. By ruling dated January 20, 2006, the joint motion was granted in part. The DAR was filed on January 20, 2006, and the schedule was extended as parties requested.

3. Overview

Eighty issues in 14 categories are arbitrated in this proceeding:

CHAPTER NO.	CATEGORY	NO. OF ISSUES REMAINING
4	General Terms and Conditions (GT&C)	7
5	Definitions (Def)	1
6	Network Interconnection Method (NIM)	18
7	Invoicing (Inv)	4
8	Operational Support Systems (OSS)	2
9	Performance Measures (PM)	1
10	Resale (Resale)	2
11	Digital Subscriber Line and Line Sharing (xDSL)	3
12	Reciprocal Compensation (RC)	13
13	Unbundled Network Elements (UNE)	9
14	Physical Collocation (P. Collo)	5
15	Virtual Collocation (V. Collo)	4
16	Pricing Appendix (Pr App)	3
17	Price Schedule (Pr Sch)	8
	TOTAL	80

Issues are addressed in this report in the order of the categories above. Issue numbers used herein are the same as identified by parties in order to maintain consistency and ease of reference throughout the proceeding. This is also true for the statement of each issue. In some cases, parties do not agree on the statement of the issue, and each party's statement of the issue is included.

The existing ICA took effect in 2001, and is referred to herein as the 2001 ICA. The replacement ICA being arbitrated here is expected to take effect in or about April 2006, and is referred to herein as the 2006 ICA.

The general approach taken herein is to continue results from the 2001 ICA unless new fact or law justifies a change. This is consistent with the parties' views. For example, MCIm says:

> "parties' existing ICA, which was approved by the Commission, is prima facie evidence of just and reasonable rates, terms and conditions. Therefore, absent some compelling reason such as a change of law or material fact, the Commission should adopt the proposed language for disputed issue that most closely adheres to the provisions of the existing ICA." (MCIm Opening Brief, page 9.)

SBC-CA agrees saying: "where one party proposes and the other opposes a departure from the existing ICA language, the arbitrator should defer to the existing ICA outcomes unless the facts or law justify a departure." (SBC-CA Opening Brief, page 7.) In some cases, parties each propose something different than in the 2001 ICA, and a decision is made herein based on the facts and law presented.

4. General Terms and Conditions

4.1. GT&C 3

Issue:

SBC-CA: Should the General Terms contain a cost recovery clause in the event of a change in either party's OCN or ACNA?

MCIm: Should each party be permitted to make one name change per year at no cost?

Agreement Reference: GT&C §§ 6.2, 6.5, 6.6 and 6.7

Positions

SBC-CA seeks cost recovery for processing MCIm name changes. In support, SBC-CA asserts that it incurs such costs, such name change decisions are not those of SBC-CA but of the competitive local exchange carrier (CLEC), and changing codes is an industry-wide problem for which SBC-CA has recently developed this solution.

MCIm seeks ICA provisions allowing one name change per year at no cost, asserting that this has been standard practice between the companies. According to MCIm, additional name changes would be subject to recovery of reasonable and demonstrable costs.

Discussion

SBC-CA's language is adopted.

At issue here are changes to the Operating Company Name (OCN) and Access Carrier Name Abbreviations (ACNA). These codes are assigned by industry agencies, and are used throughout the industry to ensure accurate provisioning and billing. When a CLEC changes its OCN and/or ACNA, every SBC-CA database and downstream system that identifies the CLEC by its OCN and/or ACNA must be updated, including every end-user account and circuit in

multiple systems. This process is very labor intensive. SBC-CA organizes this work through either a service order or a record order. The work related to the name change is similar whether a customer is transferred from Company A to Company B by merger of two companies or CLEC-to-CLEC migration initiated by the customer.

An essential and guiding ratemaking principle is that the person or entity causing a utility to incur non-trivial, identifiable costs should pay those costs. In SBC-CA's case, this includes not only retail end-use customers, but interconnecting carriers such as MCIm. Such costs should generally neither be averaged into other rates, nor subsidized by other customers or SBC shareholders.

As SBC-CA says, CLECs in general, and MCIm in particular—not SBC-CA—make the business decision whether or not to change their name. SBC-CA points out that the number of name changes within the industry has been a challenging problem, and it now proposes language here to address cost and responsibility concerns. No evidence is presented that the name change problem will abate over the life of this ICA (e.g., by an end to mergers and/or acquisitions within the industry; by no company changing its name). It is reasonable to address this concern here, and adopt an approach which requires the entity making the business decision to be responsible for the resulting costs.

SBC-CA's proposed language is reasonable since it is specific regarding process and cost. For example, name changes require a record order, and company code changes require a service order. MCIm pays the related fees for each order. Moreover, it is reasonable for the CLEC to initiate the orders since the CLEC is usually the only party with the information necessary to submit the record or service orders, and SBC-CA is not a party to most CLEC

transactions involving name or company code changes. Even if SBC-CA were able to issue the service orders, doing so could place SBC-CA at risk for violating anti-slamming rules prohibiting changing carriers without the affected end user's consent.

In contrast, MCIm's proposed language may lead to future disputes because it only permits an entity to "seek" recovery rather than stating there will be recovery. Additionally, disputes are likely with MCIm's language regarding which costs are "reasonable and demonstrable" and which systems are "applicable." Further, MCIm's language does not address company code changes, branding changes, and collocation-related changes to locks and stenciling. On the other hand, SBC-CA's language specifies the detailed process, and provides for clear and specific cost recovery in a way that will likely minimize future disputes.

SBC-CA's language also provides other reasonable conditions. It specifies that MCIm give SBC-CA 90 calendar days advance notice of assignment or transfer. Absent an "emergency" name change, MCIm can reasonably be expected to know of an upcoming name change 90 days in advance. This period before the transfer allows parties to resolve outstanding accounts, determine if a deposit is required of the new entity, amend the ICA to reflect new names and/or codes, and to modify affected records. This will facilitate a smooth transition for each entity's customers.[1]

[1] The closing date of a merger is subject to the resolution of many details, including shareholder, regulatory and other approvals. As a result, the final closing date might not be known, but the target closing date will almost certainly be known, at least 90 days in advance.

SBC-CA's language reasonably requires consent for the transfer, but such consent cannot be unreasonably withheld. This allows SBC-CA to ensure that outstanding charges owed by MCIm are paid. It permits SBC-CA to ensure that the new entity is a certificated carrier in California (so that SBC-CA does not provide UNEs and other telecommunications services to an entity not permitted to engage in such activities). It also permits SBC-CA to secure deposits concurrently with assignment or transfer, as appropriate. Again, these terms will facilitate a smooth transition.

MCIm argues that the cost of one name change per year is a normal cost of an incumbent local exchange carrier (ILEC) doing business. To the contrary, it may be an ordinary cost of doing business, but that does not mean those costs should not be directly paid by the entity causing the cost rather than "bundled" in other charges. In fact, each ordinary cost of doing business should be charged, where reasonable and appropriate, to the entity causing that cost. In this case, the entity is MCIm.

MCIm argues that this type of cost is generally absorbed by vendors in a competitive marketplace. Vendors in a competitive marketplace, however, do not typically provide any product or service for free. Rather, the cost of each product or service is recovered in the firm's total revenues. The only issue is whether the cost is absorbed (i.e., folded, blended, bundled) into other prices, or is individually charged. It is, on balance, more reasonable here to unbundled the cost and charge it to the entity causing the cost to be incurred.

MCIm asserts that just because costs are incurred does not warrant their being charged to MCIm, as long as the number of changes is not excessive (i.e., not more than one per year). To the contrary, the standard is not whether a cost is excessive before it is reasonably charged.

MCIm asserts that its language is particularly appropriate because SBC-CA's language works only one-way, and does not permit MCIm reciprocity to assess charges for costs it incurs due to SBC-CA's ACNA name changes. SBC-CA reports that MCIm has little reason to be concerned, however, because MCIm does not provide service to SBC-CA. As a result, a change in SBC-CA's name or ACNA, for example, would require few or no changes to MCIm's records. While MCIm's proposed clause would provide reciprocity, on balance SBC-CA's proposed clause is more reasonable than MCIm's, and is adopted.

MCIm contends that SBC-CA has failed to meet its burden of proof by failing to produce evidence that the charges are cost-based. UNE rates, however, have been reviewed and approved by the Commission as meeting all applicable tests. SBC-CA's record order and service order charges have been reviewed and established in the Commission's OANAD proceedings, and are not subject to dispute here.

MCIm also says these costs are already recovered in UNE rates but that:

> "this is not the proceeding in which to establish a new charge for UNEs, whether this is characterized as a new charge for Operations and Support Systems (OSS) UNE or some other UNE. Instead, SBC CA should…[seek] to establish a new charge…in a future [proceeding] (which it may still do)." (MCIm Reply Brief, page 1.)

Arbitrations rely on specific, final costs to be determined in other proceedings.[2] SBC-CA should raise this issue as necessary in other proceedings,

[2] The Commission has specifically said: "Therefore, we order that all agreements arrived at by arbitration include the provision that all arbitrated rates for unbundled

Footnote continued on next page

and those outcomes incorporated as appropriate.[3] The principle raised by SBC-CA has merit, however, and SBC-CA's proposed solution to this problem should be adopted here. The rates are subject to further adjustment as necessary, consistent with Commission practice ordered by Resolution ALJ-181.

Thus, on balance, SBC-CA's language is superior and is adopted.

4.2. GT&C 5

Issue:

SBC-CA: What terms and conditions should apply to the contract after expiration, but before a successor ICA has become effective?

MCIm: If the parties are negotiating a successor agreement, should either party be entitled to terminate this agreement before the successor agreement becomes effective?

Agreement Reference: GT&C §§ 7.2, 7.7-7.10

Positions

SBC-CA contends that its proposed language adds clarity about parties' rights and responsibilities after expiration of the current ICA but before commencement of a replacement ICA. SBC-CA claims without this language

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elements will be subject to change in order to mirror the rates adopted in OANAD." (Resolution ALJ-181, page 3.)

[3] The issue for the two parties in this matter has perhaps lost some of its urgency since both the SBC/AT&T merger and the Verizon/MCI merger will close before the ICA being arbitrated here becomes effective. Name change costs, if any, as a result of those mergers will be subject to treatment and recovery under the 2001 ICA. Nonetheless, SBC-CA's treatment is reasonable for cost recovery going forward, including for other CLECs who might take the arbitrated ICA here under the MFN provision of TA 96 (§ 252(i)).

MCIm could unilaterally force SBC-CA to continue operating under this ICA forever. MCIm seeks continuation of existing "evergreen" language, arguing there is no evidence that a change is needed, and SBC-CA's language is likely to create confusion and cause future conflicts.

Discussion

MCIm's language is adopted for the following reasons. MCIm's proposal essentially continues existing ICA language, while SBC-CA proposes a substantial departure from current language. Current ICA language, however, has already been found to meet the tests under the law, and change is generally unreasonable unless justified. Indeed, parties are successfully operating under the "evergreen" provisions in the existing ICA.[4] SBC-CA neither shows difficulties in currently operating under these provisions, nor difficulties with this language in other jurisdictions. Neither does SBC-CA show a change in law or fact that justifies modification.

Moreover, SBC-CA's proposed language (GT&C §§ 7.2 and 7.7-7.10) creates a substantial likelihood of conflict with agreed-to language in GT&C § 7.6. In particular, SBC-CA's new sections address several conditions for termination, while § 7.6 addresses continuation. SBC-CA says it seeks to draw clear lines and distinctions, applying the principle that "good fences make good neighbors." This is not necessary here, however. Nothing could be clearer than for parties to continue operating under terms and conditions of the existing ICA, which parties have been successfully using the last several years. On the other

[4] The existing ICA expired on September 25, 2004.

hand, new requirements and provisions offer the opportunity, and are likely, to create more uncertainty, confusion and conflict than they avoid.

SBC-CA contends none of its proposed severability clauses (§§ 7.7-7.10) apply unless MCIm acts to make them apply (e.g., by withdrawing a request for negotiations) but that they are nonetheless needed to protect SBC-CA. For example, SBC-CA asserts § 7.7 provides a mechanism for SBC-CA to force MCIm to decide whether or not MCIm wants to pursue a successor ICA. This is not a compelling argument. MCIm already has adequate incentive to decide whether or not it wants a successor ICA. That is, MCIm needs a successor ICA if it wants to continue in business. The existing evergreen provision continues the ICA, but only during negotiations or arbitrations. MCIm must either negotiate or arbitrate a successor ICA, or it will be unable to continue normal business operations.

Absent SBC-CA's proposed severability clauses, SBC-CA is concerned that MCIm will "attempt to 'game the system.'" (SBC-CA Opening Brief, page 16.) No example is given of such action having occurred, and no compelling evidence is presented supporting this concern.

Without its proposed clauses, SBC-CA argues that MCIm might delay action to avoid an undesirable change of law otherwise in SBC-CA's favor. This is not convincing. Other ICA provisions adequately deal with change in law and dispute resolution. Further, the evergreen provision does not apply if MCIm is not actively engaged in negotiation or arbitration. If negotiations for a successor ICA have begun but SBC-CA believes MCIm is not negotiating in good faith, SBC-CA may apply for arbitration. Therefore, SBC-CA has adequate avenues for relief without its proposed additional ICA language.

SBC-CA is also concerned that MCIm may withdraw its statutory request to negotiate. In that case, SBC-CA seeks protection via §§ 7.9 and 7.9.1. SBC-CA makes no convincing case, however, that once MCIm makes a statutory request to negotiate that MCIm would have any realistic incentive to then withdraw. SBC-CA's concern is unreasonably speculative.

SBC-CA says its language provides reasonable and necessary finality by resulting in termination of the ICA if certain events do not occur. To the contrary, this is essentially in conflict with an ILEC's obligation under TA 96 to interconnect and provide service. If MCIm truly does not want to remain in business, SBC-CA will have little trouble finally terminating the ICA. If MCIm is not exiting the business, however, current ICA language provides sufficient protection for SBC-CA with continuation of the ICA only pending negotiation and/or arbitration.

Finally, SBC-CA is concerned that without its proposed language SBC-CA could be placed "in a situation of theoretically having to comply with the old ICA forever, no matter how the law may have changed, without any means arguably of triggering a §§ 251/252 arbitration to replace it." (SBC-CA Opening Brief, page 19.) Even if theoretically possible in some extreme case, it is not a plausible concern for the reasons stated above. SBC-CA overstates the need, and fails to present convincing arguments in favor of its language. MCIm's language is adopted.

4.3. GT&C 6

Issue:

SBC-CA: With the instability of the current telecommunications industry is it reasonable for SBC CALIFORNIA to require a deposit from parties with a proven history of late payments?

MCIm: Which Party's Deposit clause should be included in the Agreement?

Agreement Reference: GT&C §§ 9 et seq.

Positions

SBC-CA proposes financial protection requirements (e.g., deposits, letters of credit) intended to shield SBC-CA from losses due to nonpayment, including a CLEC's bankruptcy. SBC-CA asserts its proposed protections are sized in relation to total exposure. SBC-CA proposes deposit triggers that include tests of financial health from independent credit rating agencies, such as Standard and Poor (S&P). SBC-CA contends its proposed triggers are reasonable, objective and measurable.

MCIm proposes deposit requirements that tie the deposit to the purchasing party's actual payment history. MCIm asserts the deposit is sized in relation to individual account exposure. MCIm claims its proposed deposit requirement is narrowly tailored to provide parties with proper incentives to make timely payments, but without onerous or punitive terms, and without becoming a barrier to competition.

Discussion

Neither party's proposed language is adopted for the reasons stated below. Rather, existing language from the current ICA (GT&C § 3 Deposits) shall continue, updated as necessary to refer to the correct ICA section (e.g., references to GT&C § 3 corrected to refer to GT&C § 9.)

4.3.1. Incentives and Protection

As explained by parties, deposits serve at least two functions: (a) an incentive to provide timely payment, and (b) protection from losses due to nonpayment, including bankruptcy. SBC-CA's proposal would seek to increase incentives and protections.

No evidence demonstrates a compelling need to increase incentives or protections. To the contrary, SBC-CA admits that MCIm is currently paying its bills on time. No evidence convincingly demonstrates any continuing pattern of late payment, nor the need to increase incentives.

SBC-CA's evidence regarding nonpayment focuses on losses suffered from the WorldCom bankruptcy. SBC-CA does not deny that MCIm, then WorldCom, paid undisputed bill amounts on time until two months prior to WorldCom's filing for bankruptcy in July 2002 (i.e., paid timely until May 2002). SBC-CA states that it was unable to request a deposit from WorldCom until approximately one month (i.e., June 2002) prior to WorldCom's bankruptcy filing, since the then-current ICA limited deposit requests until WorldCom was actually late in paying undisputed amounts. WorldCom failed to pay the requested deposit before filing for bankruptcy, according to SBC-CA.

SBC-CA reports that WorldCom lost investment grade status in April 2002. Had SBC-CA been able to demand a deposit based on WorldCom's loss of investment grade status, SBC-CA says its financial losses would have been mitigated. SBC-CA fails to show, however, that WorldCom would have paid, or been able to pay, the deposit requested in April or May 2002 that it was unable or unwilling to pay when requested in June 2002. SBC-CA fails to show that SBC-CA's claim in bankruptcy court would have been any different, or resulted in a superior outcome. SBC-CA fails to clearly and precisely state the

amount of those losses, and fails to report the extent to which those losses were recovered in part or whole through the bankruptcy proceeding. Protection from losses due to bankruptcy may be a meritorious goal, but the evidence is not convincing that SBC-CA's proposal would have materially affected the outcome, nor that bankruptcy law does not reasonably and adequately protect creditors in this unfortunate situation.

On the other hand, MCIm's proposal would unreasonably reduce incentives and protections relative to the current ICA, as discussed more below. There is no compelling evidence that incentives and protections should be reduced.

4.3.2. SBC-CA's Proposal

Specifically regarding SBC-CA's proposal, MCIm convincingly shows that it would be onerous. For example, it would permit a deposit in the amount of three months (or in some cases four months) of MCIm's total company charges in California, and allow SBC-CA to keep the deposit for up to one year. According to MCIm, three months of MCIm's charges represent tens of millions of dollars. A deposit of this amount is substantial, and denial of access to the funds for up to one year is unreasonable.

MCIm also convincingly shows SBC-CA's proposal would be punitive. That is, under SBC-CA's proposal, the deposit requirement would be triggered under at least two of the four criteria immediately upon the 2006 ICA taking effect. [5] There is no evidence, however, that MCIm failed to make timely

[5] The evidence shows MCIm now fails two of the four tests: (a) MCIm's credit is below S&P's BBB rating for long term debt, and (b) WorldCom/MCIm is in a "winding-up" or "adjustment of debts or the like" phase of bankruptcy.

payments before May 2002, or after July 2002. SBC-CA's potential exposure to an MCIm bankruptcy in or about April 2006 (and the need for tens of millions of dollars in deposits to be held by SBC-CA for up to one year) does not to merit this type, amount or duration of deposit. Rather, this would be punitive result.

SBC-CA also asserts that approximately 180 CLECs have ceased operations in SBC's 13-state ILEC region since 2000. Since any CLEC can adopt the SBC-CA/MCIm ICA arbitrated here as its own (under § 252(i) of TA 96), SBC-CA argues that these triggers and provisions are needed for its general protection in the industry at large. To the contrary, SBC-CA fails to show the amount of losses, if any, it incurred from these approximately 180 events. It fails to show that these losses, if any, were significant, how many of the 180 were bankruptcy related (as opposed to other reasons to "cease" operations, such as mergers), or that bankruptcy court failed to provide SBC-CA (as a creditor) with adequate relief. Protection from losses is important, but SBC-CA fails to show that the provisions in the current ICA (effective in 2001 and under which parties now operate) are inadequate, or that the amount of additional protection it seeks here tips the balance in its favor compared to the arguably onerous and punitive nature of its proposal.

4.3.3. MCIm's Proposal

Specifically regarding MCIm's proposal, SBC-CA convincingly shows that MCIm's "super-minimalist deposit language" does not contain adequate protections. For example, MCIm proposes deposits be assessed on an individual account basis. This requires administrative changes from current practice, and will likely introduce complications and errors. Further, it provides MCIm (or another CLEC adopting this ICA) with an unnecessary and unreasonable incentive to move services between accounts to avoid payments.

MCIm proposes allowing 30 days after the invoice due date before deeming a payment late. This is 30 days after the bill already becomes overdue, and fails to provide SBC-CA with reasonable protection. Invoices are due 30 days from the invoice date, and should be treated as late if payments are not made when due.

MCIm proposes deposits not be triggered until (a) the other party, two times during a year, has been more than thirty days late in making timely payments of undisputed amounts, and (b) the past due amount accumulates to more than 2 months of average monthly billing. This requires multiple events combined with accumulated debts. This reduces the incentive for timely payment, and means deposits would potentially not be triggered for 90 days from the invoice date. Again, this is inadequate protection for SBC-CA.

MCIm proposes limiting the deposit to the average bill for one month (e.g., 30 days). This is inadequate protection given the length of time before the deposit can be triggered (e.g., 90 days).

MCIm proposes a permanent interest rate of 6%. This rate may be unreasonably low or high. Rather, it should be the rate set in the intrastate access services tariff, as in the existing ICA. This rate is set by the Commission, applies generally to all CLECs, and can be reasonably adjusted through the tariff process.[6] Fixing 6% for MCIm but paying varying interest rates for other CLEC's deposits would impose an unnecessary and unreasonable administrative burden on SBC-CA.

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[6] The tariff process provides parties with necessary and reasonable protections (e.g., protests to advice letters or applications, which may be set for formal hearing if material facts are in dispute).

4.3.4. Current ICA

Terms and conditions in the 2001 ICA should continue unless there is compelling reason to justify departure, such as a new material fact or a change in law. No new fact or law justifies a change. Rather, the language in the 2001 ICA was found to meet relevant tests for adoption. It contains specific triggers, timeframes, amounts and interest rates, and has worked reasonably well since its adoption.

The only significant exception to its reasonable operation might arguably have been during WorldCom's bankruptcy. The evidence presented here, however, does not convincingly show that SBC-CA's proposal would necessarily have led to a significantly improved outcome. Each party fails to present convincing evidence regarding change in material fact, or argument regarding change in law, to justify making the deposit requirements either more strict or more lenient than in the existing ICA. Therefore, the language in the current ICA will continue. Parties shall make reference changes within the section as necessary for accuracy.

4.4. GT&C 7

Issue: What terms and conditions should apply in the event the Billed Party does not either pay or dispute its monthly charges?

Agreement Reference: GT&C §§ 10 et seq.

Positions

SBC-CA asserts its proposed nonpayment and disconnection process incorporates reasonable amounts of time for notice followed by payment or dispute. If unpaid or undisputed, however, SBC-CA proposes the process be concluded "'with some teeth in it'" by SBC-CA's discontinuing services to MCIm under the ICA. (SBC-CA Opening Brief, page 28.)

MCIm argues its proposal sets forth a notice and response process that balances the need for the billing party to receive payment while protecting the paying party from onerous, punitive measures. MCIm's proposal ties the scope of the parties' actions directly to the billing account number (BAN) for which there has been non-payment, according to MCIm. MCIm's proposal ends with the billing party remedy being to: (a) require a deposit or increase in deposit specific to that BAN, and/or (b) refuse to accept new, or complete pending, orders for that BAN. It does not include discontinuation of service under the ICA.

This issue is limited to charges that the non-paying party does not dispute it owes but nonetheless has failed or refused to pay. It does not apply to disputed charges which are treated, as necessary, under other provisions of the ICA (e.g., Dispute Resolution process).

Discussion

SBC-CA's proposed language is adopted.

SBC-CA's language provides a reasonable amount of time for notice followed by payment or dispute. It ends with a consequence. It makes payment a top priority for each party to the ICA, minimizing unpaid amounts that can be subject to problems exacerbated by delay. The language is very similar to that in the 2001 ICA.[7]

[7] The 2001 ICA allows the non-paying party 14 calendar days after receipt of a notice that charges are unpaid as of the bill due date to either pay undisputed amounts or to dispute the amounts. SBC-CA's proposed language here provides 10 business days for the same events to occur. While not exactly the same, it is substantially similar. Both the 2001 ICA (§ 35.3.3) and SBC-CA's adopted replacement language (§ 10.3.3) provide for use of an interest bearing escrow account for disputed charges.

MCIm complains that SBC-CA's language should be rejected because it includes the ultimate step of disconnection. Disconnection, however, is already a consequence in the 2001 ICA, and no compelling reason is presented to justify departure. Moreover, this issue is with respect to charges the non-paying party does not dispute. No convincing explanation is presented by MCIm why it is reasonable to allow undisputed charges to remain unpaid beyond the due date, or why the same provision for disconnection now permitted is not reasonably continued in the replacement ICA.

Even if disconnection was permitted in 2001, MCIm argues that the replacement ICA provides a more draconian disconnection provision which should be rejected. To the contrary, both the 2001 ICA and the language adopted for the replacement ICA provide an escalating series of notices and opportunities to pay or dispute amounts. Specifically regarding termination, the 2001 ICA provides:

> "Failure to pay charges may be grounds for termination of this Agreement." (§ 35.2)
>
> "If any Unpaid Charges for Resale Services or Network Elements remain unpaid and undisputed twenty-nine (235 [sic]) calendar days past the Bill Due Date of such Unpaid Charges, PACIFIC shall notify MCIm and the Commission in writing that unless…paid within sixteen (16) calendar days…the Resale Services and/or Network Elements furnished to MCIm under this Agreement for which Unpaid Charges are outstanding (i.e., delinquent and undisputed) shall be disconnected." (§ 35.6.1.)
>
> "If any Unpaid Charges for Resale Services or Network Elements furnished to MCIm under this Agreement remain unpaid and undisputed forty-five (45) calendar days past the Bill Due Date for such Unpaid Charges, PACIFIC shall

> disconnect such Resale Services and/or Network Elements." (§ 35.6.3.)
>
> SBC-CA's proposed language adopted here is:
>
> "Failure to pay all or any portion of any amount required to be paid may be grounds for suspension or disconnection of Resale Services, Network Elements and Collocation as provided for in this section." (§ 10.1.)
>
> "If the Non-Paying Party fails to pay the Billing Party on or before the date specified in the demand letter…the Billing Party may…discontinue providing any Interconnection, Resale… or services furnished under this Agreement." § 10.8.2.)

The 2001 ICA is arguably more draconian in stating that certain services "shall" be disconnected. By contrast, SBC-CA's proposed replacement language adopted here states "may," and is therefore discretionary. Nonetheless, while the language is somewhat different, the results are essentially the same. On balance, MCIm's concern is overstated and without substantial merit.

4.5. GT&C 8

Issue: Which Party's audit requirements should be included in the Agreement?

Agreement Reference: GT&C §§ 13 et seq.

Positions

Parties agree to most audit requirements and terms. The disputes involve audit (a) scope, (b) personnel, and (c) costs. SBC-CA recommends a broader scope, the opportunity to use its own employees, and cost-sharing with the audited party. MCIm seeks a narrower scope, the requirement to use independent auditors, and each party paying its own costs.

Discussion

SBC-CA's language is adopted for the following reasons.

4.5.1. Audit Scope

The dispute is largely encapsulated in one sentence:

> "Any audit under this Section shall be for the purpose of evaluating (i) the accuracy of Audited Party's billing and invoicing of the services provided hereunder and *(ii) verification of compliance with any provision of this Agreement that affects the accuracy of Auditing Party's billing and invoicing of the services provided to Audited Party hereunder*." (GT&C § 13.2; emphasis added.)

MCIm does not object to an audit under clause (i), but objects to clause (ii), claiming it constitutes a "fishing expedition," and could compromise confidentiality. These objections are without merit.

Not only must SBC-CA be able to audit the accuracy of MCIm's bills *to SBC-CA* (a clause (i) audit), but SBC-CA must be able to audit the accuracy of the records *sent by* MCIm upon which SBC-CA's bills *to MCIm* are based (a clause (ii) audit). This includes SBC-CA being able to ensure that MCIm is properly recording calls and routing calls. If not, SBC-CA may be underbilling MCIm. Clause (ii) is the audit provision that permits SBC-CA to conduct such an audit. Without the right to conduct a clause (ii) audit, SBC-CA has no way to check the accuracy of records sent to it by MCIm and upon which SBC-CA must rely to do accurate billing. The reverse may also be true with respect to MCIm. It is simply good business and regulatory practice to permit each party to conduct a reasonable audit of the other business partner in this ICA, thereby ensuring the validity of information and bills sent to, and received from, the other party.

The 2001 ICA permitted audits of records used for bills both to and from the other party, and that provision should continue. In particular, the 2001 ICA allowed either party to conduct an audit "of any records, accounts and processes which contain information related to the services provided under…this Agreement." (2001 ICA, GT&C § 29.11.2.) SBC-CA correctly states that this language would permit an audit of MCIm's records that MCIm sends to SBC-CA and that SBC-CA relies on in billing MCIm (i.e., a clause (ii) audit) since those would be records containing "information related to the services provided under…this Agreement." It is reasonable to continue this approach in the replacement ICA.

Agreed-upon language for the 2006 ICA already permits both type of audits. Parties agree to language requiring each to cooperate fully and provide access to any and all appropriate employees, books, records and other documents. (GT&C § 13.4.) Parties further agree that the:

> "scope of any audit under this Section shall be limited to the services *provided and purchased by* the Parties and the associated charges, books, records, data and other documents relating thereto…" (GT&C § 13.2, emphasis added.)

That is, parties agree that the audit scope is services "provided by" and "purchased by" the parties. Thus, agreed upon language already permits audits of transactions going both ways (i.e., both clause (i) and (ii) audits). SBC-CA's proposed language simply makes that clear. The fact that MCIm seeks

here to narrow the scope of this language makes including SBC-CA's language all the more important.[8]

MCIm is concerned that SBC-CA proposes "audits to encompass materials and subjects not directly related to an invoice believed to contain errors." (MCIm Opening Brief, page 32.) MCIm suggests more limited audits that are focused on specific questionable invoices. This limitation is too narrow. Audits might periodically be undertaken to verify accuracy, whether or not there is a believed error. Random, periodic checks might provide a separate ongoing incentive for accuracy. In fact, it might demonstrate and corroborate ongoing honesty which could lessen the mistrustful attitude of which each party is concerned.[9]

MCIm also expresses concern that SBC-CA will "embark on a fishing expedition into MCIm's sensitive business records under the guise of 'verifying' compliance with the ICA's billing and invoicing provisions." (MCIm's Opening Brief, pages 34-5.) To the contrary, the 2001 ICA contained

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[8] While the agreed upon language in the replacement ICA also says the audit is "limited to" the services in the ICA, this is understood to mean that an audit cannot generally explore business activities unrelated to the ICA (e.g., cannot audit corporate profits, taxes, dividends, personnel practices, executive compensation, philanthropic contributions, unless somehow related to the ICA).

[9] SBC-CA is distrustful of MCIm, as evidenced by SBC-CA's concern that MCIm might abuse the use of third party auditors absent being required to pay 25% of the cost: "…such right [to use third party auditors] will not be abused (as Mr. Hurter's and MCIm's proclivities suggest it might well be)." (SBC-CA Opening Brief, page 33.) MCIm also points out apparent SBC-CA mistrust related to concerns about MCIm "gaming" the system, circumventing deposit requirements, doing creative things to avoid paying bills, and disputing bills for illegitimate reasons. (MCIm Reply Brief, pages 5-6.) Similarly, MCIm is distrustful of SBC-CA given "SBC-CA's intensely negative view of MCIm's motives and conduct." (MCIm Opening Brief, page 36.)

confidentiality provisions, and no evidence shows those provisions were or are inadequate. The replacement ICA contains similarly reasonable confidentiality provisions.

4.5.2. Audit Personnel

SBC-CA seeks to allow the use of its own employees, but proposes that either party may request a third party auditor. MCIm proposes that auditors be limited to independent third parties, thereby ensuring an unbiased audit. SBC-CA's language is adopted.

The 2001 ICA does not require the use of third party auditors. In fact, it says either party may perform audits. (2001 ICA, GT&C § 29.11.1.) There is no credible evidence that audits under the 2001 ICA have been biased or created unreasonable problems. Therefore, the approach in the 2001 ICA should continue.

4.5.3. Audit Cost

Either party may request an audit and the other party may not unreasonably prevent such audit. When either party requests an audit, each party incurs costs. Under both the 2001 ICA and the replacement ICA, "each party shall bear its own expenses in connection with the conduct of the audit." (2001 ICA, GT&C § 29.11.3; Replacement ICA, GT&C § 13.4.)

For the 2006 ICA, SBC-CA also proposes limited cost-sharing. That is, in exchange for providing the right to the audited party to request a third party auditor, SBC-CA proposes the audited party pay 25% of the cost. This is reasonable. This will discourage either party from abusing the right to require audits to be performed by what could be more expensive outside auditors rather than a party's own employees. It will make the decision to request an outside auditor slightly more than a trivial matter, but not be an unreasonable burden if

legitimate concerns exist. MCIm argues that it would create a substantial financial disincentive for MCIm to seek third party auditors, but presents no credible evidence that the cost would be "substantial."

