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proposed by Pacific in § 30 goes beyond the fraud language in Attachments 5 and 6 by explicitly addressing who should bear the responsibility and liability for fraud.

Discussion:

In its Comments, AT&T asserts the Draft's approach to fraud in Issue 24 is inconsistent with the outcome on Issues 15 and 199. AT&T proposes that the arbitrator delete § 30.1 because it is so sweeping, it covers every conceivable kind of fraud. Also, says AT&T, the clause is not consistent with Pacific and AT&T's agreement in Section 5 of Attachment 16 that both of them bear responsibility for taking measures to prevent fraud. It is axiomatic under the law of negligence that, where there is a legal duty – for example a duty created by a contract provision such as Attachment 16, § 5 – the breach of that duty constitutes negligence. If either AT&T or Pacific should fail to undertake the fraud-prevention measures required, thereby permitting the fraud to occur, that party is responsible. Pacific's proposed § 30 flies in the face of these Attachment 16 provisions.

According to AT&T, the Draft's resolution of Issue 24 is inconsistent with recent New York and Kansas state commission decisions the arbitrator cited in her ruling on Issue 15. The same reasoning applied in Issue 15 – that common carriers should bear full responsibility for their unlawful acts and any omissions that cause injury to others -- is applicable here, says AT&T.

The question of who should and should not bear responsibility for fraud should be left to a factual investigation at the time the fraud occurs, and to the existing, well-developed body of case law on responsibility for fraud. Both AT&T and Pacific have security organizations whose mission is to investigate fraud and determine responsibility, says AT&T.

AT&T's position is adopted, and § 30.1 is deleted from the ICA. Section 30.1 says Pacific shall not be liable to AT&T for any fraud associated with any

AT&T customer account. AT&T has presented convincing arguments that § 30.1 is inconsistent with the conclusion in Issue 15 that carriers must bear responsibility for their unlawful acts and omissions. This same concept should apply in Issue 24 as well. It is not appropriate to make a blanket statement that Pacific “shall not be liable to AT&T for any fraud...” As AT&T says, the issue of fault will be determined through an investigation of the specific circumstances.

Pacific’s proposed §§ 30.2 and 30.3 are also rejected. They are largely duplicative of sections in other parts of the ICA.

Issue 25

Should Pacific’s Name Changes section be adopted?

AT&T’s Position:

AT&T asserts that Pacific’s proposed language is not appropriate in any ICA and should be not included in this ICA. AT&T points out that in the arbitration hearings, Pacific’s witness testified that Pacific treats name change expenses of large corporate customers as part of the cost of serving those particular customers.²⁵ AT&T contends that the same should hold true of name change expenses in the “interconnection agreement” world.

Pacific’s Position:

Pacific contends that it incurs substantial costs when a CLEC changes its name. There are many Pacific records, particularly billing records and E911 records, that require manual changes when a CLEC changes its name. Pacific points out with merger and acquisition activity in the telecommunications industry at a high level, name changes for CLECs are very common. Pacific’s proposed § 31 is reciprocal, and provides that when a party to the ICA changes its name, the

²⁵ Mr. Auinbauh, Tr. 584.

name-changing party has to give advance notice to the other party and pay the costs incurred by the other party as a result of that name change.

Discussion:

AT&T's position is adopted. There is no reason to treat CLEC customers any differently from large corporate customers. Pacific agreed that large corporate customers are not charged for changing their name, and neither should CLEC customers.

Issue 302

Should Pacific's Reservation of Rights to Appeal or Petition for Reconsideration be included?

AT&T's Position:

AT&T contends that Pacific's proposed § 1A should be rejected, along with other "Reservation of Rights" clauses that Pacific proposed in Preface § 8A and Attachment 6 § 15. Instead, there should be one single section addressing this subject. AT&T proposes that the following section be added to the Preface, in lieu of all other Reservations of Rights clauses:

Nothing in this Agreement alters, diminishes or expands the right of either Party to initiate or participate in any legal proceeding on any topic, whether related to the Act, FCC regulations, Commission actions or related to any other matter. Notwithstanding this Agreement, each Party is free to take any position or to oppose any position in any such legal proceeding.

AT&T contends that this language is a much cleaner and more appropriate way to address Pacific's concerns.

Pacific's Position:

Pacific contends that § 1A matches § 1 of the 1996 ICA between AT&T and Pacific. AT&T has not stated a business reason for its opposition to this previously-agreed language. Pacific asserts that proposed § 1A is reciprocal and is an important protection for both Parties and should be adopted. Pacific contends

that in the absence of this language, it could be argued that by executing and filing the conformed ICA, the parties waive such post-arbitration legal rights.

Discussion:

AT&T's proposed language is adopted and should be used to replace Pacific's proposed language in § 1A. It is a more general reservation of rights clause and would cover the appeal rights listed in Pacific's proposed § 1A. In any event, parties' rights to appeal an ICA arbitrated by a state commission are clearly established in § 252(e)(6) of the Act, and that right cannot be rescinded by any language, or lack of language, in an ICA arbitrated under § 252. Pacific's proposed Preface § 8A was rejected in the discussion under Issue 13, and Pacific's language in Attachment 6 § 15 was rejected in the discussion under Issue 297.

Issue 303

Should Pacific's or AT&T's versions of Section 1 "Provision of Local Service and Unbundled Elements" be adopted?

AT&T's Position:

AT&T contends that there is no evidence that the parties experienced problems with § 1 during the term of the current contract. Therefore, Pacific's edits to the language in the 1996 agreement should be rejected. AT&T asserts that Pacific's change in § 1.5 takes away protections that AT&T and its customers currently have in the event Pacific decides to withdraw a telecommunications service. Pacific also proposes to add multiple "except" clauses to §§ 1.3 and 1.4.

Pacific's Position:

Pacific contends that AT&T's proposed language is inaccurate and unclear. Subsection 1.3 as proposed by AT&T, is false and misleading because there is no requirement that Resale Services have to be connected to "other Network Elements, Ancillary Functions, Combinations, Resale Services, or other services

provided by Pacific.” Pacific finds AT&T’s “subject to” phrases in 1.3 to be unclear and proposes changing those phrases to “to the extent provided in.”

Pacific contends that its proposed language in Subsection 1.4 makes it clear that Pacific may discontinue UNEs, combinations, etc. that Pacific would otherwise be required to provide to AT&T under the agreement if an Intervening Law event occurs that terminates the previous requirement for such UNE, Combination, etc. This result is required by FCC Rule 51.301(c)(3) and Commission decisions. (This is also discussed under Issue 10.)

Pacific contends that Subsection 1.5 makes it clear that if Pacific properly withdraws a retail service pursuant to the tariff process, it can also discontinue that service for AT&T’s resale end users after 105 days’ notice to AT&T, provided that Pacific makes available to AT&T for resale any substitute retail service if that substitute retail service is subject to the Act’s resale requirements.

Discussion:

Pacific’s position in § 1.3 is adopted. Pacific is required to combine network elements with other network elements but is not required to combine resale services with network elements.

Pacific’s language in § 1.4 is adopted with some modification. Pacific shall remove the initial “except” clause. Subsection (ii) must be modified to refer to Section 8.3 “Material Changes in Law” since AT&T’s proposed language was adopted in the discussion under Issue 13. Subsection (iii) shall be deleted. AT&T should have certainty in the services and elements available under the life of this agreement. While changes in the law may lead to changes in the elements or other services available to Pacific, it is not reasonable for Pacific to unilaterally discontinue providing an element or service to AT&T on the basis that it would be “unreasonable” or “burdensome” for Pacific. If Pacific decides to discontinue

offering a particular element or service, Pacific should present that in the next round of negotiations in three years.

AT&T's proposed language for § 1.5 is adopted. Section 1.5 has two options which Pacific can provide if it decides to withdraw a Resale Service. AT&T's language makes it clear that while "grandfathering" of the service would be offered to AT&T to the extent that it is available to Pacific's retail customers, subsection (b), which requires Pacific to offer AT&T an alternate service that is subject to the Act's resale requirement, does not require that Pacific offer that option to its retail end user customers. AT&T should be able to receive any alternate service which is available and subject to the resale requirements, even if Pacific does not choose to offer an alternate to its own end user customers.

Issue 304

Should Pacific's obligation to AT&T, under Section 2.2, to assure that a subsequent vendor selected by AT&T can provision UNEs, etc. as well as Pacific be limited to a "reasonableness" standard?

AT&T's Position:

AT&T's proposed language for § 2.2 was taken from the 1996 ICA between the parties. AT&T contends that the language should be adopted since Pacific produced no evidence of any problems with this wording.

Pacific's Position:

Pacific cannot guarantee that, if AT&T voluntarily decides to purchase its UNEs, Ancillary Functions, Combinations, or resale services from another vendor, that the vendor selected by AT&T will be able to do as good a job as Pacific. Pacific therefore contends that its obligations in such a transition" should be limited to a "reasonableness standard."

Discussion:

AT&T's language is adopted. The language AT&T proposes does not, as Pacific states, require Pacific to guarantee that AT&T's vendor will be able to do

as good a job as Pacific. It merely requires Pacific "to exercise their good faith reasonable efforts to effect an orderly and efficient transition" to the other vendor so that the level and quality of services are not degraded.

Issue 305

Shall the cost to the Parties of complying with any requirements imposed by law or any requirements imposed by the ICA be borne by each party (AT&T's proposal), or borne by each Party "except as otherwise provided by applicable law or the ICA" (Pacific's proposal)?

AT&T's Position:

AT&T is opposed to Pacific's proposal to add an "except" clause to Preface § 6. These Pacific-proposed edits would do nothing but confuse and burden the ICA and cause future disputes.

Pacific's Position:

Pacific says that under AT&T's proposed language each party must comply at its own expense with all applicable law that relates to such party's obligations under the agreement, even if the law places the burden of paying the expenses of complying with such obligations on the beneficiary of the obligations instead of on the obligor.

If Pacific's proposed phrase "Except as otherwise provided by Applicable Law or this Agreement" is not added, AT&T's language could be interpreted to require Pacific to provide UNEs to AT&T without AT&T having to pay the TELRIC cost thereof since under AT&T's language, each party has to comply with its obligations at its own expense. Pacific's language would prevent that illegal and unintended result. Pacific's language would require AT&T to pay for UNEs as required by both the law and the Agreement, even though it is Pacific's obligation under both the law and the Agreement to provide the UNEs to AT&T.

Discussion:

The arbitrator is at a decided disadvantage to resolve this issue since the draft ICA that was provided did not show the disputed language. In an attempt to resolve the dispute, the arbitrator referred to the joint mark-up of disputed language presented by the parties on February 18, 2000.

Pacific's premise is that its introductory "except" clause, "Except as otherwise provided by Applicable Law of this Agreement," is the only language in the ICA which makes it clear that AT&T has to pay for the UNEs. However, Pacific's interpretation is a tortured view of the obligations under this ICA. The availability of services under the ICA is clearly subject to the prices adopted for those elements, even without Pacific's "except" clause in § 6. The "except" clause does not appear to add clarity to § 6 and shall be deleted.

AT&T does not explain why it recommends changing the reference to "resale services" obtained under the agreement to "local services" provided under the agreement. "Local services" is much less exact and overlaps with other items in the series, which reads: "Network Elements, Ancillary Functions, Combinations, Resale Services and other services pursuant to this agreement." Pacific's proposed language is reasonable and is adopted.

Issue 307

Should Disputes regarding billing be governed by Attachment 3 (Alternative Dispute Resolution (ADR)) or Attachment 13 (Billing and Recording)?

AT&T's Position:

The parties have proposed very similar language for dealing with billing disputes, with AT&T's proposal appearing in Attachment 13 (Billing), § 12, and Pacific's proposal appearing in Attachment 3 (ADR).

AT&T suggests that its proposed § 12 be adopted and included in both Attachments 3 and 13.

Pacific's Position:

According to the Joint Matrix, the parties will agree to have the informal dispute resolution process in Attachment 13 if it is also retained in Attachment 3. Pacific believes the settlement agreement is as follows: The informal dispute resolution process will appear in both Attachment 13 and in Attachment 3. Pacific believes that means that AT&T's proposed Sections 12.1 and 12.2 of Attachment 13 should be adopted and Pacific's proposed Sections 4 and 5 and the first two sentences of Section 6.1 of Attachment 3 should be adopted, with some exceptions that are addressed in other issues.²⁶

Pacific believes the relevant sections have to be in Attachment 3 since their application is broader than just "billing" disputes, and if AT&T wants to refer to them in Attachment 13, that should be done by incorporation by reference into Attachment 13 to avoid inconsistencies and any ambiguities that may result. Pacific proposes that the arbitrator either approve the proposed resolution set forth above or include the subject of billing disputes only in Attachment 3.

Discussion:

The parties appear to agree that the informal dispute resolution process be included in both Attachment 13 and Attachment 3. However, they disagree as to the specific language to adopt, which is a key element of including the language in both attachments. AT&T proposes that its language be adopted for both Attachments, while Pacific proposes that AT&T's language appear in Attachment 13 and that Pacific's language, appear in Attachment 3. As an alternative, Pacific says that the subject of billing disputes should appear only in Attachment 3.

²⁶ Subsection 12.2.1 of Attachment 13 is addressed in Issue 207. The last two sentences of Section 5 of Attachment 3 are addressed in Issue 29 under Attachment 3.

Review of the language in the two sections shows that they do not mesh well. The issue is further complicated by the fact that the parties have dueling dispute resolution clauses in Attachment 3, which also must be resolved. AT&T's language in sections 12.1 and 12.2 of Attachment 13 provides greater detail for the informal process to follow in attempting to resolve billing disputes. Section 12.2 points to the *Alternative Dispute Resolution Process delineated in Attachment 3*, as the next step in the process if parties are unable to resolve the dispute through the informal process outlined in § 12.1.

Sections 12.1 and 12.2 are quite specific to billing and belong in Attachment 13, but not in Attachment 3, which is the *Alternative Dispute Resolution process for all disputes under the ICA*. In reviewing both AT&T and Pacific's proposed language for Attachment 3, it is difficult to see where the specific language on billing would appropriately be placed. AT&T's language in §§ 12.1 and 12.2 is adopted for Attachment 13, but will not be added to Attachment 3. The disputed issues in Attachment 3 will be addressed under Matrix issue 27.

Issue 309

Should Pacific's or AT&T's version of the Referenced Documents section be adopted?

AT&T's Position:

AT&T describes this as a "minor" matter where Pacific proposed edits to the existing contract language to which AT&T responded. AT&T points to the Joint Matrix of Disputed Issues, February 25, 2000 version for a description of its position. However, the matrix merely restates that AT&T made a compromise proposal to Pacific on February 21, 2000 and is awaiting a response.

Pacific's Position:

Pacific contends that it is appropriate to add the word "tariff" in a section which includes a list of various documents referenced in the ICA. The second

language change Pacific proposes is to add “or referenced by” to include documents referred to in the ICA, as well as documents specifically incorporated into the ICA. Pacific proposes to preface the final sentence in Section 26.4 with the following clause: “Except as otherwise stated in this Agreement...” Pacific says that language is needed to clarify that it is not in conflict with the second to the last sentence, and other terms of the agreement.

Pacific also contends that AT&T proposed some minor variations, which Pacific could not accept because they did not address the problems Pacific found in AT&T’s generic language.

Discussion:

The first change that Pacific proposes to add to AT&T’s proposed language--to add the word “tariff” to the list of reference materials or publications which could be referred to in the ICA--is appropriate. There certainly could be reasons to refer to a tariff in the ICA. Pacific’s second proposal is also appropriate. There could be a need to reference documents, while not specifically incorporating them into the ICA. Those two language changes which Pacific proposed are adopted. However, Pacific’s proposed “except” clause is rejected. The “except” clause provides uncertainty and dilutes the value of having a binding contract between the parties. In case of disputes between referenced documents and this ICA, this ICA prevails.

B. Attachment 3: Alternative Dispute Resolution

Issue 27

Should the Commission adopt Pacific’s or AT&T’s Dispute Resolution Attachment?

AT&T’s Position:

AT&T contends that its Attachment 3, by and large, preserves the existing ADR contract language. AT&T proposes to keep the structure of Attachment 3,

while adding an expedited process, thus fulfilling the Commission directive in D.98-12-069.

AT&T argues that Pacific's attempt to limit recourse to ADR, and to make the process expensive and burdensome when ADR is used, would result in most, if not all, ICA disputes being handled by this Commission. Pacific would limit mandatory commercial arbitration to disputes where only nominal amounts of money are at stake. This position ignores the realities of modern commercial dispute resolution, in which parties agree to arbitrate every dispute arising under their agreements, no matter how large. The Commission previously approved a dollar cap of \$25 million in the 1996 ICA between Pacific and AT&T for all disputes under that ICA. AT&T believes that amount is too small to capture many of the claims arising under the ICA and therefore proposes that the dollar limit be doubled.