MCIm says SBC-CA's language would require MCIm (the party being audited) to incur 25% of the costs of an independent auditor employed by SBC-CA (the auditing party). MCIm argues such approach is contrary to standard practice of placing costs on the party causing them, which in this case is SBC-CA, according to MCIm.

To the contrary, if the cause-causation approach is adopted here, MCIm (not SBC-CA) should pay the cost. That is, it is established above that SBC-CA should be allowed to use its own employees, along with employing proper confidentiality provisions. MCIm, however, may still wish an independent auditor. If so, MCIm is the party requiring, and causing the cost of, the third party auditor. In this case MCIm should perhaps pay 100% not 25%. SBC-CA does not propose the audited party, upon requesting a third party auditor, pay 100%, however, and 100% is not adopted.

MCIm argues that paying 25% of the cost subjects the audited party to costs over which it has no control. Under the same logic, subjecting SBC-CA to 75% of the cost if MCIm demands the use of an independent auditor arguably requires SBC-CA to incur costs over which it has no control. The fact is that both parties incur costs if the other party demands an audit under either the 2001 or the 2006 ICA. Since SBC-CA still pays 75% of the cost of the third party auditor, SBC-CA maintains an incentive for the costs to be reasonable. Requiring the audited party, upon its request for a third party auditor, to pay 25% of the third party auditor's cost does not subject the audited party to unreasonable costs in

any way that is substantially different than current practice, but provides a necessary balance for the opportunity to request an outside auditor.

Finally, SBC-CA proposes that the 25% cost-sharing provision apply only in two instances: (a) if the audited party requires the use of an independent auditor (discussed above) or (b) regardless of who decides to use the independent auditor, if the audit reveals, and the parties subsequently verify, a net adjustment against the audited party of greater than 5% of the charges audited. (GT&C § 13.6.) This is a reduction from 50% cost-sharing by the audited party based on a 3% adjustment in the 2001 ICA. (2001 ICA, GT&C § 29.11.3.)

The concept is that when the audit turns up a confirmed adjustment against the audited party of a non-trivial magnitude, the audited party should pay some of the cost. In fact, SBC-CA persuasively says "it is hard to justify why the Audited Party should not pay 100% of the independent auditor costs, not just the 25% compromise that SBC-CA proposes." (SBC-CA Opening Brief, page 34.) Nonetheless, the concept was reasonable in 2001 and it continues to be reasonable. SBC-CA's proposal is adopted here.

4.6. GT&C 9

Issue: Which Party's Intervening Law clause should be included in the Agreement?

Agreement Reference: GT&C § 23

Positions

SBC-CA proposes language which it argues more clearly defines a party's right to invoke the change of law clause, the process to be used, and the timeframe.[10] According to SBC-CA, this is will prevent disputes and result in fewer complaints before the Commission.

MCIm proposes language it says is consistent with TA 96 and has been used successfully elsewhere. MCIm contends its language avoids confusing and repetitive language proposed by SBC-CA, as well as objectionable unilateral action by SBC-CA.

Discussion

SBC-CA's proposal is adopted.

SBC-CA's proposal more clearly defines the rights, processes and timeframes. Further, it provides that failure to negotiate for a continuous period of 15 business days moves the matter from negotiation to the dispute resolution procedure. This ensures against inaction by either party unreasonably delaying implementation of a change in law.

SBC-CA's final proposed language removes the largest objection raised by MCIm (regarding SBC-CA's alleged ability, without first negotiating

[10] SBC-CA originally proposed language that included certain changes to the ICA potentially happening "immediately." MCIm objected, saying that this allowed SBC-CA to unilaterally impose certain outcomes, even absent a "bright-line" application or interpretation of the initiating event. Rather, MCIm argued that TA 96 required negotiations. In the Joint Revised Statement of Unresolved Issues filed on October 11, 2005, SBC-CA included alternative language it believed addressed MCIm's concern. SBC-CA adopted the alternative language as its proposal in its Opening Brief, which SBC-CA said "is expected to be more to MCIm's liking." (SBC-CA Opening Brief, page 37.) MCIm still objects. (MCIm Reply Brief, page 6.)

with MCIm, to make unilateral and immediate changes to the ICA based on its interpretation of a change in law). MCIm continues to express concern about unilateral action by SBC-CA, but the adopted language contains no such provision. In support, MCIm cites to offending language in Issues UNE 2 and UNE 3. If objectionable, that language will be addressed with those issues.

To complete this section of the ICA, the date of May 26, 2005 will be inserted into adopted § 23 (e.g., at sentences 2, 3, and 5), as proposed by SBC-CA. MCIm expresses concern, and proposes its own alternative. That alternative, however, accomplishes the same objective. Change of law events may have occurred, but not yet been successfully incorporated in the ICA proposed by parties, since the proposed ICA was submitted for arbitration on May 26, 2005. As such, it is reasonable to recognize this date to clarify the terms of this clause.

4.7. GT&C 10

Issue: Should MCIm be permitted to purchase the same service from either an approved tariff or the interconnection agreement?

Agreement Reference: GT&C § 51

Positions

SBC-CA argues no. MCIm argues yes.

Discussion

MCIm's position is adopted.

MCIm proposes one simple, direct sentence that clearly states the option. This should eliminate questions or disputes.

MCIm's proposal advances the TA 96 public policy goal of increasing local telecommunications competition. ICAs and tariffs become powerful competitive tools when used in concert, mimicking the vigorous give and take in

a competitive market. In those markets, for example, buyers chose between many sellers to obtain the desired product or service at the least cost.

Tariffs offer products or services to all eligible customers on a basis that is just, reasonable, equitable, and non-discriminatory. A CLEC should always have a right to select a product or service offered by tariff. This is an important way to level the field during negotiations. An ILEC might negotiate for the CLEC to give up availability of an item by tariff, but nothing about the negotiation process is known to automatically take away availability of an item via tariff. MCIm did not here negotiate away its option to use otherwise available tariffs.

SBC-CA argues that MCIm's proposed right to pick and choose violates the FCC's most recent rejection of the pick and choose rule under § 252(i) of the Act.[11] To the contrary, the FCC was considering the matter with respect to selecting individual elements of an ICA versus the entire ICA. The matter here is between an item in an ICA versus that same item in a generally available tariff.

SBC-CA argues that MCIm's pick and choose proposal violates the public policy and spirit underlying the FCC's rejection of pick and choose. To the contrary, the controlling public policy and spirit is to promote and encourage competition. Competition is increased by permitting purchase of an item from

[11] According to SBC-CA, in 2004 the FCC found that a CLEC adopting another CLEC's ICA under this provision of TA 96 must take the entire ICA, and cannot "pick and choose" selected parts. (Opening Brief, page 209, citing Second Report and Order, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, 19 F.C.C. Rcd. 13,494, ¶11 (rel. July 13, 2004 ("*Second Report and Order*")).

either the ICA or tariff, more nearly emulating the competitive market. This promotes good economic and public policy.

SBC-CA is concerned that this approach violates the give and take inherent in the ICA negotiation process. To the contrary, as MCIm points out, the ILEC generally has superior bargaining power, and the CLEC comes to the negotiation with little or nothing the ILEC wants or needs. TA 96 addresses this problem by creating a negotiation and arbitration process in which the CLEC may assert certain rights not otherwise available. The arbitration provides relief from unreasonable negotiation (should that occur), and tends to level the field during those negotiations.

SBC-CA says MCIm's approach will diminish the incentive to give and take in ICA negotiations because the ILEC will never give if it cannot take. Even if arguably true, the public policy goal of increasing competition outweighs the narrower interest of the ILEC.

SBC-CA asserts that allowing MCIm to pick and choose between items in the ICA or tariff would be administratively burdensome and confusing for both SBC-CA and MCIm. SBC-CA fails to quantify the incremental burden and confusion, however, and does not persuasively show it would occur.[12]

The industry is already relatively complex. It is simply not credible that the incremental burden and confusion, if any, would be great given the current level of administrative burden in this complex industry. In fact, the option is simply to allow the use of tariffs, a matter with which ILECs are already

[12] For example, the burden and confusion, if any, could be one-time, and resolved with training and system programming. Further, the claim runs counter to MCIm's actual experience with SBC-CA.

familiar. SBC-CA's arguments regarding the remote possibility of confusion pale in comparison to the important pro-competitive effect gained by allowing CLECs the incremental leverage here by leveling the field. MCIm expresses no concern about incremental administrative burden or confusion.

MCIm convincingly points out that incremental burden and confusion, if any, can be addressed via changes to SBC-CA's Universal Service Ordering Codes (USOCs).[13] Adding or modifying a USOC is a relatively simple process that involves updating a table in SBC-CA's provisioning systems. This will give MCIm the alternative of purchasing a service at the rates, terms and conditions specified in SBC-CA's tariff without amending the rates, terms and conditions in the ICA.

Finally, SBC-CA argues that MCIm should not be permitted to "'mix and match' ICA terms and conditions with tariffs terms and conditions." (SBC-CA Opening Brief, page 207, and page 48.) On this, SBC-CA is correct. MCIm agrees saying: "MCIm *is not* proposing to 'mix and match' terms and conditions (i.e. purchasing a service or UNE under a hybrid set of rates, terms and conditions." (MCIm Reply Brief, page 7, emphasis in original.)

5. Definitions

Definition Issue 3

Issue: Which party's definition of End User should be included in the Agreement?

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[13] A USOC is a three-to-six digit alphanumeric code that is used to specify services, features or options, and their associated rates, for a feature or function to be provided to an end user customer. USOCs are not unique to wholesale services sold to CLECs. (MCIm Opening Brief, page 51; Exhibit 106, pages 17-20.)

Appendix Definition: "End User"

Positions

SBC-CA says the concept of end user is unique to wholesale telecommunications, with an industry-specific meaning as well as statutory importance. SBC-CA proposes a definition developed from Newton's Telecom Dictionary.

MCIm says SBC-CA's proposal places an unlawful restriction on MCIm's obligation to resell its services. MCIm proposes a broader definition which it says is consistent with FCC and Commission orders.

Discussion

MCIm's proposed definition is adopted.

The 2001 FAR and Decision (D.) 01-09-054 specifically addressed and decided the issue here in favor of MCIm. In particular, the Commission said: "We support the FAR's finding that MCIm should be permitted to purchase services from Pacific at wholesale prices for resale to other carriers." (D.01-09-054, page 15.) SBC-CA fails to convincingly show any change in fact or law that would merit a different outcome.

D.01-09-054 and the 2001 ICA addressed this in the context of the definition of "customer." Parties now use the term "end user" for essentially the same purpose. SBC-CA cannot undo the Commission's 2001 decision by using a different term for the same purpose.

SBC-CA argues that, from a policy perspective, TA 96 was intended to address competition in the markets for telecommunications services provided to end users. SBC-CA says that §§ 251(c)(3) and (d)(2) state that UNEs are to be used by "telecommunications carriers" to provide "telecommunications services," and that the Act defines a "telecommunications carrier" as an entity

that is engaged in providing "telecommunications services."[14] According to SBC-CA, the Act further defines the term "telecommunications services" as "the offering of telecommunications for a fee *directly to the public, or to such classes of users as to be effectively available directly to the public*, regardless of the facilities used."[15]

Indeed, the Commission already addressed and rejected this exact argument, concluding "[w]e find Pacific's interpretation of the Act to be impermissibly narrow." (D.01-09-054, *mimeo*., page 15.) SBC-CA does not convincingly show that anything has changed, and that the Commission should reverse the outcome it reached in 2001.

SBC-CA argues that allowing a CLEC to resell UNEs to another carrier (such as an interexchange carrier (IXC)) would ultimately undermine the competitive market for access services and create the opportunity for unfair arbitrage. SBC-CA says the IXC (or other carrier) could circumvent ILEC Special Access tariffs and obtain (typically lower) regulated UNE prices which are intended solely to promote competition for end users. SBC-CA contends that the CLEC would be the "front" for the tariff evasion, potentially obtaining some share of the extra profit gained by the other carrier, and that the ILEC (and competing facilities-based access providers) would unfairly lose access business to the CLEC reseller. According to SBC-CA, this would undermine the mature, competitive special access market and devalue the assets of facilities-based CAPs.

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[14] SBC-CA Opening Brief, page 49, citing 47 U.S.C. § 153(44).

[15] SBC-CA Opening Brief, pages 49-50, citing 47 U.S.C. § 153(46) (emphasis added).

Even if there is some truth in SBC-CA's concern, the fundamental purpose of the Act is to promote competition. The Commission has already weighed the arguments on both sides and rejected SBC-CA's position. According to the Commission, the FCC "never intended to create a distinction between wholesale and retail services, as Pacific attempts to do." (D.01-09-054, *mimeo*., page 16.) SBC-CA fails to clearly state any change in material fact or law that would merit a different outcome.

Therefore, MCIm's proposed language is adopted.

6. Network Interconnection Method

6.1. NIM 4

Issue: Should SBC-CA's definition of "Access Tandem" be included in the Agreement?

Agreement Reference: NIM § 1.8

Positions

SBC-CA says it is important to define each type of tandem because not all tandem provisions within the ICA apply to all different types of tandems. SBC-CA says the term is used in both its proposed language and five times in MCIm's proposed language, and should be defined in this ICA no matter whose disputing language is adopted.

MCIm says the issue is either not ripe, or is moot, because it is already resolved or addressed in the 13-State Amendment between SBC-CA and MCIm. If the Commission determines otherwise, MCIm says a definition is unnecessary because SBC-CA's architecture is different than in former Southwestern Bell states, with all SBC-CA's exchanges in California served by a local tandem.

Discussion

MCIm contends that this issue is currently resolved or covered by the 13-State Amendment. SBC-CA does not disagree. In fact, SBC-CA states that the 13-State Amendment "will supersede any inconsistent terms in the ICA currently being arbitrated" until July 1, 2007. (SBC-CA Opening Brief, page 139.) Thus, no dispute presently exists, and the issue for now is either not ripe, or moot.

Moreover, as explained more below, the issue may never be in dispute. If it is, a venue can be made available at that time for parties to resolve the matter when the dispute is more imminent, and the basis of the dispute more certain.

This is also true for other issues. Including NIM 4, SBC-CA agrees with MCIm that this is the case for a total of 10 issues: NIM 4, 8 and 12, plus Reciprocal Compensation 2, 4, 5, 6, 8, 9 and 16.

The 13-State Amendment controls the outcome here for the following reasons. The original 13-State Amendment (to the then current ICA) was effective from February 1, 2001 through May 31, 2004. The replacement 13-State Amendment renews the same compromises reached in the original, is currently in effect, and remains effective until July 1, 2007. As MCIm correctly argues, the 13-State Amendment obviates the need for the Commission to decide certain issues here based on the issues not being ripe (i.e., no controversy currently exists or is imminent) and/or moot (i.e., the issue is resolved or settled).

As a result, the 13-State Amendment will preempt or override any outcome otherwise reached here on these 10 issues until at least July 1, 2007. As provided below, parties will have ample opportunity later to have the issue(s) decided when the disputes are more imminent or certain.

In fact, however, these issues they may never be in dispute. The FCC is reconsidering its decisions and rules on intercarrier compensation, and

may issue new rules in its *Intercarrier Compensation Rulemaking*.[16] This FCC proceeding is specifically designed to implement sweeping reform of the current intercarrier compensation regime. In the event of an FCC ruling, not only would the Commission's determination of these issues in this arbitration have no effect until the 13-State Amendment expires, but even then those determinations would almost certainly have to be revisited and revised in light of determinations pursuant to the FCC's new intercarrier compensation rules.

Moreover, both SBC and MCI have shown that they believe it to be in their best interests to negotiate successor agreements rather than allow an agreement to lapse. Thus, even if the issues resurface on July 1, 2007, parties might either extend or renegotiate the current 13-State Amendment.

It is unnecessary and unwise for the Commission to decide issues not now in dispute only because they might be in dispute at some future time. To do so might prejudice parties' renegotiations and potential compromises.

To resolve this matter, MCIm proposes that the Commission adopt the following relief:

1. adopt language proposed by MCIm which references the 13-State Amendment until termination of that Amendment;
2. order that parties begin renegotiating the California portion of the 13-State Amendment beginning no later than December 29, 2006;
3. if no successor Amendment is in place or the current Amendment extended by May 14, 2007, require that parties use either the dispute resolution procedures of the ICA or the arbitration procedures under §§ 251 and 252 of TA 96; and

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[16] See Further Notice of Proposed Rulemaking, R*e Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92 (March 3, 2005), FCC 05-33 ("*Intercarrier Compensation Rulemaking*"), ¶¶ 3-5.

4. require that parties continue to operate under the existing 13-State Amendment until such time as a successor agreement is reached and approved by the Commission.

With some modification, this approach is adopted.

First, the ICA language for these 10 issues is either that mutually agreed to, or the section is blank or omitted. For example, MCIm does not propose disputing clause language for some issues, and SBC-CA's disputed language is not adopted (e.g., NIM 4 regarding NIM Appendix § 1.8; NIM 8 regarding NIM Appendix 1.14). Unless there is mutually agreed to language, the section is blank or omitted. In all other cases there is a disputing clause proposed by MCIm if the matter is arbitrated here (e.g., NIM 12, NIM Appendix §§ 3.9, 3.11, 3.11.2). The issues are not arbitrated here, however, and MCIm's proposed language does not specifically reference the 13-State Amendment. Therefore, MCIm's language is not adopted. Neither is SBC-CA's disputed language, if any (e.g., Reciprocal Compensation 2, §§ 2.3(i) and (ii), 2.3.1(i) and (ii), 16.1). The result of this is that the 13-State Amendment controls until the amendment expires.

Second, parties have a mutual interest in a reasonable, professional business relationship. They should begin renegotiations as soon as they see fit, but are directed to meet for the purpose of further negotiation on these issues no later than March 1, 2007.

Third, by April 1, 2007, if:

(a) no continuation of the current 13-State Amendment is in place,

(b) no successor agreement is in place, or

(c) no Commission, FCC or court order is entered that resolves these issues,

then:

(a) parties shall jointly submit a letter to the Commission's Executive Director and Telecommunications Division Director (also served on the service list for this proceeding) stating that they are resolving disputed issues via the Dispute Resolution clause of the ICA and no Commission involvement is needed, or

(b) SBC-CA shall file an application for arbitration.

This is before the May 14, 2007 date recommended by MCIm, but is not so soon as to miss taking advantage of the most current conditions.

This process is adopted to "provide a schedule for implementation of the terms and conditions by the parties to the agreement." (TA 96, § 252(c)(3).) Because it is not ripe to decide these issues now, the adopted "schedule for implementation" continues operation under the 13-State Amendment while that amendment controls, and provides for necessary process thereafter.

The ICA contains its own dispute resolution procedure. Parties may wish to use that process. If so, the only requirement is that they inform the Commission and the service list.[17]

[17] For example, parties may use informal dispute resolution. (GT&C § 12.3.2.) Alternatively, parties may use either the Commission or a non-Commission entity (e.g., American Arbitration Association) under the provisions for formal dispute resolution. (GT&C § 12.3.3.)

Alternatively, if parties do not agree to use the dispute resolution provisions of the ICA but some of these issues remain unresolved, the same party that filed the arbitration application here (SBC-CA) shall file an application for arbitration. The application shall seek arbitration of any of the following issues that are unresolved at that time: NIM 4, 8 and 12, plus Reciprocal Compensation 2, 4, 5, 6, 8, 9 and 16. If nothing has changed by April 1, 2007, parties may simply ask that the record in this proceeding (including both facts and argument) be used in the new proceeding for purposes of reaching a decision. Alternatively, applicant can propose the latest information and argument, and respondent may reply. If parties are ready to proceed with arbitration at the Commission before April 1, 2006, SBC-CA may file the application whenever appropriate (but no later than April 1, 2006).

The arbitration schedule can largely be based on that in Resolution ALJ-181, but the time can be shortened since the number of issues is limited. Also, parties will have met by March 1, 2007 to reexamine resolution, thereby focusing issues, facts and argument reasonably clearly at that time. Because it is desirable to use the latest information, the arbitration should not start before necessary, and should move along quickly to reach a July 1, 2007 deadline. Therefore, a possible schedule could be:

LINE NO.	DAY	ITEM OR EVENT
1	1	Application
2	10	Response
3	12	Initial Arbitration Meeting (IAM)
4	20	Opening Brief
5	25	Reply Brief
6	40	Draft Arbitrator's Report (DAR)
7	47	Comments on DAR
8	54	Final Arbitrator's Report

9	57	Conformed ICA
10	71	Proposed Decision
11	76	Comments
12	89	Commission Decision

This schedule assumes no evidentiary hearing. Rather, it assumes the same essential facts as presented in this proceeding, and provides parties the opportunity to present updated argument. If there are no new disputed material facts, this schedule should provide a reasonable opportunity to resolve disputes and have an amendment to the current ICA in place by July 1, 2007. Applicant and respondent, if they wish, may propose a different schedule with their application and response, respectively, or may do so at the IAM.

If there are new disputed material facts different from those in the instant application, however, that is precisely why the Commission should not now decide one or more of the 10 issues. Rather, those new material facts should be considered before a decision is reached for implementation on July 1, 2007. If parties raise new disputed material facts, parties should propose a revised schedule as soon as possible for the consideration of the assigned arbitrator, along with a proposal for interim treatment of these issues after July 1, 2007.

Finally, parties are not ordered to continue to operate under the existing 13-State Amendment after July 1, 2007. Rather, SBC-CA correctly points out that the 13-State Amendment is a mutually agreed to matter with a termination date. Absent more compelling circumstances than are present here, the Commission should decline to order the continuation of a voluntary agreement as a term in a mandatory arbitration. The disputing clauses on these points appear to contain different language than in the 13-State Amendment. Requiring the terms of the 13-State Amendment agreement to remain in place in California once it has terminated in the other 12 states would conflict with the

premise of the 13-State Amendment itself. Nonetheless, parties should consider continuation of the 13-State Amendment as necessary, or other alternatives, to address treatment of these issues after July 1, 2007 pending a final Commission decision.

6.2. NIM 5

Issue: Which parties' definition of "Local Interconnection Trunk Group" should be included in the Agreement?

Agreement Reference: NIM § 1.10

Positions and Discussion

See positions and discussion under NIM 15

6.3. NIM 8

Issue: Which party's definition of Points of Interconnection should be included in the Agreement?

Agreement Reference: NIM § 1.14

Positions and Discussion

See NIM 4. The same outcome is adopted here.

6.4. NIM 9

Issue: When is mutual agreement necessary for establishing the requested method of interconnection?

Agreement Reference: NIM §§ 2.2, 4.4.1, 4.5.1

Positions and Discussion

See NIM 14.

6.5. NIM 11

Issue:

SBC-CA: Should MCIm be solely responsible for the facilities that carry OS/DA, 911, mass calling and Meet-Point trunk groups?

MCIm: Are OS/DA, 911, mass calling and meet-point-trunk-group facilities within the scope of 251(c)(2) interconnection obligations?

Agreement Reference: NIM §§ 2.5; 7.1.2

Positions

SBC-CA asserts MCIm should be solely responsible for these facilities. MCIm says these facilities are an integral part of SBC-CA's interconnection obligations under § 251(c)(2), and must be priced at TELRIC rates.

Discussion

SBC-CA's proposed language is adopted.

SBC-CA's proposed NIM § 2.5 makes clear that MCIm is responsible for providing the facilities that MCIm uses to provide telecommunications services to its end users. The facilities in question are:

1. 911 facilities that connect MCIm's 911 switch to the Selective Router, so that calls may be forwarded to the proper Public Safety Answering Point;
2. facilities that connect MCIm's switch to the Operator Services and/or Directory Assistance Platform provided by SBC CA;
3. facilities that connect MCIm's switch to interexchange carriers (so-called "Meet Point"); and
4. facilities that connect MCIm's switch to an SBC-CA Choke Tandem that restricts or "chokes" the number of calls that can be completed in response to mass calling events such as radio contests or "American Idol"-type shows ("Mass Calling Trunks").

These are all ancillary services provisioned and transported over facilities specifically designed to serve only MCIm's end users. For example,

Operator Services (OS) and Directory Assistance (DA) are provided by MCIm strictly for the benefit of its own end users. When an MCIm customer calls "0" or "411," it is not for the purpose of completing a call to an SBC-CA customer but rather to access the operator and directory assistance services provided by MCIm to its own customers.[18] The 2001 FAR required MCIm to bear the costs for the facilities used to provide its own OS saying:

> "Pacific's position is adopted. There is a big difference between MCIm's OS/DA traffic, and traffic which passes over its local interconnection trunks. All of the OS/DA traffic is one-way, originated by MCIm's end users and terminating at Pacific's operator platform. MCIm should supply the necessary trunks to carry its customer's traffic to Pacific's operator platform." (2001 FAR dated July 16, 2001 in A.01-01-010, page 77.)

There is no reason for a different outcome here.

Moreover, with respect to 911 traffic, MCIm has already agreed to language in NIM §10.2 that obligates it to provide its own "facilities/trunks" between the MCIm switch and the 911 Selective Router. As such, there is no basis to dispute NIM §2.5 as it relates to 911 facilities, since NIM §2.5 merely confirms that MCIm is responsible to provide its own 911 facilities to the 911 Selective Router.

The same is true for "Meet-Point" facilities that connect MCIm's switch to interexchange carriers. An MCIm end user might take local service from MCIm but select Sprint as the presubscribed "1+" long-distance carrier.

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[18] That fact that MCIm may choose to lease the OS/DA services from SBC-CA does not change the fact that MCIm uses those leased services to provide OS/DA services to its own customers and not to send and receive calls to or from SBC-CA end users. MCIm may also self-provide or lease those services from another carrier.

When that MCIm end user places a long distance call on a "1+" basis, the call is transported from the MCIm switch to the Sprint switch via the Meet Point trunk groups to the appropriate SBC-CA Access tandem, where Sprint is interconnected with SBC-CA via switched access (*i.e.*, Feature Group D) trunks. SBC-CA need not be involved in, and should not be required to provide, the transport facilities used by MCIm in that situation.

SBC-CA's proposed language for NIM §2.5 clarifies that MCIm is responsible for the transport facilities necessary to provide services to its own end users. SBC-CA has no obligation to provide transport in these situations, and the ICA should so provide.

MCIm asserts the fact that these trunks all carry one-way traffic is irrelevant given that, according to MCIm, "[t]he right of an interconnection carrier to utilize one-way trunks for purposes of interconnection is well-established." (MCIm Opening Brief, page 75.) But whether the parties may establish one-way trunks for traffic that flows both ways (such as traditional voice traffic) is irrelevant. The traffic at issue here – OS-DA, 911, mass calling, and meet point traffic – never flows from SBC-CA to MCIm, but only from MCIm to SBC-CA, so there would never be any need to establish two-way trunks. Indeed, "MCIm agrees that the trunks at issue here will carry traffic in only one direction." (MCIm Opening Brief, page 74.) The Commission found this fact dispositive in 2001 with respect to OS facilities. The same logic compels the same conclusion with respect to the other traffic at issue here.

MCIm says the issue in essence is whether MCIm may use logical trunks rather than physical facilities to interconnect for the purpose of transporting this traffic and, if so, whether the price for such interconnection must be TELRIC-based. (MCIm Opening Brief, pages 75-76.) Where the

appropriate OS/DA, mass calling, meet-point tandem, or the 911 selective router is located at the same place as the SBC-CA access tandem, SBC-CA agrees that MCIm may use logical trunk groups over the facilities it has already established to that point. But, where the appropriate OS/DA, mass calling, meet-point tandem, or the 911 selective router is located elsewhere, MCIm is responsible for the facilities used to get its traffic to that location in order to provide these services to its own customers. MCIm may lease those facilities out of the applicable SBC-CA tariff, or reach some other commercial arrangement, such as self-provisioning or obtaining those facilities for a third-party. SBC-CA has no obligation to assist MCIm complete its one-way traffic for services unrelated to SBC-CA's system. Thus, SBC-CA's proposed language is adopted.

6.6. NIM 12

Issue:

SBC-CA:

(a) When MCIm selects a single POI, should this attachment contain language detailing the need for MCIm to establish additional POIs when MCIm reaches the appropriate threshold of traffic?

(b) Should MCIm be required to trunk to every Local Calling Area in which it Offers Service?

MCIm: Should the Agreement include language reflecting the well-established legal principle that MCIm be entitled to interconnect at a single POI per LATA?

Agreement Reference: NIM §§ 3.2, 3.5, 3.6, 3.7, 3.8., 3.9., 3.11, 3.11.1, 3.11.2

Positions and Discussion

See NIM 4. The same outcome is adopted here.

6.7. NIM 13

Issue:

SBC-CA: Should a non-section 251/252 service such as Leased Facilities be arbitrated in this section 251/252 proceeding?

MCIm: Should facilities used for 251(c)(2) interconnection be priced at TELRIC rates?

Agreement Reference: NIM § 4.3.1 iii

Positions

SBC-CA says this issue is not arbitrable because neither § 251 nor any other provision of the Act requires ILECs to provide interconnection facilities on the CLECs side of the POI.

MCIm argues that transport facilities purchased for purposes of interconnection to exchange traffic must be based on TELRIC pricing and not SBC-CA's special access tariff.

Discussion

SBC-CA's proposal is adopted.

The issue presented here is with respect to leased transport facilities by MCIm from SBC-CA for the purpose of interconnection without collocation. (NIM § 4.3.1 (iii).) This in turn relates to entrance facilities.

As SBC-CA points out, an entrance facility is a form of dedicated transport that provides a transmission path between the networks of SBC-CA and a CLEC.[19] SBC-CA reports the FCC held in both the *TRO* and the *TRRO* orders that entrance facilities need not be unbundled and provided by SBC-CA at TELRIC rates. Conducting an impairment analysis pursuant to § 251(c)(3) in

[19] SBC-CA Opening Brief, page 74 citing *TRRO* ¶136.

the *TRRO*, the FCC found that CLECs are not impaired without access to entrance facilities. Further, SBC-CA notes:

> "Critically, the FCC found that, '[b]ecause of this aggregation potential, entrance facilities are more likely than dedicated transport between incumbent LEC offices to carry enough traffic *to justify self-deployment by a competitive LEC*.' [footnote deleted; emphasis added.] The FCC also found that CLECs 'are increasingly relying on competitively provided entrance facilities.' [footnote deleted.] No commenter disputed the supporting evidence, which only reinforced the FCC's conclusion that 'wholesale alternatives to entrance facilities provided by incumbent LECs are widely available.' [footnote deleted.] Moreover, the FCC explained, 'competitive LECs have a unique degree of control over the cost of entrance facilities, in contrast to other types of dedicated transport, because they can choose the location of their own switches' either by locating them 'close to other competitors' switches, maximizing the ability to share costs and aggregate traffic'; 'close to transmission facilities deployed by other competitors, increasing the possibility of finding an alternative wholesale supply;' or 'close to the incumbent LEC's central office, minimizing the length and cost of entrance facilities.' [footnote deleted.]"[20]

Thus, entrance facilities need not be provided at TELRIC rates under § 251(c)(3).

MCIm nonetheless proposes that SBC-CA be required to continue to provide interconnection, including entrance, facilities at TELRIC-based rates. Specifically, MCIm's proposed language for § 4.3.1(iii) states that when MCIm

[20] SBC-CA Opening Brief, page 75, in turn citing from TRRO at ¶¶138 and 139 and n.393.

"leases such transport facilities [*e.g.*, entrance facilities] from SBC CALIFORNIA, it shall be at TELRIC rates."

MCIm's proposal would contradict the FCC's holding with respect to entrance facilities. It is not a credible result that the FCC would negate its determination that carriers are not impaired without entrance facilities by requiring them to be unbundled at TELRIC rates under § 251(c)(2).

Nor could this be lawfully done. Section 251(c)(2) only requires an ILEC to provide interconnection "*for* the facilities and equipment" of a CLEC. It does not require the ILEC to provide the CLEC's own facilities that are to be interconnected with the ILEC's network. Rather, the CLEC itself must deliver the traffic to the POI within the ILEC's network. The CLEC may not demand that the ILEC also provide the transmission facilities on the CLEC's side of the POI, and deliver the traffic to the ILEC's own network for the CLEC.

SBC-CA clearly provides the capacity and space for the CLEC to run its own entrance facility through a vault and up through various cable racks and finally into an SBC-CA central office, where it can then interconnect on a fiber cross-connect panel.[21] In other words, SBC-CA provides exactly what is required under section 251(c)(2): the ability "for the facilities and equipment of" MCIm to be interconnected with SBC-CA's network.