Pacific's Position:

Pacific contends that its proposal combines the best features of the current ICA's Attachment 3 with the Dispute Resolution provisions voluntarily negotiated between Pacific and MFS WorldCom. Pacific has added an Expedited Dispute Resolution section, based on the sections proposed by AT&T. Pacific also made changes to the MFS WorldCom language in limited areas to make clear Pacific's positions in areas disputed by AT&T. Pacific urges that its proposed Attachment 3 be adopted as a package, rather than selecting portions from both AT&T and Pacific.

Discussion:

AT&T's position is adopted. AT&T's proposed language in Attachment 3 will be adopted, except as described below in Issues 28-35. AT&T's language parallels to a large extent the current ICA. Also, as Pacific mentions, it is difficult to "mix-and-match" the two proposals without creating a jumbled result.

Therefore, since AT&T's position has largely been adopted in Issues 28-35, it makes sense to adopt AT&T's version of Attachment 3, with some ordered changes as described in the sections which follow.

Issue 28

What claims should be subject to Alternative Dispute Resolution Attachment

AT&T's Position:

AT&T contends that all claims of \$50 million or less should be subject to mandatory ADR pursuant to AT&T's proposed § 2.1. Parties would retain the ability to bring complaints before the FCC or any court of competent jurisdiction if the facts alleged would also amount to violations of federal law or FCC rules.

AT&T asserts that Pacific's proposal is intended to narrowly limit the disputes that go to ADR. ADR, as now constituted, is clearly a robust mechanism for allowing the parties to police improper conduct without burdening the Commission or the courts except in narrowly defined circumstances. ADR should be expanded, not curtailed.

Pacific's Position:

Pacific contends that ADR is intended to work rough justice and has limited procedural protections for the parties and no appellate rights under either party's proposal. As a result, its use should be limited to less important issues where a "split the baby" result is tolerable for the parties. Large and important issues should be handled by the courts, the CPUC or the FCC, as appropriate, or through voluntary arbitration.

Pacific questions whether a private arbitrator would be qualified to review Total Element Long Run Incremental Costs (TELRIC) cost studies and set "To Be Determined" (TBD) prices or properly devise the rules for line sharing between Pacific and AT&T. Pacific contends that important policy issues and disputes involving significant monetary amounts require industry-wide uniformity that

private arbitrators cannot provide. Pacific's proposed Attachment 3 should be adopted as properly limiting the scope of mandatory arbitration to billing disputes and other relatively small disputes where industry-wide uniformity or expertise in telephony issues is not necessary.

Discussion:

In its Comments, Pacific asserts that the \$50 million dollar limit for use of the ADR process goes far beyond what Pacific would voluntarily agree to. The Commission is legally precluded from ordering Pacific to participate in ADR regarding claims it has not voluntarily agreed to submit to ADR.

Pacific states it cannot be forced to waive its right to bring its claims or defend claims before an authority of competent jurisdiction. In this case, Pacific has not agreed that claims as large as \$50 million should be submitted to ADR, and the Commission cannot compel it to do so.

Pacific's position is adopted. As Pacific states, the Commission does not have the authority to require Pacific to participate in an ADR process when Pacific does not agree to the maximum dollar amount which is subject to ADR. The first sentence of AT&T's Section 2.1 shall be modified to delete the \$50 million dollar ceiling and will read as follows: "Except for disputes or matters (i) described in Section 2.1.3 below...." Pacific's proposed section 6.2 will become the new section 2.1.3. Pacific's section 6.2 must be updated to delete the reference to section 6.5.

This dollar limitation on use of the ADR process also applies to the Expedited Dispute Resolution processes described under Issue 31.

Pacific raises the specter of unqualified private arbitrators attempting to review TELRIC studies to set TBD prices or determine the rules for line sharing between AT&T and Pacific. Disputes of TBD prices and other technical issues are subject to the ADR process in the current agreement. Neither party has indicated

that arbitrators have not understood the technical issues with which they have been confronted. Certainly, the optimum solution is to raise an issue to the Commission in the appropriate generic proceeding and get a definitive answer which applies to all carriers, and parties are encouraged to take that step as a long term solution. However, the Commission does not have the resources to adjudicate every dispute under the ICA. The ADR process is a means to resolve disputes in an expeditious manner.

Issue 29

What discovery should be permitted in the private arbitration process?

AT&T's Position:

AT&T contends that no discovery should be permitted as part of ADR except for the exchange of documents that the arbitrator deems necessary to understand and resolve the dispute. The current ICA limits discovery in ADR. AT&T contends that the broad discovery Pacific proposes is subject to misuse, and defeats the purpose of ADR.

Pacific's Position:

Pacific contends that reasonable discovery (including depositions) should be at the discretion of the arbitrator based upon the facts of the specific case. Pacific contends that there is no reason to limit discovery.

Discussion:

AT&T's position is adopted. Discovery has been a contentious issue between AT&T and Pacific in this proceeding, and the implementation of a discovery process would slow the ADR process considerably. Pacific has not provided any evidence that the lack of discovery under the current ICA has caused problems in the dispute resolution process.

Issue 30

Should arbitration proceedings be confidential?

AT&T's Position:

AT&T contends that arbitration proceedings should not be confidential as a general matter. However, special provisions may be made for proprietary materials that may be disclosed in the course of an arbitration. AT&T's proposed rule would still allow parties to protect trade secret material from public disclosure, while affirming the generally public nature of arbitration proceedings.

Pacific's Position:

Pacific contends that private arbitration is a means for parties to resolve their disputes short of litigation, but it does not afford the same procedural rights and protections to the parties as does traditional litigation. Due to the greater risk of error and reduced procedural protections associated with the private arbitration process, Pacific asserts that a private arbitrator's award should not have any precedential value and should not be made public. Pacific also asserts that confidentiality of commercial arbitrations is the norm in the industry.

Discussion:

In its Comments, AT&T urges the arbitrator to reconsider the proposed outcome on this issue. At a minimum, the arbitrator should adopt the following language making it clear that both parties have the right to disclose information, including confidential information, to federal and state regulators, not merely in response to requests, but at the initiative of either party:

Notwithstanding the foregoing, either on a Party's own initiative in connection with a legal or regulatory proceeding, or in response to a request from a court or government agency, either Party shall have the right to disclose such information on a confidential basis, including information qualifying to be treated as Confidential Information under Section 13.3, to any mediator, arbitrator, state or federal

regulatory or legislative body, the Department of Justice or any court.

AT&T points to the Draft's statement that the current ADR confidentiality clause has caused problems for the Commission. One reason for that was the ambiguity over the circumstances under which a party had the right to disclose ADR information to the Commission, even on a confidential basis. The parties should have that right. The Commission and other regulatory bodies have a right to see that information on a confidential basis.

According to AT&T, a general rule of non-confidentiality would benefit the CLEC community as a whole and further local competition. If Pacific takes untenable positions in private arbitrations, CLECs should be made aware of those positions. If a private arbitration elucidates the meaning of a particular clause in the AT&T/Pacific contract, other CLECs, some of whom may have similar contract language in their ICAs with Pacific, need to know that. If parties go to court, says AT&T, the testimony and results would not be confidential.

Pacific's proposed language relating to confidentiality of the ADR process in Attachment 3, Section 6.5.2 shall be adopted, with modification. AT&T's proposed language cited above will be added to Section 6.5.2 to make it clear that regulatory and legislative bodies have access to information from the ADR process. The current confidentiality rule has caused problems for the Commission in workshops and in the hearings in this arbitration proceeding. Regulatory agencies with oversight over the telecommunications industry have the right to information needed to regulate carriers under their jurisdiction.

As Pacific states, confidentiality is the norm in commercial arbitrations and should be adopted here. It will facilitate the process if the record and outcome are not made public, and since decisions by private arbitrators are not in any way

precedent-setting, there is no reason for other CLECs to know the outcome of a particular ICA dispute.

Issue 31

For purposes of expedited dispute resolution (EDR), what should be the definition of a "service-affecting dispute"?

AT&T's Position:

AT&T contends that its definition of a service-affecting dispute implements the substance of D.98-12-069, while Pacific's does not. In D.98-12-069, the Commission recommended that EDR be available:

"to address targeted service complaints, including but not limited to such situations as, service termination and where impending or recently implemented Pacific changes would substantially impair a CLC customer's service or its quality." Conclusion of Law 39, p. 211.

AT&T asserts that Pacific's § 10.1 would require a service-affecting dispute to meet four separate criteria before it would qualify for EDR. Pacific's proposal would limit EDR to disputes which affect either party's end users, so it would not apply to AT&T in its role as a wholesale customer of Pacific. In addition, AT&T points out that Pacific's triggering requirement for the adverse effect sets an artificially short deadline, which would deter the use of EDR.

Pacific's Position:

Pacific contends that EDR should be limited to emergency situations. AT&T's citation of the Commission's definition in D.98-12-069 refers to a Commission-based expedited formal complaint process, which is not a commercial arbitration process.

Pacific asserts that the four criteria that it proposes for EDR are important to ensure that the right disputes are handled by EDR rather than regular ADR or other dispute resolution mechanisms. With the expedited process of EDR you lose

even more rights than in ADR. Therefore, EDR should be limited to truly emergency situations where ADR would otherwise be used.

AT&T's proposed scope of EDR imposes no requirement of "emergency" circumstances to justify the further dilution of the parties' procedural rights. In addition, AT&T's proposal makes EDR applicable to TBD pricing and changes in the law and regulations. As explained under Issue 28, Pacific contends that neither ADR, much less EDR, should apply to these kinds of disputes which require Commission or FCC expertise and uniformity throughout the industry.

Discussion:

AT&T's proposed § 15.1 is adopted, with modification. In D.98-12-069 the Commission limited the types of disputes which should be settled through an EDR process to those which could impact an end user's service. AT&T would expand the definition to include: (1) interruptions in service to AT&T itself, since AT&T is a wholesale customer of Pacific; (2) To Be Determined (TBD) pricing; and (3) implementation of changes in law and regulation.

The purpose of EDR in D.98-12-069 was to attempt to resolve quickly any dispute which would cause disruption to an end user's service, and that definition will be maintained in this arbitration case. It is difficult to see how an interruption in service to AT&T would not also include interruption in service to AT&T's end user customers.

TBD pricing (which is addressed further in Issue 33 below) and changes in law and regulation (which is addressed in Issue 32 below) do not lend themselves to an EDR process.

Pacific's language, on the other hand, adds an unnecessary layer of complexity to the process. It requires that the affected party seek relief within 60 days of when the party seeking expedited resolution first knew or should have known that such adverse effect might occur. This could be difficult to administer

and could potentially be the subject of dispute. It is not simple or straightforward in all instances to determine when someone "first knew or should have known" something.

AT&T's proposed language in § 15.1 will be modified to read as follows:

This Section 15 describes the procedures for an expedited resolution of disputes between PACIFIC and AT&T arising under this agreement which (1) are likely to materially adversely affect, substantially impair or cause termination of service to either Party's End Users, or materially adversely affect or substantially impair the quality of such service, and (2) which cannot be resolved using the procedures for informal resolution of disputes contained in Section 3.

Issue 32

Should the EDR process be used to amend the ICA to accommodate changes in the law?

AT&T's Position:

AT&T contends that nothing in D.98-12-069 requires that an EDR process be limited to service-affecting disputes. Rather, by using the phrase "such as," the Commission held open the possibility of designating other time-sensitive disputes for resolution under EDR. There is no good reason not to expedite arbitration of contractual implementation of the change in law process. The only dispute will be the parties' differing interpretations of the new law or rule that made them unable to negotiate implementing language. This presents only a legal question to resolve in the EDR process.

Pacific's Position:

Pacific contends that there is no persuasive reason to apply an expedited emergency EDR process to issues as important as amendments to the ICA to comply with changes in the law. Pacific argues that neither ADR, much less EDR,

should apply to these kinds of disputes, which require Commission or FCC expertise and uniformity throughout the industry.

Discussion:

Pacific's position is adopted. AT&T has not presented any convincing reason to expedite implementing changes in the law.

Issue 33

Should the EDR process apply to TBD pricing?

AT&T's Position:

AT&T favors the use of EDR to resolve disputes over TBD pricing. The current contract provides that ADR will apply if the parties fail to agree on a TBD price for services not priced in OANAD or for which the agreement is silent on price. AT&T contends that Pacific often withholds the provision of a new service because of disputes over its pricing.

Pacific's Position:

Pacific asserts that TBD pricing does not require emergency resolution because the price can always be paid subject to true-up. Contrary to AT&T's claim that it refuses to provide a service while pricing disputes are pending, Pacific offers the service at a specified price subject to true-up.

Discussion:

The Commission and the parties have invested years in the development and adoption of TELRIC costs and prices. It is mind-boggling that AT&T believes that a commercial arbitrator, with no technical background, could review TELRIC cost studies on an expedited basis and make meaningful recommendations for any needed changes to the studies to make them TELRIC-compliant.

As AT&T states, the current ICA allows those pricing disputes to be addressed through the ADR process, and we will continue that practice here since

parties have not indicated any problems. Subsection (b) of AT&T's proposed § 15.1, "concern TBD pricing, as defined in Attachment 8, for any services, Network Elements or Combinations to be provided pursuant this Agreement, or" will be deleted. See revised § 15.1 in Issue 31.

AT&T's proposed § 4 shall be modified to mirror the language in § 15.1. Having slightly different language in different sections of the ICA to describe the same process could lead to controversy.

Issue 34

Should the American Arbitration Association (AAA) be the mandatory arbitration agency in the case of EDR?

AT&T's Position:

AT&T's proposed language in § 5 of Attachment 3 is the existing, previously agreed-upon contract language. Section 5 states that the rules of the AAA shall apply to ICA ADRs but that ADRs will not be conducted under AAA auspices unless the parties agree. Pacific proposes to retain this approach for regular ADR but to mandate use of AAA arbitrators for EDR. AT&T contends that there is no reason for this distinction.

AT&T asserts that the AAA process is expensive and sometimes cumbersome. AT&T proposes a mechanism by which two standing arbitrators are selected in advance and remain available to serve at short notice throughout the term of the ICA.

Pacific's Position:

Pacific contends that the AAA should serve as a default source of an EDR or regular ADR arbitrator only if the parties cannot agree on an arbitrator. Pacific asserts that AT&T's approach is fundamentally flawed and potentially susceptible to fraud and abuse or bias because AT&T's proposal provides no effective way for the parties to determine whether conflicts of interest, or other kinds of biases, exist in connection with the other party's proposed arbitrators. Under AT&T's

proposal, once an arbitrator gets selected to be one of the two permanent arbitrators, the arbitrator remains for the life of the ICA. Under the current ICA, and under Pacific's proposal, the arbitrator would hear only one arbitration.

Under Pacific's proposed Attachment 3, in the event that the ADR option for dispute resolution is used, the parties can mutually agree on an arbitrator for each arbitration or apply to AAA if they cannot agree on an arbitrator. Pacific states that its proposed language does not prevent the parties from agreeing to an arbitrator outside the AAA process.

Discussion:

AT&T's position relative to § 5 is adopted. There is no reason that the same rules should not apply to both ADRs and EDRs, and in spite of Pacific's claim, its language under § 10.2.2 relating to the EDR process does not indicate that there is an alternative to the use of AAA. Under AT&T's language, the ADR or EDR will not be conducted under the auspices of AAA unless the parties mutually agree otherwise. If AAA is found to be costly or cumbersome, parties can agree on an alternative.

AT&T's position relative to § 6 is rejected; § 6 is to be removed in its entirety. Section 6 does not appear anywhere on the Matrix of Disputed Issues, but both parties discuss the issue of how arbitrators are selected. AT&T discusses the issue briefly under Issue 34, while Pacific's discussion is included in Issue 27. AT&T's proposal is untried and could be subject to bias. Pacific's proposed language does not deal with the issue of the selection of arbitrators in the same detail as AT&T's. AT&T and Pacific should refer to § 6 in the current ICA, which provides considerably more detail on the appointment and removal of arbitrators. If the parties cannot agree on appropriate language based on the language in the current ICA, then the first sentence of Pacific's § 6.5.1 will govern.

Issue 35

Should subsequent California Public Utilities Commission (CPUC) decisions override private arbitrations prospectively?

AT&T's Position:

AT&T contends that the ICA already contains appropriate language addressing the role of subsequent CPUC decisions in relation to private arbitrations under the ICA. AT&T asserts that to replace existing contract language with Pacific's new language would only result in having the Commission resolve every arbitrated dispute.

Pacific's Position:

Pacific contends that when an arbitration result conflicts with a subsequent Commission decision, the Commission decision controls and should preempt the arbitration result prospectively. Pacific asserts that this result is necessary to assure that regulators can take control of a situation and reestablish appropriate industry uniformity and enforce appropriate public policy determinations in the face of conflicting arbitration decisions.