In support of its view, MCIm cites the Commission's decision in the 2001 arbitration between SBC and MCI, requiring SBC-CA to provide unbundled dedicated transport (UDT) at TELRIC rates. The 2001 holding, however, was based on the FCC's then-existing rules treating UDT as a UNE pursuant to

[21] *See* diagram of SBC-CA's facilities in Exhibit 1, Albright Direct at 47; 1 Tr. 79-82 (Albright for SBC-CA).

§252(c)(3), as interpreted in the 1999 *UNE Remand Order*.[22] As SBC-CA correctly explains (SBC-CA Opening Brief at 74-76), the FCC (in response to judicial reversal of its UNE rules) has now held in both the *TRO* and *TRRO* that UDT used as an entrance facility is no longer available as a UNE. Thus, the 2001 holding is not controlling here.

In further support of its position, MCIm contends that the TRO deals with modification of an ILEC's obligations to unbundle under § 251(c)(3), not an ILEC's interconnection obligations under § 251(c)(2). This is not persuasive. While §251(c)(3) requires "nondiscriminatory access to network elements on an unbundled basis," SBC-CA correctly points out that §251(c)(2) does not require an ILEC to provide any facilities. Rather, it only requires interconnection "for" the facilities and equipment of an interconnecting carrier. This shows Congress knew how to require an ILEC to provide facilities when it wanted to in subsection (c)(3), and it did not do so in subsection (c)(2). Inclusion in one section with omission in another must be honored as intentional and purposeful.[23]

In addition, §251(c)(2) requires only that interconnection be "at any technically feasible point within the carrier's network." MCIm's position that entrance facilities are required by §251(c)(2) contravenes the statutory text that interconnection (a) be at a "point" and (b) that the interconnection point be "within" the ILEC's network.

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[22] *See* MCIm Br. at 83 (quoting 2001 FAR, which relied on ¶346 of the *UNE Remand Order*).

[23] SBC-CA Reply Brief, page 5, citing Supreme Court decisions *Duncan v. Walker*, 533 U.S. 167, 173 (2001), quoting *Bates v. United States*, 522 U.S. 22, 29-30 (1997), quoting, in turn, *Russello v. United States*, 464 U.S. 16, 23-24 (1983).

SBC-CA points out that the Ohio Commission very recently (November 2005) rejected CLEC claims that § 251(c)(2) requires the provision of any facilities at all. Their reasoning is consistent with that here:

> "We find that Section 251(c)(2) of the 1995 Act and §51.5 of the FCC rules as well as ¶140 of the TRRO, clearly require the ILEC (SBC in this case) to interconnect its network with the requesting carrier's (*i.e.*, the CLEC's) facilities and equipment. Such CLEC facilities and equipment are provided by the CLEC, not leased from the ILEC, and are a part of the CLEC's network that starts from the point of interconnection (POI) between the two networks. Therefore, any facilities on the CLEC's side of the POI, including entrance facilities, are part of the CLEC's network regardless of whether they are used for transport and termination of traffic exchanged between that CLEC and the ILEC, used to access UNEs or used to backhaul traffic. We find that the CLEC may build its network by either purchasing facilities, including entrance facilities, from SBC's Special Access tariff if it chooses to do so, by self-provisioning entrance facilities themselves or by securing them from a third party. If a CLEC chooses to purchase entrance facilities from SBC's Special Access tariff, the rates specified in that tariff would apply, not TELRIC rates as proposed by the CLECs."[24]

Thus, leased transport facilities by MCIm from SBC-CA for the purpose of interconnection without collocation need not be at TELRIC rates. SBC-CA's proposal adopted.

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[24] SBC-CA Reply Brief, page 5, quoting from *Re Establishment of the Terms and Conditions of an Interconnection Agreement Pursuant to the Federal Communications Commission's Triennial Review Order and Its Order on Remand*, Case No. 05-887-TP-UNC, *Arbitration Award*, at 22-23 (Ohio P.U.C. Nov. 9, 2005).

6.8. NIM 9 and 14

Issue NIM 9: When is mutual agreement necessary for establishing the requested method of interconnection?

Agreement Reference: NIM §§ 2.2., 4.4.2, 4.5.1

Issue NIM 14:

SBC-CA:

(a) Should MCIm be required to interconnect on SBC-CA's network?

(b) Should the Fiber Meet Design option selected be mutually agreeable to both parties?

MCIm: Should SBC-CA be permitted to limit methods of interconnection?

Agreement Reference: NIM §§ 4.4.1, 4.4.4.3.1, 4.4.4.3.2

Positions

SBC-CA argues that mutual agreement is necessary for establishing interconnection, including the fiber meet design option, and that interconnection must be at a point within SBC-CA's network. MCIm contends that SBC-CA must interconnect with MCIm at any technically feasible point, and may not refuse or deny interconnection methods required by TA 96.

Discussion

Each party says its proposed language is a modification to that in the 2001 ICA, but contends it is substantially similar or reaches a substantially similar outcome. On balance, SBC-CA's position is more aligned with the 2001 ICA, current practice, practical considerations, the facts, and the law, and is adopted.

The 2001 ICA repeatedly specifies the requirement (a) for "mutual agreement" or (b) that parties "will agree." (2001 ICA, NIM §§1, 1.5.1, 2, 2.1, 3.2, 5, 5.1.) This language was legally proper then, and is so now. MCIm does not

identify any instance where its use has been a problem between the parties. Disputes—including one party's belief that the other is unreasonably withholding agreement—are subject to the dispute resolution procedures of the ICA, and/or may be referred to the Commission. No new facts or law are presented here that merit a change.

MCIm is concerned that "mutual agreement" gives SBC-CA veto power over a method of interconnection. MCIm says this is contrary to SBC-CA's affirmative duty to provide interconnection at any technically feasible point within SBC-CA's network. (MCIm Opening Brief, page 70 citing TA 96, 47 U.S.C. 251(c)(2)(B).)

MCIm's concern is misplaced. Agreed-to language in the 2006 ICA already requires that:

> "Each Party shall act in good faith in its performance under this Agreement and, in each case in which a Party's consent or agreement is required or requested hereunder, such Party shall not unreasonably withhold or delay such consent or agreement." (2006 ICA, GT&C § 1.4.)

SBC-CA must act in good faith and cannot unreasonably withhold or delay agreement. MCIm may seek relief under the ICA if it believes SBC-CA has failed to act in good faith, or has unreasonably withheld or delayed agreement.[25] Also, as MCIm points out, SBC-CA may not deny interconnection unless it proves to a state commission that such interconnection is technically infeasible.

[25] This may include formal dispute resolution procedures, such as submitting the matter to the Commission. (See agreed-to language in the 2006 ICA, GT&C § 12.3.3.)

(MCIm Opening Brief at page 71, citing FCC Rule 47 CFR § 51,305(e).) Thus, MCIm has avenues for relief, if needed. [26]

On the other hand, MCIm's proposed language fails to reasonably reflect legal requirements. For example, the interconnection between SBC-CA and MCIm is required to be at a point "within" SBC-CA's network. (TA 96, 47 U.S.C. 251(c)(2)(B).) MCIm's proposed language fails to implement this statutory requirement, and may lead to disputes.[27]

There are limited exceptions requiring a build-out of SBC-CA facilities to MCIm to accommodate interconnection.[28] SBC-CA's proposal provides for such limited build-out (e.g., taking MCIm fiber from the last manhole before SBC-CA's network and pulling it into SBC-CA's building). (SBC-CA's proposed language at § 4.4.4.3.2.) MCIm's proposal is not limited in this way. Rather, it is an open-ended obligation that could arguably be read to require SBC-CA to construct facilities anywhere within the LATA, even outside SBC-CA's operating territory.

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[26] In its Reply Brief, MCIm recommends that "language should be incorporated which provides that neither party may unreasonably withhold agreement. That is, they must negotiate in good faith…" (MCIm Reply Brief, page 10.) This is already required by undisputed, agreed-to language in 2006 ICA at GT&C § 1.4.

[27] As SBC-CA correctly points out, MCIm proposes at § 4.4.1 that SBC-CA establish "a fiber meet at one or more locations in each LATA." This fails to reasonably restrict the interconnection to a point within SBC-CA's network. Similarly, at § 4.4.4.3.1, MCIm requires SBC-CA to provide the working side of a two fiber system, again ignoring that the POI must be within SBC-CA's network.

[28] For example, SBC-CA points out that Paragraph 553 of the FCC's *Local Competition Order* may describe one such exception. (SBC-CA Opening Brief, page 66.)

Thus, on balance, SBC-CA's proposed language is superior and is adopted.

6.9. NIM 5 and 15

Issue NIM 5: Which parties' definition of "Local Interconnection Trunk Group" should be included in the Agreement?

Agreement Reference: NIM § 1.10

Issue NIM 15:

SBC-CA:

(a) May MCIm combine originating 251(b)(5) Traffic, intraLATA toll traffic, and interLATA toll traffic on the same trunk groups?

(b) Should a non-section 251/252 service such as Leased Facilities be arbitrated in this section 251/252 proceeding?

(c) May MCIm use UNE transport for the purpose of interconnecting on SBC's network?

MCIm: If MCIm provides SBC CALIFORNIA with the jurisdictional factors required to rate traffic, should MCIm be permitted to combine InterLATA traffic on the same trunk groups that carry Local and IntraLATA traffic?

Agreement Reference: §§ 7.1.1; 7.1.1.1

Positions

NIM 5 and NIM 15 involve the types of traffic MCIm may route over local interconnection trunk groups. SBC-CA proposes that local trunks carry only § 251(b)(5) traffic, ISP-bound traffic, and intraLATA toll traffic where the traffic is exchanged only between SBC-CA and MCIm with no third-party interexchange carrier (IXC) handling any portion of the call. SBC-CA opposes commingling local traffic with interLATA traffic.

MCIm proposes a definition for local interconnection trunk groups that allows the exchange of local, intraLATA toll, interLATA and transit traffic.

MCIm seeks to commingle intraLATA and interLATA traffic (subject to access charges) with § 251(b)(5) traffic (subject to reciprocal compensation) on the same interconnection trunks, as long as factors are provided to permit proper rating of traffic.

Discussion

SBC-CA's proposed language is adopted.

The definition of local interconnection trunk group controls the traffic that may be properly routed over local trunks. SBC-CA permits intraLATA toll traffic over local trunks by MCIm (without a third-party IXC handling any portion of the call) because it is possible to determine the proper intercarrier compensation. MCIm's proposal, however, would permit both intraLATA and interLATA traffic over local trunks even when carried by a third-party IXC. This creates the potential for improperly billed traffic because SBC-CA's local trunks are not designed to capture the proper billing data necessary for such traffic.

In an undisputed portion of the proposed ICA, MCIm has already agreed to deliver IXC-carried traffic on meet-point trunks. (2006 ICA, NIM § 9.1.) This is consistent with the current ICA, which provides for the delivery of such traffic over separate trunk groups. (2001 ICA, Appendix ITR, §§ 3.1 and 3.2.) In short, MCIm has already agreed to separate out all IXC-related traffic, both in the existing ICA, and agreed-to language in the proposed ICA. MCIm's disputed clause language for NIM Appendix §§ 1.10, 7.1.1, and 7.1.1.1 would create unnecessary and unreasonable ambiguity, and is rejected.

The remaining dispute is whether MCIm can route non-IXC traffic over local trunks when it is interLATA traffic. SBC-CA has already agreed to route non-IXC, intraLATA traffic over local trunks. Current practice between

SBC-CA and MCIm is that interLATA traffic is terminated over switched access trunks, not local trunks. It is reasonable to continue existing practice. LATA boundaries have existed for over two decades, carriers are familiar with both these boundaries and LATA-related types of traffic, and SBC-CA's proposal is in line with current practice in California. As explained more below, no departure is justified.

MCIm claims it would have to establish or maintain additional trunk groups for interLATA traffic if the status quo is maintained. SBC-CA correctly points out, however, this is not the case. Rather, MCIm may simply route that traffic over the same meet-point trunks it has already agreed to establish to route IXC-carried traffic. Thus, efficient trunk utilization does not require commingling.

More importantly, MCIm's proposal would give MCIm (or any CLEC adopting this ICA pursuant to 47 U.S.C. § 252(i)) a ready means to avoid paying access charges. Continuing the current practice of maintaining separate trunk groups allows SBC-CA to much more effectively monitor and detect this sort of otherwise improper activity. SBC-CA's concern is not mere conjecture. SBC-CA's witness Albright testified that there has always been, and continues to be, a strong incentive to avoid paying access charges. Several disputes have occurred, and considerable distrust results. There is no need to adopt a provision here that would encourage further disputes and distrust.

Moreover, the governing regime is one of reciprocal compensation and access charges. This regime may or may not be changed as a result of the FCC's re-examination of its intercarrier compensation mechanisms. Unless and until changed, however, it must be implemented and honored in a way the permits accurate billing while minimizing disputes and distrust. To do

otherwise would seriously jeopardize the current governing compensation structure.

MCIm argues that its proposal permits efficiency gains. To the contrary, the record here does not convincingly establish the degree or amount of efficiency gains, if any, from commingling traffic. Efficiency gains, if any, however, might be weighed by the FCC in its reconsideration of intercarrier compensation (e.g., assessing the tradeoffs between any engineering and cost efficiencies, if any, compared to market definition, accounting, accurate compensation, regulatory or other efficiencies). In the meantime, the existing definitions of traffic and markets, plus the existing compensation schemes, should be followed and implemented in a reasonable way that seeks to minimize the incentives and opportunities for abuse. Continuation of existing practice, as recommended by SBC-CA, does that more effectively than would MCIm's proposal.

MCIm's proposal, for example, would permit traffic to be commingled "provided such combination of traffic is not for the purpose of avoiding access charges, and facilities charges…" (MCIm proposed clause in NIM Appendix, § 7.1.1.) It would not be a trivial task, however, to determine the purpose for which particular traffic was commingled. This provision would invite disputes, and would be difficult, if not impossible, to administer and enforce.

MCIm argues that:

> "with today's new technologies, in particular the use of the Internet to transmit Voice over Internet Protocol ("VoIP") traffic, geographic distinctions are meaningless except only to the question of legacy compensation mechanisms, such as access charges." (MCIm Opening Brief, page 93.)

Until the FCC changes the access charge regime, however, that regime is the current system. California should not prejudge what the FCC should or will do to that regime. The current method of handling traffic is working reasonably well (including MCIm commingling of MCIm intraLATA toll traffic with local traffic on local trunks) and should continue.

MCIm contends that jurisdictional allocators may be used to track and bill multi-jurisdictional traffic, such as the Percent Interstate Usage (PIU) method used by the FCC for interstate traffic. MCIm proposes use of PIU factors for this ICA, with audits to verify proper allocation of charges. Allocation factors and audits are a poor substitute for continuing the treatment of traffic now employed in the 2001 ICA. VOIP traffic is increasing under the existing scheme, the existing treatment is working reasonably well, and it can continue to do so until the FCC addresses intercarrier compensation (which is expected reasonably soon).

In support of its position, MCIm cites an Indiana Commission decision permitting commingling of interLATA traffic. The issue there was different, however, as it concerned whether the CLEC would have to establish a new, third set of trunks in addition to the local and meet-point trunks already in existence. As SBC-CA has explained here, MCIm may route its non-IXC interLATA traffic over the meet-point trunks that have already been established. Moreover, other state commissions, including this Commission, have not permitted such commingling.

Therefore, SBC-CA's language is adopted, and the status quo continued, with MCIm routing its non-IXC-carried interLATA traffic over switched access trunks (which may include meet-point trunks).[29]

6.10. NIM 17

Issue:

SBC-CA: Should each party be financially responsible for the facilities on its side of the POI?

MCIm: For two-way interconnection trunks, should the parties apportion costs by applying a "Relative Use Factor"?

Agreement Reference: NIM §§ 8.6; 8.6.1; 8.6.2

Positions

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[29] Both SBC-CA and MCIm agree that the 2001 ICA should be strong precedent for the result in the 2006 ICA, absent a change in law or material fact. (Respective Opening Briefs at p. 7 and 9.) For the first time in a footnote in its Reply Brief, MCIm seeks to carve out exceptions for portions of the 2001 ICA that (a) were not raised as issues before or (b) were negotiated outcomes. (MCIm Reply Brief, p. 8, footnote 28.) Regarding the first point, a new issue, not raised before, must be decided on the facts and law in this case, according to MCIm. This Arbitrator's Report does so by applying the facts and law in this case to reach the result, as explained in the text. Regarding the second point, a previously negotiated result should not be binding precedent nor prejudice MCIm's position in this case, according to MCIm, because to do so would violate public policy favoring settlements, and settlements would be discouraged because parties would run the risk of having their agreements used against them as binding precedent. Here, however, MCIm characterizes this issue (NIM 15 and related NIM 5) as one that was not previously negotiated. ("It simply reflects that MCIm did not seek the arrangement or raise the issue in previous ICA negotiations and arbitrations in California. This is a new issue, one not addressed in the existing ICA." See MCIm Reply Brief, page 8, footnote 28, emphasis added.) Thus, the issue was not raised in 2001 for negotiation, according to MCIm. As such, reliance on the 2001 ICA cannot violate any previously negotiated outcome. Nonetheless, it does demonstrate the technical and economic feasibility of the adopted result.

SBC-CA says each party should be financially responsible for the facilities on its side of the POI.

MCIm proposes a method of allocating the costs for two-way trunks used by both parties based on each party's relative use.

Discussion

SBC-CA's proposed language is adopted.

A typical method of interconnection is for a CLEC to provide its own facility (*e.g.*, a DS1 or DS3) to a POI on SBC-CA's network, after which each party provisions a two-way trunk group in the appropriate switch on its side of the POI. SBC-CA's proposed language provides that MCIm bears the financial responsibility for "the transport facility underlying the trunks to a MCIm designated POI, without regard to the direction of the traffic on the trunks."[30] That is, each party pays its own costs for facilities on its side of the POI.

MCIm's proposed language provides that "the provider of a two-way trunk facility will share the cost of such trunk facility with the other Party by applying a relative use factor ("RUF")."[31] In this way, the party that receives the most traffic would be able to bill the originating party for a portion of its trunk facility cost.

[30] SBC-CA Proposed § 8.6.1.

[31] MCIm Proposed § 8.6.1.

In support, MCIm cites the FCC's *First Report and Order*:

> " '….*The amount an interconnection carrier pays for dedicated transport is to be proportional to its relative use of the dedicated facility*. For example…if the providing carrier provides two-way **trunks** between its network and the interconnecting carrier's network, then the interconnecting carrier should not have to pay the providing carrier a rate that recovers the full cost of those **trunks**. These two-way **trunks** are used by the providing carrier to send terminating traffic to the interconnecting carrier. *Rather, the interconnecting carrier shall pay the providing carrier a rate that reflects only the proportion of the trunk capacity that the interconnecting carrier uses to send the terminating traffic to the providing carrier*.' "[32]

MCIm, however, does not convincingly show that there has been a failure to implement this FCC order via the reciprocal compensation or access charge regime. On the other hand, SBC-CA shows existing compensation mechanisms properly recover these costs.

The FCC order says that the "amount an interconnecting carrier pays for *dedicated transport* is to be proportional to its relative use of the dedicated facility."[33] But under the subsequently released *TRRO*, SBC-CA shows that the FCC clarified that dedicated transport is available only for transmission facilities connecting the incumbent LEC switches and wire centers within a LATA. Dedicated transport is not available for use as an entrance or interconnection facility between a CLEC's own network and the point of interconnection

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[32] MCIm Opening Brief, page 100, citing *Local Competition Order,* ¶ 1062 (portions omitted, emphasis added by MCIm).

[33] *Local Competition Order* ¶1062 (emphasis added).

established within the incumbent's network. Since unbundled dedicated transport is not available for the facilities in question, MCIm must bear the cost of setting up its trunking over those facilities and cannot require SBC-CA to underwrite part of that cost. It is MCIm's responsibility to interconnect within SBC-CA's network.

Even if considered for implementation now, it is contrary to the requirement that interconnection must occur *within* the ILECs's network. (TA 96 § 251(c)(2); also see NIM 13, 20, 21.) Requiring SBC-CA to pay the cost of a portion of the facilities used by MCIm to bring its network to interconnect at SBC-CA's network would be tantamount to requiring SBC-CA to build out its network to interconnect *outside* of where it currently exists. This is not permissible. Therefore, MCIm's RUF is not adopted.

There are several other reasons why MCIm's RUF proposal should be rejected. First, as SBC-CA explains, each carrier must provision a "trunk" on its switch in order to enable an end-to-end call path. If just one carrier does so, then no call path is created and no call can complete. Therefore, trunk provisioning is always equivalent between the carriers and there is no reason why one carrier should charge the other.

Second, the RUF would amount to a double recovery by MCIm. Costs would be recovered once via reciprocal compensation (for costs associated with transporting and terminating the originating carrier's traffic). Under MCIm's proposal, costs would be recovered again by charging an RUF based upon traffic imbalances.

Third, MCIm's proposal would create a revenue stream by allowing the carrier that is on the receiving end of more traffic to charge the originating carrier. Since MCIm receives more traffic from SBC-CA than it originates, the

effect of this scheme would be to allow MCIm to charge SBC-CA for MCIm's own trunks. While this might benefit MCIm in the short term, it would create a perverse incentive for carriers to seek to terminate more traffic than they originate in order to be paid a greater relative use factor.

Fourth, the proposal is ripe for abuse because nothing would prevent MCIm (or an adopting CLEC) from installing more trunks than needed, and then charging for those trunks. This proposal would permit the CLEC to charge SBC-CA for those trunks whether or not they are efficiently utilized.

Finally, MCIm's proposal is unreasonably vague and will likely engender disputes. MCIm proposes that the cost sharing begins by the parties "assuming an initial RUF." (MCIm Proposed § 8.6.1.) Parties might agree to an initial RUF of fifty percent (50%), but there is no certainty that they will. The RUF may then be adjusted, but the mechanism is unclear. The RUF is based on "actual minutes of use during the most recent calendar month" and "actual accumulated minutes of use during the most recent calendar month." The formula for the RUF, however, is never stated. For example, it is neither in NIM Appendix § 1 (Definitions), § 8.6 (Relative Use Factor), nor the General Definitions Appendix. Further, while parties agree there is an important distinction between trunks and facilities, MCIm's proposal refers to the apportionment of costs for a "trunk facility." Also, the costs of the trunk facility are unknown and subject to dispute (e.g., are they to be based on depreciated accounting cost, TELRIC, or other cost basis).

According to SBC-CA, the Illinois Commission rejected the same MCIm proposal, and MCIm does not show otherwise. The rationale is largely the same as that used here, wherein the Illinois Commission said:

> "The Commission finds that MCIm's proposed "relative use factor" ("RUF") is a novel approach that would depart from the well-established methodology of apportioning the costs to LECs for facilities on their side of the POI. The Commission also shares SBC's concern that the RUF would create opportunities for double recovery and arbitrage. SBC explained that nothing would limit MCIm from over-building capacity and charging for all of it, whether or not it is needed. MCIm did not refute that contention. Nor does MCIm counter SBC's claim that MCIm already recovers its cost as an embedded component of reciprocal compensation. Accordingly, the Commission rejects MCIm's proposed RUF."[34]

MCIm argues in support of its position that deference should be given to the outcome of the 2001 SBC-CA/MCIm arbitration. This outcome was reflected in one sentence in the Introduction to Appendix NIM:

> "Where the parties interconnect by a method other than mid-span fiber meet, each Party shall bear interconnection facility costs for two-way trunks in proportion to the percentage of originating traffic for which its customers are responsible."

SBC convincingly shows, however, that the adopted language was contained only in an introductory paragraph of the NIM appendix, there was no language explaining how to apportion the interconnection facility costs, and the parties never implemented that provision. MCIm does not show otherwise.

Finally, MCIm argues that SBC-CA has failed to carry its burden to overcome the deference that should be given to the result in the 2001 ICA, which

[34] Illinois SBC/MCIm Arbitration Order at 104.

MCIm argues its proposal implements here. To the contrary, the facts and law discussed above require adopting SBC-CA's proposed language.

6.11. NIM 20

Issue:

SBC-CA: Should a non 251/252 facility such as 911 interconnection trunk groups be negotiated separately?

MCIm: Should facilities used for 911 interconnection be priced at TELRIC rates?

Agreement Reference: §§ 10.2; 10.3; 10.8; 10.10; 10.12

Positions

SBC-CA contends 911 interconnection trunk groups are not 251/252 facilities and not subject to TELRIC prices.

MCIm asserts they are 251/252 interconnection facilities subject to TELRIC prices.

Discussion

SBC-CA's proposed language is adopted.

The transport facilities at issue here connect MCIm's switch to the Selective Router in the 911 tandem office, which in turn connects MCIm's end users to the public safety answering points that respond to 911 calls. These are not interconnection facilities under § 251(c)(2). While MCIm may lease entrance facilities that connect the two parties' networks, it cannot secure those facilities at TELRIC, but must order them out of the applicable tariff or reach some other commercial arrangement, including self-provisioning or obtaining those facilities from a third-party.

MCIm has the sole obligation to provide E911 services to its own end user customers. Hence, MCIm is financially responsible for providing a facility from MCIm's switch or Point of Presence to the SBC-CA E911 Selective

Router. There are no provisions of the Act that require ILECs to provide transport facilities for the purpose of section 251(c)(2) interconnection. Consequently, the provision of such facilities/trunks is not properly part of this arbitration, nor should they be priced at TELRIC.

The Commission held in a 1999 arbitration that the rates, terms, and conditions for 911 facilities should be provided pursuant to SBC-CA's tariff, and therefore not at TELRIC rates. (A.99-03-047, FAR, page 74, cited by SBC-CA Reply Brief, page 7.) SBC-CA's proposal here is consistent with that result, and should be adopted.

MCIm asserts that one obvious requirement to begin providing local service is to not disrupt the provision of 911. According to MCIm, local service cannot be provided by those who do not provide access to 911. Because of this linkage, MCIm says any of the so-called ancillary trunks required in the provision of local service must be considered local interconnection trunks. This is incorrect. Not all ancillary trunks or interconnection facilities are the same. As discussed under issue NIM 13, the FCC has determined some facilities need not be unbundled and provided at TELRIC rates, having found that CLECs are not impaired without access to those facilities. Rather, certain facilities are now more widely available from alternative providers.

Moreover, MCIm's argument is contrary to the plain language of the statute. Section 251(c)(2) establishes the following duty:

> "Interconnection. The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network…"

That is, § 251(c)(2) requires an ILEC to provide interconnection "*for* the facilities and equipment" of a CLEC. It does not require the ILEC to provide the CLEC's own facilities that are to be interconnected with the ILEC's network.

Thus, SBC-CA's position is adopted.

6.12. NIM 21

Issue: What should the point of interconnection for 911 be?

Agreement Reference: NIM § 10.7

Positions

SBC-CA says the point of interconnection for 911 should be at the SBC-CA 911 selective router.

MCIm says that interconnection for 911 at the selective router may be appropriate in certain circumstances, but it should not be the only option available to MCIm since it is also possible to interconnect through a central office or a collocation point.

Discussion

SBC-CA's proposed language is adopted.

Unlike normal interconnection trunking, 911 trunking does not use the Public Switched Telephone Network ("PSTN"). Instead of being used for two-way end-user-to-end-user calling, 911 trunking connects to a dedicated private network that is intended only for one-way calling to Public Safety Answering Point ("PSAP") agencies. SBC-CA's language provides that "MCIm's Point of Interconnection (POI) for E911/911 Service shall be at the SBC-CALIFORNIA 911 Selective Router." By contrast, MCIm proposes that "MCIm's Point of Interconnection (POI) for E911/911 Service can be at the SBC CALIFORNIA Central Office, a Collocation point, or via a facility provisioned directly."

MCIm has already agreed to provide trunking and facilities directly to the Selective Router in NIM § 10.2. Specifically, the agreed-to language in § 10.2 provides that MCIm "shall establish dedicated trunks from MCIm's Central Office to each SBC CALIFORNIA E911 Selective Router (*i.e.*, E911 Tandem Office) for the provision of E911 services," and that will do so "by providing its own facilities/trunks." This inherently establishes a point of interconnection at the 911 Selective Router. MCIm cannot be allowed to undo that agreement by the language it proposes in § 10.7. The two sections must be consistent.

This 911 traffic is also quite different from ordinary voice traffic exchanged between MCIm and SBC CA. SBC-CA does not charge MCIm for transport and termination (*i.e.*, reciprocal compensation) of 911 traffic, so SBC-CA is not otherwise compensated for providing the transport MCIm seeks. In addition, MCIm has the sole obligation to provide E911 services to its end users, who alone benefit from such services. SBC-CA should not be required to provide free transport to assist MCIm in its legal obligation to provide emergency telecommunications capabilities to its own end users. Hence, MCIm should be financially responsible to provide a facility from MCIm's switch or Point of Presence to the SBC-CA E911 Selective Router.

While MCIm says it will be responsible for the cost of the logical trunk that SBC California provides on its facilities to the Selective Router, this financial responsibility provision is not clearly found in MCIm's proposed language for § 10.2. In fact, MCIm's proposed language could be read to imply it is SBC-CA's responsibility to deliver MCIm's E911 traffic from MCIm's POI to the correct Selective Router. That is inconsistent with current practice, and not adopted here.

Accordingly, SBC-CA's proposal for § 10.7 is adopted.

6.13. NIM 22

Issue: What terms and conditions should apply for inward operator assistance interconnection?

Agreement Reference: NIM §§ 12.2.1; 12.2.2

Positions

SBC-CA proposes that the parties mutually agree on the physical interconnection necessary for inward operator assistance calls, subject to the dispute resolution section of the ICA.

MCIm proposes that MCIm may route calls requiring inward operator assistance through its designated interexchange carrier (IXC) Point of Presence (POP), and SBC-CA shall route such calls through its designated IXC POP. Alternatively, the parties may establish separate trunks or trunk groups per LATA.

Discussion

MCIm's proposal is adopted.

Operator Service and Directory Assistance trunk groups facilitate voice connections between operator service platforms. These connections are established between companies that each provide their own operator services, and they allow operators for one carrier to hand off calls to operators of the other carrier. The question here is whether the ICA should designate the IXC POP as the point at which each party hands off calls requiring inward operator assistance, as MCIm proposes.

MCIm says its proposal continues the parties' current practice for the routing of inward operator assistance calls. MCIm proposes language which

MCIm says is virtually verbatim from the existing ICA.[35] Given that the parties have been operating under that provision since it went into effect, and have been routing calls in accordance with that provision, the practice should continue. No new facts or law justify a change.

In contrast, SBC-CA would make the decision subject to "mutual agreement," and in turn subject to the dispute resolution portion of the ICA if agreement is not reached. There is no reason to adopt such an open ended requirement for the routing of inward operator assistance calls given satisfactory current experience.

6.14. NIM 23

Issue: Should trunk forecasts include trunk quantities for all trunking required in this Appendix NIM/ITR?

Agreement Reference: NIM § 16.4.1

Positions

SBC-CA says yes.

MCIm says no.

Discussion

SBC-CA's position is adopted.

Trunk forecasts are estimates of the number of trunks a carrier expects to have in service over a given time period. SBC-CA reasonably needs to obtain MCIm's forecast of its future trunk requirements in order to determine

[35] MCIm states this comes from existing ICA, ITR Appendix ¶ 5.6.1. That is incorrect. There is no such section, and no such section in the NIM Appendix. Nonetheless, MCIm asserts, and SBC-CA does not disprove, that somewhere within the existing ICA there is such a section, and that MCIm's proposal virtually mirrors that language.

when SBC-CA must acquire more equipment. Accordingly, SBC-CA proposes to require forecasts from MCIm "for all trunking required in this Appendix."[36] This is consistent with language in the 2001 ICA which requires that MCIm provide trunk forecasts "for all trunk groups described in this Appendix."[37] No new facts or law are presented justifying a change.

It is reasonable that MCIm be required to provide all material forecasting data so that SBC-CA can predict with some degree of certainty what it will have to do to accommodate the future interconnection needs of MCIm. This is necessary for system reliability.

MCIm asserts that the issue here is relatively straightforward, with SBC-CA asking for more information under its proposed ICA language than MCIm has provided in the past. To the contrary, the 2001 ICA language is nearly parallel to that proposed here.

The specific dispute concerns CLCI-MSG data, which MCIm resists providing. MCIm claims it has never provided this data to SBC-CA. SBC-CA persuasively shows, however, that MCIm has provided this data, and that it is reasonable to continue to do so.

Therefore, SBC-CA's position is adopted.

6.15. NIM 24

Issue: For trunk blocking and/or utilization, what is the appropriate methodology for measuring trunk traffic?

Agreement Reference: NIM §§ 17.1; 18.7

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[36] NIM §16.4.1 (SBC-proposed language).

[37] 2001 ICA, Appendix ITR, Section 5.1.

Positions

SBC-CA proposes that trunk design blocking criteria be based upon "time consistent average busy season busy hour twenty (20) day averaged loads." (§ 17.1.) SBC-CA proposes underutilization be measured by using "a monthly average basis." (§ 18.7.)

MCIm proposes that trunk design blocking criteria be based upon "a weekly peak busy hour average." (§ 17.1.) MCIm proposes that underutilization be measured by using "a weekly peak busy hour basis." (§ 18.7.)

Discussion

SBC-CA's proposed language is adopted.

The optimal number of trunks between any two switches is a function of the volume of traffic between them. Network engineers seek to ensure that the number is appropriate for each pair of switches (*i.e.*, that there are enough trunks to support the traffic between those switches without having an excessive, non-economic number of trunks). The question presented here is how best to balance the objectives of minimizing both blocked calls (from too few trunks) and unused capacity (from too many trunks). Plainly, with enough trunks no call would ever be blocked, but that would almost certainly be wastefully expensive.

Neither party's proposed language is exactly the same as that in the 2001 ICA, but the 2001 ICA should be given weight in considering the proposals here. On balance, SBC-CA's proposal is reasonably consistent with the existing ICA, and should be used. For example, the 2001 ICA uses a study period of

20 business days.[38] SBC-CA's proposal here to use 20 days is more in line with the 2001 ICA than is MCIm's proposal to use one week.[39] Also, the 2001 ICA provides that data is applied to "industry standard Neal-Wilkinson Trunk Group Capacity algorithms."[40] SBC-CA's proposed use of Neal-Wilkinson Trunk Group Capacity algorithms is consistent with the 2001 ICA, while MCIm's proposal to use Erlang B tables is not.

The 2001 ICA also provides that trunk requirements be based on "peak busy hour" data typically using 20 business days. MCIm proposes use of "a weekly peak busy hour average." SBC-CA proposes use of "time consistent average busy season busy hour twenty (20) day averaged loads." SBC-CA seeks this language to improve the opportunity for optimal utilization. That is, the facts in this case show that trunks between SBC-CA and MCIm are underutilized. This is likely to be because "peak busy hour" averages can skew results by chasing the highest hour, which may vary from day to day. This may in turn cause wider swings between forecasts, and will likely cause larger investment in trunks. SBC-CA's method provides greater statistical confidence by using time consistent data that is still within the busy season and busy hour. The evidence shows this is more likely to produce consistent forecasts of greater

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[38] 2001 ICA, Appendix ITR § 4.1. The 2001 ICA at § 4.1 also says that "a study period on occasion may be less than twenty (20) days…" This is understood to be an exception rather than the rule.

[39] The FAR on the 2001 ICA says it adopts MCIm's position on this issue. (2001 FAR, Issue ITR-22, pages 53-55.) MCIm's position there, however, was "over a 20-day period." (*Id.*, page 54.) In contrast, for the 2006 ICA, MCIm proposes a weekly period.

[40] 2001 ICA , Appendix ITR § 4.1.

statistical confidence. This will help ensure optimal investment without being excessive.

MCIm says it respects SBC-CA's right to adopt its own methods for use in forecasting traffic flows on its network. In turn, MCIm says SBC-CA should respect MCIm's rights to determine what methods are most appropriate for use in measuring and forecasting traffic requirements that impact MCIm's customers. In short, MCIm asserts that a CLEC faces very different circumstances than an ILEC.

In response, SBC-CA correctly points out that this is not the issue. The trunks in question connect two networks and the capacity on each side of the interconnection should match. As a result, each party should use the same criteria, and the criteria should rely on industry standards, to the fullest extent possible. The accepted industry-standard here is the one proposed by SBC-CA, which SBC-CA points out it also uses with other CLECs both in California and other states. That standard is a 20 average business day basis applied to the industry-standard Neal-Wilkinson Trunk Group Capacity algorithms.

MCIm claims the SBC-CA method does not rely on current data. To the contrary, SBC-CA's proposal uses 20 recent days, similar to the 2001 ICA language. Moreover, agreed-upon language regarding trunk resizing will be based on any three consecutive month period, not years of past traffic data as incorrectly asserted by MCIm. Finally, the busy season busy hour data to be used is recent, not years old.

Therefore, SBC-CA's proposed language is adopted.

6.16. NIM 25

Issue: Should SBC-CA be required to provision trunk augments within 30 days?

Agreement Reference: NIM § 19.4

Positions

SBC-CA says no.

MCIm says yes.

Discussion

SBC-CA's proposal is adopted (i.e., agreed-to language is adopted and MCIm's proposed additional language is rejected).

The issue here is whether the provisioning intervals for this trunk augmentation activity should be set at 30 days or be more flexible. SBC is correct that a hard-and-fast requirement is inappropriate. Some events (e.g., large orders, complex orders) may prevent a party from augmenting trunks within 30 days, but failure to do so could place that party in breach of the ICA if MCIm's proposal is adopted.

SBC-CA cannot reasonably be expected to guarantee that every order to provision trunks can be completed within 30 days. For example, there may be instances where there are insufficient trunk ports available at the SBC-CA Tandem or End Office where the trunk group is to be established or augmented. Or, if there are no facilities available to a SBC-CA Tandem or End Office where the trunk group is to be provisioned, SBC-CA again cannot guarantee that a trunk group could be completed within 30 days. Nonetheless, SBC-CA states that when it has the trunks or facilities available at the SBC-CA Tandem or End Office, it then makes every effort to ensure that the trunk order is completed within 30 days.

Consistent with this performance, agreed to language already provides for due dates and intervals based on the CLEC online handbook (which

MCIm's additional language would seek to constrain to 30 days). No evidence shows that due dates and intervals in the CLEC online handbook are unreasonable. In fact, SBC-CA asserts (and MCIm does not refute) that the due date interval in the handbook is generally 20-business days.

MCIm is concerned that SBC-CA may simply change the dates in the handbook, and MCIm's customers will suffer degraded service as a result. MCIm, however, fails to show that SBC-CA can simply change its handbook unilaterally and at will. To the contrary, SBC-CA convincingly asserts that it provisions trunks for requesting carriers in parity with how SBC-CA provisions trunks for itself based on SBC-CA's § 271 requirements.

MCIm says it "recognizes that there are circumstances that could limit SBC California's ability to meet hard deadlines." MCIm asserts its "language does not impose on SBC California a hard requirement that is unwavering" but if the first due date (i.e., 30-days) cannot be met, a new date can be established. (MCIm Reply Brief, page 111.) Already agreed to language, however, provides that if the due date is infeasible in a given circumstance, "the other Party will provide with [sic] a requested revised service due date that is no more than thirty (30) calendar days beyond the original service due date." This renders MCIm's proposal relatively pointless, and all the more confusing. In fact, MCI's proposal (to limit the entire provisioning period to a total of 30 days) is inconsistent on its face with the plain meaning of the agreed to language, and MCIm's additional language should be rejected.

Moreover, the agreed-upon language in § 19.4 is similar to that in the 2001 ICA (Appendix ITR, § 6.12). The 30-day trunk augmentation requirement now proposed as added language by MCIm does not appear in the 2001 ICA. MCIm fails to convincingly show that the language in the 2001 ICA

has resulted in unacceptable performance by SBC-CA. No evidence shows the timeframe in the online handbook has failed to provide adequate results. No new facts or law justify the change proposed by MCIm.

Finally, both parties must act in good faith in their performance under the ICA. (2006 ICA GT&C, § 1.4.) MCIm may seek relief under the dispute resolution provisions of the ICA for unreasonable actions by SBC-CA of which MCIm here seems concerned (e.g., improperly changing the online handbook, unreasonable delays beyond 30 days). This may include bringing an action before the Commission. Thus, not only is this provision as proposed by SBC-CA reasonable, but MCIm has adequate means of relief, if necessary.

Therefore, SBC-CA's proposal is adopted.

6.17. NIM 26

Issue:

SBC-CA: Should a non-section 251/252 service such as Transit Service be arbitrated in this section 251/252 proceeding?

MCIm: For transit traffic exchanged over the local interconnection trunks, what rates, terms and conditions should apply?

Agreement Reference: NIM §§ 22 *et seq.*; (Recip Comp § 7.1, 2.1)

Positions

SBC-CA believes transit service is not required under §§ 251 and 252 of the Act, and is, therefore, not subject to this arbitration. If the Commission determines otherwise, SBC-CA offers a Transit Traffic Service Appendix, which it says is more comprehensive than that offered by MCIm.

MCIm says transit traffic is an integral part of indirect interconnection, is subject to negotiation and arbitration under that Act, and must be priced at TELRIC rates. According to MCIm, it has traditionally been

included in ICAs, and should be here. MCIm asserts that requiring a separately negotiated transit service agreement has the potential to jeopardize the quality of service available to subscribers.

Discussion

MCIm's proposed language is adopted.

MCIm demonstrates that transit service is a requirement under §§ 251(a)(1) and 251(c)(2). These sections state:

> "Each telecommunications carrier has the duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." (§ 251(a)(1).)

> "…each incumbent local exchange carrier has the… duty to provide…interconnection with the local exchange carrier's network for the transmission and routing of telephone exchange service and exchange access." (§ 251(c)(2)(A).)

Parties agree that that duty to interconnect directly or indirectly pursuant to § 251(a)(1) applies to all carriers, not just incumbents.

As described by SBC-CA:

> "Transit traffic refers to a call between a customer of a third-party carrier and the customer of MCIm that is handed off in the middle to SBC-CA for transiting between the other two carriers' networks. Thus, as the transiting carrier, SBC-CA is neither the originating nor terminating carrier." (SBC-CA Opening Brief, page 102.)

MCIm clearly explains SBC-CA's role in the interconnection and transit:

> "Because SBC California is the incumbent in its traditional service territories and currently provides the local access lines that serve the vast majority of customers, every CLEC

> providing service in those areas seeks to interconnect with SBC California so that the CLECs' customers can place calls to, and receive calls from, SBC California's customers. As a result, it is most common for the interconnection between two different CLEC networks to be accomplished 'indirectly' by the interconnection of each of them with the incumbent LEC's network." (MCIm Opening Brief, page 112.)

Section 251(a)(1) expressly recognizes that the duty of interconnection borne by all carriers can be accomplished indirectly. When SBC-CA provides transit service it is providing indirect "interconnection with the local exchange carrier's network for the transmission and routing of telephone exchange service and exchange access." (§ 251(c)(2)(A).) In its discussion of shared transport, the FCC recognizes the interrelationship between indirect interconnection and transit service:

> "Shared transport between local tandem switches sometimes is used by competing carriers for 'transiting' - a means of indirectly interconnecting with other competing carriers for the purpose of terminating local and intraLATA traffic." (TRO, ¶ 534, footnote 1640; emphasis added.)

MCIm further explains this obligation by citing to a recent Arbitrator's' Report approved by the Missouri Commission:

> "In its *Clariton Valley Order*, the Commission stated, 'Transit service falls within the definition of interconnection service…[b]ecause the transit agreement is an interconnection service, it must be filed with the commission for approval.' Section 252 ICAs are negotiated or arbitrated for the purpose of implementing § 251 obligations. Thus, transiting service is a necessary part of these ICAs and is a matter within the jurisdiction of the Commission and thus of the Arbitrator.

* * *

> "As explained in the Commission's *Clariton Valley Order*, the existence of the obligation of indirect interconnection imposes by implication a transiting obligation - how else can there be indirect interconnections? Indirect interconnection is effected by the fact that the two carriers in question are each directly interconnected to an intermediary carrier. This intermediary carrier, for the purposes of the present discussion, is a dominant ILEC like SBC. SBC is not indirectly interconnected to the two carriers in question, it is directly interconnected. Its duties are set out in § 251(c)(2). That section requires SBC to interconnect with any requesting carrier for the purpose of exchanging traffic. The statute does not specify that the traffic must be intended for termination, or that it must have originated, on the two interconnected networks." (Attachment A, pages 2-3 to MCIm Reply Brief, Excerpted from the Final Arbitrator's Report, June 21, 2005, Section I(C), "Transit Traffic," p. 1-9 in Missouri Public Service Commission Arbitration Order, Case No. TO-2005-0336, July 11, 2005.)

Thus, transit traffic is a method of indirect interconnection covered under §§ 251 and 252.

In arguing against MCIm's position, SBC-CA says that nowhere does the Act mention transiting traffic. That is probably because Congress believed it was covered as explained above (since this is at least one important way indirect interconnection is accomplished, as required).

SBC-CA is concerned that this interpretation, if adopted, would allow any telecommunications carrier to demand that any other carrier provide transiting service. Indeed, that is consistent with the pro-competitive intent of the Act.

SBC-CA notes that the FCC in particular has said that "the FCC's 'rules have not required incumbent LECs to provide transiting.'" (SBC-CA Opening Brief, page 103.[41]) SBC-CA is correct. Importantly, however, the FCC goes on to say: "The Commission plans to address transiting in its pending *Intercarrier Compensation* rulemaking proceeding." (TRO, ¶ 534, footnote 1640.) Thus, it is not required, but also not prohibited, by FCC rule at this time. Rather, it is an open issue the FCC is considering, and apparently has not yet finally decided.

SBC-CA argues that the FCC has held that interconnection under § 251(c)(2) refers only to the physical linking of two networks for the mutual exchange of traffic. Even if true, this ignores that the duty is to interconnect directly or indirectly. If it is indirect (as permissible, and an obligation of all LECs under the Act) it can be accomplished by transit.

SBC-CA says even if SBC-CA has a duty to transport and deliver transit traffic, it cannot be an obligation subject to the compulsory arbitration requirement under § 252. SBC-CA is incorrect. As noted above, transiting is an obligation under § 251(c). In particular, § 251(c)(1) requires negotiation by the ILEC of all the duties in § 251(b) and (c). If unable to resolve by negotiation, the matter is eligible for arbitration. Pursuant to § 251(c)(2)(A), each ILEC is required to negotiate interconnection with any requesting CLEC for the transmission and routing of service and access. Any CLEC may interconnect directly or indirectly under § 251(a)(1). An indirect interconnection is a right

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[41] SBC-CA also references an FCC *ex parte* letter that is not part of the record here. SBC-CA's cited statement from that letter cannot and will not be considered in this Report.

given to each CLEC that the ILEC cannot by itself deny or vacate. The ILEC has the duty to negotiate the provision of interconnection, including indirect interconnection. Even if possible to accomplish indirect interconnection in other ways, this includes indirect interconnection accomplished by transit. The ILEC cannot deny or vacate the right of indirect interconnection via transit by refusing to negotiate and arbitrate terms and conditions for transit.

MCIm's position is also based on terms and conditions for transit traffic in the 2001 ICA. Those provisions have worked successfully. No new facts or law justify a change.

SBC-CA acknowledges that it now provides transit pursuant to the ICA. SBC-CA says it should not—and cannot—be required to continue to do so because it did so voluntarily before.[42] To the contrary, transit is noted in the 2001 ICA in parts identified as "represents a Non-Voluntary Arrangement." Transit was part of at least two arbitrated issues.[43]

Moreover, transit is consistent with the pro-competitive goals of the Act. It was included in the 2001 ICA. No evidence was presented here demonstrating that it was unworkable, or will be during the life of the 2006 ICA. Therefore, it should continue unless and until the FCC makes some other determination in its *Intercarrier Compensation* rulemaking. Parties may invoke the provisions of the ICA regarding change of law should the FCC make a determination contrary to the outcome in this arbitration.

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[42] SBC-CA says it will do so again only voluntarily on a commercially negotiated, separate stand-alone basis.

[43] See Issues ITR-2 and ITR-3 in July 16, 2001 FAR.

Regarding rates, SBC-CA says it will offer transiting at the same rates as in the currently effective ICA, which is the same as proposed by MCIm, except that SBC-CA proposes increasing the rate after the first 50 million minutes. SBC-CA's proposal is rejected. Existing prices have been found to be TELRIC compliant by the Commission, while the cost basis of SBC-CA's proposal is unclear.[44]

Therefore, for all these reasons, MCIm's proposal is adopted.

6.18. NIM 28

Issue:

SBC-CA:

(a) What is the proper routing, treatment and compensation for Switched Access Traffic including, without limitation, any PSTN-IP-PSTN Traffic and IP-PSTN Traffic?

(b) Is it appropriate for the Parties to agree on procedures to handle interexchange circuit-switched traffic that is delivered over Local Interconnection Trunk Groups so that the terminating party may receive proper compensation?

MCIm: Since other provisions of the agreement specify in detail the appropriate treatment and compensation of all traffic types exchanged pursuant to this agreement, is it necessary to include SBC-CA's additional "Circuit Switched Traffic" language in the agreement?

Agreement Reference: NIM § 25; Recip Comp § 16

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[44] SBC-CA says the higher rate (a) provides an incentive for MCIm to establish direct connections and (b) permits SBC-CA to increase prices to help cover the very high cost of additional tandem switches. The record here does not show whether the increased price covers less, all, or more than the cost of additional tandem switches.

Positions and Discussion

See Recip Comp Issue 17 below.

7. Invoicing

7.1. Invoicing 1

Issue: Should the Billed Party be entitled to withhold payment on disputed amounts?

Appendix Invoicing §§ 3.2.1, 3.3, 8.3, 8.3.1, 8.3.2, 8.3.2.1, 8.3.2.2, 8.3.3.

Positions

SBC-CA says the billed party should not be entitled to withhold payment on disputed amounts. Rather, SBC-CA proposes that the billed party either (a) pay the entire bill subject to disputing portions as necessary, or (b) pay undisputed amounts with the disputed portions deposited into an escrow account pending resolution.

MCIm says the billed party should pay undisputed amounts but be entitled to withhold payment of disputed amounts.

Discussion

SBC-CA's proposed language is adopted.

The 2001 ICA implements the same options SBC-CA proposes here: (a) pay the entire bill and dispute portions as necessary or (b) pay undisputed amounts and deposit disputed amounts in an interest bearing escrow account held by a neutral third party. In fact, the arbitrator in 2001 specifically considered the issue; rejected MCIm's proposed language (that contained no escrow requirement); and directed that the billed party also be given the option to pay the full amount, including the disputed portions. (FAR dated July 16, 2001, page 17.) No new facts or law justify a change.

MCIm argues that withholding the disputed amount is standard industry practice. To the contrary, it may or may not be the practice in some portions of the industry, but it was not the practice in the 2001 ICA. It is also not the practice for disputes between parties which are brought to the Commission (wherein disputed amounts are placed on deposit with the Commission).

MCIm claims payment into an escrow account will cause it accounting difficulties, arguing that MCIm is an accrual-based company and must accrue expected costs based on published rates and expected volumes. As such, MCIm says if an invoice is too high due to errors, "MCIm will have to adjust its accruals to set aside excess monies until the error on the invoices can be identified and properly documented." (MCIm Opening Brief, page 118.) This concern is unpersuasive. Setting aside money internally or in an interest bearing escrow account presents no apparent significant difference. Moreover, MCIm does not show that increased work, if any, due to it being an accrual-based company is burdensome or unreasonable, (e.g., given that accurate accounting of amounts due and paid without excessive burden should be possible using existing accounting techniques and computer-based accounting tools, whether or not MCIm is an accrual-based company). Also, MCIm presents no evidence that the language in the 2001 ICA has presented unworkable problems.

Finally, MCIm contends it has no incentive to capriciously withhold payment since it must pay substantial late fees on disputed amounts resolved in the billing party's favor. Therefore, according to MCIm, it should be permitted to withhold payment on disputed amounts. This is not persuasive. The 2001 ICA also included late fees and interest, but did not permit withholding of disputed amounts. There is no reason to change that practice here.

Moreover, the existing approach is simply a good business practice. When disputes are resolved in the billing party's favor the funds are readily available. When resolved in the billed party's favor, funds are returned with interest, thereby reasonably neutralizing the effect of the time value of money. Moreover, this ICA may be adopted by other CLECs. Not every CLEC will necessarily be able to maintain a pattern of timely payments. Given the potential for more generalized use of this ICA, it is reasonable to continue the good business approach already embodied in the 2001 ICA.

Thus, SBC-CA's language is adopted.

7.2. Invoicing 2

Issue: If payments are to be withheld, should they be put in an interest-bearing escrow account pending resolution of a dispute?

Appendix Invoicing §§ 3.4, 3.4.1, 3.4.2, 3.4.2.1, 3.4.2.2, 3.4.2.3, 3.4.2.4, 3.4.2.5, 3.4.2.6, 3.4.2.7, 3.4.2.8.

Positions

SBC-CA proposes that disputed amounts either be paid to SBC-CA pending resolution of the dispute, or placed into an interest-bearing escrow account.

MCIm opposes paying disputed amounts to SBC-CA or into an escrow account.

Discussion

SBC-CA's proposed language is adopted.

As discussed above (see Invoicing 1), SBC-CA's proposed language continues the approach used in the 2001 ICA. No new facts or law justify a change.

Moreover, placing the money in an interest-bearing escrow account reasonably treats the time value of money while eliminating needless conflicts about the availability of funds once the dispute is resolved. This benefit is all the more important given that other CLECs may adopt this ICA.

MCIm contends the administrative burden and cost of establishing an escrow account is unnecessary given that SBC-CA states it will strive to resolve billing disputes within 30 days. MCIm says this is particularly true given that MCIm has a long history of successfully resolving disputes without escrow accounts. To the contrary, MCIm's argument supports the approach of allowing the billed party to determine whether or not to use the escrow account, not the elimination of the escrow account option.

MCIm is concerned that it may be penalized by having to pay millions of dollars into escrow pending dispute resolution. To the contrary, the evidence does not show a significant number of ongoing bill disputes in California, significant dollar amount of ongoing disputes in California, or significant resolution of disputes against SBC-CA (which would have potentially tied up MCIm's money). There is no credible evidence to suggest this will change. Moreover, the escrow account bears interest, reasonably compensating the prevailing party for the time value of money without penalty.

Therefore, SBC-CA's proposed language is adopted.

7.3. Invoicing 3

Issue: When a Party disputes a bill, how quickly should that Party be required to provide the other Party all information related to that dispute?

Appendix Invoicing § 6.2, 7.6.

Positions

SBC-CA proposes 30 days.

MCIm proposes 90 days.

Discussion

MCIm's proposed language is adopted.

The 2001 ICA allows 90 days for the disputing party to provide the other party all information related to the dispute. No new facts or law justify a change.

SBC-CA says a bona fide dispute should not require an additional 90 days (three months) after the payment due date before the provision of necessary data. To the contrary, as MCIm says, some billing disputes require the query of a large number of records (e.g., reciprocal compensation over several months may require the extraction of millions of call detail records). Ninety days is reasonable.

SBC-CA says its proposed 30 days will benefit both parties by expediting dispute resolution. A shorter time, however, has just as much potential for increasing disputes as expediting dispute resolution (e.g., in cases where data is not available in 30 days and an extension is sought by one side but opposed by the other). Both parties state they already do everything reasonably possible to resolve disputes in 30 days, or as little time as possible. Continuing the allowance of 90 days is reasonable given both parties' stated commitment to resolve matters earlier when feasible.

SBC-CA contends that giving CLEC's 90 days encourages improper behavior by giving CLECs an incentive to delay payment by disputing changes. This is not true. The disputing party must either (a) pay in full and dispute or (b) pay disputed charges to an escrow account. Moreover, interest and late payment charges apply, as appropriate. This provides adequate incentive against capricious billing disputes.

Finally, SBC-CA argues that the concern addressed in the 2001 ICA was different. In 2001, SBC-CA proposed that failure to provide certain information in 29 days should result in MCIm waiving its right to dispute the subject charges. The arbitrator felt 29 days was too short, and adopted 90 days. SBC-CA says that concern does not occur now because the language here only specifies the amount of time to provide information supporting a dispute, not the amount of time to file a billing dispute.

This is not entirely accurate. SBC-CA is correct that the time for filing a billing dispute is addressed elsewhere in the ICA (e.g., stake date in § 6.3). SBC-CA is also correct that the 2001 ICA specifically stated that failure to provide the required information and evidence within the required number of days "…shall constitute MCIm's irrevocable and full waiver of its right to dispute the subject charges." (2001 ICA, § 29.13.4.1.) That language is not in the 2006 ICA. Nonetheless, the 2006 ICA is silent on what happens after 30 or 90 days. It may or may not be that failure to file necessary supporting data constitutes a waiver of further pursuit of the claim. Rather than increase the likelihood of needless conflicts by adopting 30 days, it is more reasonable to continue the 90 days used in the 2001 ICA.

The evidence here is that 90 days worked reasonably well in the 2001 ICA. There is insufficient reason to adopt a shorter period here. MCIm's proposed language is adopted.

7.4. Invoicing 4

Issue: What should trigger the contractual Stake Date limits? Appendix Invoicing §§ 6.3, 6.5, 7.4.

Positions

SBC-CA proposes that the Stake Date be tied to the date a claim is raised by one party to the other.

MCIm proposes that the Stake Date be tied to the Bill Date.

Discussion

MCIm's proposed language is adopted.

The Stake Date sets a point in time before which no billing adjustments may be made. One purpose is to limit parties' risk by specifying the timeframe within which a dispute may be raised.

Parties agree that Stake Date provisions were not included in the 2001 ICA, but agree to include them now to provide additional certainty about billing and accounting procedures. MCIm's proposal provides the most clarity and certainty by setting a concrete date for the Stake Date. SBC-CA's proposal would set a floating date that is less clear, less certain, and less precise in limiting risk.

SBC-CA argues that MCIm's proposal should be rejected because it is unclear what the Stake Date is if no bill has been issued. This is not persuasive. The adopted language is based on the Bill Date. The 2006 ICA states: "Each Party will establish monthly billing dates ("Bill Date") for each bill type, which Bill Date will be the same day from month to month." (2006 ICA, Appendix Invoicing § 2.6.) Thus, the bill date is firmly established, and is not dependent upon issuance of the bill.

Therefore, MCIm's proposed language is adopted.

8. Operational Support Systems

8.1. OSS 1

Issue:

SBC-CA: To what extent should MCIm be required to indemnify SBC-CA in the event of unauthorized access for use of SBC-CA's OSS by MCIm personnel?

MCIm: In the event of unauthorized access for use of SBC-CALIFORNIA's OSS by MCIm personnel, should SBC CA be required to demonstrate that it incurred damages caused by the unauthorized entry, before MCIm is obligated to indemnify SBC?

Appendix OSS § 2.2

Positions

SBC-CA proposes that MCIm bear responsibility for any harm to SBC-CA's OSS if anyone (whether an MCIm employee or a third party) harms SBC-CA's OSS after gaining access to it through MCIm's workstations, systems, information or facilities.

MCIm opposes being required to indemnify SBC-CA, particularly in the absence of any underlying fault on MCIm's part.

Discussion

SBC-CA's language is adopted.

The damage at issue here would be as a result of access to SBC-CA's OSS through MCIm's workstations, systems, information or facilities. MCIm (not SBC-CA) controls access to SBC-CA's OSS through MCIm's facilities. Consequently, MCIm should bear responsibility for whatever harm results, if any, from that access.

MCIm argues SBC-CA's proposed language is unreasonable since it would require MCIm to indemnify SBC-CA even in the absence of any

underlying fault on MCIm's part. To the contrary, as also found by the Michigan Commission in 2001, MCIm:

> " 'is in the best position to ensure that its equipment and access to the OSS are not abused or misused. Even if a situation arises in which unauthorized access cannot be said to be [CLEC'S] direct fault, if the access is gained through [CLEC's] equipment or personnel, [CLEC] should be responsible for damages that result.'" (SBC-CA's Opening Brief, page 114, citing Michigan Commission order dated September 7, 2001 in Case U-12952, page 28.)

MCIm also argues that SBC-CA's proposed language is unnecessary since the parties have agreed to comprehensive indemnity provisions in the General Terms and Conditions (GT&C). This is not the case. The indemnity provisions of the GT&C do not cover damage caused to SBC-CA by a third party through MCIm's facilities as addressed here, and MCIm does not show specific language doing otherwise. Indeed, if the GT&C adequately covered the situation, MCIm would not have proposed its own language for OSS § 2.2. MCIm, however, proposes the Commission adopt:

> "In addition, MCIm agrees to indemnify and hold SBC CALIFORNIA harmless against any claim made by an end user customer of MCIm or other third party against SBC CALIFORNIA caused by or related to MCIm's use of any SBC CALIFORNIA OSS."

As a result, the only actual competing language presented for this arbitration is whether or not liability (a) is limited to MCIm's use of SBC-CA's OSS or (b) also extends to use by another party through MCIm's facilities of SBC-CA's OSS. As stated above, and as found by the Michigan Commission, SBC-CA's proposal is reasonable.

Finally, MCIm is also concerned that SBC-CA be required to demonstrate that it incurred damages. This is adequately covered by SBC-CA's proposed language, wherein SBC-CA has the burden to demonstrate that the damages were caused by unauthorized entry, access or use through MCIm's systems.

Therefore, SBC-CA's proposed language is adopted.

8.2. OSS 3

Issue: Should MCIm be responsible for cost incurred as a result of inaccurate ordering or usage of the OSS?

Appendix OSS § 2.10

Positions

SBC-CA proposes that MCIm pay all costs caused by inaccurate ordering or usage of the OSS, unless such costs are already recovered through other charges assessed by SBC-CA to MCIm.

MCIm contends that SBC-CA's additional language is unnecessary since both parties have already agreed to use reasonable business efforts to submit orders that are correct and complete.

Discussion

MCIm's proposed language is adopted.

SBC-CA's additional language is unnecessary. MCIm already has sufficient incentive to submit accurate and timely orders. Otherwise, service to its customers will be delayed, and MCIm will loose revenue and potential profit.

Further, MCIm already commits in agreed-to language to use reasonable business efforts to submit orders that are correct and complete, while SBC-CA commits to using reasonable business efforts to process MCIm's orders before rejecting those orders as inaccurate or incomplete. Parties also agree to

conduct internal and independent reviews for accuracy. Thus, both parties are committed to reasonable actions along with reviews to test for accuracy.

There is no evidence of an increase in inaccurate orders or misuse of SBC-CA's OSS that would justify SBC-CA's proposed language. Both parties are already required to act in good faith under this ICA. (2006 ICA GT&C, § 1.4, agreed language). They also have the additional responsibility here to act in accordance with reasonable business efforts along with periodic reviews. (2006 ICA Appendix OSS, § 2.10, agreed language).

Finally, MCIm commits in agree-to language to being "responsible for all actions of its employees using any of SBC-CA's OSS systems." (2006 ICA OSS, § 2.10.) That is, if an MCIm employee uses any of SBC-CA's OSS systems and damages result, MCIm already says it is responsible for those actions. MCIm's language is not understood to be hollow. That is, being responsible for an action is understood in this ICA to also mean being responsible for the consequences of the action (at least to the extent not already recovered via other charges). As such, SBC-CA's proposed language is largely, if not completely, redundant.

Therefore, MCIm's proposed language is adopted.

9. Performance Measures

9.1. PM 1

Issue: Is a reservation of rights regarding the obligation to provide a self-executing performance remedy plan appropriate?

Appendix PM Section 3 – Appeals

Positions

SBC-CA says it is necessary and appropriate to reserve its rights to dispute any legal obligation to negotiate or arbitrate a self-executing performance remedy plan.

MCIm says it is neither necessary nor appropriate for SBC-CA to have a separate reservation of rights in this appendix, and that MCIm does not agree with SBC-CA's views regarding the obligations under §§ 251 and 252 of the Act for a performance remedy plan.

Discussion

SBC-CA's proposed language is adopted.

SBC-CA states that it has and will continue to abide by the Commission's performance incentive plan established in Investigation 97-10-017 and various decisions (e.g., D.03-07-035, D.02-03-023, D.01-05-087, and D.01-01-037). SBC-CA believes, however, that it has no legal obligation to negotiate or offer a performance remedy plan as part of the §§ 251 and 252 process. As such, SBC-CA proposes adding one sentence:

> "Moreover, the inclusion of the JPSA [Joint Partial Settlement Agreement] and performance incentives plan in this Agreement [ICA] shall not be construed as a waiver by SBC California of its right to assert in any forum that it is under no legal obligation under Sections 251 or 252 of the Act to offer, negotiate or arbitrate a self-executing performance remedy plan."

MCIm says "SBC-CA's proposed language is largely meaningless." (MCIm Opening Brief, page 133.) This seems to be the case. SBC-CA's proposed sentence neither places any obligations on, nor harms, MCIm. The sentence makes clear, however, that SBC-CA has reserved its rights, and cannot be said to have waived those rights. This clarifies more general reservation of rights

language in the General Terms and Conditions, and may usefully prevent future conflicts. It does not prejudge the outcome should SBC-CA later seek legal review in an appropriate forum, and does no harm here.

Therefore, SBC-CA's proposed additional sentence is adopted.

10. Resale

10.1. Resale 1

Issue: May MCIm resell, to another Telecommunications Carrier, services purchased from Appendix Resale?

Resale § 1.3

Positions

SBC-CA proposes no.

MCIm says it may.

Discussion

MCIm's proposed language is adopted.