Discussion:

AT&T's sections 2.1.2, 2.1.2.1 and 2.1.2.2 are adopted. In its Comments to the DAR, AT&T points out the arbitrator interpreted the issue too narrowly. Pacific's proposed language in § 10.6.3, which the arbitrator adopted in the DAR, provides that subsequent decisions by the Commission that conflict with the private Arbitrator's decision in the dispute resolution process shall supersede the Arbitrator's decision prospectively. AT&T's proposed language recognizes that both the FCC and the Commission's rulings should over-rule the private arbitrator's decision. AT&T's proposed language is consistent with the "material change in the law" clause adopted in Issue 13 (Preface, § 8.3). Section 8.3 relates to material changes instituted by regulatory bodies (as well as action by legislative

or judicial bodies), and would therefore apply to both FCC and Commission decisions.

C. Attachment 4: Directories, Directory Listings, Directory Assistance Listings and Subscriber List Information

Issue 36

Should Pacific be required to provide directory listings and white page directories to AT&T on the same terms without regard to whether the AT&T End User is served by resale, UNEs or AT&T facilities only?

Discussion:

The parties notified the arbitrator by e-mail on April 27, 2000, that they had settled most of Issue 36. The parties shall conform the final agreement to that settlement.

The only remaining issue is the competing versions of Section 1.1 of Attachment 4. In its Comments, AT&T cites §251(c)(3) of the Act which requires ILECs "to provide . . . nondiscriminatory access to network elements...on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." In the *Local Competition Order* (at ¶ 218), the FCC determined that "'nondiscriminatory,' as used throughout section 251, applies to the terms and conditions an incumbent LEC imposes on third parties as well as on itself." AT&T asserts that its proposed language in § 1.1 conforms to the *Local Competition Order* by providing for access to directories and listings that is at least equal to the access that Pacific "provides to itself, its affiliates and third parties." AT&T criticizes Pacific's proposed language which provides access comparable to that provided to Pacific's end users. According to AT&T, this is inappropriate because AT&T does not stand in the shoes of an end user, but is a CLEC entitled under the Act to access at least equal to that which Pacific provides to itself and to third parties.

AT&T's proposed § 1.1 is adopted. AT&T's proposed language reflects the Act's broad requirement for nondiscriminatory access, while Pacific's does not.

Issue 37

Should AT&T be required to pay tariff rates for additional listings (e.g., different directory listings) for its customers?

AT&T's Position:

As a result of D.97-01-042, Pacific mutually agreed with AT&T that Pacific could provide published directory listings to third parties without compensating AT&T, so long as Pacific listed AT&T's customers in its directories without charge to AT&T. Pacific now proposes to charge AT&T for any listings over and above the basic listing, while not compensating AT&T for the sale of those additional listings to third parties. AT&T proposes that the same agreement that exists for basic listings be applied to additional listings.

Pacific's Position:

Pacific contends that AT&T should be required to pay for additional listings for its end users just as Pacific's retail end users pay for these optional listings. Pacific's obligation is to provide a basic listing for CLEC end user customers; however, Pacific does offer optional listings to facilities-based CLECs at the same tariffed price that is available to Pacific's end users.

Discussion:

In its Comments, AT&T indicates that the Final Report should include clarifying language concerning the meaning of the terms "additional" and "enhanced" directory listings. AT&T says that during negotiations, Pacific said that additional listings refers to additional basic-style listings, while enhanced listings refers to listings with additional information or formatting. It was AT&T's understanding the additional information and formatting would not be

passed on to third parties that purchase the listings from Pacific. For that reason, AT&T agreed to certain charges for enhanced listings if those charges also applied to Pacific's end-users.

However, according to AT&T, when AT&T and Pacific met to prepare the Joint Matrix of Disputed Issues, Pacific stated that enhanced listings and additional listings are the same thing. The Draft uses the two terms synonymously, in accordance with Pacific's explanation. AT&T requests that the FAR clarify that the term "enhanced listing" means listings with additional information or formatting and not merely additional basic-style listings, which the ICA refers to as "additional listings."

Pacific also addresses Issue 37 in its Comments. The Draft exempts AT&T from paying for additional listings, as a *quid pro quo* for Pacific's ability to sell these listings to third parties, as it does for basic listings. There is no evidence in the record that additional listings have the commercial value that basic listings do. Additional listings do not contain the same value. Furthermore, additional listings are discretionary. Allowing AT&T's end-users access to free additional listings could inappropriately expand the size and cost of the directory. AT&T should be required to pay the same tariff rates for additional listings that Pacific's end-users pay.

Pacific does not address the difference between "enhanced listings" and "additional listings" in either its Comments or Reply Comments. However, it is instructive that Pacific consistently refers to "additional listings." AT&T expressed its understanding that "enhanced listings" would not be passed on to third parties, and since Pacific does not address enhanced listings, it appears that enhanced listings are not passed on to third parties and do not need to be addressed in Issue 37.

Clearly, the *quid pro quo* between the parties relates only to the basic listing, which is provided at no charge to AT&T. In exchange, Pacific has the right to provide AT&T customer information to third-party vendors. Under the terms of the Commission's directory listings decision, D.97-01-042, Pacific would be precluded from supplying additional listings to third-party vendors unless Pacific compensates AT&T. Ordering Paragraph 2 of that decision reads as follows:

“Pacific and GTEC [GTE California] shall not release CLC directory-listing information to third-party database vendors or DA providers absent the express consent of the CLC and mutually agreeable compensation to the CLC.”

According to Pacific, if AT&T's end user customers purchase an additional listing, that listing will be provided to third-party vendors. That outcome is in conflict with D.97-01-042, which requires that AT&T be compensated. The Commission's decision does not exclude additional listings from the compensation requirement. Therefore, AT&T's position is adopted. Under AT&T's plan, the “compensation” the company receives is that it will not be charged for the additional listings of its end users. If Pacific believes that additional listings should be excluded from this requirement, Pacific should petition for modification of D.97-01-042.

Issue 38

Should the arbitrator adopt the following provision: “Pacific shall compensate AT&T for directory listing errors caused by Pacific using the same methods and procedures that Pacific uses to compensate its own End Users for directory listing errors caused by Pacific.”

AT&T's Position:

AT&T merely wants to hold Pacific responsible for errors that Pacific causes--and use the same methods that Pacific uses to compensate its own

customers for such errors. The fact that AT&T might attempt, through an AT&T tariff provision, to limit its liability to its customers for such Pacific errors is beside the point.

Pacific's Position:

Pacific contends that AT&T has the opportunity to verify the accuracy of its end users' listings before the book goes to print. As a result, AT&T should be responsible for the accuracy of the listings. In addition, Pacific asserts that its compensation to its end users for directory listing errors is strictly limited by its Tariff A2.1.14 (Limitation of Liability), which limits compensation to a portion of the customer's rate for local exchange service. Pacific contends that AT&T is able to include a limitation in its tariffs regarding directory listing errors.

Discussion:

Pacific's position is adopted. AT&T says that it wants to hold Pacific responsible for the errors caused by Pacific. However, since AT&T supplies the initial information about its subscriber and has opportunities to verify the accuracy of its end users' listings, it appears that it would be difficult to determine which carrier is to blame for a particular error. AT&T does not propose a way to determine the varying responsibilities of the two carriers. AT&T's proposed language could lead to finger-pointing on both sides, and result in unproductive disputes over which party is at fault.

As a matter of fact, both carriers have provisions in their tariffs which strictly limit their liability for directory listing errors. Any amounts paid out under the terms of the tariff will be minimal, and as Pacific says, "not worth the administrative expense to put into practice."

Issue 39

Should Pacific rely on the CLEC Handbook and other public documents created by Pacific to supply terms and conditions for directory listings information, or should terms and conditions be established in the ICA?

AT&T's position:

AT&T asserts that Pacific's proposed reliance on the CLEC Handbook and other documents over which it has exclusive control would place it in the position of unilaterally altering the terms of any ICA, which incorporates those documents by reference. Even though Pacific solicits input from CLECs, Pacific is the final arbiter of what goes into Pacific's own documents. AT&T does not object to references to Pacific documents when they clarify or provide technical details that are too numerous to include in a commercial contract. Wherever there are references to Pacific-produced documents in the ICA, those references must be construed as being to the version of the document(s) in effect at the time the ICA is executed. AT&T contends that subsequent changes in those documents must not automatically become part of the ICA—since that would nullify the contract as a whole.

The situation of references to tariffs is only slightly different, in that Pacific does not have exclusive control over the outcome of tariff filings. In some cases the parties have *agreed* to be governed by a tariff. What AT&T objects to is Pacific's insistence that its tariffs must control certain subjects covered in the ICA. Pacific has exclusive control over when it proposes to change an existing ICA by proposing a change in a tariff price, term or condition. AT&T has no say in whether Pacific proposes the change, or what contour the proposed change will take. While AT&T may protest Pacific's tariff changes, it is only one voice among many with regard to changes in Pacific's tariffs.

Pacific's Position:

Pacific contends that the referencing of the tariffs ensures that all customers purchasing listing services are provided with non-discriminatory, parity treatment. The use of tariffs in the listings context is important to avoid differing treatment of CLECs and non-CLECs. In addition, Pacific asserts that the appropriate use of the CLEC Handbook, as approved in the MFS WorldCom arbitration, is appropriate here as well.

Discussion:

The issue of reliance on the CLEC Handbook and other documents was addressed on a generic basis under Issue 7, and AT&T's position was adopted. In Issue 6, it was determined to look at the issue of whether actual rates and terms and conditions should be included in the ICA itself, or be addressed through reference to Pacific's tariff, on a case-by-case basis.

AT&T's position regarding §§ 1.3.1, 2.1, 2.5, 2.7, 2.8, 3.1, and 3.2 is adopted. The rates, terms and conditions under which Pacific offers directory listings and directory assistance database arrangements will be included in the ICA. In light of the disputed language under § 2.8, it appears that Pacific's DALIS tariff contains its own restrictions on the use of the directory assistance data, and Pacific does not say what those restrictions are. The language could be in conflict with the decision on Issue 43 that the third-party use of the information AT&T provides should be limited to the provisioning of directory assistance service. In this example, tariffs may not provide the protections that AT&T's end user customers deserve.

Issue 40

Should Pacific offer directory listings and directory assistance database arrangements under tariff instead of negotiating terms and conditions in the ICA?

This issue has been addressed under Issue 39 above.

Issue 41

Should Pacific deliver directories to AT&T customers listed in the directories on the same basis as Pacific delivers directories to its own end users listed in the directories?

The parties notified the arbitrator by e-mail on April 27, 2000 that they had settled Issue 41. The parties shall conform the final agreement to reflect that settlement.

Issue 42(a)

Should AT&T receive two customer information pages free of charge, as it does under its current ICA with Pacific?

AT&T's Position:

AT&T receives two customer information pages in Pacific's White Pages directory free of charge in the current ICA. In D.97-01-042, Pacific was required to provide a maximum of two information pages, at charges based on the costs which Pacific itself incurs to provide its own informational listings.²⁷ AT&T contends that because Pacific has not provided any information about its own costs in compliance with D.97-01-042, Pacific should continue to provide two pages free of charge.

Pacific's Position:

Pacific contends that it offers all CLECs on a nondiscriminatory basis 1/8 of a page in the Customer Guide. Pacific asserts that this amount of space is sufficient for CLECs to provide contact information to end users, and that in the MFS WorldCom arbitration, the arbitrator approved that amount. CLECs may also purchase up to an additional two pages at tariff prices. Pacific contends that this exceeds Pacific's obligations under the Act, and that the limitation of two pages prevents the books from becoming bulky and cumbersome.

²⁷ D.97-01-042 at § III.D.

Discussion:

Pacific's position is adopted. D.97-01-042 does not require that CLECs be given two pages in the customer guide at no charge. AT&T is reminded that the Commission approved the current ICA with Pacific before D.97-01-042 was issued. The LECs are authorized to charge the CLECs for inclusion in the customer guide pages "based on the LECs' cost to provide their own informational listings."²⁸

AT&T's language in § 1.5.1 of Attachment 4 would allow AT&T to obtain *more* than two pages with anything over the first two pages charged at cost-based rates. AT&T's language conflicts with Ordering Paragraph 10 of D.97-01-042 which states: "CLCs shall be allowed a two-page limit in Pacific's and GTEC's directory informational listings to provide key information regarding the CLCs offered services and what the CLCs local calling area is."

Issue 42(b)

Should charges for additional pages be based on costs that Pacific itself incurs to provide its own information listings, as required by D.97-01-042?

AT&T's Position:

AT&T contends that its proposed language merely restates the Commission's rule established in D.97-01-042 at page 26, that Pacific may charge no more than the costs of providing its own information pages.

Pacific's Position:

Pacific contends that the additional charges should be as set forth in Pacific's 175-T tariff, and that D.97-01-042 does not compel a different result. Although D.97-01-042 concluded that the LECs should base their charges for

²⁸ D.97-01-042, O.P. 11 at 38.

inclusion of the CLECs' information listings on the costs which the LECs themselves incur to provide their own informational listings, Pacific argues that this decision was issued prior to the Supreme Court's ruling in AT&T v Iowa Utilities Board. In that decision, the Supreme Court limited the UNEs to those which met the "necessary and impair" standard. Pacific asserts that the Act requires that the ILECs be entitled to recover the costs of the facilities provided to CLECs, and that the correct cost is Pacific's cost to provide these pages to the CLECs. Pacific contends it is speculative to assume these costs are the same, since providing the informational page to CLECs would involve billing, ordering, provisioning and other interactions between CLEC and Pacific personnel.

Discussion:

Pacific states that D.97-01-042 has been superseded by the Supreme Court's ruling in AT&T v Iowa Utilities Board, which limits UNEs to those which meet the "necessary and impair" standard of the Act. In D.97-01-042, the Commission was operating under its own independent state authority to set a fair recovery for including CLECs in the Customer Guide. The Commission did not declare the Customer Guide to be a UNE, so the necessary and impair standard does not control, and the Commission's proposed pricing quoted under Issue 42(a) above is still in effect and should govern in this case.

Pacific's tariff rate will be adopted on an interim basis until the Commission approves a cost study for Pacific, which is compliant with D.97-01-042. The interim rates will be subject to true-up once the Commission adopts the final cost-based rate.

If Pacific believes that the cost standard adopted in D.97-01-042 is inappropriate, Pacific should petition to modify the decision. In the meantime, the provisions of that decision are in effect. Pacific's proposed language in Section 1.5.1 shall be modified to replace the reference to "cost based rates" with "tariff

rates.” Pacific acknowledges that its tariff rate is not based on the cost standard in D.97-01-042.

Issue 42(c)

Should information pages of carriers, including Pacific and its affiliates, be commingled?

AT&T’s Position:

AT&T contends that Pacific must not only treat similarly-situated CLECs alike, it must treat CLECs no worse than it treats its own operations. Pacific proposes to set apart its own and its affiliates’ customer information pages. AT&T contends that competitive equity dictates that the information pages appearing in the “Customer Guide” section of Pacific’s White Pages present carriers in a random order, which would require commingling of Pacific and its subsidiaries with the CLECs.

Pacific’s Position:

Pacific contends that AT&T’s proposal infringes upon Pacific’s management of its telephone directories. As the D.C. Circuit decided in *GTE v. FCC*, on March 17, 2000, the Act is not without limits and does not remove the ILEC from the management control of its own business.²⁹

Discussion:

Pacific’s position is adopted. Section 1.5.2 shall be deleted. AT&T should not be allowed to dictate how the Customer Guide is organized. As the recent ruling of the D.C. Circuit indicates, the Act does reinforce the ILECs’ control of their facilities.

²⁹ *GTE Service Corp. v. FCC*, 200 WL 2555470 (D.C. Cir. 2000)

Issue 42(d)

Should customer guide information common to all carriers and customers be presented in a nondiscriminatory fashion?

AT&T's Position:

AT&T contends that the information in the customer guide should not cause customers to believe that the information applies to Pacific more generally than to other carriers.

Pacific's Position:

Pacific contends that there is no disagreement that the information included by the CLECs in the Customer Guide should be done so on a non-discriminatory basis. However, Pacific asserts that AT&T's proposal is an attempt to dictate the content of Pacific's Customer Guide.

Discussion:

Pacific's position is adopted, for the same reasons given in Issue 42(c) above.

Issue 43

Should the Arbitrator adopt language permitting Pacific's sale of AT&T's customer listings to third parties conditioned on the terms "set forth in Pacific's DALIS tariff Schedule CAL PUC No. D5" and "Pacific's Publication Rights tariff" (Pacific's proposal) or conditioned on selling the listings "on terms and conditions that comport with the Act and relevant FCC rules and orders" but "[I]n no event . . . for any purpose other than providing directory assistance service" or "publishing directories" (AT&T's proposal)?

AT&T's Position:

AT&T contends that its listings should be sold only on terms and conditions that comport with the Act and relevant FCC rules and orders, but in no event for any purpose other than providing directory assistance service or publishing directories. Pacific should not be allowed to rely on its tariffs. Pacific submitted no evidence in this arbitration to show that either its DALIS or

Publication Rights tariffs meet the requirements of the Act for the nondiscriminatory provision and use of directory listings information. AT&T asserts that its proposed rule comports with D.97-01-042.

Pacific's Position:

Pacific contends that its provision of directory assistance is governed by tariff and is offered on a non-discriminatory basis to other carriers at prices approved by the Commission.