As stated above (see Definition Issue 3), the Commission could not have been clearer: "We support the FAR's finding that MCIm should be permitted to purchase services from Pacific at wholesale prices for resale to other carriers." (D.01-09-054, *mimeo*., page 15.) No change in fact or law justifies a different outcome.

SBC-CA argues that a substantially similar result to that it seeks here was adopted in 2001, citing §§ 4.6 and 4.10 of Appendix Resale of the 2001 ICA in support. That is incorrect. To read those sections in the 2001 ICA as SBC-CA proposes would be in direct conflict with the Commission's clear statement otherwise. Rather, they are correctly read to be compatible with the Commission's order.

Thus, MCIm's proposed language is adopted.

10.2. Resale 5

Issue:

SBC-CA: Should the Commission adopt SBC-CA's Resale liability and indemnity language?

MCIm: Should the Commission adopt SBC-CA's liability and indemnity language contain in Appendix Resale?

Resale §§ 8.5.1, 8.5.1.1, 8.5.1.2, 8.5.1.3, 8.5.1.4

Positions

SBC-CA seeks specific language in the Resale Appendix limiting its liability regarding 911 service.

MCIm proposes one sentence that states liability with respect to 911 shall be governed by the provisions of the General Terms and Conditions.

Discussion

SBC-CA's proposed language is adopted.

SBC-CA correctly states that there is no overlap or inconsistency between the liability and indemnity language in the General Terms and Conditions and the proposed limitation of liability and indemnity section in Appendix Resale. For example, the liability and indemnity sections of the General Terms and Conditions are essentially focused on addressing liability as between SBC-CA and MCIm. The Appendix Resale provision operates to protect SBC-CA against liability to MCIm end users for inadvertent errors in SBC-CA's provision of Resale 911 service.

Moreover, absent SBC-CA's proposed limitation of liability provision, MCIm and its resale end users would receive a windfall in preference to the terms applicable to SBC-CA's similarly situated retail customers. This results because SBC-CA's rates to MCIm for retail services are based upon a discount from SBC-CA's regular retail rates for what are supposed to be identical

services. The services applicable to MCIm and its end users, along with the related terms and conditions of service, should be the same as those applicable to SBC-CA's retail customers. This requirement applies to limitation of liability provisions as well, since the existence of SBC-CA's retail limitation of liability avoids the necessity of SBC-CA adding what amounts to an "insurance premium" for SBC-CA's potential 911 errors on top of SBC-CA's retail rates.

Further, SBC-CA's proposed language here is substantially similar to the language in the 2001 ICA (e.g., proposed §§ 8.5.1.1, 8.5.1.2 and 8.5.1.3 in the 2006 ICA Appendix Resale are substantially similar to §§ 6.3, 6.4 and 6.1 in the 2001 ICA Appendix 911, respectively). MCIm does not state a convincing reason why the replacement ICA should not model the 2001 ICA in this case.

Therefore, SBC-CA's proposed language is adopted.

11. Digital Subscriber Line and Line Sharing (xDSL)

11.1. xDSL 2

Issue: Should the Commission adopt SBC-CA's liability and indemnity language for the xDSL Appendix in addition to that contained in GT&C?

xDSL §§ 3.7, 3.7.1, 3.8, 3.8.1, 3.8.2, 3.8.3, 3.8.4 and 3.8.5

Positions

SBC-CA proposes specific liability and indemnity language for the xDSL Appendix in addition to that in the General Terms and Conditions.

MCIm asserts SBC-CA's proposed language conflicts with prior decisions, is unnecessary and is too broad.

Discussion

SBC-CA's proposed language is adopted.

MCIm is correct that in September 2000 the Commission considered and rejected SBC-CA's argument that it needed special liability and indemnification language for non-standard xDSL technologies in its line sharing appendix. (D.00-09-074, *mimeo*., pages 9-10.) Nonetheless, this outcome was superseded one year later, in September 2001, with the Commission's adoption of such language in the 2001 ICA. (D.01-09-054.)

The 2001 ICA contains substantially the same language that SBC-CA proposes here. For example, proposed §§ 3.7.1 and 3.8 in Appendix xDSL are nearly the same as §§ 3.7 and 3.8 in the 2001 ICA Appendix xDSL. SBC-CA's proposed language in Appendix xDSL §§ 3.8.2 through 3.8.5 addresses procedure, similar to the procedures used in the 2001 ICA by cross-reference to § 27 of the General Terms and Conditions. MCIm fails to convincingly present any new facts or law which would merit a change from the outcome in 2001.

MCIm argues that the additional language is duplicative of that in the General Terms and Conditions and is therefore unnecessary. This is not correct. For example, General Terms and Conditions § 15.3 specifically provides for no consequential damages. In contrast, the language proposed here for xDSL Appendix § 3.8.1 specifically includes consequential damages. (This is also true in § 3.8.1 in the 2001 ICA.)

Similarly, as SBC-CA points out, the indemnification in the xDSL Appendix is not limited by a "fault" concept, but applies to any damages caused by the indemnifying party's election to use a non-standard xDSL technology. In contrast, the indemnification provisions in the General Terms and Conditions indemnify almost exclusively against losses to third parties and only in specific instances (e.g., in agreed-upon language in the 2006 ICA GT&C regarding finding of fault in § 16(a), slander/privacy in § 16(b), intellectual property in §

16(c), Communications Assistance to Law Enforcement Act of 1994 in § 16(d), and law compliance indemnity in § 16(e)).

MCIm argues SBC-CA's language is too broad. To the contrary, as SBC-CA says, the 2001 xDSL liability/indemnification language did not require proof of negligence. No change is proposed by SBC-CA on that point here. Because negligence will invariably be difficult or impossible to prove, neither party should be permitted to avoid liability/indemnification responsibilities to the other if it elects to deploy a non-standard xDSL technology that interferes with, or damages, another service. This provision was not excessively broad in the 2001 ICA, and is not in the 2006 ICA.

Therefore, SBC-CA's proposed language is adopted.

11.2. xDSL 3

Issue: Should time and materials charges be set forth in appendix pricing or as set forth in SBC's tariff?

xDSL §§ 7.4, 9.3.2, 9.3.2.1, 9.4.2, 10.4.2, 10.4.4

Line Sharing §§ 5.1.1, 8.2.1, 8.3.3.1, 8.10

Att YZP §§ 3.3.3, 5

Att RABT MMP § 5.1

Att RABT YZP 5.1

Pricing Appendix 3.6

Positions

SBC-CA contends these charges should be as set forth in SBC-CA's tariff.

MCIm proposes that the rates be in the Pricing Appendix.

Discussion

SBC-CA's proposed language is adopted.

According to SBC-CA, parties agree to the inclusion of time and material rates in the ICA Pricing Appendix that will apply to services under the xDSL Appendix. Parties also agree that these rates must be those in SBC-CA's tariffed Maintenance of Service charges. The disagreement is whether (a) Maintenance of Service charges may be changed from time to time in accordance with tariff modifications, or (b) should be established in the Pricing Appendix and not be subject to change during the life of this ICA (except by amendment to the ICA).

SBC-CA correctly states that the 2001 ICA adopted similar rates with reference to an FCC-approved tariff and these rates were subject to tariff changes. (2001 ICA, Appendix xDSL, § 10.) No new facts or law compel a change from this approach.

SBC-CA originally proposed use of rates in FCC Tariff No. 1, Section 13.2.6. For consistency among various time and material charges applicable to the products and services under this ICA, SBC-CA now proposes use of the Maintenance of Service charges under its California state tariff, Schedule CAL. P.U.C. No. 175-T, Section 13.3.1. (See October 11, 2005 Joint Revised Statement of Unresolved Issues, and SBC-CA Opening Brief dated November 4, 2005.) MCIm presented no objection to that specific proposal. (See MCIm Reply Brief dated November 18, 2005.) Consistency among the use of various charges is desirable and is adopted.

MCIm argues that these rates should be set in the Pricing Appendix, and not subject to change, in order to ease MCIm's contract administration. Otherwise, MCIm will have to keep track of prices in ICAs and tariffs in all

13 states, thereby administering 26 documents rather than 13, according to MCIm. This concern is not credible. The telecommunications market and industry is already quite complex. MCIm does not show that the added complexity of referring to rates set by tariff is unreasonably burdensome. In fact, these are sophisticated companies already familiar with tariffs, and the use of tariffs. There should be no increased burden by the use of tariffs here, especially since that was the practice in the 2001 ICA.

MCIm also says that SBC-CA has unilateral control over its tariffs. As such, MCIm is concerned that SBC-CA will unilaterally amend its tariff, without having to undergo the more difficult process of negotiating or arbitrating changes with MCIm, and this will create substantial uncertainty for MCIm. To the contrary, tariff changes require regulatory approval. That regulatory approval will provide MCIm the protection it desires against unilateral change and uncertainty.

Therefore, SBC-CA's proposed language is adopted.

11.3. xDSL 5

Issue:

(a) Are acceptance testing, cooperative testing, loop conditioning, maintenance, and repair of xDSL loops within the scope of SBC's 251(c)(3) unbundling obligations?

(b) Has SBC waived the argument that it did not voluntarily negotiate the items listed in Issue 5 (a) above?

xDSL §§ 2.9; 6.2; 7.3; 7.4; 9 (all); 10 (all); footnotes in xDSL appendix, Line sharing appendix, Att. YZP (all); Att. RABT YZP (all); Att. RABT MMP 5.1.

Positions

SBC-CA says it recognizes its obligation under TA 96 to provide conditioning, maintenance and repair of xDSL loops, but voluntarily agrees to also provide Acceptance Testing and Cooperative Testing. SBC-CA proposes that the applicable rates be from its tariff for Maintenance of Service charges, and be subject to change if and when tariff rates change. SBC-CA contends it neither engaged in, nor consented to, negotiations under §§ 251 and 252 for these voluntary offerings, and, therefore, they are not subject to arbitration here. If MCIm does not agree with SBC-CA's provisions, SBC-CA says the voluntary offerings should be eliminated from the ICA entirely.

MCIm says SBC-CA is required to provide MCIm with access to DSL-capable loops, including not only conditioning, maintenance and repair but also testing. MCIm says inclusion of such language in the ICA is *prima facie* evidence that SBC-CA voluntarily negotiated these topics with MCIm and thus these topics are subject to compulsory arbitration under § 252(b)(1) of the Act.

Discussion

SBC-CA's proposed language is adopted.

SBC-CA claims that MCIm states the issue too broadly. According to SBC-CA, most of the language regarding conditioning, maintenance and repair of xDSL loops is agreed to language. Rather, SBC-CA says there are only "two extremely narrow disputes under this issue." (Supplemental Response, November 23, 2005, page 13.)

The first dispute is the same as that under xDSL 3: whether the rates should be (a) from the tariff and subject to change as tariff rates change, or (b) fixed in the Pricing Appendix for the life of this ICA. For the same reasons as

stated under xDSL 3, the applicable rates shall be those from the tariff, and the rates shall be subject to change as tariff rates change. Thus, SBC-CA's language is adopted.

According to SBC-CA, the "second dispute relates to whether Acceptance Testing and Cooperative Testing are within the scope of SBC-CA's unbundling obligations under § 251(c)(3) of the Act." (Supplemental Response, November 23, 2005, page 13.) The actual dispute focuses on whether or not an asterisk should apply to certain sections[45] with the accompanying endnote:

> "* SBC CALIFORNIA's Position: It is SBC CALIFORNIA's position that the provisions noted above with asterices are voluntary, non-251(b) or (c) provisions/offerings that were not subject to the Parties' negotiations under Sections 251 and 252 of the Act and are not subject to arbitration under Section 252 of the Act. SBC CALIFORNIA disputes MCIm's submission of the issues for arbitration under Section 252 of the Act. Without waiving said objection, SBC CALIFORNIA has shown in this section the language it can agree to and the substantive disputes between the Parties as to the language itself in the event that the Commission does not exclude the issues associated with SBC CALIFORNIA non-251(b) and (c) offerings from this Section 252 arbitration proceeding. SBC CALIFORNIA does not waive, but instead reserves all its rights, arguments and positions that the provisions noted with asterices (including disputed and non-disputed provisions) are not subject to Sections 251 and 252 of the Act, including without limitation, negotiations under Sections 251/252 of the Act and Section 252 arbitration. Nothing herein shall constitute a concession by SBC CALIFORNIA that the

[45] §§ 2.9, 6.2, 7.4 , 9 (all) 10 (all), Attachment YZP (all), Attachment RABT YZP (all).

> provisions are subject to negotiation and arbitration under Sections 251/252 of the Act." (Appendix xDSL, page 18.[46])

This specifically relates to Acceptance Testing and Cooperative Testing. SBC-CA agrees to include these two testing protocols. There is no dispute about including these protocols or the language in §§ 9 and 10, with the exception of pricing which is resolved separately above. As a result, no fundamental dispute is presented for arbitration.

Moreover, Acceptance Testing was included in § 9, and Cooperative Acceptance Testing in § 6.3, of the 2001 ICA. They met all tests for inclusion under the Act in 2001, and there is no reason not to continue the services here.

Thus, these portions of the ICA shall be included as worded by SBC-CA. The issue of whether these terms are subject to arbitration is not ripe, and need not be resolved to conclude this proceeding.

SBC-CA's proposed asterisk and endnote shall be included for the same reasons certain reservation of rights language is included pursuant to Issue PM 1. That is, the asterisk and endnote neither place any obligations on, nor harm, MCIm. The endnote makes clear that that SBC-CA has reserved its rights, and cannot be said to have waived those rights. This clarifies more general reservation of rights language in the General Terms and Conditions, and may usefully prevent future conflicts. It does not prejudge the outcome should SBC-CA later seek legal review in an appropriate forum, and does no harm here.

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[46] A similar footnote (with slightly different wording but the same substantive result) is also included with Attachment YZP, page 6 of 6, and Attachment RABT YZP, page 4 of 4.

When the ICA is signed, however, these provisions shall apply for the life of the ICA. That is, the adopted language does not contain an "early termination" provision within the two testing protocols nor in the endnote. Specifically, nothing in Appendix xDSL, including nothing in § 9 (Acceptance Testing) or § 10 (Cooperative Testing), states a term or termination date. Thus, the term of the ICA applies. That term is 3 years, subject to extension until the ICA is superseded or terminated. (2006 ICA, GT&C § 7.2.) This will control unless SBC-CA later exercises its right to challenge these provisions as not subject to §§ 251/252 in an appropriate forum and prevails, including success on a claim in that forum of early termination.

The one exception is in § 6.0 of Attachment YZP, wherein proposed and adopted language states that "Term and Termination: Either Party may terminate this Attachment upon 180 days advance written notice to the other Party." MCIm opposes SBC-CA's position that this entire matter is not subject to arbitration, but, unlike alternative language for pricing, MCIm proposes no alternative language for the 180-day notice and termination. Thus, in this one case, the term and termination provision applies.

12. Reciprocal Compensation

12.1. Recip Comp 2

Issue:

SBC-CA: Is compensation for Section 251(b)(5) Traffic and ISP-Bound Traffic limited to traffic that originates and terminates within the same ILEC local calling area?

MCIm: Do the words "originates and terminates within the same local calling area" depend upon the rating point of the originating and terminating NPA/ NXX?

Agreement Reference: §§ 2.3,(i),(ii); 2.3.1(i), (ii); 16.1

Positions and Discussion

See NIM 4. The same outcome is adopted (i.e., reliance on 13-State Amendment until at least July 1, 2007; potential further arbitration by application due April 1, 2007).

12.2. Recip Comp 4

Issue: What is the appropriate form of inter-carrier compensation for FX and FX-like traffic, including ISP FX traffic?

Agreement Reference: § 2.8

Positions and Discussion

See NIM 4. The same outcome is adopted (i.e., reliance on 13-State Amendment until at least July 1, 2007; potential further arbitration by application due April 1, 2007).

12.3. Recip Comp 5

Issue: Should SBC-CA's (segregating and tracking FX traffic) language be included in the Agreement?

Agreement Reference: §§ 2.9; 2.9.1; 2.9.2; 2.10

Positions and Discussion

See NIM 4. The same outcome is adopted (i.e., reliance on 13-State Amendment until at least July 1, 2007; potential further arbitration by application due April 1, 2007).

12.4. Recip Comp 6

Issue:

SBC-CA:

(a) What is the appropriate treatment and compensation of ISP Traffic exchanged between the Parties outside of the local calling scope?

(b) What types of traffic should be excluded from the definition and scope of Section 251(b)(5) Traffic?

MCIm: Given that SBC-CA's proposal for Recip Comp., Sec. 2.11 does not carefully define categories of traffic that the parties will exchange with each other and how such traffic should be compensated, should SBC-CA's additional terms and conditions for internet traffic set forth in section 2.11 et seq. be included in this Agreement?

Agreement Reference: §§ 2.11; 2.11.1

Positions and Discussion

See NIM 4. The same outcome is adopted (i.e., reliance on 13-State Amendment until at least July 1, 2007; potential further arbitration by application due April 1, 2007).

12.5. Recip Comp 7

Issue:

SBC-CA: In the absence of CPN, what methods should the Parties use to jurisdictionalize the traffic for the purposes of compensation?

MCIm: When CPN is unavailable, what processes should apply for assessing percent local usage to determine appropriate termination rates?

Agreement Reference: §§ 3.3; 13.3; 13.3.1

Positions

SBC-CA proposes use of a Percent Local Usage (PLU) factor.

MCIm proposes parties may jointly exchange industry standard jurisdictional factors, such as PIU, PIIU, or PLU.

Discussion

SBC-CA's proposed language is adopted

SBC-CA's proposed language is specific. In contrast, MCIm proposes: "Parties may jointly exchange industry standard jurisdictional factors, such as PIU, PIIU, or PLU…" (§ 3.3.) MCIm's proposal is not adequately specific, and is likely to lead to disputes. Also, MCIm's proposed language permits the originating party to commingle interstate and intrastate toll traffic, in conflict with the outcome of NIM 15 above.

MCIm points out that § 3.3 is not reciprocal. SBC-CA states it was not SBC-CA's intent that the item be one-way. As provided below, the language shall be made reciprocal.

MCIm correctly points out that SBC-CA's proposed language for §§ 3.3 and 13.3 are nearly identical. SBC-CA does not oppose omitting § 3.3 and leaving § 13.3. To minimize duplication and unneeded language, § 3.3 will be omitted, and § 3.3 shall state: "intentionally omitted."

Further, §§ 13.3 and 13.3.1 will be as proposed by SBC-CA, with SBC-CA's additional language in § 13.3 to make it reciprocal and define PLU (see SBC-CA Opening Brief, page 157, footnote 472; also see Reciprocal Compensation Issue 13 below). The language for § 13.3 shall be:

> "For those usage based charges where actual charge information is not determinable by one of the Parties, because the jurisdiction (*i.e.*, interstate vs. local) or origin of the traffic is unidentifiable, the Parties will jointly develop a Percent Local Use (PLU) factor in order to determine the appropriate charges. PLU is calculated by dividing the Local MOU delivered to a Party for termination by the total MOU delivered to a Party for termination."

12.6. Recip Comp 8

Issue: What percent of the traffic should MCIm be permitted to charge at the tandem interconnection rate?

Agreement Reference: §§ 4.4.4(i) and (ii)

Positions and Discussion

See NIM 4. The same outcome is adopted (i.e., reliance on 13-State Amendment until at least July 1, 2007; potential further arbitration by application due April 1, 2007).

12.7. Recip Comp 9

Issue:

SBC-CA:

(a) Should the rates be subject to a true-up upon the conclusion of state proceedings to rebut the 3:1 presumption?

(b) Should the date for retroactive true-up of any disputes relating to the rebuttable presumption be set as the date such disputing Party first thought to rebut the presumption at the Commission?

MCIm: Should SBC's proposed true-up mechanism for ISP traffic be included in the agreement?

Agreement Reference: § 4.9.1

Positions and Discussion

See NIM 4. The same outcome is adopted (i.e., reliance on 13-State Amendment until at least July 1, 2007; potential further arbitration by application due April 1, 2007).

12.8. Recip Comp 13

Issue:

SBC-CA: Is it appropriate to address a delivery process for Meet-Point-Billing access usage records in relation to IntraLATA toll traffic compensation?

MCIm: What billing arrangements should apply to 251(b)(5) Traffic, ISP-Bound Traffic, and IntraLATA interexchange traffic?

Agreement Reference: §§ 13.2 (settled), 13.3, 13.3.1, and 13.6 (settled)

Positions

This issue is related to Reciprocal Compensation Issue 7. SBC-CA seeks usage of PLU, the exchange of reports, and the right to audit.

MCIm proposes omitting §§ 13.3 and 13.3.1, but relying on language in § 3.3. MCIm would permit use of one of three factors (PIU, PIIU or PLU), would require quarterly PIU reports (if the originating party desires to combine interstate and intrastate toll traffic on the same trunk group), and establish the right to audit.

Discussion

MCIm correctly notes that SBC-CA's proposal is not that different from MCIm's. (MCIm Opening Brief, page 162.) Nonetheless, MCIm opposes adoption of § 13.3 and 13.3.1 because they largely duplicate language proposed by MCIm for § 3.3. As noted above (Reciprocal Compensation Issue 7), MCIm's language for § 3.3 is not adopted (due to it not being sufficiently specific and permitting commingling of interstate with intrastate toll traffic in conflict with the outcome of NIM 15). Thus, it is appropriate to adopt SBC-CA's proposed language for § 13.3 and 13.3.1 (as revised above so § 13.3 is reciprocal and defines PLU).

Parties have settled § 13.2. Parties have also settled § 13.6 by adoption of SBC-CA's proposed language. (See MCIm Opening Brief, page 166; also see October 11, 2005 Joint Revised Statement of Unresolved Issues, pages 50-53.) Specifically, the proposed language for § 13.6 is adopted as shown

in the October 11, 2005 Joint Revised Statement of Unresolved Issues at page 52 (which is the same as in proposed by SBC-CA witness McPhee, Exhibit 5 at pages 29-30).

12.9. Recip Comp 14

Issue:

SBC-CA: Is it appropriate to include terms and conditions for special access as a dedicated private line service in the Reciprocal Compensation Appendix?

MCIm: Should the parties follow MECAB guidelines for billing special access and meet-point traffic?

Agreement Reference: § 11.12

Positions

SBC-CA says no such terms and conditions need to be included.

MCIm proposes that compensation for Special Access be on a meet point billing basis pursuant to Multiple Exchange Carrier Access Forum (MECAB) guidelines.

Discussion

MCIm's proposed language is adopted.

SBC-CA says special access (e.g., T1, DS1, DS3 facilities) provides a dedicated private line service between two locations on a point-to-point connection. SBC-CA argues that intercarrier compensation is not applicable to special access because both end points of a special access circuit are on one party's network, rather than between two parties' networks. SBC-CA concludes that such traffic is not intercarrier traffic and compensation need not be addressed here.

In contrast, MCIm asserts that special access is not used solely to provide a dedicated private line service but may also be for other uses (e.g.,

access to an interexchange carrier's switch), and may involve more than one carrier. MCIm proposes language to address the situation of jointly provided special access facilities.

If SBC-CA is correct (that intercarrier compensation is never an issue for special access), it does no harm to include MCIm's proposed language. Rather, the language will simply be surplusage. SBC-CA contradicts itself, however, by also asserting that compensation for special access is a matter for tariffs and, as a result, should not be included here. Tariffs typically address compensation between carriers, or between carriers and parties, not matters only within one party's network. SBC-CA does not cite the tariff to show otherwise (e.g., that it addresses matters only within one party's network).

On the other hand, if MCIm is correct, language should be included for the cases where special access involves more than one carrier. SBC-CA says inclusion of MCIm's language "could conflict with the terms of the tariff." (SBC-CA Opening Brief, page 164.) SBC-CA does not cite the tariff, and show that any actual conflict occurs. Parties agree that MECAB guidelines address billing for access service provided by two or more carriers. There is no viable alternative presented for consideration, and no known reason to reject MCIm's proposed language.

Thus, MCIm's proposed language is adopted.

12.10. Recip Comp 15

Issue Recip Comp 15:

SBC-CA:

(a) What is the proper routing, treatment and compensation for Switched Access traffic including, without

limitation, any PSTN-IP-PSTN traffic and IP-PSTN traffic?

(b) Is it appropriate for the Parties to agree on procedures to handle Switched Access traffic that is delivered over local interconnection trunk groups so that the terminating Party may receive proper compensation?

MCIm: What terms and conditions should apply for switched access traffic?

Agreement Reference: § 16

Positions and Discussion

See Recip Comp Issue 17 below.

12.11. Recip Comp 16

Issue:

SBC-CA: Is it appropriate to include a specific change in law provision to address the FCC's NPRM on inter-carrier compensation?

MCIm: Should the contract presume the outcome of any order from the FCC affecting compensation for ISP traffic?

Agreement Reference: § 17; 17.1

Positions and Discussion

See NIM 4. The same outcome is adopted (i.e., reliance on 13-State Amendment until at least July 1, 2007; potential further arbitration by application due April 1, 2007).

12.12. NIM 28, Recip Comp 15 & Recip Comp 17

These three issues are related and are addressed together.

Issue NIM 28:

SBC-CA:

(a) What is the proper routing, treatment and compensation for Switched Access Traffic including, without

limitation, any PSTN-IP-PSTN Traffic and IP-PSTN Traffic?

(b) Is it appropriate for the Parties to agree on procedures to handle interexchange circuit-switched traffic that is delivered over Local Interconnection Trunk Groups so that the terminating party may receive proper compensation?

MCIm: Since other provisions of the agreement specify in detail the appropriate treatment and compensation of all traffic types exchanged pursuant to this agreement, is it necessary to include SBC-CA's additional "Circuit Switched Traffic" language in the agreement?

Agreement Reference: NIM § 25; Recip Comp § 16

Issue Recip Comp 15:

SBC-CA:

(a) What is the proper routing, treatment and compensation for Switched Access traffic including, without limitation, any PSTN-IP-PSTN traffic and IP-PSTN traffic?

(b) Is it appropriate for the Parties to agree on procedures to handle Switched Access traffic that is delivered over local interconnection trunk groups so that the terminating Party may receive proper compensation?

MCIm: What terms and conditions should apply for switched access traffic?

Agreement Reference: Recip Comp § 16

Issue Recip Comp 17:

SBC-CA: ***See*** **SBC-CA's issue statement for Recip Comp 15.**

MCIm: What is the proper compensation treatment for Voice Over Internet Protocol traffic?

Agreement Reference: Recip Comp § 18

Positions

SBC-CA contends that, pursuant to current FCC rules, all but limited switched access traffic must be terminated over access trunks, and that this traffic is subject to switched access charges. According to SBC-CA, switched access traffic (with limited exceptions) is traffic that originates from an end user physically located in one local exchange and delivered for termination to an end user physically located in a different local exchange. SBC-CA says that this includes traffic using Internet Protocol (IP) over the Public Switched Telecommunications Network (PSTN) either at the originating or terminating end of the call, or for transmission in the middle of the call (e.g., IP-PSTN, PSTN-IP, or PSTN-IP-PSTN). SBC-CA asserts that the use of IP technology does not change whether or not it is switched access traffic. SBC-CA contends that existing tariffs contain various methods to deal with the occasional lack of geographically accurate endpoint information. SBC-CA says the Commission should find IP-PSTN traffic is subject to access charges to protect SBC-CA against unlawful access charge avoidance schemes that could jeopardize the affordability of local rates until the FCC completes its pending work on intercarrier compensation and Voice over Internet Protocol (VoIP) traffic. Finally, SBC-CA recognizes that some switched access traffic may be improperly delivered to SBC-CA or MCIm by a third party, and proposes a method to address such traffic, which may include blocking such traffic if authorization is obtained from the Commission.

MCIm believes SBC-CA's proposed language in NIM Appendix § 25 is unnecessary since virtually the same proposed language is in Reciprocal Compensation Appendix § 16. MCIm asserts that SBC-CA's proposed language is vague, ambiguous and confusing and will lead to disputes. MCIm contends SBC-CA's proposed language has the effect of imposing switched access terms,

conditions and rates on VoIP and other enhanced service traffic in direct conflict with FCC's long-standing access charge exemption for enhanced (information) services, including internet service provider (ISP)-bound traffic. MCIm claims state regulation of this traffic is preempted by the FCC, and that this proceeding is not the proper forum to seek modification to FCC's rules. As such, MCIm says that, pending completion of the FCC's further inquiry into these matters, the FCC's interim compensation scheme for ISP-bound traffic should apply for transport and termination of VoIP and other enhanced services traffic.

Discussion

With one exception discussed below, SBC-CA's proposed language is adopted.

With these three issues, parties present disputes regarding NIM Appendix § 25, and Reciprocal Compensation §§ 16 and 18. Parties agree that the disputes do not involve PSTN-IP-PSTN traffic (i.e., "IP in the middle"). That is, parties agree on "the proper intercarrier compensation arrangements for 'IP in the middle traffic.' " (MCIm Opening Brief, page 172.) That compensation includes access charges where appropriate (i.e., traffic that originates in one local exchange and terminates in another local exchange), and reciprocal compensation where appropriate (i.e., traffic that originates and terminates within one local exchange).

Parties also agree that the "status quo" should be maintained until the FCC concludes its current inquiries into intercarrier compensation and IP-enabled services, including VoIP.[47] Parties agree that FCC rules now exempt

[47] SBC-CA cites four proceedings: (1) *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Notice of Proposed Rulemaking*, 16 F.C.C. Rcd.

Footnote continued on next page

certain enhanced (information) services traffic from access changes. Parties disagree whether or not that FCC exemption applies to IP traffic, including VoIP. SBC-CA says:

> "Both parties assert that, until the FCC issues new access charge rules applicable to IP-PSTN traffic, this Commission should apply existing compensation rules to such traffic. [footnote deleted.] Both parties claim their proposed contract language does this; obviously, one of the parties is wrong." (Opening Brief, page 170.)

The approach generally used in this arbitration decision is to apply the result reached in the 2001 ICA, and/or the status quo, unless new fact or law justifies a change. That is the approach for this issue as well.[48] For the following

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9610, FCC 01-132 (2001) ("*Intercarrier Compensation NPRM*"); (2) *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92*, Further Notice of Proposed Rulemaking*, 20 F.C.C. Rcd. 4685, FCC 05-33 (2005); (3) *In the Matter of IP-Enabled Services*, WC Docket No. 04-36, *Notice of Proposed Rulemaking*, 19 F.C.C. Rcd. 4863, FCC 04-28 (2004) ("*IP-Enabled Services NPRM*"); and (4) *Pleading Cycle Established for Grande Communications' Petition for Declaratory Ruling Regarding Intercarrier Compensation for IP-Originated Calls,* WC Docket No. 05-283, DA 05-2680 (FCC Public Notice Oct. 12, 2005).

[48] SBC-CA asserts the FCC has determined that IP-PSTN services are subject to FCC's exclusive federal jurisdiction and this Commission has no independent state authority to establish unique terms and conditions for IP-PSTN traffic, including VoIP traffic. (SBC-CA Opening Brief, page 168, citing *In the Matter of Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, *Memorandum Opinion and Order*, 19 F.C.C. Rcd. 22404, FCC 04-267 (2004) ("*Vonage Preemption Order*"), *petition for review pending*, *California v. FCC*, No. 05-70007 (9th Cir).) SBC-CA continues, however, saying that the Commission is a deputized federal regulator and has the duty to ensure the ICA is consistent with federal law. In SBC-CA's view, that means applying the FCC's existing rules on IP-PSTN traffic pending an FCC determination otherwise.

reasons, the status quo is determined to be as stated by SBC-CA, and SBC-CA's proposed language is adopted.

The general regulatory status quo is clear: calls originating and terminating in the same exchange are subject to reciprocal compensation; calls originating and terminating in different exchanges are subject to switched access charges. This is true despite the originating or terminating location of the call, or technology used, with limited exception.

The reason to maintain this system is also clear. The industry compensation scheme is based on this system. Changes must be done recognizing the effects, if any, on such things as: (a) programs that ensure accessible and affordable telephone service, (b) reasonable intercarrier compensation that efficiently and equitably recovers costs from customers and provides a reasonable opportunity for shareholders to earn a return on investment, and (c) creating fair competitive opportunities on a technology neutral basis. To do otherwise invites disruption and inefficient outcomes.

Moreover, the existing system is generally based on the geographic location of customers. This system may change. For now, however, the assigning of NPA/NXX codes largely permits reasonable compensation based on the FCC's current scheme. CLECs, like MCIm, tend to honor the physical locations in assigning numbers in order to enable reasonable use of the 911 emergency system. SBC-CA asserts that adequate systems are in place to provide reasonable compensation for the few calls where the physical location cannot be determined.