Discussion:

AT&T's proposal in § 2.5 of Attachment 4 which states that listings are to be supplied to third parties "on terms and conditions that comport with the Act and relevant FCC orders..." is vague. There is no description of what that means, which leaves room for interpretation by the parties, and potential disputes as to its meaning. AT&T does have the right, however, to limit the use of its customers' directory assistance data which it provides to Pacific. Pacific's § 2.5 is adopted, with modification. The second to the last sentence in Pacific's § 2.5 is deleted and replaced with the final sentence from AT&T's proposal: "In no event, however, shall Pacific provide directory assistance data for AT&T End Users to third parties for any purpose other than providing directory assistance services."

A similar modification is to be made to Pacific's § 3.2. That section is adopted with the inclusion of the final sentence from AT&T's proposed § 3.2.

Issue 44

Should general terms and conditions (e.g., liability provisions) be included in the directory listings attachment or the general terms and condition section of the agreement?

AT&T's Position:

AT&T contends that this is another of the many general terms and conditions for which Pacific seeks special treatment in individual attachments. The current ICA has one liability and indemnity clause that applies to the entire

agreement. AT&T asserts that Pacific does not explain what particular aspect of the directory listings gives rise to a need for liability or indemnity provisions that are different than the general liability and indemnity provisions that AT&T has proposed in the Preface at § 11.

AT&T also, for the reasons described under Issue 11, opposes Pacific's proposed "Breach of Contract" clause for Attachment 4. AT&T is also opposed to the "Incorporation by Reference" clause that Pacific seeks to include in Attachment 4 (and many other attachments).

Pacific's Position:

Pacific contends that liability issues can be expected to arise with directory listings so it is appropriate to tailor specific language to the circumstances. In the MFS WorldCom arbitration, Pacific asserts that the Commission adopted this very same language for the directory listings attachment, and that the FAR noted that "Pacific's limitations-of-liability language is fair and reasonable, particularly since the costs of service charged to [MFS WorldCom] do not include any compensation to cover costs of insurance or liability protection for Pacific."

Pacific asserts that its proposed language makes each party responsible only for the services and facilities it provides to its end users, and not those provided by the other carrier. Both Pacific and AT&T already have limitation of liability provisions in their respective retail tariffs to insulate them from liability with respect to retail end users, unless it is due to gross negligence. Pacific merely seeks to extend this concept to its wholesale customers.

Discussion:

In its Comments, AT&T asserts that Pacific's proposed Section 5.1 requires AT&T to release Pacific from all liability, including liability based on Pacific's own errors and omissions. That is not appropriate. The limitations of liability in AT&T's tariffs limit the amount of direct damages AT&T might suffer as a result

of paying out claims to end users based on Pacific's errors or omissions. That, in turn, limits the amount of claims AT&T might have against Pacific for damages. This is the scheme in place and operating well today.

Section 5.2 is even worse, says AT&T. It requires AT&T to indemnify Pacific against third-party claims, even when those suits are based on Pacific's errors or omissions. AT&T has no control over third parties that might seek to make claims directly against Pacific and no control over Pacific's actions that might give rise to those claims. It would be patently unfair to require AT&T to indemnify Pacific against such claims when AT&T never had any control over the action of either Pacific or the claimant.

Both parties have liability provisions in their retail tariffs to protect them specifically from errors in directory listings; in fact, their tariff language is almost identical. It is reasonable to adopt Pacific's limitation of liability language in Attachment 4, which relates specifically to the DA database and white page directory information. AT&T should not be able to sue Pacific for errors, while being protected against legal action by its own end users. Pacific's proposed Section 5.1 is adopted.

However, Pacific's proposed indemnification language in Section 5.2 is rejected. As AT&T says, it is inappropriate to put AT&T on the hook when it has no control over the actions of either Pacific or any possible claimant.

AT&T's position relative to Attachment 4, § 6 is adopted. The decision was made to incorporate Pacific's Breach clause under Issue 11. It is not necessary to have a breach clause in each attachment to the ICA. The clause in the Preface governs the entire agreement.

Issue 45

Should Pacific's or AT&T's language on Directory Assistance database maintenance be adopted?

AT&T's Position:

AT&T contends that Pacific should use commercially reasonable efforts to maintain the database in good order and should notify AT&T as soon as possible, but no fewer than six months, before making changes in maintenance of the database that affects AT&T's access. AT&T further asserts that Pacific has not made it clear what guidelines it is willing to abide by, or what timeframes for notification those alleged guidelines provide with regard to changes in maintenance or access to directory assistance databases.

Pacific's Position:

Pacific contends that AT&T's proposal constitutes an unreasonable intrusion into the management of Pacific's databases. Pacific states that it will notify CLECs via an Accessible Letter, in advance of changes in database management and interface changes. However, Pacific asserts that six months' advance notice is unnecessary for the typical types of changes.

Discussion:

Pacific's language in § 2.6 is adopted. Pacific has a process in place for notifying CLECs of changes. AT&T does not allege that it has not received notice of database changes in a timely manner in the past. AT&T's request for a six-month advance notice of changes is too confining on Pacific. Pacific may not even know that a particular change will be implemented six months in advance.

D. Attachment 5: Resale Services

Issue 47

May AT&T aggregate its customers' usage of services to qualify for volume discounts from Pacific on the basis of such aggregated usage (AT&T's proposal) or are volume discounts limited to a per-customer basis (Pacific's proposal)?

AT&T's Position:

AT&T contends that this same issue was posed in 1996, resolved against AT&T's position, and appealed to the U.S. District Court for the Northern District of California. The Court vacated the Commission's final arbitration decision on this point and reinstated the Arbitrator's adoption of AT&T's language. (*AT&T v. Pacific, supra, slip op.* at 23.) AT&T's proposed language is what is in the current ICA and what has been approved by a Federal court.

Pacific's Position:

Pacific contends that this issue is currently the subject of an open pleading cycle in the Commission's Local Competition proceeding, and should not be addressed in this arbitration. Instead, the parties should be ordered to amend their ICA in the future to reflect the Commission's resolution of this issue.

Discussion:

AT&T's position is adopted. AT&T's position is consistent with the U.S. District Court decision on this issue. If the Commission issues a decision that is contrary to the outcome, the ICA shall be amended to conform with the Commission's order.

Issue 48

Should Attachment 5 include Pacific's or AT&T's language on payphone service provider compensation?

AT&T's Position:

Pacific is obliged to pay compensation to payphone service providers (PSPs) when payphone users dial a Pacific 800 number. Pacific proposes that

whenever AT&T provides a line that a PSP uses to provide payphone service, AT&T should handle Pacific's payphone compensation obligations by providing a credit against AT&T's local service bill to the PSP. Pacific proposes to charge AT&T five cents per call for providing this billing service to Pacific.

AT&T contends that it would have to undertake the expense of building a module to its billing system to accommodate Pacific's request. Further, Pacific has never described the process by which AT&T is to coordinate the bill it receives from Pacific for the resold line with the monthly bill AT&T renders the pay telephone owner. Under the system of credits that Pacific proposes, AT&T would also incur the added billing costs of adding a line item to the PSP's bill and would have to program unique billing requirements for PSPs using a resold line obtained from Pacific.

Pacific's Position:

Pacific contends that it is reasonable and appropriate for AT&T to remit to its PSP customers the monthly revenue derived from the PSP's pay telephone, rather than to have Pacific shoulder this burden. When AT&T purchases a resold line and makes that line available to a PSP, Pacific asserts that it has no way of knowing the identify of the PSP to whom that line has been resold, nor would Pacific have a billing relationship with that PSP vendor. AT&T will already have a billing relationship with the PSP, as AT&T will be issuing bills to the PSP for the PSP's payment to AT&T of monthly recurring charges. Since Pacific's monthly bills to AT&T for the resold line delineate the "credits" attributable to pay telephone compensation, Pacific contends that AT&T will have the information necessary to remit the appropriate pay telephone compensation to the PSP customer. AT&T must be willing to assume the responsibility of compensating its PSP customers instead of attempting to hand this obligation off to Pacific.

Discussion:

AT&T's position, which provides for the parties to negotiate the PSP compensation issue if AT&T orders payphone lines, is adopted. As Pacific says, it has no billing relationship with a customer served by AT&T as a reseller of Pacific's service, and Pacific has no way of knowing to whom AT&T has resold the line. Only AT&T has a billing relationship with its PSP customer. Given the limited record of this arbitration case, it is difficult to determine how Pacific would develop a billing relationship with AT&T's PSP customer to remit the appropriate compensation. It is not clear why *AT&T* should pay *Pacific* for performing this billing service, and Pacific does not address that particular issue.

AT&T's proposed language in Attachment 5 § 3.8.5 does not resolve the issue. It merely says the parties should negotiate further on the issue, and resort to the ICA's dispute resolution process in Attachment 3 if agreement is not reached. Hopefully, continued negotiations on the matter will serve to clarify some of these outstanding issues.

Issue 50

Should Attachment 5 contain AT&T's section on Emergency Calls?

The section on emergency calls will be included in the E-911 Section in Attachment 10, (See Issue 196.) Since AT&T indicates that the information should appear in only one Attachment, § 4.3.4 in Attachment 5 will be deleted.

Issue 52

Should Attachment 5 contain the warm-line transfer language AT&T proposes?

AT&T's Position:

AT&T's proposed language is identical to a provision in the currently-effective ICA. AT&T contends that Pacific failed to show any harm that it has suffered from the operation of the language over the past three years.

Pacific's Position:

Pacific contends that AT&T seeks to require Pacific to provide warm-line transfer services for certain calls to AT&T free of charge. Pacific argues that it should not be required to provide this service to AT&T for free. Warm-line transfer is available to AT&T and all other CLECs under the tariff at tariffed rates. Under AT&T's proposal, this cost to Pacific would increase because Pacific's operators would have to spend time distinguishing between chargeable and non-chargeable warm-transfer calls.

Discussion:

Pacific's position is adopted. AT&T's proposed language in § 4.3.1.3 of Attachment 5 would be expensive and difficult for Pacific to implement. Live operators would have to keep track of the various types of warm-line transfers requested. For example, under AT&T's proposal, warm line transfers for intra-LATA rate information would be at no charge but requests for intraLATA calling plan information would be charged at the tariff rate. If the calling customer is not clear about whether the request is for rates or a calling plan, it could involve a judgment call by the operator.

E. Attachment 6: UNEs and Combinations

Issue 53(a)

Should the ICA require Pacific to provide the UNEs and Combinations provided for in the Agreement for the Agreement's three-year term, regardless of any potential changes in the law?

AT&T's Position:

AT&T needs assurance that the UNEs provided for in the ICA will be available for the 3-year contract term, in order to engage in reasonable business planning and to provide continuity of service to its customers. The FCC's *UNE*

*Remand Order*³⁰ is replete with references acknowledging the CLEC's need for certainty in the availability of UNEs and UNE combinations, and specifically alluded to the need for three years of certainty. *Id.*, at ¶ 150. By contrast, under Pacific's proposal, AT&T asserts that Pacific has virtually unlimited discretion to determine and account for the impact on the ICA of the change in law.

Pacific's Position:

Pacific contends that if legal or regulatory mandates are issued between now and the end of the contract term that bear on the UNEs and combinations that Pacific is required to provide to AT&T, the parties should have to abide by those changes in the law. Pacific asserts that AT&T's proposed contract language would preempt any such legal or regulatory mandates.

Discussion:

Pacific's proposed language in Preface § 1.4 is rejected. That section gives Pacific the unilateral authority to discontinue offering services to AT&T that it no longer uses itself, if Pacific determines it would be "burdensome" to continue to provide the service to AT&T. AT&T needs certainty in the services it will receive from Pacific.

Pacific's language is adopted for Attachment 6, Section 2.12, with one modification. Pacific must provide combinations, as well as Network Elements or Interconnection. As Pacific says, the FCC saw the importance of providing certainty in the list of UNEs available to CLECs and said it would not reassess the list for at least three years, which is November 2002 at the earliest. This provides

³⁰ Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (released November 5, 1999). Referred to in this Report as the "UNE Remand Order."

AT&T with certainty on the UNEs, which will be available through most of the life of this ICA. This same outcome is incorporated by reference into Issue 10. It is not legally defensible to make a determination that this ICA is above the law as AT&T proposes.

Issue 53(b)

Should Attachment 6 contain Pacific's proposed limitation that the available UNEs are only those meeting the Act's "necessary" and "impair" standards?

AT&T's Position:

AT&T contends that Pacific's proposed language does not make clear who will make the determination that a UNE meets the "necessary and impair" standards of the Act. Given the ambiguity of its language, Pacific may take the position that it may make this determination. AT&T asserts that Pacific's proposed language could delay provisioning of the UNEs or UNE combinations that AT&T requests, force AT&T to litigate frivolous assertions by Pacific, and effectively render null all of Pacific's obligations regarding the provisioning of UNEs or UNE combinations in the ICA.

Pacific's Position:

In the MFS WorldCom arbitration where Pacific prevailed on this issue, the final arbitrator's report noted that Pacific's proposed "necessary" and "impair" language "merely obligates it to provide only those UNEs ultimately mandated by the FCC, nothing more, nothing less."³¹ Pacific contends that a network element does not meet the "necessary" and "impair" standards, it is not a UNE and is not required to be offered as a UNE.

³¹ MFS WorldCom FAR, p. 53.

Discussion:

Pacific's proposed language in Section 2.16 is adopted. Pacific is not required to offer as "UNEs" any elements which have not met the "necessary" and "impair" standards of the Act. However, nothing in Pacific's language shall preclude the Commission from ordering additional UNEs under its state authority.

Issue 54

Should Pacific's or AT&T's language on UNE combinations and ancillary equipment in these listed sections be adopted?

AT&T's Position:

Pacific insists that CLECs must combine all UNEs themselves, using one of its so-called "three methods," paying for cross-connects between each UNE and between the resulting UNE combination and Pacific's Main Distribution Frame (MDF). Pacific offers only two exceptions: (1) the so-called "enhanced extended link" or "EEL" which is a loop and port combination that allows a CLEC to interconnect with Pacific at a different central office than the one that services the customer the CLEC wishes to serve, and (2) "access to UNEs that are currently interconnected and functional."

AT&T contends that this Commission rejected Pacific's position in its final OANAD UNE order. (D.99-11-050 at 137-148.) In the OANAD UNE order, the Commission required Pacific to provide UNEs that are already combined to serve a Pacific customer that is becoming a CLEC customer, to combine UNEs that are not currently combined to provide service to any customer, and to combine new UNEs with UNEs that are already combined in serving Pacific customers that become CLEC customers. In that decision, the Commission also squarely addressed the issue of whether it has authority under state law essentially to reinstate FCC Rules 315(c)-(f), by requiring an ILEC to combine network elements in ways that the ILEC may not use itself. The Commission concluded: "We agree with [the US Supreme Court's] analysis [in *AT&T v. Iowa Utilities*.

Board., supra], and conclude that our unbundling authority under California law includes the power to order ILECs to combine network elements in innovative ways..." (*Id.*, at 147.)

AT&T asserts that the Commission is not alone in its determination. The 9th Circuit US Court of Appeals recently decided two appeals from arbitration decisions by the Washington Utilities and Transportation Commission requiring US West to combine any UNEs the CLECs may request, without regard to whether it is an "existing" or "new" combination. (*US West Communications v. MFS Intelenet*, 193 F.3rd 1112, 1121 (9 Cir. 1999); *MCI Telecommunications v. US West communications*, 2000 U.S. App. LEXIS 3139, No. 98-35819 (9 Cir. March 2, 2000).)

AT&T states that Pacific has consistently taken the position that it will provide, at no additional charge, all ancillary equipment necessary to make the UNEs function properly. Pacific will not, however, make available without additional charge ancillary equipment that is necessary to make UNE combinations function properly. Its refusal to do so is directly related to its position that it is not required to combine UNEs for AT&T. Because Pacific's position about ancillary equipment in connection with UNE combinations is directly tied to its already-rejected position that it need not combine UNEs for AT&T, AT&T contends that its contract language should be adopted.

AT&T also asserts that Pacific refuses to provide a list of the ancillary equipment that it will make available at no additional charge to make the UNEs function properly. Pacific has said it is impossible to develop a general list of ancillary equipment that will be made available with each UNE. However, Pacific's witness Lube indicated that by reviewing the NC or NCI codes that a CLEC includes in its order for UNEs, Pacific will know what ancillary equipment

it needs to provide to make the requested UNEs function properly.³² If Pacific can figure out from the NC or NCI codes what ancillary equipment it must provide, AT&T contends that Pacific can provide a list of ancillary equipment that it will provide. AT&T asserts that Pacific should also provide a similar list for UNE combinations.

Pacific's Position:

Pacific contends that the U.S. Supreme Court upheld FCC Rule 315(b), requiring that UNEs that have already been combined in providing the ILEC's retail service could not be taken apart when the customer migrated the same service to a CLEC. Accordingly, Pacific provides those existing combinations under the OANAD pricing rules.