According to SBC-CA, the exception to this system is enhanced service provider (ESP) traffic, including ISP-bound traffic. The dispute here is

whether or not the FCC's exemption for ESP traffic includes IP-PSTN traffic. The most reasonable reading is as presented by SBC-CA. As SBC-CA convincingly says:

> "The FCC's so-called 'ESP exemption' does not exempt interexchange IP-PSTN traffic from access charges. Under the ESP exemption, in certain circumstances 'enhanced service providers are treated as end users for purposes of [the FCC's] access charge rules.' [footnote deleted.] But that exemption applies only to an ESP's use of the PSTN *as a link between the ESP and its subscribers*. A traditional ESP-bound call uses the PSTN only as a link between an end user and its ESP to obtain access to the ESP's information service (*e.g.*, for internet access). The FCC exempted ESPs from access charges for such calls, where the calls are delivered from the ESP's subscribers to the ESP's 'location in the exchange area.' [footnote deleted.] As the FCC subsequently described its ESP exemption, that exemption carves ESPs out from the access charge obligation when they 'use incumbent LEC networks *to receive calls from their customers*.' [footnote deleted.] In other words, the FCC 'determined that exempted [ESPs] should not be subjected to *originating* access charges for *ESP-bound* traffic.' [footnote deleted.]
>
> "The interexchange IP-PSTN traffic at issue here, on the other hand, uses LEC switching facilities and the PSTN to deliver telephone calls from one end user that subscribes to an IP service to another end user that receives a telecommunications service over the PSTN. In other words, this traffic is *not* 'ESP-bound,' but is 'PSTN-bound' in the exact same fashion as a traditional telephone call. Similarly, IP-PSTN service providers do not merely 'use incumbent LEC networks to receive calls from their customers,' [footnote deleted.] but they use the PSTN to *terminate* calls from their customers to *non*-customers in other exchanges (IP-PSTN traffic), or to receive calls from *non*-customers in other exchanges (PSTN-IP traffic) – just

> like traditional long-distance telephone calls. In short, the FCC's limited ESP exemption simply does not apply to these services. [footnote deleted.]" (SBC-CA's Opening Brief, pages 178-79, emphasis included in original.)

SBC-CA says it agrees with MCIm that IP-PSTN traffic is an information service for the person on the IP end of the call, but disagrees with MCIm that the FCC has made such a ruling. Even if it is an information service, SBC-CA correctly says:

> "The FCC rule that governs reciprocal compensation expressly excludes 'traffic that is interstate or intrastate exchange access, *information access*, or exchange services for such access' from reciprocal compensation. Thus, even assuming that the FCC one day rules that IP-PSTN traffic is an information service, any proposal to require reciprocal compensation for such traffic when it is interexchange again runs directly afoul of the FCC's current rules." (Opening Brief, page 179 citing 47 C.F.R. § 51.701(b)(1), emphasis added.)

MCIm argues that the only rate available for intercarrier compensation for the VoIP traffic at issue here is the FCC's ISP compensation rate of $0.0007 per minute of use from the FCC's *ISP Remand Order*. SBC-CA correctly points out, however, that this is an interim compensation scheme with rates lower than reciprocal compensation rates only for traffic delivered to ISPs. It is to limit, if not end, regulatory arbitrage through serving ISPs. IP-PSTN traffic, however, is not traffic delivered to ISPs, and cannot qualify for the $0.0007 rate intended for ISP-bound traffic.

Importantly, it would be bad public policy to adopt MCIm's recommendation in advance of the FCC's determination because to do so would encourage deployment of this technology based on regulatory decisions rather

than the merits of the technology. The arbitration decision here should be technology neutral.

SBC-CA also proposes language specifying procedures for third party traffic inappropriately delivered over local interconnection trunks. SBC-CA's language is adopted to provide a reasonable procedure for parties to work cooperatively to obtain proper terminating access charges.

In support of its alternative view, MCIm says that as long ago as the Computer Inquiry in 1966, the FCC has drawn a distinction between basic and enhanced services. Any service that undergoes a net protocol conversion, according to MCIm, is an information or enhanced service. MCIm argues that IP traffic involves a net protocol conversion; is, therefore, an information or enhanced service; and, as an information service, is not subject to access charges. To the contrary, as explained above, not all information or enhanced services quality for the ESP exemption.

MCIm argues that VoIP is a nascent technology and should not be required to pay rates that include subsidies for the traditional network. Rather, it should be permitted to develop without these unreasonable burdens, according to MCIm.

To the contrary, IP and VoIP have the potential of dramatically changing the telecommunications industry. Intercarrier compensation, including compensation related to IP and VoIP, is the subject to current inquiry at the FCC. This arbitration decision should not prejudge the outcome or give an advantage to any technology. To the fullest extent possible, this decision should maintain the status quo until the FCC determines otherwise. The FCC will make that decision when it is appropriate to do so. In the meantime, the status quo is best accomplished by adopting SBC-CA's proposed language.

MCIm also argues that geographic distinctions are not relevant for IP calls, as found by the FCC in its ISP Remand Order. To the contrary, while the FCC declined to rely on geographic location, MCIm itself says "the *ISP Remand Order* makes clear that the federal intercarrier compensation regime applies to all ISP-bound traffic…" (MCIm Opening Brief, page 191, emphasis added.) That is, it is ISP-bound, not necessarily all IP and/or VoIP traffic.

SBC-CA's propose NIM Appendix § 25 is virtually the same as Reciprocal Compensation Appendix § 16. SBC-CA does not explain why the same language needs to be repeated. As a result, SBC-CA shall delete the language in NIM Appendix § 25, and shall state "intentionally omitted." Alternatively, SBC-CA shall state:

a. for NIM Appendix § 25.1: "See Reciprocal Compensation Appendix § 16.1" and
b. for NIM Appendix § 25.2 shall state: "See Reciprocal Compensation Appendix § 16.2."

Thus, with this one exception, SBC-CA's proposed language is adopted.

12.13. Issue Recip Comp 18

SBC-CA: Should non 251/252 services such as Transit Services be negotiated separately?

Agreement Reference: §§ 2.1; 7

***See* NIM Issue 26, *supra*.**

Positions and Discussion

Parties refer to the results in NIM 26 and recommend the same outcome. Consistent with that outcome, MCIm's proposed language is adopted for NIM Appendix § 22, and Reciprocal Compensation Appendix §§ 2.1 and 7.

13. Unbundled Network Elements

13.1. UNE 1

Issue: What are the appropriate geographic limitations of SBC-CA's obligation to provide access to network elements?

Lawful UNE § 1.1

Positions

SBC-CA proposes language it says clarifies that SBC-CA's unbundling obligations arise only within SBC-CA's incumbent territory. Failure to do so in a manner consistent with the Act risks a subsequent contract interpretation dispute, according to SBC-CA.

MCIm asserts that the appropriate limitations are set forth in agreed to language in General Terms and Conditions § 2.12.1. MCIm contends that SBC-CA's additional language is unclear and unnecessary, and is likely to create confusion and future disputes.

Discussion

MCIm's proposed language is adopted.

MCIm correctly states that the appropriate limitations on the scope of SBC-CA's service obligations are already set forth in agreed to language in General Terms and Conditions § 2.12.1. That section states in part: SBC-CA's

obligations shall apply only to the area "in which SBC California is deemed to be the ILEC under the Act." (Emphasis added.)[49]

SBC-CA contends its additional language is necessary for areas where SBC-CA is a CLEC. According to SBC-CA, an example is Verizon's ILEC territory, where both SBC-CA and MCIm (at least at the moment) are CLECs, and neither "have § 251(c) obligations in Verizon's ILEC territory." (SBC-CA Opening Brief, page 187, emphasis added.) SBC-CA does not convincingly explain how it might be "deemed to be the ILEC" in Verizon's ILEC territory. Therefore, SBC-CA's concern is adequately addressed in GT&C § 2.12.1, and SBC-CA's additional language is unnecessary.

13.2. UNE 2

Issue: Which parties' definition of Lawful UNE should be included in the Agreement?

Lawful UNE §§ 1.1.2, 1.5

Positions

SBC-CA proposes a definition tied to lawful and effective FCC rules and orders. Under its definition, SBC-CA would be allowed to decline to provide UNEs to the extent not required by lawful and effective FCC rules and orders.

MCIm proposes a definition tied to UNEs as described in the ICA and applicable law.

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[49] The agreed upon language in GT&C § 2.12.1 should be corrected to state (addition underlined): "SBC's obligations under this Agreement to provide Lawful unbundled Network Elements and Resale shall apply only to the portions of California in which SBC CALIFORNIA is deemed to be the ILEC under the Act."

Discussion

MCIm's proposed language is adopted.

This dispute focuses on when a declassified UNE is no longer required to be offered by SBC-CA. MCIm's proposed language is clear, stated simply, and less likely to lead to disputes. Moreover, MCIm's proposed language is likely to permit a smoother transition when a UNE is declassified. For example, under MCIm's propose language a UNE will include those as described in the ICA, and will be subject to change of law and dispute resolution procedures. Thereby, more continuity and certainty will be provided while still maintaining each party's rights should a dispute occur.

On the other hand, SBC-CA proposes a definition that is tied to effective rules and orders, but permits SBC-CA to decline to offer a UNE under certain terms. This is likely to lead to disputes and more uncertainty should a UNE be discontinued by SBC-CA at SBC-CA's option.

SBC-CA asserts that it proposes the same or similar concepts here as already found in the 2001 ICA. While partially correct, the 2001 ICA language does not include the option of SBC-CA declining to offer UNEs. On the other hand, the 2001 language is reasonably similar in concept to that proposed by MCIm.

In fact, however, the difference between parties' proposed language is not as substantial as parties contend. For example, orders from the FCC, Commission or court are very likely to include the dates, terms and conditions for ending a UNE, or transitioning to another service. As such, it is extremely unlikely that the worst fears of either party will materialize: that SBC-CA may unilaterally decide to end the offering of a UNE, or that MCIm may force the continued offering of a UNE for the duration of the 2006 ICA (even after an

agency or court order finds that a UNE is no longer required). This is because the declassification of a UNE will certainly involve the issue of what happens to existing UNEs, and the continued offering of UNEs during any transition. It is inconceivable that parties will fail to bring that matter to the attention of the FCC, Commission or court. If deemed relevant, it will be addressed in the agency or court decision.[50]

SBC-CA seeks to reduce its risk of having to offer a UNE any longer than absolutely required, but proposes an assurance here that essentially prejudges an agency or court outcome. On balance, MCIm's proposed language is superior since it is more likely to permit consistency with agency or court decisions, promote smoother transitions, and produce fewer disputes.

13.3. UNE 3

Issue:

SBC-CA: Should the UNE Appendix contain transition procedures in the event of declassified UNEs, in addition to change of law rights under GT&C?

MCIm: What procedures should apply when there has been a change of law event affecting the obligations to provide UNEs?

Lawful UNE §§ 1.1.1, 1.1.3, 1.1.4

Positions

SBC-CA proposes language making the transition procedure for declassified elements in § 5.0 of the UNE Appendix self-effectuating, thus

[50] In fact, SBC-CA says: "the FCC and the Courts have proven themselves to be perfectly capable of mandating transition periods for the discontinuance of UNEs where they deem them to be appropriate…" (Opening Brief, page 193.)

requiring no further amendment to the ICA to implement or make that change effective. As proposed by SBC-CA, this would include where a UNE is declassified or otherwise no longer a lawful UNE pursuant to a lawful and effective FCC or court order. SBC-CA proposes specifying the events that trigger the declassification of a UNE, such as the issuance of a legally effective finding that requesting carriers are not impaired without access to a UNE.

MCIm proposes language requiring parties to continue to comply with all obligations under the ICA until amended in accordance with General Terms and Conditions § 23, even when an agency or court issues a decision that materially affects any provision under the UNE Appendix.

Discussion

MCIm's proposed language is adopted.

MCIm's proposed language preserves the parties' obligations related to the availability of UNEs until a particular obligation is made effective through the parties' negotiation of an appropriate amendment to reflect a change in law. As discussed with UNE 2 above, this is more likely to promote smoother transitions and produce fewer disputes.

SBC-CA is concerned that MCIm may use this provision to indefinitely delay a change or unilaterally impose its will on SBC-CA. For example, SBC-CA argues that MCIm's proposed language should be rejected because neither party should be permitted to ignore dates that an agency or court have "hard-coded" into their rulings for the discontinuance of UNEs.

SBC-CA's concern is without merit. Each agency or court decision will almost certainly contain language regarding the transition. The transition will be specific if it is "hard-coded" into the ruling. Once the agency or court decision is effective, the transition date in that decision—if directed to include

existing ICAs—will necessarily implement a change in the ICA. MCIm cannot delay indefinitely, or unilaterally force an outcome against SBC-CA's will. As SBC-CA itself says:

> "…the FCC has been very capable of specifying when negotiation of ICA amendments is required and when a change in law is automatic, as well as specifying applicable timeframes and effective dates. [footnote deleted.] There is no reason to expect the FCC not to do so in the future." (SBC-CA Reply Brief, page 14.)

Moreover, this ICA will be subject to the "Transition Procedure for Elements that are Declassified During the Term of the Agreement." This was UNE Issue 9 in this proceeding (involving UNE Appendix § 5.0), and has been transferred to the TRO/TRRO proceeding (A.05-07-024, the "generic proceeding"). To the extent appropriate, the Commission will determine the transition procedure there. In fact, SBC-CA says the arbitrator here "should assume that proper and lawful 'Transition Procedure' language is adopted for Section 5 by the Commission in the Generic Proceeding." (Opening Brief, page 192.)

SBC-CA is correct. As a result, there is no serious concern that MCIm's proposed language here can be used to cause indefinite and unreasonable delay.[51] At the same time, if there is a case where there is doubt

[51] SBC-CA argues its language must be adopted here because its language refers to § 5.0. This argument is not persuasive. Whether or not specific language in § 1.1.1 refers to § 5.0, a transition procedure for declassified UNE will be included in ICAs if the Commission determines in A.05-07-024 that a transition procedure is necessary and/or appropriate. That outcome will control, and will not be dependent on language considered here for § 1.1.1.

(e.g., in the very unlikely case of an agency or court order failing to address the transition, or where § 5.0 of the UNE Appendix does not apply), MCIm's proposed language is more likely to promote smoother transitions and produce fewer disputes by making clear that parties must honor this ICA until an amendment is made effective.

13.4. UNE 5

Issue:

SBC-CA: When should SBC CALIFORNIA be permitted to separate previously combined UNEs?

MCIm: What terms and conditions for Combinations should be included in the Agreement?

Lawful UNE § 2.2.10

Positions

SBC-CA proposes language stating that SBC-CA shall not, except at MCIm's request, separate MCIm requested UNEs that are currently combined. SBC-CA's also proposes language stating that SBC-CA is not prohibited from separating lawful UNEs not requested by MCIm.

MCIm proposes language stating that SBC-CA shall provide combinations of UNEs in accordance with law, may not require MCIm to own local exchange facilities as a condition of offering MCIm a UNE, may not require MCIm to combine UNEs, and shall not separate MCIm requested UNEs that are already combined unless requested by MCIm.

Discussion

MCIm's proposed language is adopted.

Unlike SBC-CA's proposal, MCIm's proposed language more nearly mirrors FCC rules in 47 CFR §51.315, and does a better job of stating SBC-CA's obligations to combine elements. MCIm's proposal goes beyond this FCC rule in

two ways: (a) that SBC-CA may not require MCIm to own or control any local exchange facilities as a condition of offering to MCIm any network element or combination, and (b) that SBC-CA may not require MCIm to combine network elements. SBC-CA complains that, with limited exception, MCIm's proposed language "does not comply with or track any language contained in the FCC's combination rule referenced above" (i.e., 47 CFR § 51.315). (SBC-CA Opening Brief, page 195). SBC-CA raises no specific objection to MCIm's two additions, however, and the two additions are compatible with FCC rules, MCIm's rights, and SBC-CA's obligations. Moreover, they are compatible with the FCC's clarification on ILEC UNE duties. (See MCIm Opening Brief, page 209, citing FCC TRO ¶ 573, including the FCC's comments on the Supreme Court's *Verizon* decision.) In other respects, MCIm's proposed language, contrary to SBC-CA's claim, complies with and tracks the FCC's rules, and does a better job than SBC-CA's proposed language of complying with and tracking those rules.

SBC-CA's proposed language apparently seeks to clarify that it may separate lawful UNEs not requested by MCIm, but does not convincingly show that such clarification is appropriate or necessary (e.g., due to past or current disputes). For example, SBC-CA contends if MCIm does not request such UNEs the ICA must make clear that:

> "SBC-CA is not prohibited from separating UNEs in order to provide such UNEs (*i.e.*, to another CLEC upon that CLEC's request) or to provide other SBC-CA's offerings. This is simply a statement of the 'first come, first served' principle." (SBC-CA Opening Brief, page 195.)

SBC-CA fails to show, however, that absent this language in its ICA with MCIm that SBC-CA is prohibited from separating UNEs in order to provide them to another CLEC, or another SBC-CA offering. Further, there is no known

dispute or claim regarding a 'first come, first served' principle that requires the remedy proposed by SBC-CA.

Thus, on balance, MCIm's proposed language is superior and is adopted, with the following two minor corrections. The first sentence should be corrected (a) from "Section 21" to "Section 2" and (b) from "47 CFR Section 315" to "47 CFR Section 51.315." As corrected it should read:

> "At MCIm's request, SBC California shall provide combinations of unbundled Network Elements in accordance with the requirements of this Section 2, other applicable requirements of this Agreement and Applicable Law, including 47 CFR Section 51.315."

13.5. UNE 6

Issue: Should MCIm be permitted to use SBC-CA's unbundled Network Elements to provide service to other Telecommunication Carriers?

Lawful UNE § 2.3

Positions

SBC-CA says no.

MCIm says yes.

Discussion

MCIm's proposed language is adopted.

Both parties refer back to Definition Issue 3, and recommend a parallel outcome here as there. MCIm prevailed on Definition Issue 3. As a result, and for the same reasons as stated there, MCIm's proposed language is also adopted here.

SBC-CA further argues for its proposed language here, and against MCIm's proposed language, saying that:

> "In the *TRO Remand Order* (FCC 04-290), the FCC clarified that Rule 309(b) does not permit IXCs and Wireless providers to obtain UNEs exclusively for long distance and wireless traffic." (SBC-CA Opening Brief, page 196.)

This argument does not support rejecting MCIm's proposed language, however, because MCIm's language already includes the following statement:

> "provided, however, that MCIm may not use a Network Element or combination… to provide exclusively mobile wireless telecommunications service or interexchange service…" (MCIm proposed language for UNE Appendix § 2.3.)

Moreover, MCIm is not limited by the FCC's rule from accessing a UNE or combination to provide mobile wireless services or interexchange services, only that of accessing a UNE or combination for the exclusive provision of mobile wireless services or interexchange services. The adopted language is consistent with this rule.

Thus, MCIm's proposed language is adopted.

13.6. UNE 7

Issue:

SBC-CA: If MCIm orders a product from an SBC-CA tariff, must it amend its ICA to remove the rates, terms and conditions associated with the product it is ordering from the tariff?

What are the appropriate terms surrounding MCIm ordering products or services from an SBC-CA tariff?

MCIm: Should the UNE Appendix be the sole vehicle by which MCIm can purchase UNEs from SBC-CA?

Lawful UNE § 2.15

Positions

SBC-CA's proposed language limits MCIm's obtaining UNEs to the UNE Appendix in this 2006 ICA, and not simultaneously from tariffs.

MCIm proposes that SBC-CA's language here be omitted, with the result that MCIm be permitted to obtain UNEs either from this ICA or tariff.

Discussion

MCIm's proposed language is adopted (i.e.., "Intentionally Omitted.")

The substance of this issue is the same as General Terms and Conditions (GT&C) Issue 10 and Physical Collocation (P.Collo) Issue 1. Parties raise nothing substantially different here. For the same reasons that MCIm prevails on GT&C 10 and P.Collo 1, MCIm similarly prevails here. That is, for example, permitting purchases from either the ICA or tariff promotes the pro-competitive goals of the Act. Also, nothing in this option conflicts with the FCC's limitation on "pick and choose." Rather, using the tariff as a "baseline" that is generally always available enhances the opportunities for "give and take" in negotiations. Finally, the incremental administrative burden, if any, is not unreasonable in light of the larger goal of promoting competition.

MCIm claims the issue here is broader than in GT&C 10. For example, MCIm contends that SBC-CA's language here would prohibit MCIm from purchasing a UNE from a tariff even if the ICA does not include the offering.

In response, SBC-CA asserts that Appendix UNE requires SBC-CA to provide MCIm with all UNEs required by the law, and there are no UNEs other than UNEs required by the law. As a result, SBC-CA contends that MCIm's argument (that there might be a UNE offered by tariff that is not offered

by the ICA) is meritless. SBC-CA says that to the extent a change in law creates a new UNE, the Change in Law provision of the ICA is triggered and, therefore, the current ICA is broad enough to cover all present and future UNEs. (SBC-CA Reply Brief, page 15.)

If SBC-CA's contention is true, SBC-CA's proposed language for UNE § 2.15 is unnecessary, and the reasons for SBC-CA's proposal are all the less clear. That is, for a UNE there is no need to limit purchases to the ICA that might otherwise be from tariff because there can be no such conflict. This is further reason to reject SBC-CA's proposal, and adopt MCIm's proposal (i.e., that the language here be "intentionally omitted").

13.7. UNE 19

Issue: Which Party's proposal about tariff restrictions should be included in the Agreement?

Lawful UNE § 7.6.1

Positions

This issue involves commingling tariffs.

SBC-CA proposes referring to FCC Tariff No. 1, Section 5.1.1.

MCIm proposes that SBC-CA be required to not impair or impede MCIm's commingling arrangements. Further, MCIm proposes that SBC-CA not change its tariffs in any fashion that impacts commingling without first amending this ICA.

Discussion

SBC-CA's proposed language is adopted.

SBC-CA's language is clear and direct, and will minimize disputes. It refers to an FCC tariff, which itself states commingling eligibility criteria from 47 CFR 51.318(b) through (d). This addresses what is necessary for this ICA.

MCIm's primary concern is that SBC-CA's reference to an FCC tariff "would allow SBC CA to alter or propose to alter the obligations in the ICA unilaterally, in violation of orders of the FCC and this Commission." Rather, MCIm wants changes to the ICA "to be implemented through negotiation and amendment of the contract…" (MCIm Opening Brief, page 214.) This concern is without merit.

For the reasons stated above (see xDSL Issue 3), SBC-CA cannot unilaterally alter an FCC tariff. Moreover, tariff changes require regulatory approval. That regulatory approval will provide MCIm the protection is desires against unilateral change, uncertainty, and unreasonable outcomes.

MCIm argues that SBC-CA has already made modifications to its federal tariff that have the effect of precluding MCIm from commingling. Even if true, MCIm does not persuasively explain why it did not, or could not, obtain the protection it believes necessary or desirable from the FCC before the change was made effective.

Moreover, as a general proposition, it is efficient and reasonable for portions of the ICA to refer to, and rely on, tariffs and other documents. In fact, MCIm seeks that approach in several contexts, and it is generally adopted in this arbitration. (See GT&C Issue 10, UNE Issue 7, and P.Collo Issue 1.) It is similarly reasonable here.

On the other hand, MCIm's proposed language fails on several counts. First, it creates a vague and undefined contractual obligation on SBC-CA not to do things that "impair or impede" MCIm's ability to implement commingling arrangements. What does and does not "impair or impede" is sure to engender disputes. Second, it requires SBC-CA to "acknowledge and agree" to things SBC-CA does not acknowledge and with which SBC-CA disagrees.

Third, it requires the ICA to be amended before certain tariffs can be amended. This provision conflicts with SBC-CA's right to seek amendment to its tariffs as necessary consistent with law. It is also bad public policy to effectively make this portion of the ICA paramount over more generally available tariffs, particularly when MCIm may exercise all its legal rights before the FCC.

Therefore, SBC-CA's proposed language is adopted.

13.8. UNE 24

Issue: Should SBC-CA be required to build facilities where they do not exist?

Lawful UNE §§ 9.2; 15.2; 20.1.19

Positions

SBC-CA proposes that MCIm have access to copper loops, if available (§ 9.2); MCIm have access to dedicated transport only where such facilities exist at the time of MCIm's request (§ 15.2); and SBC-CA not be required to provide UNEs where facilities are not available, but MCIm may request provision of a UNE through a Bona Fide Request (§ 20.1.19).

MCIm proposes that, where facilities are not available, SBC-CA be required to make modifications and engage in construction to provide MCIm with access to UNEs on a nondiscriminatory basis and at parity with what SBC-CA does for itself and its own customers.

Discussion

SBC-CA's proposed language is adopted for §§ 9.2 and 15.2, while MCIm's proposed language is adopted for § 20.1.19.

The issue here is the degree of modification and/or construction that may be required for (a) UNE copper loops (§ 9.2), (b) DS1 And DS3 UNE dedicated transport facilities (§ 15.2), and (c) other UNE facilities (§ 20.1.19). The

FCC has determined that some modification or construction is required of ILECs, but not to the point of placing new cables or creating a superior network.

In particular, as quoted by MCIm, the FCC has found that:

> "639. We reject Verizon's argument that the Commission lacks authority to compel incumbent LECs to deploy new equipment to meet the demands of a competitive carrier. Verizon contends that the Commission cannot require incumbent LECs to *add* capacity or circuits, ***including constructing and modifying loops by adding electronics***, where these facilities do not already exist. That is, Verizon argues that these modifications are not necessary to provide access to existing UNEs, they are the 'creation of *new or improved* UNEs' that would unlawfully force an incumbent LEC to provide superior quality access. In particular, Verizon claims that the Commission is barred from requiring incumbent LECs to build a new loop, place new line cards or electronics on a circuit, and provide line conditioning, because these are all 'substantial alterations to an ILEC's existing network.' ***We disagree and, with the exception of constructing an altogether new local loop, we find that requiring an incumbent LEC to modify an existing transmission facility in the same manner it does so for its own customers provides competitors access only to a functionally equivalent network, rather than one of superior quality. Indeed, incumbent LECs routinely add a drop for a second line without objection***. We conclude that with the exception of building a loop from scratch by trenching or pulling cable, because incumbent LECs are able to provide routine modifications to their customers with relatively low expense and minimal delays, requesting carriers are entitled to the same attachment of electronics. Lastly, to the extent that certain routine network modifications to existing loop facilities affect loop provisioning intervals, contained in, for example, section

> 271 performance metrics, we expect that states will address the impact of these modifications as part of their recurring reviews of incumbent LEC performance." [52]

This FCC statement is in a section of the *TRO* on "Routine Network Modifications to Existing Facilities." In that context, the FCC disagrees with Verizon and concludes that the FCC may compel ILECs to deploy new equipment for a CLEC. In particular, the FCC may require ILECs "to *add* capacity or circuits, including constructing…where these facilities do not already exist." With the exception of constructing an altogether new local loop, the FCC finds that it may require ILECs to modify facilities in the same manner an ILEC does for its own customers.

> At the same time, the FCC makes clear that:
>
> "We do not find, however, that incumbent LECs are required to trench or place new cables for a requesting carrier." (*TRO,* ¶ 636.)
>
> "…with the exception of constructing an altogether new local loop, we find that…[the FCC may require] an incumbent LEC to modify an existing transmission facility in the same manner it does so for its own customers…" (*TRO,* ¶ 639.)
>
> "We do not require incumbent LECs to construct transmission facilities so that requesting carriers can access them as UNEs at cost-based rates." (*TRO,* ¶ 645.)
>
> " '…we do not require incumbent LECs to construct new transport facilities to meet specific competitive LEC point-to-point demand requirements for facilities that the

[52] MCIm Opening Brief, pages 218-19, citing *TRO* ¶ 639 (emphasis in bold added; emphasis in italics in original).

> incumbent LEC has not deployed for its own use.' " (*TRO,* ¶ 645, quoting from *UNE Remand Order,* 15 FCC Rcd at 3843, para. 324.)

Given this balance in the FCC's requirements, it is reasonable to adopt SBC-CA's proposal for the first sentence of § 9.2, including "if available:" Otherwise, § 9.2 could be misinterpreted to require construction of UNE copper loops. As adopted, it shall read:

> "9.2 Lawful UNE Copper Loops. SBC California shall provide to MCIm, upon MCIm's request, Lawful UNE copper Loops on an unbundled basis, if available."

Similarly, for § 15.2 it should include "only where facilities exist at the time of MCIm's request." Otherwise, § 15.2 could be misinterpreted to require construction of DS1 and DS3 UNE dedicated transport. Therefore, it shall read:

> "15.2 Subject to the limitations set forth in Section 5 ("Transition") of this Appendix Lawful UNE, SBC CALIFORNIA shall provide MCIm with nondiscriminatory access to DS1 and DS3 Lawful UNE Dedicated Transport on an unbundled basis in accordance with the requirements of this Agreement only where such facilities exist at the time of MCIm's request and only over routes that have not been Declassified."

Finally, given this balance, it is reasonable to adopt MCIm's proposal for the § 20.1.19. This is consistent with FCC's requirement for ILECs to make modifications and engage in construction on a nondiscriminatory basis "in the same manner it does so for its own customers." (*TRO,* ¶639.) Therefore, as adopted, it shall read:

> "20.1.19. Access to Lawful unbundled Network Elements is provided under this Agreement over such routes, technologies,

> and facilities as SBC CALIFORNIA may elect at its own discretion, but also at parity and on a nondiscriminatory basis. SBC CALIFORNIA will provide access to Lawful unbundled Network Elements where technically feasible. Where facilities are not available, SBC CALIFORNIA will make modifications and engage in construction to provide unbundled Network Elements on a nondiscriminatory basis as it does for itself, its subsidiaries, its affiliates, and third parties.

MCIm complains that SBC-CA's language for §§ 9.2 and 15.2 "conflicts with the FCC's rules because it ignores its routine network modification ('RNM') obligations." (MCIm's Reply Brief, page 18.) To the contrary, RNM for UNE local loops was covered in UNE Issue 29 (UNE Appendix § 9.9). UNE Issue 29 was transferred to the TRO/TRRO proceeding (A.05-07-024). The outcome there shall govern, in the context of RNM, other aspects of the modification and construction of such facilities. Here, SBC-CA's proposed language in §§ 9.2 and 15.2 properly recognizes the balance struck by the FCC.

SBC-CA complains that MCIm's language for § 20.1.19 is an unlimited and unqualified affirmative requirement to engage in construction where facilities are not available. To the contrary, MCIm's language reasonably models the FCC language in *TRO* ¶639, and reflects the balance struck by the FCC.

13.9. UNE 40

Issue: Should the prices for network reconfiguration service be included in Appendix Pricing or outlined in SBC-CA's tariff?

Lawful UNE § 15.10.1

Positions

SBC-CA proposes that the prices for network reconfiguration service be those in Access Tariff FCC No. 73, and be subject to revision as the tariff is modified over the life of the 2006 ICA.

MCIm seeks to have the prices fixed in Appendix Pricing and not be subject to revision except by negotiation of, and amendment to, the 2006 ICA.

Discussion

SBC-CA's proposed language is adopted.

As explained above (see xDSL 3 and UNE 19), the price certainty and protection sought by MCIm is provided here by use of SBC-CA's FCC tariff. For example, SBC-CA cannot unilaterally alter an FCC tariff. Tariff changes require regulatory approval. That regulatory approval provides MCIm the protection it desires against unilateral change, uncertainty, and unreasonable outcomes.

Portions of the 2001 ICA referred to tariffs. No new facts or law compel a change from that approach. As a general proposition, it is efficient and reasonable for portions of the ICA to refer to, and rely on, tariffs and other documents. In fact, MCIm seeks that approach in several contexts, and it is generally adopted in this arbitration. (See GT&C Issue 10, UNE Issue 7, and P.Collo Issue 1.) It is similarly reasonable here. The incremental cost, if any, of referencing another document outside the ICA is not shown by MCIm to be unreasonably burdensome, particularly when compared to the cost and complexity of negotiation of, and amendment to, the 2006 ICA, which would be in addition to costs incurred to change the tariff.

14. Physical Collocation

14.1. Physical Collo 1

Issue: Should the Physical Collocation Appendix contain the sole and exclusive terms and conditions by which MCIm obtains Physical Collocation from SBC-CA or should MCIm also be able to purchase from the tariff?

Physical Collocation § 1.4

Positions

SBC-CA's proposes that the Physical Collocation Appendix contain the "sole and exclusive" terms for MCIm to obtain physical collocation from SBC-CA pursuant to §251(c)(6) of the Act. SBC-CA also proposes that MCIm "waives any right" to purchase physical collocation from SBC-CA's tariff.

MCIm says the dispute here is the same as in GT&C Issue 10. MCIm asserts it should be permitted to purchase from either the ICA or an approved tariff.

Discussion

MCIm's proposal is adopted.

This issue is the same as GT&C 10. For all the reasons stated above for GT&C 10, the same outcome is adopted.

SBC-CA argues here that the Physical Collocation Appendix consists of approximately 63 single-spaced pages of thoroughly negotiated, fully comprehensive and mostly agreed-to language that is a modern collocation appendix reflecting current law and the best thinking of both parties. Even if true, SBC-CA fails to show that MCIm negotiated away its right to obtain the rates, terms and conditions for physical collocation otherwise available by tariff. MCIm's proposal is adopted.

14.2. Physical Collo 2

Issue: Should the Physical Collocation Appendix include a Limitation of Liability requirement when such requirement is contained in the General Terms and Conditions?

Physical Collocation § 3

Positions

SBC-CA says yes, proposing more specific language than that in the GT&C. SBC-CA asserts it seeks a reasonable limitation of liability specific to collocation that addresses the unique circumstances of collocation.

MCIm says no, arguing that SBC-CA's proposal is duplicative of the comprehensive and agreed-upon language in the GT&C.

Discussion

SBC-CA's proposed language is adopted, with the exception of §§ 3.1.2 and 3.1.4.

The 2001 ICA contains general liability and limitation of liability provisions in the GT&C (e.g., § 28), with specific terms in individual Appendices (e.g., Appendix Collocation § 16). This approach was reasonable for the 2001 ICA, and remains so for the 2006 ICA. As SBC-CA says, the liability and limitation of liability provisions in the GT&C are more general, and do not address the unique risks of liability presented in collocation arrangements.

Regarding these unique risks, SBC-CA's proposed collocation language reciprocally and equitably limits each party's collocation liability to an amount equivalent to the proportionate monthly charge to the collocator for the period of the mistakes, omissions, interruptions, delays or errors, or defects in transmission. (Proposed § 3.1.1.) SBC-CA points out—and MCIm does not deny—that SBC-CA's proposed collocation liability limitation closely tracks

MCIm's own tariff regarding liability limitation with respect to MCIm's own CLEC customers. (SBC-CA' Opening Brief, page 217, citing MCIm's California CLEC tariff, Cal. P.U.C. Schedule CLC 6-T, Section 1, Original Sheet 12.) As a result, the specific limitation of liability SBC-CA proposes for collocation with MCIm does not put MCIm at unfair risk *vis a vis* its own customers, but merely provides SBC-CA with reasonable protection in this unique collocation environment. Also, as discussed more below, this treatment is reasonably similar to that in the 2001 ICA regarding liability limitation for Line Information Data Base (LIDB) and CNAM (Calling Name) database services.

In addition, SBC-CA's proposal here for the 2006 ICA Physical Collocation Appendix § 3.2 is similar in concept, and the language largely parallel, to that contained in the 2001 ICA Appendix Collocation § 16.[53] This was

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[53] For example, the 2001 ICA provides (in Appendix Collocation, § 16) that:

> "16. LIMITATION OF LIABILITY
> MCIm acknowledges and understands that PACIFIC may provide space in or access to the Eligible Structure to other persons or entities ("Others"), which may include competitors of MCIms; that such space or access may be close to the Premises, possibly including space adjacent to the Premises and/or with access to the outside of the Premises; and that any cage placed around the Premises is a permeable boundary that will not prevent the Others from observing or even damaging MCIm's equipment and facilities. In addition to any other applicable limitation, PACIFIC shall have absolutely no liability with respect to any action or omission by any Other, regardless of the degree of culpability of any such Other or PACIFIC, and regardless of whether any claimed PACIFIC liability arises in tort, contract or otherwise. MCIm shall save and hold PACIFIC harmless from any and all costs, expenses, and claims associated with any such acts or omission by any Other."

In nearly parallel language, SBC-CA proposes that the 2006 ICA (in Physical Collocation Appendix, § 3.2) state that:

> "3.2 Third Parties

Footnote continued on next page

reasonable in 2001, and continues to be so here. It improves on the language by clearly providing that the terms are reciprocal.

MCIm argues that SBC-CA has failed to meet its burden to prove that any proposed special terms here do not conflict with or are duplicative of those in the proposed GT&C. Specifically, MCIm says §§ 3.1.2 and 3.1.4 are redundant of GT&C § 15.3, and § 3.1.3 modifies or is redundant with GT&C § 16.1. In support, MCIm cites the 2001 FAR, wherein the Arbitrator rejected a proposed clause finding that "Pacific does not meet its burden of proof that the standard indemnity language in the GT&C is not adequate to cover this appendix." (MCIm Reply Brief, page 20, citing FAR in A.01-01-010 (filed July 16, 2001) at page 66.)

MCIm is partially right. The 2001 FAR adopted Pacific's proposed language for §§ 7.1 and 7.2 (limiting Pacific's liability to the revenue received from LIBD and CNAM database services), but rejected it for § 7.8 (which would have required MCIm to indemnify Pacific for claims related to a failure to block

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3.2.1 SBC CALIFORNIA also may provide space in or access to the Eligible Structure to other persons or entities ("Others"), which may include competitors to the Collocator's; that such space may be close to the Dedicated Space, possibly including space adjacent to the Dedicated Space and/or with access to the outside of the Dedicated Space within the collocation area; and that if caged, the cage placed around the Dedicated Space is a permeable boundary that will not prevent the Others from observing or even damaging the Collocator's equipment and facilities.

3.2.2 In addition to any other applicable limitation, neither SBC CALIFORNIA nor the Collocator shall have any liability with respect to any act or omission by any Other, regardless of the degree of culpability of any Other, except in instances involving willful actions by either SBC CALIFORNIA or the Collocator or its agents or employees."

calling name information). The rejection for § 7.8 was based on Pacific failing to meet its burden to show the standard GT&C language was inadequate.

Similarly here, § 3.1.3 proposed by SBC-CA is adopted. It is not redundant of GT&C § 16.1, since § 3.1.3 refers to all applicable agreements and tariffs while GT&C § 16.1 refers to this ICA (e.g., see "this Agreement" in §§ 16.1(a) and (b).)

However, also similar to the 2001 finding, SBC-CA fails to show how § 3.1.2 (limiting liability for indirect, special, consequential or specific other damages) is different than GT&C § 15.3. SBC-CA fails to show how § 3.1.4 (providing unlimited liability for willful misconduct or gross negligence) is different than GT&C § 15.3.

Therefore, SBC-CA's proposed language is adopted, except for §§ 3.1.2 and 3.1.4.

14.3. Physical Collo 3

Issue: Should the Physical Collocation Appendix include an Insurance requirement when such requirement is contained in the General Terms and Conditions?

Physical Collocation §§ 5.8 *et seq.*

Positions

SBC-CA proposes clauses that require certain things in addition to the insurance required in GT&C § 5. Specifically, MCIm must have all risk property insurance coverage on a full replacement cost basis insuring all of collocator's property. That insurance must release SBC-CA from liability for risks that are customarily included in standard all risk casualty insurance. The insurance policy must contain a waiver of subrogation against SBC-CA. Also, MCIm must require all contractors to have similar insurance.

MCIm proposes one clause that says the insurance provisions of GT&C § 5 shall apply and are incorporated by reference.

Discussion

SBC-CA's proposed clauses are adopted.

The 2001 ICA contains substantially similar provisions as those now proposed by SBC-CA. (2001 ICA, Appendix Collocation, §§ 23.1.6 and 23.2.) For example, they both require all risk property coverage on a full replacement cost basis insuring all of MCIm's property, a release of SBC-CA for risks customarily included in an all risk policy, and a waiver of subrogation against SBC-CA. No new or different fact or law justifies a change.

MCIm argues that a reference to GT&C § 5 is all that is necessary. This is incorrect. GT&C § 5 requires certain liability insurance (i.e., worker's compensation, commercial general liability, automobile). SBC-CA's proposal here, however, like that in the 2001 ICA involves insurance policies and terms beyond those in GT&C § 5. For example, GT&C § 5 requires commercial general liability insurance with minimum limits. In contrast, SBC-CA's proposed Physical Collocation § 5.8.1.1 specifically requires all risk property insurance on a full replacement cost basis.

Moreover, as SBC-CA shows, proposed Physical Collocation § 5.8 does not address liability insurance, which is the focus of GT&C § 5. Thus, the two sections are not redundant, as claimed by MCIm.

Interestingly, some insurance portions of the 2001 ICA were moved from Appendix Collocation to the GT&C portion of the 2006 ICA. For example:

LINE NO.	ELEMENT	2001 ICA APP COLLO §	2006 ICA GT&C §
1	General Liability	23.1.1	5.3
2	Automobile	23.1.2	5.4
3	Worker's Compensation	23.1.3	5.2

Two sections from the 2001 ICA Appendix Collocation were not moved: § 23.1.6 (all risk full replacement cost coverage, release of SBC-CA, waiver of subrogation) and § 23.2 (MCIm may elect to buy coverage knowing SBC-CA has no liability). MCIm fails to convincingly show, however, that these two terms from the 2001 ICA should not be continued in the 2006 ICA, or are adequately addressed in GT&C § 5. Theoretically, either party could have proposed that these terms be moved to GT&C § 5, as were others, but that is not what is presented in this arbitration. It is appropriate, however, to retain these two terms from the 2001 ICA in the 2006 ICA and, on balance, SBC-CA's proposal is superior than the one made by MCIm.

Therefore, SBC-CA's proposal is adopted.

14.4. Physical Collo 5

Issue: Should the Physical Collocation Appendix include an Indemnification provision when such provision is contained in the General Terms and Conditions?

Physical Collocation § 12

Positions

SBC-CA says yes, proposing more specific language than that in the GT&C. SBC-CA asserts it seeks appropriate indemnification applicable to the unique circumstances of collocation.

MCIm says no, arguing that SBC-CA's proposal is duplicative of, or conflicts with, the comprehensive and agreed-upon language in the GT&C.

Discussion

SBC-CA's proposed clauses are adopted, for the same reasons discussed above with Physical Collocation Issues 2 and 3 (e.g., similar provisions contained in 2001 ICA; separate treatment in Physical Collocation Appendix addresses unique circumstances of collocation without being duplicative; improved language clearly providing that terms are reciprocal).

14.5. Physical Collo 6

Issue: Should MCIm, at its option, be allowed to implement power metering in its collocation space in SBC-CA's locations?

Physical Collocation § 19.2.3.

Positions

SBC-CA says no, and proposes that the sections offered by MCIm be "intentionally omitted." According to SBC-CA, MCIm is currently billed for collocation power based upon the amount of power that MCIm ordered and that SBC-CA provisioned to satisfy that order. This method has been approved in California and several SBC states based on MCIm's advocacy (with AT&T) of the Collocation Cost Model (CCM). As a compromise, SBC-CA proposes that (1) MCIm submit a power reduction collocation application to change its fuse size during a maintenance window and/or (2) SBC-CA agree not to bill MCIm for 50% of the power that SBC-CA makes available to MCIm in a backup mode.

MCIm says yes, proposing clauses which allow MCIm to elect to be billed only for the power MCIm actually uses. MCIm says that this will increase its ability to use power more efficiently, such method is technically feasible, and its proposal ensures SBC-CA's cost recovery with the same level of security and safety as exist in SBC-CA's central offices today.

Discussion

SBC-CA's proposal is adopted.

Parties do not dispute that these costs are currently charged on a per amp ordered (fixed) basis. As discussed below, no new facts or law justify a change. Moreover, even if MCIm's proposal were desirable (which it is not), it is inadequately developed to justify its adoption at this time.

14.5.1. Cost Causation, Accuracy, Efficiency

Both parties argue that costs should be recovered in relationship to cost causation. The concept has merit. Parties disagree, however, on whether costs are largely (if not completely) variable or fixed, and therefore should be charged primarily (if not completely) based on units of consumption (i.e., largely a variable recovery) or monthly over time based on investment (i.e., largely a fixed recovery). Parties also dispute the resulting bill accuracy and efficiency.

SBC-CA makes the more convincing showing on the way these costs are incurred and should be recovered. In particular, SBC-CA contends it has incurred predominately fixed investment on behalf of MCIm to make the requested amount of power available regardless of how much power MCIm actually uses. In support, SBC-CA cites the FCC:

> "LECs rely primarily on batteries for DC power in their central offices, and it is not clear that the costs they incur for these batteries vary based on the specific amounts of power drawn, as opposed to the overall capacity that

> they are designed to support." (SBC-CA Opening Brief, page 225, citing FCC Second Report and Order (FCC 97-208, adopted June 9, 1997), emphasis deleted.)

Thus, it is reasonable to recover largely (if not exclusively) fixed costs by a monthly charge largely (if not exclusively) based on the amount of power that is ordered, and the overall needed capacity designed to support that service. This is consistent with current practice using the CCM.

MCIm contends that SBC-CA's proposal to continue charging on a non-metered basis causes inaccurate charges and inefficient use. In support, MCIm cites a study comparing power bills for non-metered and metered arrangements (in Texas and Illinois, respectively). MCIm says that the study shows two things.

First, MCIm says the data show that "where power usage is metered, MCIm's monthly charges for power vary by central office because charges are based on the actual power its collocation arrangement consumes on a per kilowatt basis." (MCIm Opening Brief, page 230, citing Exhibit 107, page 80.) This, however, is essentially a tautology. As MCIm says, the "charges vary because under the power metering rate structure implemented in Illinois MCIm pays only for power it actually consumes…" (MCIm Opening Brief, page 230.) Certainly bills based on consumption will vary when consumption varies. This does not show, however, whether the underlying SBC-CA costs are incurred on a fixed or variable basis, and whether the resulting bills cause (or do not cause) inaccurate charges and inefficient use relative to the underlying costs.

Second, MCIm reports the study shows that "the non-metered method of assessing power charges in Texas results in a substantially higher average monthly power charge per collocation arrangement when compared to

Illinois." (MCIm Opening Brief, page 230, citing Exhibit 107, page 82.) According to MCIm, the study shows that consumption between collocation arrangements in Illinois varies by more than 500 times, but each arrangement would be assessed the same amount if not metered. Again, however, this does not show whether the underlying costs are incurred on a fixed or variable basis, and whether the resulting bills cause inaccurate charges and inefficient use relative to underlying costs. In fact, if the underlying costs are largely fixed and the same for each collocation arrangement in Illinois, bills varying by up to 500 times between these two collocation arrangements might reflect substantially inaccurate charges and result in inefficient use relative to incurred costs.

The theory that bill accuracy and economic efficiency are promoted when charges reflect costs is not disputed on this record. MCIm's evidence, however, does not support its claim that metered consumption promotes bill accuracy and economic efficiency. Charges are currently recovered on a per amp ordered basis, and no new fact or law justifies a change.

14.5.2. MCIm Proposal is Faulty

Even if MCIm's proposal were theoretically preferable (which it is not based on the way costs are incurred), it is faulty as proposed and not ready for adoption. For example, SBC-CA correctly shows that MCIm's proposed § 19.2.3 conflicts with agreed language in § 19.2.4. Specifically, § 19.2.3 provides for measurement of actual power usage once per quarter, that is in turn employed to prepare bills during the following quarter. In contrast, parties agree in § 19.2.4 to a DC Power Amperage Charge based on the amount of power ordered by MCIm. The agreed-upon language in § 19.2.4 does not provide for billing on the same basis as in § 19.2.3, and there is no reconciliation of the differences.

Further, MCIm's proposed § 19.2.3.1 conflicts with proposed § 19.2.3.2. In particular, § 19.2.3.1 provides for measurements of "actual power usage." Power usage is most often understood to be over a period of time. In contrast § 19.2.3.2 specifies that measurements "shall be taken once each quarter." MCIm explains here that this is at a moment in time.

Moreover, MCIm's language is likely to lead to disputes. The moment in time for the § 19.2.3.2 measurement is not specified. Based on the testimony here, it is likely parties will dispute whether the measurement was taken at a moment that represents peak, average, or non-peak usage. MCIm's proposal permits SBC-CA to challenge the measurement, but only with respect to the "accuracy of Collocator's BDFB [Battery Distribution Fuse Board] meter." (§ 19.2.3.4.) Challenges over meter accuracy are not understood to include challenges about the moment of the measurement.

MCIm's proposed language is silent on who installs the necessary equipment, where, and how costs are determined and paid. MCIm may seek that SBC-CA install the meter.[54] If installed by SBC-CA, costs are to be paid by the Collocator (§ 19.2.3.6), but neither the exact costs to be paid nor the type of costs to be recovered are specified. This will most likely lead to dispute.[55]

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[54] "…SBC-CA should be required to deploy power metering equipment…MCIm's proposed language would give it the option of requesting that SBC-CA install a power meter…" (MCIm Opening Brief, page 225.)

[55] MCIm says applicable rates may be taken from existing tariffs, citing, for example, the monthly charge for an increment of DC power from Pacific Bell Schedule Cal. P.U.C. No. 175-T, 1st revised 727. (MCIm Opening Brief, page 226.) SBC-CA, however, does not state an agreement to this proposal.

For example, recoverable costs might be the total sum stated on an invoice of the actual accounting cost of the installation. Alternatively, they might be based on total element long run incremental cost (TELRIC), or another cost basis. Further, the investment cost might be annualized over time and, if annualized, might be annualized using either an economic or nominal carrying charge rate. They might be annualized over a few or great number of years. The interest and inflation rates for the annualization would likely be subject to dispute. The resulting charges may vary widely. Adopted language for this ICA, however, should, to the fullest extent possible, minimize or eliminate disputes. MCIm's proposed language fails to meet that goal.

Finally, rates may be designed to recover all appropriate costs on any basis (e.g., either variable or fixed). The evidence does not convincingly show that MCIm's proposed change would improve economic efficiency or in any other way improve upon the existing approach. Rather, on balance, MCIm's proposal shifts most of the financial, administrative and cost-recovery burden to SBC-CA, and potentially leaves SBC-CA's investment cost stranded.

14.5.3. Cost Reduction

MCIm's primary interest appears to be to reduce its power costs. This is accomplished in the 2006 ICA in two ways. First, parties have already agreed to language which reduces MCIm's bills by 50% from what they would otherwise have been by simply continuing to apply the method used in the 2001 ICA. (§ 19.2.4.) Second, MCIm may submit a power reduction request to reduce the fuse size in the BDFB.

Regarding this second approach, MCIm may elect to "fuse down" if it actually needs less power than previously ordered. If MCIm does not fuse down, it is likely because MCIm's power draw may vary, as explained by MCIm

witness Starkey. (Reporter's Transcript, Volume 7, page 743.) Importantly, MCIm wants SBC-CA to have power available for MCIm should it be necessary for MCIm's use. SBC-CA incurs costs, however, to provide power for MCIm's actual and potential use, including standby power to be available for variations in power consumption. The evidence shows that MCIm ordered a specific amount of power, which SBC-CA is providing, and for which MCIm is now charged. No evidence shows that if unused by MCIm that SBC-CA may resell or otherwise use that power. In fact, SBC-CA notes that "fusing down" would at least allow some of SBC-CA's power plant investment on MCIm's behalf to be redeployed to another use. If not available for redeployment, however, the cost has been incurred for MCIm's actual and potential power use, and MCIm should pay for the amount of power ordered from SBC-CA.[56]

14.5.4. Conclusion

It is economically efficient and equitable for MCIm to pay the cost of the power resources that SBC-CA has provisioned for MCIm's, and that are reserved and directly available for MCIm's instantaneous use. SBC-CA's proposal is consistent with the approach used in the 2001 ICA, and this approach should be continued. No new facts or law justify a change.

Thus, SBC-CA's proposal is adopted.

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[56] MCIm complains that "fusing down" is not a viable option since DC power is available only in specific increments. As SBC-CA points out, however, MCIm could request reduced minimums. That issue, however, is not presented for resolution in this arbitration.

15. Virtual Collocation

15.1. Virtual Collo 1

Issue: Should the Virtual Collocation Appendix contain the sole and exclusive terms and conditions by which MCIm obtains Virtual Collocation from SBC-CA or should MCIm also be able to purchase from the tariff?

Virtual Collocation § 1.2

Positions

SBC-CA's proposes the same outcome here as with Physical Collocation Issue 1 (i.e., the Virtual Collocation Appendix contain the "sole and exclusive" terms for MCIm to obtain virtual collocation from SBC-CA pursuant to § 251(c)(6) of the Act, and that MCIm "waive any right" to purchase virtual collocation from SBC-CA's tariff).

MCIm says the dispute here is the same as in GT&C Issue 10. MCIm asserts it should be permitted to purchase from either the ICA or an approved tariff.

Discussion

MCIm's proposal is adopted.

This issue is the same as GT&C 10 and Physical Collocation 1. For all the reasons stated above for those issues, the same outcome is adopted.

15.2. Virtual Collo 3

Issue: Should the Virtual Collocation Appendix include an Indemnification provision when such provision is contained in the General Terms and Conditions?

Virtual Collocation § 11.1

Positions

SBC-CA says yes, and proposes one specific sentence that SBC-CA asserts is different in substance and scope from other indemnification provisions

in the proposed ICA. Just as with Physical Collocation 5, SBC-CA says here it also seeks appropriate indemnification applicable to the unique circumstances of collocation.

MCIm says no, arguing that SBC-CA's proposal is duplicative of, or conflicts with, the comprehensive and agreed-upon language in the GT&C.

Discussion

SBC-CA's proposed sentence is adopted.

Just as with the outcome adopted for Physical Collocation 2, 3 and 5, SBC-CA's proposed sentence is adopted here.

MCIm argues that SBC-CA should be required to prove that special indemnity provisions here are not duplicative of, or in conflict with, those in the GT&C. SBC-CA convincingly does so by pointing out:

> "The closest to a similar provision in the GT&C indemnification section is GT&C §16.1(a) which reciprocally indemnifies each party against, among other things, any loss to a *third party* caused by the *negligence* of the indemnifying party *or its agents and subcontractors*. In contrast, the Virtual Collocation indemnification sentence provides that MCIm will indemnify *SBC-CA* for any damage done to MCIm's virtually collocated equipment, *regardless of fault or negligence*, if SBC-CA permits *MCIm to hire an approved contractor to remove virtually collocated equipment.*
>
> "Thus, while the GT&C indemnification provision protects both parties against losses to *third parties* caused by the indemnifying party's *negligence*, the Virtual Collocation indemnification sentence protects *SBC-CA itself* against losses *to MCIm* should MCIm's selected contractor, *even without negligence*, damage MCIm's virtually collocated equipment during the removal process.* This is a relatively common problem, since removing equipment, even with due care, often results in some damage to the removed equipment. SBC-CA should be protected against MCIm claims for

damage to such equipment where the removal is done by someone other than SBC-CA and where SBC-CA is not grossly negligence. [sic] [footnote deleted.]"

"* *Agreed* language in § 11.1 of Appendix Virtual Collocation already makes SBC-CA liable for damage caused to MCIm virtually collocated equipment caused by SBC-CA's gross negligence during removal."

(SBC-CA Opening Brief, pages 237-238, emphasis in original.)

Thus, SBC-CA's proposed sentence is adopted.

15.3. Virtual Collo 5

Issue: Should the Virtual Collocation Appendix include a Limitation of Liability requirement when such requirement is contained in the General Terms and Conditions?

Virtual Collocation §§ 14.1-14.5

Positions

SBC-CA says yes for the same reasons it stated under Physical Collocation 2 and 5.

MCIm says no for the same reasons stated with Physical Collocation 2, 3 and 5.

Discussion

SBC-CA's proposed language is adopted for the same reasons stated above under Physical Collocation 2, 3 and 5.

15.4. Virtual Collo 6

Issue: Should the Virtual Collocation Appendix include an Insurance requirement when such requirement is contained in the General Terms and Conditions?

Virtual Collocation §§ 14.6 *et seq.*

Positions

SBC-CA says yes for the same reasons it stated under Physical Collocation 3.

MCIm says no for the same reasons stated with Physical Collocation 2, 3 and 5.

Discussion

SBC-CA's proposed language is adopted for the same reasons stated above under Physical Collocation 2, 3 and 5.

16. Pricing Appendix

16.1. Pricing Appendix 2

Issue: Should SBC CA's "Notice to adopting CLECs" be included in the Agreement?

Agreement Reference: Appendix Pricing § 1.9

Positions

SBC-CA proposes a clause which addresses retroactive adjustment of rates for CLECs who adopt this ICA under § 252(i) of the Act. The clause does not affect MCIm.

MCIm argues that SBC-CA's proposed clause should be omitted because it has no contractual effect with respect to MCIm, and it improperly attempts to limit the rights of adopting CLECs.

Discussion

SBC-CA's proposed clause is adopted, with the exception of the last phase (i.e., delete: "and any Adopting CLEC is foreclosed from making any such claim hereunder").

SBC-CA's proposed clause does not negatively affect MCIm, but provides reasonable clarity regarding rate adjustments for CLECs who adopt this ICA pursuant to § 252(i) of the Act. That is, the proposed clause reasonably

clarifies that an Adopting CLEC may not seek rate adjustments (where they might otherwise be available) to a date before the effective date of the ICA between the Adopting CLEC and SBC-CA. This appears obvious, but SBC-CA reports that at least one CLEC has attempted to do otherwise. No reason is known why a CLEC could reasonably seek and obtain an adjustment in rates to a date before the effective date of the ICA between it and SBC-CA. Nonetheless, the language creates no known harm to MCIm or any other CLEC, and should save SBC-CA time and expense addressing this issue if otherwise unreasonably asserted by a CLEC.

MCIm contends that this clause has no effect on MCIm and is surplusage. MCIm says that a fundamental rule of contract drafting requires that surplus language be omitted in order to avoid disputes and misunderstandings about application of such language. In response, SBC-CA correctly points out that the Commission has included language in previous ICAs expressly for the purpose of addressing concerns related to Adopting CLECs. The proposed clause may be surplus language with respect to MCIm, and contrary to "normal" rules of contract formation. Nonetheless, ICAs created pursuant to § 252 of the Act are unique, and, consistent with prior Commission practice, it is reasonable to include this language here.

Another reason to include this phrase is that SBC-CA has very limited grounds to complain or seek change to an ICA adopted by a CLEC under § 252(i) of the Act. (See Resolution ALJ-181, Rule 7.2 regarding the limited basis for an ILEC to complain.) That is, an Adopting CLEC may adopt this ICA in its entirety. If the proposed clause is not included here, SBC-CA may not seek inclusion or arbitration of this clause when the ICA is adopted by an Adopting CLEC. On the other hand, if this clause is included in this ICA but opposed by a

CLEC seeking to adopt this ICA, the CLEC has a remedy. The CLEC can negotiate with SBC-CA, then, if necessary, arbitrate this clause before the Commission, under § 252 of the Act. Thus, on balance, inclusion of the clause provides reasonable clarity, does no harm to MCIm or another CLEC, and provides assurance to SBC-CA, while maintaining the ability of an Adopting CLEC to challenge this clause for good cause.

The one exception is the last phrase: "and any Adopting CLEC is foreclosed from making any such claim hereunder." It is unreasonable to include a phrase here that otherwise permanently forecloses the CLEC from making a claim regarding its rights. While it is unclear under what conditions an Adopting CLEC could seek to adjust rates to a date before the effective date of its ICA with SBC-CA, the CLEC should not be prohibited from making this claim in cases where it might be reasonable. MCIm is correct that the rights of the Adopting CLEC are as determined by the Commission, and other regulatory, judicial and legislative bodies, and should not be limited by this ICA.

Thus, with the exception of the last phrase, SBC-CA's proposed clause is adopted.

16.2. Pricing Appendix 4

Issue: Should SBC-CA's proposal for products and services not covered by the Agreement be included in the ICA?

Agreement Reference: Appendix Pricing § 1.11, 1.11.1, 1.11.2.

Positions

SBC-CA proposes clauses that address its obligations to provide a product or service when the rates, terms and conditions for the product or service are not contained in the ICA.

MCIm contends SBC-CA's language should be omitted because it addresses the same subject as, and is in conflict with, agreed-upon language in Appendix Pricing § 1.2.

Discussion

SBC-CA's proposed clauses are adopted.

SBC-CA's proposal clarifies its obligations with respect to providing a product or service when the rates, terms and conditions for the product or service are not contained in the ICA. As SBC-CA points out, the proposed language also makes clear "that MCIm has various options for obtaining services not included in the ICA—including the BFR [Bona Fide Request] process, SBC-CA's tariffs, and SBC-CA's publicly available generic ICA." (SBC-CA Opening Brief, page 241.)

The disputed language was not included in the 2001 ICA, but is reasonably included here to make SBC-CA's obligations clear when parties have not negotiated rates, terms and conditions for a product or service. While SBC-CA acknowledges that certain obligations apply whether or not this language is included in the ICA, including this language is reasonable in order to minimize disputes, particularly with CLECs who adopt this ICA pursuant to § 252(i) of the Act but who are less familiar than MCIm with this situation.

MCIm objects, asserting that proposed § 1.11 covers the same subject as agreed-to language in § 1.2. This is incorrect. Section 1.2 is limited to the subject of inadvertently omitted rates. Specifically, § 1.2 covers products and services having terms and conditions in the ICA but for which "Parties have inadvertently omitted an appropriate Commission-approved rate." If there is no Commission-approved rate, § 1.2 provides how the parties shall proceed pending a Commission determination. In contrast, § 1.11 addresses the situation

where MCIm would like to purchase a product or service "for which rates, terms and conditions are not contained in this Agreement." That is, § 1.11 goes beyond inadvertent omission of a rate. To be operative, § 1.11 requires that three elements be missing from the ICA: rates, terms and conditions.

MCIm also argues that § 1.11 sets up a conflict with § 1.2, and permits SBC-CA to refuse service to MCIm even if a rate were inadvertently omitted. This is incorrect. Section 1.2 applies when the terms and conditions for a product or service are addressed in the ICA, but the rate is inadvertently omitted. Section 1.11 applies when the terms and conditions for a product or service are not included in the ICA, and the rate is also not included. There is no conflict, and no ability for SBC-CA to refuse service based solely on inadvertent omission of a rate.

16.3. Pricing Appendix 7

Issue: Should SBC-CA's proposals regarding non-recurring charges be included in the Agreement?

Agreement Reference: Appendix Pricing § 3.2, 3.3, 3.4, 3.5 *et seq.*, 3.7.

Positions

SBC-CA proposes language it says clarifies when non-recurring charges apply.

MCIm opposes SBC-CA's proposal saying it is confusing, vague, and of questionable accuracy and application.

Discussion

MCIm's proposal is adopted (i.e., that SBC-CA's proposed language be omitted).

Parties agree there was no similar language in the 2001 ICA. No new fact or law justifies making the addition here.

SBC-CA argues that it seeks to clarify when non-recurring charges apply, thereby preventing future disputes. This is belied by the fact MCIm finds the language unclear.

No example is evident of where or how non-recurring charges referred to elsewhere in the ICA do not adequately indicate when they apply, and SBC-CA fails to show an example. No dispute is known to have occurred which this language would have prevented, and SBC-CA fails to identify one.

SBC-CA's proposed language is unreasonably vague. For example, SBC-CA proposes: "Nonrecurring Charges are applicable to all categories of rates." If nonrecurring charges are applicable, they must be stated or identified in the list of prices attached to this Appendix. If not in a rate category, saying they are applicable does not make them so.[57]

SBC-CA's proposed language is also unclear. For example, SBC-CA proposes:

> "3.4. For Resale, when a CLEC converts or adds new service, an End User's existing service, the normal service order charges and/or non-recurring charges associated with said additions and/or changes will apply." (Proposed § 3.4.)
>
> It is unclear if what SBC-CA intends is the following:
>
> "3.4. For Resale, when a CLEC converts or adds new service to an End User's existing service, the normal service order charges and/or non-recurring charges associated with said additions and/or changes will apply."
>
> Alternately, SBC-CA might intend:

[57] If a rate is inadvertently omitted, Pricing Appendix § 1.2 applies. If rates, terms and conditions are missing, Pricing Appendix § 1.11 applies.

> "3.4. For Resale, when a CLEC converts or adds new service, each of the following apply: an End User's existing service charge plus the normal service order charges and/or non-recurring charges associated with said additions and/or changes."

Thus, MCIm's proposal is adopted, and SBC-CA's proposed language is omitted.

17. Price Schedule

17.1. Price Schedule 24

Issue: What are the appropriate non-recurring rates for OA/DA & BLV/I Trunks Trunk Installation per trunk?

Price Schedule Lines 442-443 & Lines 446-447

Positions

SBC-CA contends that these trunks do not interconnect with SBC-CA's network "for the transmission and routing of telephone exchange service and exchange access" under § 251(c)(2)(A) of the Act. SBC-CA says these trunks are on MCIm's side of the POI, and connect MCIm's network with SBC-CA's Operator Assistance (OA), Directory Assistance (DA) and Busy Line Verification (BLV/I) tandems solely for the benefit of MCIm's customer, providing no functionality whatsoever to SBC-CA's customers. As a result, MCIm is not entitled to TELRIC rates for its OA/DA and BLV/I trunks, according to SBC-CA. Rather, SBC-CA says its proposed market-based rates should be adopted.

MCIm asserts, as also argued under NIM 13, that these trunks are used for § 252(c)(2) interconnection, and that prices must, therefore, be based on TELRIC. MCIm proposes continuation of TELRIC-based prices adopted by the Commission in the 2001 ICA.

Discussion

SBC-CA's proposed rates are adopted.