Pacific asserts that with respect to providing UNE combinations that are not pre-existing, Pacific's obligations under the Act and FCC rules are currently under review by the Eighth Circuit as part of the remand from the Supreme Court. AT&T is incorrect that the Commission's OANAD pricing decision requires Pacific to offer combinations. The Commission refused to reach the question of whether it had independent state authority to order combinations.³³

Apart from the extended loop, Pacific will not offer combinations. Pacific states that the Commission should not attempt to exercise independent state authority to make Pacific do so. Pacific argues that it remains unclear whether the Act permits states to order combining under the terms of the statute.

³² Exhibit 203 at Q. and A. 55.

³³ D.99-11-050, *mimeo*, p. 137 (Similarly, because the Supreme Court has now reinstated the key portion of the FCC's rules on combining elements, it is no longer necessary to resolve the controversy over the extent of our authority under California law to order ILECs to provide pre-assembled UNE 'platforms' to CLECs").

AT&T wants a comprehensive list “identifying all ancillary equipment necessary to make the Network Elements and Combinations listed in this Attach. 6 and attached Table 1 function.” Pacific contends that there are too many permutations of possible equipment to make such a list feasible. AT&T also says that Pacific should offer ancillary equipment for combinations without additional cost. Pacific contends that this is in conflict with D.98-12-069, which expressly allows Pacific to charge for this, stating that “CLCs should pay cost based rates for such equipment.”³⁴

Discussion:

With regard to the “Combination” issue, AT&T’s position is adopted. In its OANAD pricing decision, the Commission clearly held that, under state law, the Commission has the authority to order the ILEC to combine UNEs for the CLECs. Conclusion of Law 58 in the OANAD Order reads as follows:

“Notwithstanding the current uncertainty surrounding the status of FCC Rules 315(c)-(f), this Commission has the authority under Pub. Util. Code § 709.2(c)(1) to order ILECs to combine separate UNEs upon the request of a telecommunications carrier, or to order an ILEC to combine additional UNEs with an existing UNE platform.”³⁵

Both AT&T and Pacific address the combination issue in their Comments. According to Pacific, the OANAD order did not require Pacific to combine UNEs on a going forward basis and did not rely on its independent state authority to order combinations. Instead, the OANAD order directed Pacific to retain in place its existing offer to provide combinations, but only until then-existing ICAs expired or were superceded. Pacific concludes that nothing in the OANAD order

³⁴ D.98-12-069, *mimeo*, App. B, p. 18.

³⁵ D.99-11-050, *mimeo*, at 263.

compels the conclusion that Pacific should be ordered to combine UNEs for AT&T. Pacific asserts that if the Commission undertakes to interpret the Act on this matter, the Commission could be subject to liability for monetary damages if its interpretation turns out to be inconsistent with the impending decision by the 8th Circuit.

Pacific urges the Commission to consider the potential arbitrage effects of the requirement for Pacific to combine UNEs. Pacific states that the Draft orders Pacific to offer combinations without addressing the argument raised in Pacific's post-hearing brief that combinations are contrary to the intent of the Act since they effectively vitiate its resale provisions. Pacific proposes that the Commission examine the combination issue in a generic proceeding where it can explore the arbitrage issue.

In its Reply Comments, AT&T refutes Pacific's allegations regarding Pacific's obligation to combine UNEs for AT&T. The Commission squarely addressed the issue of whether it has authority under state law to reinstate FCC Rules 315(c)-(f), by requiring ILECs to combine network elements "in ways the ILEC may not use itself." (D.99-11-050 at 144). The Commission concluded: "We think this question must be answered in the affirmative....We agree with [the US Supreme Court's] analysis [in *AT&T v. Iowa Utils. Bd.*, supra], and conclude that our unbundling authority under California law includes the power to order ILECs to combine network elements in innovative ways." (*Id.* at 145).

AT&T, in its Reply Comments, attacks Pacific for raising the arbitrage issue, in light of the fact that the US Supreme Court specifically criticized the arbitrage argument in *AT&T v. Iowa Utils. Bd.*:

The incumbents argue that this result is totally inconsistent with the 1996 Act. They say that it not only eviscerates the distinction between resale and unbundled access, but that it also amounts to Government-sanctioned regulatory arbitrage. Currently, state laws require local phone rates to include a

'universal service' subsidy. Business customers, for whom the cost of service is relatively low, are charged significantly above cost to subsidize service to rural and residential customers, for whom the cost of service is relatively high. Because this universal service subsidy is built into retail rates, it is passed on to carriers who enter the market through the resale provision. Carriers who purchase network elements at cost, however, avoid the subsidy altogether and can lure business customers away from incumbents by offering rates closer to cost. This, of course, would leave the incumbents holding the bag for universal service.

As was the case for the all-elements rule, our remand of Rule 319 may render the incumbents' concern on this score academic. Moreover, §254 [of the Act] requires that universal-service subsidies be phased out, so whatever possibility of arbitrage remains will be only temporary. *AT&T v. Iowa Utils. Bd.*, *supra*, 119 S.Ct. at 737.

The arbitrator retains her original determination to require Pacific to combine UNEs for AT&T. While D.99-11-050 does order Pacific to honor the requirement in existing ICAs to combine UNEs, it looks beyond that point in time and establishes policy under independent state authority to be used in future arbitrations. The Commission was well aware that the major ICAs which included the combining requirement, were due to expire shortly after D.99-11-050 was issued and, therefore, set the stage for the treatment of combinations in future arbitrations. The arbitrator has relied on that adopted Commission policy in determining the outcome on this Issue.

The arbitrage issue was given short shrift by the US Supreme Court and by the Commission in D.99-11-050 (*mimeo* at 135-138), and will not be given credence in this arbitration.

In its adoption of D.99-11-050 the Commission articulated its intent to exert its state authority to order Pacific to combine UNEs for CLECs. That requirement governs this ICA between Pacific & AT&T.

AT&T's proposed sections 2.2.1, 2.2.2 and 2.2.3 are adopted. These sections describe process for AT&T to make a request to Pacific to combine UNEs.

Sections 2.5, 2.7 and 2.9 are addressed under Issue 55.

Section 2.8: In its Reply Comments, Pacific asserts that it should have the right to approach the Commission and request a compensating glue charge if Pacific is able to demonstrate that the combination requirement has resulted or will result in severe arbitrage consequences. Pacific states that AT&T's proposed § 2.8 should be deleted.

AT&T asserts that it proposed § 2.8 for three reasons: 1) to make clear that Pacific must combine any of the UNEs listed in the ICA and/or the OANAD pricing order, together with all ancillary equipment necessary to make either the constituent UNEs or the combination itself function properly, 2) to make clear Pacific may not impose any additional charges, glue charges or otherwise, and 3) to refute Pacific's position that it need not provide digital cross connects upon AT&T's request. AT&T concludes that the clause provides guidance to Pacific on how to respond to UNE combination orders: with all ancillary equipment necessary to make the combination function properly.

Decision 99-11-050 determines that the compensation the ILEC should receive for combining UNEs is "the sum of the full stand-alone non-recurring charges" for the elements requested. (*Id.* at 141). In its discussion of the pre-assembled platform, the Commission concluded, "it is clear that an ILEC is not entitled to any additional compensation for providing to a requesting CLEC, network elements that are already pre-assembled or combined in a 'platform' that the ILEC uses itself." (*Id.* at 139). The Commission is on record that a gluing charge is not appropriate, and that outcome will be reflected in this ICA.

Section 2.8, which prohibits institution of a gluing charge, is adopted.

Section 2.10: AT&T's language is adopted. Pacific shall provide a written list identifying all ancillary equipment necessary to make the network elements and combinations listed in this ICA function. Without the list, the ordering process becomes a guessing game for AT&T.

Section 2.12 is addressed under Issue 53.

Section 2.13: This section is deleted due to reference to replacing access service with UNEs. (See Issue 55 below.)

Section 3.1: Pacific's language in Section 3.1 is rejected because it says CLECs are responsible for combining UNEs. AT&T's Section 3.1 is adopted, with the exception of Sections 3.1.4.3 and 3.1.4.4, which are addressed separately below.

Section 3.2: Pacific's proposed section is deleted. It is not necessary since Pacific is responsible for combining UNEs for AT&T.

Section 3.3: Pacific's language is rejected. It is partially duplicative of AT&T's Section 3.1.

Sections 3.1.4.3 and 3.1.4.4: In its Reply Comments, AT&T refutes the Draft's outcome of Sections 3.1.4.3 and 3.1.4.4. The draft deletes the requirement that Pacific provide cross connections at no additional charge. According to AT&T, D.99-11-050 set the charges that Pacific can impose in connection with such combinations. None of the "scenarios" in Appendix C, describing how charges for combinations are to be determined, sets out separate charges for cross-connects. The provision of cross-connects is a non-recurring function that is recouped in the nonrecurring charges the Commission calculated for UNEs and UNE combinations.

AT&T's position has merit. Since cross-connects are included in the nonrecurring charges the Commission calculated for UNEs, AT&T should not have to pay separately for those cross-connects.

Sections 3.1.4.3 and 3.1.4.4 are adopted.

Table 1 in Attachment 6 contains a list of the Combinations that AT&T wants Pacific to provide under the ICA. Table 1 is not included in the Matrix of Disputed Issues so the arbitrator has included a discussion of the Table under Issue 54 which relates to UNE combinations.

Pacific provided edits to Table 1 in its Comments, with the comment that Table 1 contains numerous combinations that Pacific is not obligated to provide. For example, in the *UNE Remand Order*, the FCC ordered that CLECs may not replace special access with UNEs. Likewise, the DAR rejects AT&T's attempt to use UNEs to bypass special and switched access. Nevertheless, in Table 1, AT&T impermissibly lists, for example, "2 wire loop and port plus packet transport" as a UNE combination that Pacific must provide. AT&T is not entitled to use UNEs for provisioning plain old telephone service (POTS) with a data packet option, says Pacific.

In its Reply Comments, AT&T includes a copy of Table 1 as AT&T originally proposed it, with those Pacific edits that AT&T accepts for purposes of compromise. Pacific seeks to delete many of the combinations listed on Table 1 saying they use UNEs to replace access services. Pacific has included four combinations labeled "premise to premise" combinations (such as a circuit directly linking two branch offices of a bank) that AT&T offers to serve business customers. These are appropriate combinations and should not be deleted.

AT&T states Pacific has deleted every reference to data conditioning. Whether or not there is a charge for DSL line conditioning is a separate topic. AT&T should not be denied conditioning. The version of Table 1 attached to AT&T's Reply Comments is adopted. AT&T has deleted the packet switching options that Pacific objects to. AT&T is entitled to data conditioning and premise to premise service.

Issue 55

Should Attachment 6 contain any use restrictions on UNEs and UNE Combinations?

AT&T's Position:

AT&T contends that Pacific's proposed language restricts the ability of AT&T to use UNEs to provide exchange access to both its local and toll customers. The Commission should exert its independent state authority and adopt contract language which would permit AT&T to use UNEs purchased from Pacific to provide any telecommunications service, regardless of whether it might be characterized as local service or exchange access service.

AT&T opposes Pacific's proposed § 6.4.4 wherein Pacific proposes to add a complex Exhibit to the ICA to describe when and how charges will apply for the switching UNE. AT&T contends that this is unnecessary since the Commission spelled out in elaborate detail in D.99-11-050 how the UNE charges are to be calculated and applied.

Pacific's Position:

Pacific contends that if a CLEC or IXC is not an end-user's local carrier, it is not permitted to use UNEs to provide other services to the end user. Pacific's proposed language is the same as what was adopted in the MFS WorldCom arbitration.³⁶ As the FCC has held, a requesting carrier may use a UNE obtained from the ILEC to provide exchange access and interexchange services only "if [the] requesting carrier purchases access to [the] network element in order to provide local exchange service."³⁷ The FCC specifically has precluded bypass of

³⁶ MFS WorldCom FAR, pp. 53-56.

³⁷ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Dkt. Nos. 96-98 and 95-185, 12 FCCR 12460, FCC No. 97-295, *Third Order on Reconsideration and Further Notice or Proposed Rulemaking*, para. 39 (rel. Aug. 18, 1997).

special access pending completion of its *Fourth FNPRM* in its Local Competition Implementation docket.

Pacific further asserts that allowing this CLECs to purchase UNEs at cost-based prices as a substitute for tariffed access services, would render academic the federal and state access charges associated with the use of local transport. Carriers could then obtain access services over Pacific's network at a lower price and would no longer purchase access services.

Pacific contends that AT&T's proposed language at Attachment 6, § 2.9 would give AT&T the broadest possible rights to replace existing switched access services with UNEs. As discussed above, this is a unilateral dismantling of existing access charge regulation. FCC rules do not allow CLECs to use UNEs to bypass switched access services except when the CLEC provides local service to the end user.

Pacific may restrict AT&T's use of the unbundled loop to situations where AT&T's customer is the end user of the loop for switched local exchange service. Pacific contends that this restriction is in conformance with the FCC's *Third Reconsideration Order*.³⁸

Discussion:

In its *Supplemental Order*, the FCC determined that its temporary constraint on the use of combinations of unbundled loops and transport network elements to provide exchange access service was appropriate and consistent with the Commission's finding in the *Local Competition First Report and Order*. At the same time, the FCC sought to refresh the record developed in the *Further Notice of Proposed Rulemaking* in the *Shared Transport Order* regarding whether requesting carriers may use unbundled dedicated or shared transport facilities in

³⁸ *Third Reconsideration Order*, paras. 38, 61.

conjunction with unbundled switching to originate or terminate interstate toll traffic to customers to whom the requesting carrier does not provide local exchange service.

The FCC released its *Supplemental Order Clarification* on June 2, 2000. That order resolved some of the issues relating to the issue of whether CLECs may convert special access services to combinations of unbundled loop and transport. The FCC found that a requesting carrier can use the loop-transport combination, as long as it provides a significant amount of local exchange service. In its *Supplemental Order Clarification*, the FCC clarifies what constitutes a "significant amount of local exchange service." (*Supplemental Order Clarification* ¶ 22).

In the three examples given in ¶22, the FCC reiterates that the option does not allow loop-transport combinations to be connected to the incumbent LEC's tariffed service. In paragraph 28, the FCC provides further clarification by stating that the tariffed service it is referring to is special access. "We further reject the suggestion that we eliminate the prohibition on 'co-mingling' (i.e., combining loops or loop-transport combinations with tariffed special access services) in the local usage options discussed above."

The following sections reflect the fact that it is appropriate to have use restrictions on UNEs, and also reflect the dictates of the FCC's *Supplemental Order Clarification*. Sections 2.2, 2.6, 2.7 are modified to reflect the FCC's prohibition on combining UNEs with tariffed special access services.

Section 2.2: Delete AT&T's proposed language: "Pacific special access services."

Section 2.3: Pacific's proposed language is adopted, with modification. A new final sentence shall be added as follows: "Special access services may be converted to combinations of unbundled loops and transport network elements if

AT&T provides a significant amount of local exchange service to a particular customer. The definition of what constitutes a "significant amount of local exchange service" is pursuant to Paragraph 22 of the FCC's *Supplemental Order Clarification*."

Section 2.5: The first sentence of AT&T's proposed § 2.5 should be deleted. That sentence reads: "AT&T may use one or more Network Elements to provide any Telecommunications Service."

Section 2.6: Delete AT&T's proposed language "access services."

Section 2.7: Delete the reference to access services in the first sentence. The final sentence of Section 2.7 is deleted.

Section 2.9: AT&T is authorized to convert special access to loop and transport if AT&T provides a significant amount of local exchange service to the end user. AT&T's proposed language is necessary to describe how that conversion will occur. The final two sentences shall be modified as follows: "When existing Access Service(s) employed by AT&T is replaced with a combination(s) of loop and transport, PACIFIC shall not physically disconnect or separate in any other fashion equipment and facilities employed to provide the Access Service(s) except for technical reasons or if requested by AT&T. The charge for such transitioning of an existing Access Service(s) to a combination of loop and transport shall be the service order charge(s), as described in Section 2.13.2.2 of this Attachment."

Section 2.23: Pacific's language is rejected because it is overly broad.

Sections 3.3 and 3.1.3 are addressed under Issue 54.

Section 5.1.5: AT&T's language is rejected. Until the FCC acts on its *Fourth FNPRM*, Pacific can restrict use of the loop to instances in which AT&T's customer is the end user of the loop.

Issue 56

Should the Arbitrator require Pacific to provide shared transport to AT&T to connect intraLATA calls?

AT&T's Position:

AT&T contends that Pacific's proposal forces AT&T to route its intraLATA toll traffic in a substantially less efficient manner than Pacific. AT&T asserts that the benefit of allowing AT&T to use Pacific's shared transport UNE to carry AT&T toll traffic would relieve pressure on Pacific's tandems that are overburdened and facing exhaust, since AT&T's proposal would avoid the extra uses of Pacific's tandems.

Pacific claims that if AT&T orders the customized routing option of Pacific's switching UNE, so that Pacific carries AT&T intraLATA toll traffic using the shared transport UNE, AT&T should pay access charges in addition to the UNE charges. AT&T contends that this is precisely the contention that the US District Court for the Northern District of California rejected in overturning the Commission's D.96-12-034 (the 1996 AT&T/Pacific arbitration decision).

Pacific's Position:

Pacific contends that it is not obligated under the Act to custom route AT&T's presubscribed intraLATA toll traffic. Completion of end-user calls over Pacific's intraLATA toll network is not part of the shared transport UNE under the FCC's *UNE Remand Order*. In applying the "necessary and impair" standard, the FCC did not find that the ILECs' toll networks were part of the shared transport UNE. Pacific contends that the FCC's definition of the shared transport UNE explicitly excluded completion of calls over the toll network because it does not include transport between end-offices and end users.³⁹

³⁹ *UNE Remand Order*, para. 370, fn. 732.

Pacific also contends that there are technical complexities of the custom routing arrangement which AT&T requests. Pacific would have to make switch translations for Option C unbundled switching in each Pacific end-office, utilize Feature Group C signaling, obtain a unique Carrier Identification Code (CIC) for the custom routing, and specify the network trunk groups to be used. Pacific also asserts that there would be implementation costs associated with modifying the 2-PIC technology to route intraLATA toll traffic over UNEs.

Discussion:

Pacific's position is adopted. Pacific is not required to custom-route AT&T's presubscribed intraLATA toll traffic.

AT&T asks to use Pacific's shared transport UNE to carry its intraLATA toll traffic. However, in its *UNE Remand Order*, the FCC acknowledges that shared transport is technically inseparable from unbundled switching so requesting carriers do not have the option of using unbundled shared transport without also taking unbundled local switching. (§ 371). AT&T's request cannot be met, except in those cases where AT&T buys unbundled switching from Pacific and implements custom routing Option C.

In its Comments, AT&T criticizes both Pacific and the arbitrator for characterizing the issue as whether Pacific's "intraLATA toll network" is a UNE. According to AT&T, it never requested the designation of Pacific's intraLATA toll network as a UNE. AT&T finds the phrase a red herring since Pacific does not maintain a separate intraLATA toll network. AT&T is correct. Issue 56 can be resolved on the merits without concluding that Pacific's so-called "intraLATA toll network" is or is not a UNE. The arbitrator's conclusion that Pacific's intraLATA toll network is not a UNE has been deleted from the discussion.

AT&T also criticizes the arbitrator's reliance on § 371 as the basis for concluding that shared transport is technically inseparable from unbundled switching. According to AT&T that paragraph is merely a recitation of an

argument made by Ameritech, which the FCC rejected. AT&T has misread the FCC's order. In ¶ 371, the FCC rejected Ameritech's argument that shared transport is not an unbundled element because it is technically inseparable from unbundled switching. According to Ameritech, the shared transport element is not an "unbundled" element within the meaning of section 251(c)(3). The FCC rejected Ameritech's arguments with the following statement:

The Supreme Court upheld the Commission's interpretation that the phrase 'on an unbundled basis' in section 251(c) does not refer to physically separated elements but rather to separately priced elements. [footnote omitted] Shared transport is an 'unbundled' element because it consists of separately priced switching and transport network elements. The fact it is technically infeasible for a competitor to use shared transport with self-provisioned switching is irrelevant to whether an element is 'unbundled' pursuant to section 251(c)(3). (*UNE Remand Order* ¶ 372).

Paragraphs 371 and 372 together make it clear that AT&T's request to use shared transport without unbundled switching is not technically feasible. As stated above, when AT&T purchases Option C unbundled switching, that function, in combination with shared transport, can be used to route AT&T's intraLATA toll traffic.

AT&T also points out in its Comments that some of the adopted contract terms unequivocally deny AT&T's right to use shared transport to deliver its intraLATA toll traffic and make no reference to the exception for local switching Option C. AT&T's proposed language changes, which clarify the Option C exception, are included in the discussion below of particular sections relating to this Issue.

In its Comments, Pacific asserts that § 6.4.4 and Exhibit B should be restored to the ICA. According to Pacific, the arbitrator errs in concluding that those sections relate to access charges. Exhibit B includes UNE prices for

switching and transport UNEs listed in the pricing attachment, Attachment 8. The confusion arises, says Pacific, because the names of the rate elements for access charges and the UNE switching and transport are similar since they are basically the same functions. In its Reply Comments, AT&T asserts that Pacific admits Exhibit B to Attachment 6 does not address the use of Pacific's network for the completion of toll calls (as for example through the use of option C). Therefore, says AT&T, Exhibit B would not cover all scenarios permitted under the ICA. AT&T concludes the Draft properly excluded that Exhibit.

Sections 6.2.1 and 6.2.3: Pacific's proposed language shall be adopted, as modified. The phrase "except as provided in § 6.5.3, below" shall be added to both sections.

Section 6.2.9.1: This is addressed under Issue 63. AT&T's position was adopted in Issue 63, and AT&T's proposed language is adopted.

Exhibit B and Section 6.4.4 are to be deleted. The Exhibit does not include all possible call scenarios. Therefore, it is incomplete and, therefore, potentially confusing.

Sections 6.5.1 and 6.5.2: Pacific's position is adopted. Pacific is not required to route AT&T's generic intraLATA toll traffic over Pacific's network under either unbundled switching options A or B. Option A has no custom routing functions associated with it, and the only customized routing associated with Option B is for operator services.

Section 6.5.3: AT&T's position is adopted. Option C customized routing calls for special routing in a manner ordered by AT&T. Under this option, AT&T is entitled to route its intraLATA toll traffic over Pacific's network.

Section 7.5.1.1: Pacific's position is adopted with modification. Pacific is not required to route AT&T's intraLATA traffic over its network unless AT&T is using Option C unbundled switching. The following phrase shall be added to the third sentence of § 7.5.1.1: "except as provided in § 6.5.3 above."

Issue 57

Should Pacific's or AT&T's sub-loop language be adopted?

AT&T's Position:

AT&T asserts that in its *UNE Remand Order*, the FCC found that ILECs must provide access to portions of their loops (*UNE Remand Order* at ¶ 205, ¶209), at any "technically feasible point" (*Id.* at 206), including, but not limited to, "the point of interconnection between the drop and the distribution cable, the NID [Network Interface Device], or the MPOE [Minimum Point of Entry]...[and] any FDI [Feeder Distribution Interface], whether the FDI is located at a cabinet, CEV [Controlled Environment Vault], remote terminal, utility room in a multi-dwelling unit, any other accessible terminal." (*Id.* at ¶ 210). Pacific seeks to require connection via cross connect cabling, rather than direct CLEC access to the FDI. Pacific also says that AT&T should not receive access to Pacific's loop concentrator and/or multiplexer equipment as a subloop component.

AT&T asserts that the FCC established a rebuttable presumption that AT&T may access Pacific's subloop plant at the FDI and any other "technically feasible point." (*Id.*, ¶ 206, ¶ 209). AT&T argues that Pacific has not met its burden of proof as to its space limitation claims or other reasons offered for not unbundling its loop plant at its FDIs, or as to alleged technical infeasibility of allowing access to Pacific's concentrator/multiplexer equipment. Nor has Pacific presented any facts regarding specific FDIs in its network at which space would be unavailable, while claiming that there is "usually" not enough space in CEVs for access to sub-loop plant. (Ex. 203 at 112-113.)

Pacific asserts that the FCC did not require access to loop concentrator/multiplexer equipment as part of sub-loop unbundling. Ex. 203 at 101. AT&T contends that the FCC required access to sub-loop components at any "technical feasible point" and left it to the states to determine the issue of

technical feasibility as it relates to any particular request. (*Id.*, at ¶ 223-224). AT&T asserts that Pacific's sole testimony on the alleged infeasibility of providing access to its concentrator/multiplexer equipment notes that AT&T access to some Digital Loop Carrier equipment would displace Pacific's use of some of its feeder system. (Ex. 203 at 107-108.) AT&T contends that would be a matter of cost, not of technical infeasibility.

AT&T also argues that the FCC has already rejected the alleged impossibility of testing loop facilities in the presence of sub-loop unbundling and rejected it as a basis for denying access to sub-loop facilities. (*UNE Remand Order*, at ¶ 228.) AT&T also contends that Pacific's assertion that problems may arise when allegedly unskilled CLEC technicians obtain access to Pacific's FDI's are not justifications for denying access to either the sub-loop UNE itself or to the FDI as a point of interconnection with that UNE.

Pacific proposes that access to sub-loop unbundling be on an Individual Case Basis (ICB) only. (Ex. 201 at 20.) AT&T asserts that such a proposal is a formula for making the UNE effectively unavailable. ICB prices take too much time to develop and are often in excess of legitimate costs.

AT&T states that the FCC has acknowledged that its unbundling rules do not require ILECs to "build additional space." *UNE Remand Order*, at ¶ 221. Therefore, AT&T asserts that it is not necessary to include Pacific's phrases "where available" or "if available" with regards to access to loop feeder plant.

AT&T also refutes Pacific's allegation that its proposed language in § 5.14.5.4.3 relating to performance monitoring is "ambiguous" and "undefined." AT&T contends that performance monitoring is a standard feature of ICAs.

Pacific's Position:

Pacific contends that the FCC identified the following "technically feasible points" where sub-loop unbundling should occur: (1) the Network

Interconnection Device (NID) at the customer's premises; (2) the FDI; and (3) the MDF at the central office. The sub-loop component created between the NID and the FDI is the distribution component, and the component between the FDI and the MDF is the feeder component. Pacific asserts that its proposed language correctly tracks the requirements of the *UNE Remand Order*.

Pacific contends that AT&T's proposed language does not track the Order. In addition to unbundling the two sub-loop components described above, AT&T also proposes unbundling a loop concentrator/multiplexer. This component would appear to be a Digital Loop Carrier (DLC) remote terminal. Pacific argues that this component does not meet the FCC's "impair" standard, and was not unbundled in the FCC's *UNE Remand Order*.⁴⁰

Moreover, there are significant technical problems with sub-loop unbundling, which are worsened if the DLC remote terminal is unbundled. These issues include:

- a. Testing of the sub-loop components.
- b. Equipment and cable utilization.
- c. Administration and recordkeeping.
- d. Transmission impairments.
- e. Physical limitations.
- f. Environmental aesthetics.

Pacific contends that if the DLC remote terminal is unbundled, the full capacity of the DLC terminal cannot be utilized.

Due to the technical difficulties associated with sub-loop unbundling, Pacific has proposed the following provisioning language:

⁴⁰ On cross-examination, Ms. Fettig for AT&T conceded that subloop unbundling at the DLC remote terminal is not required by the Act or the FCC's *UNE Remand Order*. 1 Tr. 140 (Ms. Fettig for AT&T)

[A]ccess to the sub-loop-elements should be provided via cross-connect cabling between Pacific's F1/F2 interface at or near the FDI and AT&T's FDI or RT, not through direct CLEC access to the FDI. There are major security/network reliability concerns with direct CLEC access to the FDI, as the FCC noted in the UNE Remand Order based on the experience of the Texas PUC.⁴¹

Discussion:

The FCC has established a rebuttable presumption that the subloop can be unbundled at any accessible terminal in the outside loop plant. If the parties do not reach agreement about the technical feasibility of the request, the ILEC will have the burden of demonstrating to the state, in the context of a section 252 arbitration proceeding, that it is not technically feasible to unbundle the subloop at these points.⁴²

Pacific's position is adopted. AT&T's request to unbundle the concentrator/multiplexer loop component goes beyond the requirements of the FCC's *UNE Remand Order*. Pacific believes that the loop concentrator/multiplexer component would be a DLC remote terminal. The FCC expressed its concern with the CLECs' inability to access IDLC loops at the incumbent's central office.

"In order to reach subscribers served by the incumbent's IDLC loops, a requesting carrier usually must have access to those loops before the point where the traffic is multiplexed. That is where the end-user's distribution subloop can be diverted to the competitive LEC's feeder, before the signal is mixed with the traffic from the

⁴¹ *UNE Remand Order*, para. 222 (noting that Texas did not require unbundling at the FDI due to network integrity concerns).

⁴² *Id.*, ¶ 223.

incumbent LEC's other distribution subloops for transport through the incumbent's IDLC feeder.⁴³

"In a footnote to ¶ 217, the FCC went on to say, "The Commission also found that it is technically feasible to unbundle IDLC-delivered loops through use of a multiplexer to separate the unbundled loop(s) prior to connecting the remaining loops to the switch. *Local Competition First Report and Order*, 11 FCC Rcd at 15692, para 383. In the three years since the *Local Competition First Report and Order*, however, such methods have not proven practicable. Competitors are not yet able economically to separate and access IDLC customers' traffic on the wire-center side of the IDLC multiplexing devices." ⁴⁴

In light of the FCC's findings on current technical infeasibility, AT&T's proposal to unbundle the loop concentrator/multiplexer is rejected. AT&T's proposed language relating to the loop concentrator/multiplexer in Sections 5.14.2, 5.14.4, and 5.14.5 shall be deleted, as is the entire section 5.14.3. AT&T's proposed 5.14.4.1 is adopted (except for the reference to loop concentrator/multiplexer).

Pacific's proposed language in § 5.14.4.1 for FDI access is too restrictive in that it does not allow AT&T direct access to the FDI, even in cases where there would be space available. Under the FCC's rules, AT&T has the right to direct access, if it is technically feasible. Granted, physical access in a CEV is unlikely due to space limitations, and in that case, the FCC encourages CLECs to build their own facilities adjacent to the incumbent's equipment. (¶ 221). Under Pacific's proposed language, the only method of access would be via tie cables, and only if technically feasible.

⁴³ *UNE Remand Order*, para. 217.

⁴⁴ *Id.*, Footnote 418.

Section 5.14.5.1: AT&T says Pacific seeks to use the same phrase "loop distribution" for the entire component and one of its sub-components. AT&T prefers the phrase "distribution media," since the parties agree that this may be copper twisted pair, coax cable or fiber optic cable. In the interest of clarity, AT&T's proposed term distribution media is adopted throughout Section 5.14.5.

Section 5.14.5.2: According to AT&T, Pacific would state that distribution media provides connectivity between the NID and the access point to the feeder or FDI. AT&T prefers the term, "the terminal block on the subscriber-side of an FDI." Pacific also objects to AT&T's language that states the FDI may also house loop concentrators/multiplexers. According to AT&T, its language relating to the FDI's location is clearer and more inclusive. Pacific did not present any information on this section. AT&T's proposed language in Section 5.14.5.2 is adopted.

Section 5.14.5.3: Pacific did not present any information on this section. AT&T has included a factual statement that it is possible to have a combination that includes two or more of these media. That language is appropriate and shall be adopted.

Section 5.14.5.3.1: AT&T opposes Pacific's phrase "if available" as unnecessary and unwarranted. Pacific did not present any information on this section. AT&T's proposed language is adopted.

Section 5.14.5.4.1.2: The parties dispute the loop conditioning rate. Pacific has added language to this section stating the loop conditioning rates shall be those in Attachment 8. Pacific's position is appropriate and shall be adopted.

Section 5.14.5.4.2: Pacific says it has added language to clarify that the support functions referred to in this section that Pacific is to provide shall be at parity with what Pacific provides to itself. Pacific is not required to provide a competitor with service that is superior to the service it provides to itself. AT&T

does not present any information on this section. Pacific's proposed language relating to parity is adopted.

Section 5.14.5.4.3: AT&T asserts this section is necessary to ensure compliance with Section 14 of the Preface regarding Performance Measures. It makes no sense to make Pacific subject to the Commission's Performance Measures, but under no obligation to provide monitoring of the performance of the subloop UNE and any UNEs attached to or combined with it, says AT&T. Pacific asserts that it need not provide a competitor with service that is superior to the service it provides to itself. It is not clear how Pacific's superior quality argument would apply in this case. AT&T's proposed language is adopted. Pacific should provide the performance information, where technically feasible.

Section 5.14.5.4.5: According to AT&T, Pacific's proposed edits would gut the purpose of the clause, which is to ensure that when AT&T purchases the Distribution Media subloop component, it has the right physically to access and connect with the FDI. Pacific's edits would ensure access only to distribution cabling and tie lines, but not to the FDI itself, which is essential for AT&T's effective use of the subloop component. According to Pacific, its edits reflect the fact that access besides physical may be provided. According to Pacific, AT&T's proposed language in this section is too broad in that it would give AT&T the unconditional right to direct access, even where space is not available. AT&T's proposed language is adopted. In its *UNE Remand Order*, the FCC orders access to the FDI (*UNE Remand Order* at ¶ 210).

Section 5.14.5.4.6: According to AT&T, Pacific's language would narrow access to subloop UNEs by denying one of the two options that § 5.14.5.1 offers to AT&T – i.e., to take the distribution media component separately from the NID, at AT&T's option. Pacific asserts the loop distribution component consists of the subloop component from the NID to the FDI. Pacific cannot offer unbundled loop distribution separately from the NID. Pacific has also modified AT&T's language

to clarify that AT&T may order the loop distribution sub-loop component and elect to provide its own NID. Pacific states this is different from AT&T's proposed language that simply would allow it to order the loop distribution without the Pacific NID. AT&T's proposed language is adopted. AT&T makes it clear that if it is not ordering Pacific's NID, it will be providing a suitable NID of its own.