For the same reasons as discussed in NIM 13, these are not interconnection facilities used for § 251(c)(2) interconnection. The trunks at issue here are on MCIm's side of the POI. They exist only within MCIm's network, and solely to provide services to MCIm's customers. They are not accessible to SBC-CA's customers, and they do not carry traffic to or from SBC-CA's network. Thus, they are not used for § 251(c)(2) interconnection.

Further, as SBC-CA correctly explains, the plain language of §251(c)(2) does not obligate ILECs to provide interconnection *facilities* at TELRIC rates. It only requires ILECs to provide *interconnection* at TELRIC rates:

> "each incumbent local exchange carrier has the…duty to provide, for the facilities and equipment of any requesting telecommunications carrier, *interconnection* with the local exchange carrier's network…" (§ 251(c)(2), emphasis added.)

FCC regulations confirm this fact, declaring that TELRIC rates apply to "interconnection" (as opposed to "interconnection facilities"):

> "§ 51.501 Scope.
>
> (a) The rules in this subpart apply to the pricing of network elements, *interconnection*, and methods of obtaining access to unbundled elements…" (SBC-CA Reply Brief, page18, citing 47 C.F.R. § 51.501(a); emphasis added.)

This FCC rule says nothing about interconnection *facilities*. As such, even if MCIm's OA/DA and BLV/I trunks were facilities used to interconnect with SBC-CA's network (which they are not), they still would not qualify for TELRIC pricing because §251(c)(2) of the Act requires interconnection—not interconnection facilities on the CLEC's side of the POI—to be provided at TELRIC rates.

Moreover, an ILEC must make provisions "*for* the facilities and equipment" of the CLEC, but is neither required to provide the facilities themselves, nor make them available at TELRIC prices. SBC-CA satisfies the requirement to make provisions "for" the facilities and equipment of MCIm.

MCIm argues that rates in the existing ICA should continue. Those rates, however, were adopted "until Pacific provides the custom routing MCIm is requesting." (FAR dated July 16, 2001 in A.01-01-010, page 91.) That in turn was based on the FCC concluding that OS/DA is a UNE until customized routing was available. (2001 FAR, page 32, citing FCC UNE Remand Order, paragraph 463.) The 2001 FAR concluded that: "OS and DA will be treated as UNEs in this ICA as along [sic] as Pacific does not provide the specific form of custom routing MCIm has requested." (2001 FAR, page 33.[58]) That is, this treatment was limited.

The FCC has now determined that entrance facilities need not be unbundled and priced at TELRIC. (See NIM 13 above, citing from TRRO at ¶¶ 138 and 139.) The same conclusion applies to the pricing of the trunks here.

MCIm makes no claim that the custom routing it previously sought cannot now be obtained. Moreover, custom routing is no longer the controlling concern since OA, DA and BLV/I are not longer UNEs, and OA, DA and BLV/I need not continue to be treated as UNEs, as was the case in the 2001 ICA.

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[58] The 2001 FAR treats them as UNEs for the 2001 ICA, but does not specifically name them as UNEs. Rather, the 2001 FAR states: "While a state commission has the authority to name additional UNEs, it must be based on the robust 'necessary and impair' analysis described in the FCC's UNE Remand Order. This Commission's determination of which elements constitute UNEs must conform to the process established in the UNE Remand Order." (2001 FAR, page 33.)

Thus, SBC-CA's proposed rates are adopted.

17.2. Price Schedule 25

Issue: Should the price schedule include prices for Digital Cross Connect System (DCS) and Network Reconfiguration Services?

Price Schedule Lines 460-470

Positions

SBC-CA says no. Rather, SBC-CA proposes that the rates be incorporated into this ICA by reference to an SBC-CA tariff.

MCIm says yes. MCIm argues that the actual tariffed rates should be stated in the ICA. According to MCIm, this provides contractual certainty, eases ICA administration, and reduces the potential for SBC-CA making unilateral changes.

Discussion

SBC-CA's proposal is adopted.

SBC-CA's proposal is identical to the treatment of this issue in the 2001 ICA. No new fact or law justifies a change. Parties have successfully used this approach for years, and there is no reason to change this practice now.

Moreover, for all the reasons discussed above, it is reasonable and efficient for the 2006 ICA to refer to an appropriate tariff in all cases where it is feasible. On the other hand, MCIm's arguments regarding contract certainty, administrative ease and potential for unilateral change by SBC-CA are not compelling. (See GT&C 10, xDSL 3, xDSL 5, UNE 7, UNE 19, UNE 40, P. Collo 1 and V. Collo 1.)

MCIm also argues here that DCS and/or network reconfiguration service (NRS) may in the future be used as an interconnection facility or function, or part of a routine network modification, that SBC-CA is required to provide at

TELRIC prices. While MCIm does not now challenge the prices for these functions as set out in Tariff CPUC 175-T, MCIm is concerned that SBC-CA may seek to propose increases that are unlawful or inequitable. MCIm says the advice letter process does not permit MCIm to test the TELRIC basis of proposed rate increases, that SBC-CA is not required to provide TELRIC studies or other cost support with its advice letter filings, and that there is no upper bound on the rate increase SBC-CA may implement through the advice letter process.

To the contrary, whether or not something "may" in the future be required to be priced based on TELRIC does not conclusively show that it must be priced on that basis now. MCIm states it does not challenge current prices levels. Nonetheless, should MCIm later object, MCIm may file a complaint. Alternatively, if SBC-CA seeks to change prices, MCIm may protest the advice letter. If the complaint or protest has merit, the Commission will provide necessary process, potentially including evidentiary hearing. Through that process, potentially including hearing, MCIm may fully test the cost, or any other basis used, for the rate or rate change. Contrary to MCIm's concern, the Commission does not permit rates, or unlimited rate increases through the advice letter process, which are unlawful or inequitable.

17.3. Price Schedule 26

Issue: What are the appropriate recurring rates for Diverse Routing?

Price Schedule Lines 472-480

Positions

SBC-CA proposes that the rates be incorporated into this ICA by reference to an SBC-CA tariff.

MCIm proposes that the actual tariffed rates be stated in the ICA. Also, MCIm asserts that diverse routing must be based on TELRIC, since it might be used in the context of interconnection or dedicated transport UNE.

Discussion

SBC-CA's proposal is adopted (as corrected in SBC-CA's Reply Brief to refer to Schedule CAL.P.U.C 175-T, Section 11).

SBC-CA's proposal is identical to the treatment of this issue in the 2001 ICA. No new fact or law justifies a change. Parties have successfully used this approach for years, and there is no reason to change this practice now.

SBC-CA argues that diverse routing is not a UNE. MCIm fails to conclusively show otherwise. For example, MCIm says diverse routing "could be used in the context of" things that are UNEs. (MCIm Opening Brief, page 249). This does not convincingly show that diverse routing is, or must be, used in this context.

Moreover, for all the same reasons stated above, it is reasonable for the price here to refer to the appropriate tariff rather than list the price itself. (See GT&C 10, xDSL 3, xDSL 5, UNE 7, UNE 19, UNE 40, P. Collo 1, V. Collo 1, and Pr Sch 25.)

17.4. Price Schedule 27

Issue: What should be the price for an NXX migration?

Price Schedule Lines 485-486

Positions

SBC-CA proposes rates to recover costs, which include translations, technician time, administrative costs and project management.

MCIm proposes there be no rate, which MCIm says is consistent with both Commission and FCC precedent.

Discussion

MCIm's proposal (no rate) is adopted.

MCIm's proposal is identical to the treatment of this issue in the 2001 ICA. No new fact or law justifies a change.

MCIm points out that this same issue was decided in MCIm's favor by the Commission in the parties' two prior ICA arbitrations. In both cases, the Commission rejected SBC-CA's proposed nonrecurring rates and adopted MCIm's proposal of no rate. For example, in the most recent arbitration, the Commission found that:

> "the rate for NXX migrations should be deleted from the Pricing Appendix. The cost of NXX migrations should be absorbed by all carriers, in the same manner as opening an NXX code by other carriers. This is consistent with the Commission's outcome in the MFSW/Pacific arbitration." (2001 FAR, pages 7-8.)

Pacific complains that this outcome is unreasonable and inequitable. The Commission has found otherwise. The existing treatment should continue in the absence of new fact or law that merits a change.

17.5. Price Schedule 28

Issue: Should the rate elements for Message Exchange be included in the Price Schedule?

Price Schedule Lines 485-488

Positions

SBC-CA proposes including a rate.

MCIm proposes that no rate be included, but parties rely on terms stated in the GT&C.

Discussion

MCIm's proposal is adopted.

SBC-CA seeks to include what it characterizes as the industry standard billing and collection charge of $0.05 per message for alternatively billed service (ABS). SBC-CA contends this rate was included in the 2001 ICA (Appendix ABT (Alternatively Billed Traffic) § 17). SBC-CA says its proposal here is identical, except to place the charge in the Pricing Schedule of the 2006 ICA.

SBC-CA's proposal, however, conflicts with parties' already agreed-upon language in GT&C § 52 of the 2006 ICA. Section 52 deals with ABS, and parties there agree that: "ABS is subject to the terms, conditions and pricing set forth in the 13 State ABS Agreement between the Parties effective January 1, 2004." As MCIm correctly states, it would be unreasonable to introduce prices elsewhere in this ICA that might conflict with the 13 State ABS Agreement, or in any other way create any conflict. SBC-CA neither states any reason why the 13 State Agreement should not control, nor why the agreed-upon language in GT&C § 52 is inadequate.

17.6. Price Schedule 31

Issue:

SBC: Should the rates for Transit and Local TRANSITING-LOCAL TRAFFIC be included in the Price Schedule

MCI: Should the elements and rates for Transit and Local TRANSITING-LOCAL TRAFFIC be included in the agreement?

Agreement Reference: Price Schedule Lines 535-537

Positions

This issue is the price issue corollary to Issue NIM 26 and Reciprocal Compensation 18.

SBC-CA believes transit service is not required under §§ 251 and 252 of the Act, is not subject to this arbitration, and may not be arbitrated unless both parties voluntarily consent to the negotiation/arbitration of such items. SBC-CA says it has not consented. Therefore, SBC-CA believes that this ICA should exclude rates, terms, and conditions for transit traffic, and parties should address the matter by private commercial agreement or tariff. If the Commission determines otherwise, SBC-CA offers a separate Transit Traffic Service Appendix, which it says is more comprehensive than that offered by MCIm.

MCIm says transit traffic is an integral part of indirect interconnection, is subject to negotiation and arbitration under that Act, and must be priced at TELRIC rates. MCIm proposes that the rates for transit service approved by the Commission for the 2001 ICA continue in the 2006 replacement ICA.

Discussion

MCIm's proposal is adopted.

As discussed above (see NIM 26 and Reciprocal Compensation 18), transit service is a fundamental component of indirect interconnection. The applicable price standard is TELRIC. MCIm proposes the same transit service rates that were included in the 2001 ICA. SBC-CA does not oppose the transit rates themselves, only their inclusion in the 2006 ICA. No new facts or law, however, merit a change from the approach used in the 2001 ICA. MCIm's proposed language and rates are identical to those in the 2001 ICA, and are adopted here.

17.7. Price Schedule 44

Issue: Should the collocation elements and rates be included in the agreement?

See agreed Appendix Physical Collocation § 20.2; agreed Appendix Virtual Collocation § 12.3; Attachment DFN-1 of Exhibit 10; Pricing Schedule; and SBC CA Accessible Letter CLECC00-064.

Positions

SBC-CA proposes collocation rates from SBC's 13-State generic collocation pricing schedule.

MCIm proposes rates from the currently effective SBC-CA Accessible Letter CLEC00-064 (Acc Ltr 00-064).

Discussion

MCIm's proposal is largely adopted, but rates shall be subject to true-up or change as described below.

In brief summary, the record here shows there was confusion or misunderstanding between parties regarding this item. SBC-CA apparently believed parties were negotiating collocation rates based on a 13-State generic collocation pricing schedule available on SBC's website. MCIm either did not have the same understanding, or believed SBC-CA's May 26, 2005 application to be SBC-CA's exact and specific proposal. SBC-CA's application contained agreed-upon language stating: "The rates and charges for collocation are set forth in the Pricing Schedule." (Physical Collocation Appendix § 20.1.1.[59]) The application, however, did not contain collocation prices. In its June 20, 2005 response, MCIm proposed continuation of current prices in Acc Ltr 00-064.[60] In rebuttal testimony served on September 2, 2005, , SBC-CA attached SBC-CA's

[59] Similar language is in the Virtual Collocation Appendix, §§ 12.3 and 16.3

[60] Even if SBC-CA had put its 13-State generic collocation prices in the Pricing Appendix with its application, MCIm had the right to propose continuation of existing prices in its response.

proposed 13-State generic collocation pricing schedule, and recommended adoption of those prices here. At hearing in late September, parties further explained the matter and various alternatives.

Parties agree that current collocation charges are from Acc Ltr 00-064. As MCIm explains, these rates are compliant with all applicable law. For example, in part based on rates in Acc Ltr 00-064 being compliant with law, the Commission and the FCC determined that SBC-CA was in compliance with all necessary sections of TA 96. This included just and reasonable interconnection and network element charges pursuant to § 252(d)(1), based on TELRIC where necessary and appropriate. As a result, the checklist for SBC's § 271 application was satisfied, and SBC's § 271 application was approved. As applied in the 2001 ICA, physical collocation rates are, with limited exception, "subject to true-up retroactive to the date of this agreement based on the outcome of the collocation pricing phase of OANAD." (2001 ICA, § 7(b).) As also applied in the 2001 ICA, virtual collocation rates are subject to change based on later Commission order. No new fact or law justifies a change in those rate levels, or that they should be subject to true-up or change based on later Commission order.

SBC-CA argues that its proposed prices are superior, representing "*compromise rates* that have resulted from negotiations with many CLECs in many SBC jurisdictions." (SBC-CA Opening Brief, page 246.) To the contrary, whether or not negotiated with many CLECs in many jurisdictions, they are not negotiated and agreed to here by MCIm.

SBC-CA further states that:

> "*It is significant to note that MCIm has already agreed to these same rates in Wisconsin, Indiana, Missouri, Kansas and Oklahoma* [footnotes deleted]. *The fact that both Parties accepted these rates*

> *in other jurisdictions supports the fairness thereof.*" (SBC-CA Opening Brief, page 246, emphasis in original.)

Again, whether or not MCIm has agreed to these rates elsewhere, MCIm has not agreed to these rates here. Moreover, while agreement elsewhere might support the fairness of SBC-CA's proposed rates here, it does not conclusively determine their fairness. Rather, the determination of the rates here—considering fairness and all relevant factors—must be based on the record in this proceeding, along with experience and precedent in California. It is not necessarily driven by what MCIm might have agreed to elsewhere but opposes here.

SBC-CA argues that Acc Ltr 00-064 rates were adopted as interim rates subject to later true-up based on a subsequent Commission decision, and are now out-of-date. SBC-CA asserts its 13-State generic collocation rates are the best rates available and should be adopted. SBC-CA asserts neither party presented evidence on the TELRIC cost basis for these rates, but the best evidence regarding the reasonableness of SBC-CA's proposed rates is that they have been adopted in many other jurisdictions.

To the contrary, Acc Ltr 00-064 rates are compliant with law. SBC-CA is correct that it presented no evidence here on the cost basis for its rate proposal. Therefore, the best evidence regarding the reasonableness of collocation rates is that current rates are consistent with law, are reasonable and should be continued.

SBC-CA argues that its proposed rates should be adopted because they address the elements provided for in the Physical Collocation and Virtual Collocation appendices, while rates proposed by MCIm do not address many of the elements in those appendices. This is not convincing. Even if true, there is

no inconsistency between the terms and conditions in the negotiated 2006 appendices and the existing Acc Ltr 00-064 rates for the services MCIm currently purchases, and says it intends to purchase in the future. The absence of some rates should cause little problem. Moreover, a cure, if necessary, is available.

That is, MCIm points out that any term or condition in the Collocation Appendices for where there is no matching Acc Ltr 00-064 rate may be treated pursuant to § 1.2 of the Pricing Appendix. This is a reasonable approach, and is adopted. That is, given how this issue developed between parties and was presented to the Commission, it is reasonable to find that a rate not included here, but for an element MCIm elects to purchase in the future, has been "inadvertently omitted."[61] As such, Pricing Appendix § 1.2 applies, including that parties agree to amend the 2006 ICA to include a Commission-approved rate for the desired element. If no Commission-approved rate exists, parties agree to negotiate an interim rate, subject to later true-up. This reasonably addresses what should be limited cases of MCIm desiring an element for which prices are not in Acc Ltr 00-064.

SBC-CA proposes that the Collocation Appendices presented here be deleted in their entirety if MCIm really prefers to buy collocation from SBC-CA's tariff under Accessible Letter rates. This is rejected. It would be unreasonable to delete these appendices in their entirety with no replacement since at least some terms, conditions and rates are necessary for collocation.

---

[61] This is regarding an element for which terms and conditions are in the Collocation Appendices, but the rate is not present. If there are also no terms and conditions, § 1.11 of the Pricing Appendix applies, which includes using the Bona Fide Request process, as and where appropriate.

A likely alternative would be to utilize the 2001 agreement language and practice, along with 2001 prices. This is similarly rejected. Large parts of the 2006 ICA Physical and Virtual Collocation Appendices presented here contain negotiated, agreed-upon language. Other parts have been arbitrated here. (See, for example, Chapters 14 and 15 above.) Neither party asserts that this agreed-upon language fails to be an improvement upon the 2001 ICA. There is no compelling reason to abandon parties' considerable work on agreed-to language, and revert to the 2001 language. This is similarly true with the arbitrated portions. There is no compelling reason to negate parties' considerable time and effort arbitrating certain issues, and the Commission's work to resolve these items, and revert to the 2001 language.

One example is the DC Power Amperage Charge. MCIm points to agreed-upon language regarding charging for DC amps over one of two power feeds. (2006 ICA, Appendix Physical Collocation, § 19.2.4.1). This contrasts with the current method of charging for the total combined DC amps capacity over both power feeds. SBC-CA concurs that this is agreed-to language. This is a very important matter for MCIm. (See Reporter's Transcript, Vol 7, pages 710-711.) There is no known reason to abandon the agreed-to language in the 2006 ICA, and revert back to 2001 ICA language and practice.

The one exception to adopting MCIm's proposal is that the Physical Collocation rates adopted here should be subject to later true-up. Similarly, the Virtual Collocation rates should be replaced with later Commission determined rates. This is because, as SBC-CA points out, Acc Ltr 00-064 rates were intended to be interim and temporary, and apply only until the Commission made a final rate determination. SBC-CA reports it expected that determination in September 2000, but none has yet been filed.

To account for this, the 2001 ICA required that adopted Physical Collocation rates, with limited exceptions, be subject to later true-up. (2001 ICA, Appendix Collocation, § 7.1.(b).) The 2001 ICA also required that adopted Virtual Collocation rates be subject to replacement based on later Commission decision. (2001 ICA, Appendix Collocation, § 10.1.) The Commission may or may not later issue final rate determinations. The 2006 ICA should include the same provisions as those in the 2001 ICA for such eventuality.

As such, the 2006 ICA shall contain the same last three sentences that are in the 2001 ICA at Appendix Collocation § 7.1(b) for Physical Collocation. Specifically, the 2006 ICA Appendix Physical Collocation-CA § 20.2 shall be changed from:

> "20.2 The rates and charges for collocation are set forth in the Pricing Schedule."

To:

> "20.2 The rates and charges for collocation are set forth in the Pricing Schedule. With the exceptions noted below, all charges for all forms of Physical Collocation are subject to true-up retroactive to the date of this agreement based on the outcome of the collocation pricing phase of OANAD. Standard cage and shared cage collocation charges are not subject to the aforementioned true up, except for site preparation, conditioning charges, BRF and ICB pricing. Any collocation rates approved by the Commission, for any forms of Physical Collocation, subsequent to the Effective Date of this Agreement shall replace the rates described above prospectively at such time as the Commission decision becomes final and no longer subject to appeal."

Similarly, the 2006 ICA shall contain language much like that in the 2001 ICA at Appendix Collocation § 10.1 for Virtual Collocation. The language

for 2006 is modified from the 2001 language only to delete the reference to a closed Commission proceeding (A.96-08-040), delete the reference to "interim" (to promote parallel treatment within the 2006 ICA), and recognize that the Commission may or may not later order retroactive treatment (which will govern any updated rates based on specific Commission order). It also includes other minor wording changes, but no change to the substance. Specifically, the 2006 ICA Appendix Virtual Collocation § 16.3 shall be changed from:

> "16.3 Application of Rates and Charges
>
> Beginning on and after the Effective Date of this Agreement, the Parties agree that the rates and charges for Collocation shall be as set forth in this Appendix and in the Pricing Schedule applicable to collocation ("Collocation Rates"). The Parties agree that the Collocation Rates shall apply, on a prospective basis only, beginning on the Effective Date of this Agreement, to all existing CLEC collocation arrangements, including those established before the Effective Date of this Agreement. Because the Collocation Rates will apply on a prospective basis only, neither Party shall have a right to retroactive application of the Collocation Rates to any time period before the Effective Date, and there shall be no retroactive right of true-up for any time period before the Effective Date."

To:

> "16.3 Application of Rates and Charges
>
> Beginning on and after the Effective Date of this Agreement, the Parties agree that the rates and charges for Collocation shall be as set forth in this Appendix and in the Pricing Schedule applicable to collocation ("Collocation Rates"). Collocation rates later determined by the Commission in the OANAD or other appropriate proceeding shall replace these rates. The Parties agree that the Collocation Rates shall apply, on a

> prospective basis only, beginning on the Effective Date of this Agreement, to all existing CLEC collocation arrangements, including those established before the Effective Date of this Agreement, unless later specifically ordered otherwise by the Commission. Because the Collocation Rates will apply on a prospective basis only, neither Party shall have a right to retroactive application of the Collocation Rates to any time period before the Effective Date, and there shall be no retroactive right of true-up for any time period before the Effective Date, unless later specifically ordered otherwise by the Commission."

Thus, MCIm's proposed rates are adopted, subject to later true-up or change as provided above.

17.8. Price Schedule 50

Issue: Should the elements and rates for Additional Engineering, Additional Labor and Miscellaneous Services be included in the agreement?

Price Schedule Lines 760-782

Positions

SBC-CA proposes that rates for these elements be incorporated into this ICA by reference to SBC-CA's California Tariff 175-T, and be subject to change as Tariff 175-T may change.

MCIm proposes that the specific rates in SBC-CA's California Tariff 175-T be listed in the ICA for these elements, and they not be subject to change except by amendment to the ICA.

Discussion

SBC-CA's proposal is adopted.

MCIm is satisfied with the rate levels for these elements as currently set out in the 175-T tariff, but is concerned that there is no upper limit to the

increase SBC-CA might seek through an advice letter filing. Further, MCIm states that these types of charges "could" be for work requested in connection with interconnection, UNEs or routine network modifications, all of the prices for which must be based on TELRIC, according to MCIm.

To the contrary, it is reasonable to incorporate these prices by reference. Parties agree that the 2001 ICA did not include additional engineering, additional labor and miscellaneous services. Nonetheless, several other items in the 2001 ICA refer to tariffs, no evidence here shows this practice posed any significant problems for either party, and no new fact or law justifies any change.

Moreover, for all the same reasons stated above, it is efficient and reasonable for the prices here to refer to the appropriate SBC-CA tariff. (See GT&C 10, xDSL 3, xDSL 5, UNE 7, UNE 19, UNE 40, P. Collo 1, V. Collo 1, Pr Sch 25 and Pr Sch 26.) For example, no substantial incremental burden is imposed by referencing the appropriate SBC-CA tariff. SBC-CA cannot unilaterally change a tariff that must be approved by either the Commission or the FCC. The price certainty and protection MCIm seeks is provided by the tariff and the regulatory structure. The incremental cost, if any, to reference a tariff is not shown by MCIm to exceed the cost and complexity of negotiating and obtaining approval for an amendment to the ICA. Finally, whether these items "could" be used with elements that are required to be priced at TELRIC levels does not show that these items "must" be used with those elements, or that the prices for these items must be based on TELRIC. MCIm does not now object to the level of the prices for these items but, if SBC-CA proposes an increase to which MCIm objects, MCIm may protest the advice letter and obtain all appropriate and necessary protection at that time.

O R D E R

IT IS ORDERED that, within seven days from today, Pacific Bell Telephone Company, doing business as SBC California (SBC-CA), and MCImetro Access Transmission Services LLC (MCIm) shall:

1. Jointly file and serve an entire Interconnection Agreement (ICA), for Commission approval, that conforms to the decisions in this Final Arbitrator's Report.
2. Separately file and serve a statement which:
   a. identifies each criterion in the federal Telecommunications Act of 1996 and the California Public Utilities Commission Rules of Practice and Procedure (e.g., 47 U.S.C. 252(e); Rules 2.18, 4.2.3, and 4.3.1 of Resolution ALJ-181) by which negotiated and arbitrated portions of the ICA must be tested;
   b. explains whether each negotiated and arbitrated portion of the ICA passes or fails each test; and

c. states whether or not the ICA should be approved or rejected by the California Public Utilities Commission.

This order is effective today.

Dated January 20, 2006, at San Francisco, California.

/s/ BURTON W. MATTSON
Burton W. Mattson
Administrative Law Judge
Arbitrator

ATTACHMENT A
ISSUES AND OUTCOMES

LINE NO.	ISSUE	BRIEF DESCRIPTION	OUTCOME		
			SBC	MCI	OTHER
CHAPTER 4 - General Terms and Conditions					
1	GT&C 3	One free name change	X		
2	GT&C 5	Evergreen provision		X	
3	GT&C 6	Deposits			X
4	GT&C 7	Failure to pay or dispute bill	X		
5	GT&C 8	Audit requirements	X		
6	GT&C 9	Intervening law clause	X		
7	GT&C 10	MCI purchase from either ICA or tariff		X	
CHAPTER 5 – Definitions					
8	Def 3	End User		X	
CHAPTER 6 - Network Interconnection Method (NIM)					
9	NIM 4	Definition of Access Tandem		X	
10	NIM 5	Definition of Local Interconnection Trunk Group	X		
11	NIM 8	Definition of Points of Interconnection		X	
12	NIM 9	Mutual agreement necessary for interconnection	X		
13	NIM 11	OS/DA, 911, mass calling and meet-point trunk facilities within §251(c)(2)	X		
14	NIM 12	Single POI		X	
15	NIM 13	Pricing of leased facilities for interconnection	X		
16	NIM 14	Interconnection limitations/requirements	X		
17	NIM 15	Commingling local and other traffic	X		
18	NIM 17	Relative Use Factor	X		
19	NIM 20	911 interconnection pricing	X		
20	NIM 21	911 POI	X		
21	NIM 22	Inward operator assistance interconnection T&C		X	
22	NIM 23	Trunk forecasting detail	X		
23	NIM 24	Trunk traffic measurement	X		
24	NIM 25	Trunk augment provisioning interval	X		
25	NIM 26	Transit traffic		X	
26	NIM 28	Switched traffic that is PSTN-IP-PSTN or IP-PSTN	X		

LINE NO.	ISSUE	BRIEF DESCRIPTION	OUTCOME		
			SBC	MCI	OTHER
CHAPTER 7 – Invoicing (INV)					
27	INV 1	Disputed amount payment withholding	X		
28	INV 2	Amounts disputed into escrow	X		
29	INV 3	Deadline for dispute documentation		X	
30	INV 4	Contractual stake date limits		X	
CHAPTER 8 - Operational Support Systems (OSS)					
31	OSS 1	Unauthorized use indemnity	X		
32	OSS 3	Inaccurate ordering or usage cost		X	
CHAPTER 9 – Performance Measures (PM)					
33	PM1	Reservation of rights to challenge a performance remedy plan	X		
CHAPTER 10 - Resale (Resale)					
34	Resale 1	Resale to 3rd carrier		X	
35	Resale 5	Resale liability & indemnity for 911	X		
CHAPTER 11 - Digital Subscriber Line and Line Sharing (xDSL)					
36	xDSL 2	xDSL liability and indemnity language	X		
37	xDSL 3	Time & materials charges in ICA or tariff	X		
38	xDSL 5	Acceptance and Cooperative Testing; Rates in ICA or tariff	X		
CHAPTER 12 - Reciprocal Compensation (RC)					
39	RC 2	NPA NXX used to rate calls		X	
40	RC 4	Intercarrier compensation for FX and FX-like calls		X	
41	RC 5	FX traffic segregation		X	
42	RC 6	Traffic excluded from § 251(b)(5) scope		X	
43	RC 7	Rates for calls without CPN	X		
44	RC 8	Applicability of tandem interconnection rate		X	
45	RC 9	True-up mechanism for ISP bound traffic		X	
46	RC 13	Termination of intraLATA interexchange traffic	X		
47	RC 14	Special Access (dedicated private line) terms and conditions		X	

LINE NO.	ISSUE	BRIEF DESCRIPTION	OUTCOME		
			SBC	MCI	OTHER
CHAPTER 12 (continued)					
48	RC 15	Switched access traffic delivered over local interconnection trunk groups	X		
49	RC 16	FCC NPRM on intercarrier compensation		X	
50	RC 17	VOIP traffic compensation	X		
51	RC 18	Transit traffic as part of this agreement		X	
CHAPTER 13 - Unbundled Network Elements (UNE)					
52	UNE 1	geographic limitations on providing UNEs		X	
53	UNE 2	Lawful UNE definition		X	
54	UNE 3	Transition when UNEs declassified		X	
55	UNE 5	Separation of UNEs		X	
56	UNE 6	Selling UNEs to other carriers		X	
57	UNE 7	Purchases from tariff/UNE appendix sole vehicle		X	
58	UNE 19	Tariff restrictions	X		
59	UNE 24	SBC requirement to construct			X
60	UNE 40	Network reconfiguration in Appendix or tariff	X		
CHAPTER 14 - Physical Collocation (Phy Co)					
61	Phy Co 1	MCIm purchase from either ICA or tariff		X	
62	Phy Co 2	Limitation of liability			X
63	Phy Co 3	Insurance requirement	X		
64	Phy Co 5	Indemnification provision	X		
65	Phy Co 6	Power metering	X		
CHAPTER 15 - Virtual Collocation (Vir Co)					
66	Vir Co 1	MCIm purchase from either ICA or tariff		X	
67	Vir Co 3	Indemnification provision	X		
68	Vir Co 5	Limitation of liability	X		
69	Vir Co 6	Insurance requirement	X		

LINE NO.	ISSUE	BRIEF DESCRIPTION	OUTCOME		
			SBC	MCI	OTHER
CHAPTER 16 - Pricing Appendix (Pr App)					
70	Pr App 2	Language re notice to adopting CLECs			X
71	Pr App 4	Products and services not in ICA	X		
72	Pr App 7	SBC proposals re non recurring charges		X	
CHAPTER 17 - Price Schedule (Pr Sch)					
73	Pr Sch 24	NRC for OA/DA & BLV/I Trunk based on TELRIC or market prices	X		
74	Pr Sch 25	Prices for Digital Cross Connect System and Network Reconfiguration services	X		
75	Pr Sch 26	Recurring charges for diverse routing	X		
76	Pr Sch 27	Price for NXX migration		X	
77	Pr Sch 28	Rates for message exchange (ABS)		X	
78	Pr Sch 31	Inclusion of rates for transit and transitting local traffic		X	
79	Pr Sch 44	Collocation elements and rates			X
80	Pr Sch 50	Rates for additional engineering, additional labor and misc. services	X		

Other Category:

1. GT&C 6: Adopt 2001 ICA language.
2. UNE 24: Adopt SBC-CA for §§ 9.2 and 15.3; adopt MCIm for § 20.1.19.
3. P. Collo 2: Adopt SBC-CA except §§ 3.1.2 and 3.1.4
4. Pr. App 2: Adopt SBC-CA except for last phrase in proposed § 1.9.1.
5. Pr. Sch 44: Adopt MCIm except (a) where no rate exists for an item in the Collocation Appendices that is desired by MCIm it will be treated pursuant to Pricing Appendix § 1.2 and (b) include 2001 ICA provisions that physical collocation rates are subject to true-up and virtual collocation rates are subject to change based on later Commission order.

Note regarding NIM 4, 8, 12 and Recip Comp 2, 4, 5, 6, 8, 9, 16: For this arbitration, these items are not ripe or moot. The existing 13-State Amendment shall control, subject to further process July l, 2007. MCIm's proposed language if the issue is resolved here is not adopted.

Note regarding Attachment A: This attachment is intended as a general summary for the assistance of the Commission and parties. If there is any conflict between the text in Final Arbitrator's Report (FAR) and this attachment, the text in the FAR controls the outcome.

(END OF ATTACHMENT A)

CERTIFICATE OF SERVICE

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

Dated January 20, 2006, 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 ensure 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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The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074, TTY 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.

Mattson Notice of Availability