Section 5.14.5.4.7: AT&T asserts Pacific's proposed language is anti-competitive. Pacific states it has added clarifying language that AT&T must pay Pacific, if it asks Pacific to condition a sub-loop component. Pacific's proposed language is adopted. It is appropriate that AT&T pay Pacific for loop conditioning. See Section 5.14.5.4.1.2 above.

Section 5.14.5.4.8: Pacific proposes deletion of this entire paragraph in that it is duplicative of Section 5.14.5.4.4. AT&T did not comment on this section. Pacific's proposal is adopted. This section is largely duplicative of another section, and AT&T has not explained the need for its proposed language.

In its Comments, AT&T asks that subloop pricing be designated as TBD, rather than ICB. There are no contract procedures for the establishment of ICB prices. By contrast, agreed-upon ICA language establishes a clear-cut procedure for TBD pricing. AT&T's request is adopted. Pricing for subloop components will be TBD.

Issue 58

Should Pacific's or AT&T dark fiber language be adopted?

AT&T's Position:

Pacific agrees to provide "dark fiber" but refuses to agree to AT&T's request that Pacific provide all "unused transmission media." AT&T contends that Pacific's more restrictive language limits its obligation to provide fiber that

has not been "lit," i.e., connected to electronics that make it useful for transmission purposes, and that has been terminated.

AT&T asserts that Pacific's definition is designed to avoid its obligation to provide, as a transport UNE, any unused transmission medium that is installed. The FCC justified its designation of dark fiber as a UNE precisely because it is, in the FCC's view, no different than unused copper and coaxial cable—which the FCC clearly views as required to be provided as "unused transport capacity." If the FCC justified its inclusion of dark fiber as a UNE by reference to "dead copper," and harkened to the very definition of "network element" in the act as justifying both items being offered on an unbundled basis, it is clear that the FCC views all "unused transmission media" as network elements.

AT&T also contends that Pacific attempts to restrict access to unused transmission media by requiring that any dark fiber Pacific provides be already "terminated." (Ex. 203 at 116-117.) AT&T argues that the FCC does not require that dark fiber be terminated in order to be considered a UNE. Pacific proposes additional restrictions on AT&T's access to dark fiber without explaining the need for them.

Pacific's Position:

Pacific contends that AT&T's proposed contract language is broader than the FCC rules. For example, AT&T would require Pacific to make available not just dark fiber but any "unused transmission media." This would include copper and coaxial cable. Pacific marked up AT&T's proposed language to limit dark fiber just to the fiber medium, as the *UNE Remand Order* states, and not to copper. Pacific also modified AT&T's proposed language to include other parameters on dark fiber that the FCC recognized as valid and legitimate concerns.

The fiber must be “terminated” so that it is “already installed and easily called into service,” as the *UNE Remand Order* requires.⁴⁵ For that reason Pacific proposes to add a revocation process in case AT&T orders dark fiber from the finite amount available and then fails to use it.

Discussion:

In discussing what constitutes dark fiber in its *UNE Remand Order*, the FCC, in responding to an argument raised by GTE states, “we disagree with GTE’s argument that unlike vacant copper, dark fiber does not qualify as loop plant.” The FCC concludes that both copper and fiber alike represent unused loop capacity, and therefore that dark fiber and extra copper both fall within the loop network element’s “facilities, functions, capabilities.”

Since the FCC makes no mention of coaxial cable, the Draft excluded coaxial cable from the definition of dark fiber. In its Comments, AT&T refutes that finding, stating the FCC specifically found that what makes dark fiber available as a UNE is that it is “unused transport capacity.” That makes it fall under the Act’s definition of a UNE as a “facility or equipment used in the provision of a telecommunications service” (§ 153 of the Act) as the US Supreme Court has interpreted that provision of the Act, to include “’features, functions and capabilities that are provided by means of such facility or equipment.’” *UNE Remand Order* at ¶ 326, quoting *AT&T v. Iowa Utils. Bd.*, *supra*, 119 S.Ct. at 731.

According to AT&T it is immaterial that the particular passage from the *UNE Remand Order* does not mention coaxial cable. The relevant standard is whether Pacific has “unused transport capacity.” If so, this capacity is included as part of the Local Transport UNE.

⁴⁵ *Id.*, fn. 694.

AT&T's interpretation is correct. The transmission medium is not the governing factor and is irrelevant. Dark fiber represents any unused transport capacity, which would include copper, fiber, and coaxial cable. AT&T's proposed § 8 is adopted.

In its Comments, AT&T points out that the Draft rejected Pacific's § 8.12. To prevent future disputes, AT&T requests that the Draft be modified to include two points relative to pricing: 1) establish TBD prices for dark fiber, and 2) deny Pacific the right to charge AT&T a "dark fiber inquiry charge." According to AT&T, Pacific failed to provide any testimony regarding what this charge represents. AT&T states it does not even know what it is.

Pacific, in its Reply Comments, addresses Issue 15 of Appendix A-1 in which AT&T requests that Pacific's dark fiber inquiry charge be reclassified from a non-recurring charge to a recurring charge. Pacific refutes that request stating the work activity of determining whether dark fiber is available is a standard non-recurring work activity. Cost causation principles require this inquiry to be included as a non-recurring charge because CLECs who receive a response to their inquiry that dark fiber is not available, will not purchase it, and therefore not incur the recurring monthly charges that would supposedly recover the costs. The FAR should keep dark fiber inquiries as a non-recurring charge.

Pacific's Reply Comments effectively refute AT&T's assertion that it is not familiar with the dark fiber inquiry charge and does not know what it represents. Pacific asserts that there are costs associated with researching the availability of dark fiber and that it should be entitled to recover those costs. Those costs represent a one-time work activity and should be recovered through a non-recurring charge. Pacific's proposed TBD non-recurring charge for a dark fiber inquiry charge is adopted.

AT&T's proposal to set TBD pricing for the recurring rate for dark fiber is also adopted.

In its Comments, Pacific challenges the Draft's rejection of Pacific's proposed language that dark fiber must be "terminated." According to Pacific, the FCC explicitly defined dark fiber as

"...unused loop capacity that is physically connected to facilities that the incumbent LEC currently uses to provide service...and can be used by the competitive LECs without installation by the incumbent." *UNE Remand Order*, fn. 323.

The entire text of footnote 323, which Pacific cited above, provides some additional guidance on this issue:

In designating dark fiber as a network element, we acknowledge that some facilities that the incumbent LEC currently uses to provide service may not constitute network elements (e.g. unused copper wire stored in an incumbent LEC's warehouse). Defining all such facilities as network elements would read the "used in the provision" language of section 153(29) too broadly. Dark fiber, however, is distinct in that it is unused loop capacity that is physically connected to facilities that the incumbent LEC currently uses to provide service; was installed to handle increased capacity and can be used by competitive LECs without installation by the incumbent. *UNE Remand Order*, fn 323).

The FCC attempts to distinguish reels of copper wire in a warehouse from dark fiber that has been installed. "Dark fiber is fiber that has not been activated through connection to the electronics that 'light' it, and thereby render it capable of carrying communications services." The phrase "terminated" should be applied to the connection to the needed electronics.

Pacific's argument that the dark fiber must be "terminated" is rejected. The FCC says dark fiber has not been connected to the electronics that light it, but it must be in place and easily called into service. (*Id.* ¶ 174). That clearly delineates the terms under which dark fiber must be provided. If the dark fiber is in place, it should not be difficult to terminate it.

In its Comments, Pacific states the arbitrator does not address the parameters and limitations Pacific has proposed for dark fiber unbundling. The parameters and restrictions include Pacific's ability to revoke leased fiber from CLECs with 12 months notice, to take back underused fiber, and to forbid competitors in any two year period from leasing more than 25% of the dark fiber in a given segment of the network. In light of the FCC's determination that the foregoing limitations and parameters are reasonable, the arbitrator should reconsider the rejection of Pacific's proposed language.

Pacific's proposed language is rejected. The FCC sets tight parameters around ILEC restrictions on access to dark fiber. "... if incumbent LECs are able to demonstrate to a state commission that unbundling dark fiber threatens their ability to provide service as a 'carrier of last resort,' states have the flexibility to establish reasonable limitations and technical parameters for dark fiber unbundling." (*UNE Remand Order* at ¶ 352). Pacific has not met its burden of proof that its carrier of last resort obligations are jeopardized, without implementation of the limitations and technical parameters it has proposed.

Issue 59

Should Pacific's or AT&T's NID language be adopted?

AT&T's Position:

AT&T contends that Pacific insists on offering the NID associated with UNE loops "as is," i.e., with no warranty that it will be in working order. Pacific bases its position on the fact that it will provide the NID without charge and the allegation that AT&T refuses to compensate Pacific for modification of a non-working NID. AT&T asserts that this Commission did not separately calculate the cost of a NID, but included its costs in the cost of the loop UNE (see D.99-11-050

at Appendix C. Scenario 1, page 1) so Pacific is not "giving away" the NID as it implies.

AT&T contends that the FCC requires that all network elements be provided in good working order. AT&T asserts that Pacific's refusal to do so violates the Act as the FCC has interpreted it. (47 CFR § 51.311(a) and (b) and Ex. 104 at 18.)

Pacific's Position:

Pacific contends that it provides the existing NID on an "as is" basis free of charge. Since there is no charge, unless AT&T has paid Pacific to service the NID, AT&T should take the NID as it currently exists. In almost all cases, the NID is in good condition. AT&T's proposed language improperly places the obligation on Pacific to fix a non-functioning NID but does not contemplate compensating Pacific for the costs associated with that work.

Discussion:

AT&T's position is adopted. D.99-11-050 in the Commission's OANAD proceeding indicates that the cost of the NID is included within the TELRIC loop costs adopted in D.98-02-106. (fn. 124 at 141). Since the costs of the NID are included in the TELRIC for the loop, Pacific is required to provide a NID in working order, at no extra charge. This is reasonable since Pacific is already being compensated through the TELRIC for the loop. This outcome is reflected in the following sections:

Section 2.19: Pacific's proposed language is deleted.

Section 4.1.1: In its Comments, Pacific asserts the Draft erred in permitting AT&T to attach its wiring directly to Pacific's lugs. In adopting this language, the DAR ignores the testimony of Pacific's Mr. Lube on the technical restraints of such an arrangement. Pacific's proposed language is adopted.

Sections 4.3.2 and 4.3.3: AT&T's proposed language is adopted.

Section 5.1.2: Pacific's proposed language is rejected.

Issue 60

Should Pacific's or AT&T's Packet Switching language be adopted?

AT&T's Position:

Both AT&T and Pacific agree that the FCC has declined to make packet switching an obligatory ILEC offering unless certain limited circumstances occur. AT&T's proposed language for packet switching, for the most part, directly copies or paraphrases the FCC's rule. (Ex. 201 at 21.)

Pacific disputes AT&T's request that Pacific provide access to the remote terminal within thirty days or provide packet switching as a UNE. AT&T contends that Pacific has provided no evidence that thirty days is an unreasonable period within which to provide access to its remote terminals.

Pacific objects to AT&T's provision that would permit AT&T to continue ordering packet switching for six months after Pacific provides evidence that AT&T no longer meets the conditions of § 6.11.2. AT&T contends that it needs time in order to ensure an orderly transition without disrupting service to end users and to develop alternatives so that it is not effectively ejected from the market altogether by a too-abrupt transition period.

AT&T contends that Pacific takes the position that if space in Pacific's remote terminal is exhausted, then the condition in § 6.11.2.3 is not met because Pacific will have "offered" collocation, but simply cannot provide it for lack of space. AT&T argues that there is no support in the *UNE Remand Order* for such a strained interpretation. Offering what is unavailable does not provide an exception to the obligation Pacific has to provide packet switching whenever a CLEC cannot collocate its DSLAM at a Pacific remote terminal (where alternative, appropriate copper facilities are also unavailable). AT&T contends that the arbitrator must

specifically reject Pacific's interpretation of § 6.11.2.3 in order to avoid the likely disputes that will arise.

Pacific's Position:

Pacific contends that its language is more consistent with the *UNE Remand Order* than AT&T's. The only changes Pacific makes are to track the FCC language accurately. Specifically, Pacific's mark-up reflects that the FCC requires the unbundling of packet switching only in the limited circumstances where (1) an ILEC provisions xDSL-based services using xDSL-capable DLC in lieu of uninterrupted copper pairs back to the central office, and (2) the ILEC prohibits CLECs from collocating their own DSLAMs at the DLC remote terminal. However, an ILEC is relieved of the obligation to unbundle packet switching (including DSLAM equipment) if it permits CLECs to collocate their DSLAMs at the remote terminal.

Although Pacific has not yet employed any xDSL-capable DLC remote terminals (also known as "next generation" DLC or NGDLC"), it has announced plans to do so beginning this year in connection with Project Pronto. When this occurs, Pacific will allow CLECs to collocate their own DSLAM line cards at the NGDLC remote terminal. Consequently, under the FCC's rules and the Act, Pacific asserts that it will be under no obligation to unbundle packet switching.

Discussion:

Pacific's language in § 6.11.2 is adopted, with some exceptions noted below. AT&T's proposed language in § 6.11.2 broadens the requirements in the *UNE Remand Order*. For example, AT&T objects to Pacific's fiber optic limitation in § 6.11.2.1. However, the FCC itself in ¶ 313 points to a situation where "an uninterrupted copper loop is replaced with a fiber segment or shared copper in the distribution section of the loop." In spite of AT&T's assertion in its

Comments, the FCC does point to the presence of fiber optic facilities that make unavailable a continuous copper facility needed to provide competing xDSL service. "Furthermore, xDSL services generally may not be provisioned over fiber facilities." The FCC clearly deals with fiber optic facilities in ¶ 313, not some other newly-invented facilities that Pacific may deploy in its network in the future, as AT&T described in its Comments.

AT&T's language in § 6.11.2.3 is adopted. It is reasonable to set a thirty-day deadline for Pacific to allow AT&T to collocate in a remote terminal.

AT&T's proposed language is adopted for § 6.11.2.4. This is consistent with the outcome for Issue 65(a). Pacific may not avoid its unbundling obligation by shifting its packet switching equipment to its data affiliate.

AT&T's language in § 6.11.4 is rejected. In its Comments, Pacific clarifies that the intent of this section is not to give AT&T 180 days so that it can transition its customer over to its own packet switched network. The purpose of § 6.11.4 is to set a cutoff date after which customers cannot be added and grandfathered. Customers who are grandfathered are allowed to stay on Pacific's network until AT&T decides to take them off. AT&T's 180-day language allows AT&T to add "grandfathered" customers long after Pacific has made the required showing to stop offering UNE packet switching. Since this is not a needed transition mechanism, the 180-day period will be deleted.

Issue 61

Should Pacific be permitted to charge AT&T for time and material for cooperative testing?

Should cooperative testing restoral be at parity with Pacific's retail products or should language stipulating accelerated resolution for provisioning troubles that occur within five days of order completion also be included?

AT&T's Position:

Over the last three years, AT&T and Pacific have performed a wide variety of cooperative testing, and each party has borne its own expense of such testing. AT&T has not proposed to charge Pacific for cooperative testing, and Pacific should not charge AT&T.

AT&T has proposed language in § 14.3.10 providing: that "For provisioning troubles within 5 days of order completion, Pacific processes shall deliver and restore Network Elements to AT&T in shorter intervals than the normal maintenance intervals." AT&T asserts that this language makes sense because trouble that occurs so soon after order completion strongly suggests defective installation, and a problem that merits accelerated troubleshooting.

Pacific's Position:

Pacific contends that cooperative testing is above and beyond any internal testing already done by Pacific before it turns a UNE over to a CLEC. Therefore, it is appropriate to charge the CLEC time and materials for such testing. However, in connection with provisioning or repair, if trouble is found in Pacific's network during cooperative testing, both the correction of the trouble and the cooperative testing are provided at no additional charge to the CLEC.

Pacific contends that cooperative testing restoral should be at parity with Pacific's retail products and not, as AT&T proposes, on an accelerated basis for provisioning troubles that occur within 5 days of order completion. Pacific is not obligated to provide service to CLECs that is superior to the service that Pacific

provides to itself and its affiliates. Pacific's only obligation under the Act is to provide CLECs with parity.

Discussion:

Section 14.1: AT&T's position is adopted, and Section 14.1 will be deleted. Both companies incur expenses in the cooperative testing process. It is not reasonable for one party to have to compensate the other for the work that both are doing.

Section 14.3.10: Pacific's position is adopted. As Pacific says, it is not obligated to provide service to CLECs that is superior to the service it provides to itself or its affiliates. Pacific does not provide the accelerated cooperative testing restoral for itself or its affiliates.

Issue 62

Should Pacific's or AT&T's language on Line Information Data Base (LIDB) be adopted?

AT&T's Position:

Pacific purports to offer a service to AT&T which permits AT&T's network to query Pacific's LIDB regarding OLNS and CNAM.⁴⁶ However, Pacific admits that it lacks the capability to bill AT&T for these queries. (Ex. 103 at 30.) AT&T contends that Pacific proposes contract language that would force AT&T, in effect, to build an interim billing system while Pacific develops its own.

Since Pacific is required to offer – and presumably, to be able to track and bill for – such database access, under relevant FCC Orders, AT&T asserts that it is incumbent on Pacific to use factors or averages (such as an average-query-per-

⁴⁶ OLNS queries provides "Originating Line Information," an SS7 Feature Group D signaling parameter which refers to the number transmitted through the network identifying the billing number of the calling party. CNAM queries allow AT&T to query Pacific's LIDB for Calling Name Information in order to deliver that information to AT&T's end users.

customer) to bill AT&T for the queries. Pacific claims it has no information from which to develop a factor. Pacific proposes that AT&T develop systems whereby it would report its use of the databases, so that Pacific can bill AT&T for the queries. (Ex. 103 at 31.) AT&T asserts that Pacific does not propose to compensate AT&T for this service, and it fails to explain why it cannot make arrangements with its third-party database vendors to track this information until its own tracking systems are ready.

Pacific's Position:

Pacific can accommodate CLECs' queries to its CNAM database and OLNS information stored in Pacific's LIDB on a nondiscriminatory basis. In addition, Pacific will generate billing for these queries in either of two ways: CLECs can report their usage to Pacific on a monthly basis, or the CLECs can have the third party that transmits the CLEC's queries report the usage.

Pacific asserts that AT&T's proposal to use a factor is unreasonable since there is currently nothing for a factor to be multiplied against. Instead, Pacific relies on the CLECs to report their usage to derive the billing. Pacific currently is developing recording capabilities that will replace the need for CLECs to report their usage. That capability will be available by 1Q 2001.

Discussion:

Section 9.3.2.1: Pacific's language is adopted. It is reasonable to add the provision limiting Pacific's liability to AT&T for delays in providing service in this specific circumstance. This section deals with the process for implementing new LIDB applications. AT&T is to make an estimate of its busy hour queries, and Pacific makes an estimate of capacity needed. If Pacific underestimates the capacity needed, it will work "diligently" to provide the service. Pacific should be protected from liability while ironing out the bugs in a new application.

Sections 9.3.4.6 and 9.3.4.7: AT&T's language is adopted. Pacific is offering a service to AT&T, although it currently has no way to bill for the service. Pacific would have AT&T supply the data to help Pacific bill for the service, which could cause AT&T to develop a method to collect the information. It is not reasonable to require AT&T to develop a way to compile the information on an interim basis, especially since Pacific says it will be able to bill by early 2001. In other instances in telecommunications where carriers cannot capture actual usage data, a factor has been employed. There is no reason why a factor cannot be developed and employed here on an interim basis.

Section 9.3.4.10: In its Comments, Pacific indicates that its proposed language is intended to make sense of AT&T's language. According to Pacific, AT&T's language, without Pacific's modifications, is nonsensical and will lead to confusion. The arbitrator agrees that AT&T's language does not make sense as written; Pacific's proposed language is adopted.

Issue 63

How should FNPA 555-1212 DA calls be routed when dialed by an AT&T customer using unbundled switching or Resale Services?

AT&T's Position:

AT&T contends that Foreign Numbering Plan Area (FNPA) DA calls, when dialed by an AT&T local customer using unbundled switching Options B or C, or resale customers using Resale Operator Alternate Routing (ROAR) should be routed to AT&T's operator platform. AT&T acknowledges that the Commission recently found in Pacific's favor in this dispute and categorized all FNPA DA calls as local (see D.99-11-028.) AT&T argues that the Commission's decision violates the dialing parity requirements of § 251(b)(3) of the Act, and that the Commission should reverse its findings in D.99-11-028 in this arbitration.

Pacific's Position:

Pacific contends that this issue was recently decided by D.99-11-028, finding that FNPA DA calls are local and should be delivered to the serving local exchange carrier. That decision is reflected in Pacific's proposed language.

Discussion:

AT&T's position is adopted, with modification. In D.99-11-028, the Commission found that FNPA DA calls should be routed to the customer's local service provider, rather than to the presubscribed intraLATA toll carrier. However, the Commission made an exception for customers served via unbundled switching or resale customers using ROAR. Ordering Paragraph 2 reads as follows: "Pacific shall offer unbundled switching options (specifically, Option B and Resale Operator Alternate Routing) in those geographic areas where the Federal Communications Commission has determined unbundled switching will be available as an unbundled network element."⁴⁷ While D.99-11-028 did not specifically address Option C, Option C merely combines the special operator routing functions found in B with other special routing functions specified by the CLEC. Therefore, Option C is included as well. The key defining element of Option B and ROAR, is that the CLEC which purchases the unbundled switching element, determines how operator calls should be routed. In this case, AT&T has determined that FNPA 555-1212 should be routed to the intraLATA toll carrier.

In its Comments, Pacific points out that AT&T's proposed § 6.2.14.2 violates the outcome of D.99-11-028, by requiring Pacific to route FNPA 555-1212 calls to AT&T when Pacific, not AT&T, is the local exchange provider, and

⁴⁷ D.99-11-028, *mimeo*, at 19. The rather cryptic FCC reference resulted from the press release issued in advance of the *UNE Remand Order*. The full order which greatly clarified the FCC's rules for unbundling switching was not released until after this decision.

AT&T is only the presubscribed IXC. Pacific is correct. Section 6.2.14.2 shall be deleted.

Issue 64

Should Pacific's or AT&T's language incorporating the UNE Remand Order be adopted in Attachment 6?

AT&T's Position:

Although the description of the issue suggests a much broader scope, AT&T's discussion focuses on only one of the disputes emerging from the *UNE Remand Order*: the circumstances under which Pacific may be excused from its obligation to provide the switching UNE. The first disagreement is about the amount of written notice Pacific needs to give before no longer providing the switching UNE. Pacific proposed 60 days, and AT&T, 180 days. AT&T contends sixty days is a very short amount of time for AT&T to re-arrange its service provision plans, since AT&T cannot bring its own switches on line that quickly.

The parties disagree about whether Pacific will elect not to provide the switching UNE (AT&T's proposal) or to provide local switching at so-called "market prices" (Pacific's proposal). An acceptable compromise to AT&T would be language stating, "Pacific may elect not to provide LSNE [Local Switching Network Element] at TELRIC [Total Element Long Run Incremental Costs] prices..."

The next set of disputed language is in § 6.1.3.2 relating to the EEL. The *UNE Remand Order* requires that an ILEC may not withdraw switching as a UNE unless it offers the EEL throughout its density zone 1 serving areas. AT&T proposes to add a limiting term to the EEL section, "without use restrictions of any kind." AT&T has the right under the Act to use UNEs to originate and terminate all its traffic, including toll traffic.

Pacific believes that it is entitled to withdraw the switching UNE for any AT&T customer that has four or more lines from AT&T. AT&T believes that the

UNE Remand Order permits Pacific to withdraw the switching UNE only as to the fourth and subsequent lines AT&T provides to a single customer at a single location. Also, for a customer purchasing more than four lines from AT&T at one location, but purchasing only three at another, AT&T would be entitled to the switching UNE for all lines at the second location. AT&T contends that Pacific's more general language presents much greater potential for misinterpretation.

The next dispute relates to the information AT&T must provide in order for Pacific to determine where it may withdraw the switching UNE. Pacific's language would require AT&T to turn over details regarding all of AT&T's largest customers that would assist Pacific in attempting to "win back" their business. *AT&T's proposed language makes it clear that Pacific can demand only the information that is relevant to the narrow determination of whether the customer is one for whom Pacific can withdraw the switching UNE.*

AT&T would prohibit Pacific from disturbing existing combinations of UNEs that Pacific is providing to AT&T customers, at the time it determines to withdraw the switching UNE. AT&T also has a savings clause for orders for the switching UNE that AT&T submitted before Pacific noticed its intention to withdraw the UNE. It takes time for AT&T to deploy switches to replace any switching services that Pacific might withdraw.

Section 6.1.3.6 provides that, once Pacific has withdrawn the switching UNE in an eligible area, Pacific should reject any orders that AT&T may mistakenly submit for the switching UNE. Since Pacific intends to keep offering switching at market prices, it could work the order and then impose substantially higher charges. To avoid misunderstanding, AT&T contends that the Commission should require Pacific to provide separate ordering forms and other ordering methodologies for non-UNE switching so such errors do not occur.

Pacific's Position:

Pacific contends that its language accurately reflects the FCC's analysis in the *UNE Remand Order*, and that AT&T's language does not comply with the switched access and special access use restrictions that the FCC order established. Pacific also asserts that AT&T's language misstates the scope of the waiver of the switching UNE in Zone 1 density areas. Pacific contends that the *UNE Remand Order* restricts CLECs from using UNEs, including the EEL, for special access applications. In addition, Pacific argues that AT&T's proposal that the waiver does not apply to the first three lines, is a misreading of the FCC Rule. AT&T also proposes that the waiver does not apply to a trunk side port. Pacific contends that this is wrong, and that the waiver applies to the entire switching UNE.

Discussion:

Section 5.1.4.1: This section is addressed in Issue 65(a).

Section 6.1.3: In its Comments, AT&T expresses concern about Pacific's use of the term "market based" to describe the prices it will charge for LSNE when it no longer offers Local Switching as a UNE. AT&T believes Pacific could use that phrase to create evidence in subsequent regulatory proceedings that local switching is competitive. AT&T proposes the phrase be replaced with the following: "Pacific may elect not to provide LSNE at TELRIC prices..." AT&T's proposed language is adopted. AT&T's phrase accomplishes the same thing, but without any possible hidden meanings.

AT&T's proposed language elsewhere in Section 6.1.3 is adopted. Sixty days is not enough time for AT&T to deploy its own switch or make other arrangements for serving its customers. Given the time needed to deploy a switch, AT&T's proposal for 180 days is reasonable.

Section 6.1.3.2: In its Comments, AT&T states Pacific's proposed definition for EEL is contrary to the *UNE Remand Order*, which explicitly declined to define the EEL as a separate network element. In ¶ 477, the FCC does

identify the functionality of the EEL, and AT&T's definition closely parallels the *UNE Remand Order's* discussion of the EEL. AT&T objects to the Arbitrator's deletion of the phrase, "without use restrictions of any kind." Simply rejecting its language implies that Pacific may impose all sorts of other restrictions on use of the EEL, says AT&T. AT&T proposes adding the proviso, "except those permitted under § 2.3." AT&T's proposed language for § 6.1.3.2 is adopted, along with the above proviso. AT&T has provided convincing evidence that its definition of EEL more closely parallels the FCC's definition than Pacific's.

Section 6.1.3.3: Pacific's position is adopted, with modification. AT&T provides a rather strained interpretation of the FCC's *UNE Remand Order*. Paragraph 253 clearly states that the switching exception applies to "end users with four or more lines within density zone a..." That does not mean that the first three lines can be purchased as unbundled switching elements. In its Comments, AT&T defends its proposal that the availability of the exemption must be determined as to each "end-user customer account" at each "physical customer location." Pacific's proposed language does not address the issue, which could lead to dispute. AT&T's proposed language relating to customer location makes sense. It would be difficult to track its customers' facilities throughout an Exception Territory. Section 6.1.3.3 shall be modified to read: "PACIFIC may only exercise this election when the AT&T customer has four or more lines at a single physical customer location."

Section 6.1.3.4: AT&T's position is adopted. AT&T's language limits the information about its customers that must be given to Pacific.

Section 6.1.3.5: In its Comments, AT&T stresses the need for this section, which was rejected in the Draft. The first sentence prohibits Pacific from tearing down existing combinations. The arbitrator must adopt this language, since it is compelled by FCC Rule 315(b). The second sentence is simply a "savings" clause that requires Pacific to fulfill all orders for local switching that were

scheduled for installation within the six-month period after Pacific issues an Exception Notice. AT&T added the reference to the consolidation of customer accounts to make it clear that, if it consolidated billing for a customer with locations inside and outside the Exception Territory, only those locations within the Exception Territory would count in determining the exemption. AT&T's proposed language for Section 6.1.3.5 is adopted, except for the reference to consolidation of accounts. While AT&T described the meaning in its Comments, the actual contract language is not at all clear. It is appropriate, however, to include a prohibition against tearing down existing combinations.

Section 6.1.3.6: AT&T's position is adopted. AT&T is concerned that Pacific will process its order since Pacific plans to offer switching at market based prices in any instance where switching is not offered as UNE.

Section 6.1.3.7: Pacific's position is adopted. The switching waiver applies to trunk side ports.

Issue 65

What loop qualification information should Pacific provide to AT&T and how should it provide such information:

AT&T states Pacific objects to AT&T's request for spectrum management analysis, in addition to a spectrum inventory identifying anything on the target loop that would disturb its use as an xDSL loop. A spectrum management analysis would indicate how Pacific would prevent interference from other Pacific facilities that would preclude the use of a particular loop for a particular xDSL service. Pacific performs a similar review on its own behalf and is, therefore, obliged to provide the information to AT&T under the Act's parity requirements.

In addition, AT&T asserts that Pacific's many disclaimers and qualifiers, including a disclaimer regarding the accuracy of provided information, renders

meaningless the loop qualification data Pacific provides. This is especially true since Pacific expects AT&T to pay for the information.

The parties disagree about AT&T's proposal that Pacific inform AT&T whether a particular loop "meets the technical parameters for PSD #5 DSL-Capable Loop without additional conditioning." According to AT&T, Pacific also objects to AT&T's language specifying the transmission media type used to deliver a target loop to the central office.

AT&T alleges that Pacific wants to limit its duty to supply any inventory it may have produced that identifies xDSL-capable loops to include only information found in its existing pre-qualification and loop qualification systems. It is obvious, says AT&T, that Pacific is attempting to shield any information it has developed for its own use.

Pacific agrees with AT&T that spectrum management must be performed. As part of the loop qualification process, Pacific will provide an inventory of disturbers to AT&T. AT&T should be responsible for performing its own spectrum management analysis, based on the data Pacific provides.

Pacific asserts that it provides AT&T the exact loop qualification information Pacific has available in mechanized and/or manual records. This is the same information Pacific uses for itself. However, errors may exist between what is recorded and what actually exists in the field. If an error is discovered, Pacific will provide the CLEC with the corrected information.

Pacific proposes to delete the language in § 5.4.3 referring to PSD masks, as Pacific provides unbundled loops for xDSL without the mask distinction. Instead, Pacific offers analog and digital loops that AT&T may order based on the physical characteristics of the loop. AT&T will communicate to Pacific the type of loop it wishes to order by using ordering codes which equate to the different spectral management class numbers (i.e. PSD). No specific references to mask number are relevant so they should be deleted from the ICA.

Pacific's proposed language in § 5.9.1.4 reflects the fact there is no need to differentiate between universal digital loop carrier (DLC) and integrated DLC. Neither will accommodate DSL.

Pacific's proposed language in § 5.4.1 is adopted. AT&T is expected to perform its own spectral management analysis, based on information received from Pacific. Also, AT&T is required to pay a loop qualification charge for that service it receives from Pacific. Pacific's proposed disclaimer information is appropriate. There could be discrepancies between the record and actual physical plant, and Pacific will provide AT&T with updated information if the original information is found to be in error.

AT&T's proposed language in § 5.4.3 is adopted. Pacific shall provide AT&T with information regarding PSD #5 DSL-capable loops. The parties agreed to that definition during negotiations. Pacific may not make unilateral changes to agreed-upon language.

Pacific's proposed language in § 5.9.1.4 is adopted. There is no point in providing the information requests since neither UDLC or IDLC loops will accommodate DSL.

AT&T's proposed language is adopted for § 5.9.1.5. If Pacific develops other systems for qualifying loops, AT&T should have access to the data contained in those systems.

Pacific's language in § 5.4.4 is adopted. This section confirms that Pacific may charge AT&T for the loop qualification information it provides.

In its Reply Comments, Pacific indicates the parties have settled § 5.2.8.4 and agreed to delete it from the ICA.

Issue 65(a)

When located in a remote terminal, should Pacific be required to offer the DSLAM as a separate unbundled network element if AT&T is denied space at the site for its own DSLAM?

AT&T's Position:

As AT&T stated in response to Issue 60, when Pacific has located a DSLAM in a remote terminal and AT&T cannot place its DSLAM there, either because Pacific refuses to permit such collocation or because the space in the remote terminal is exhausted, Pacific is obliged to offer AT&T packet switching as a UNE. Pacific's proposed language attempts to qualify what the FCC posited as an unqualified obligation for ILECs. AT&T contends that Pacific should not be allowed to escape its obligations under the Act and the *UNE Remand Order*. AT&T contends that the Commission should exercise its independent state authority to require Pacific to treat DSLAMs owned by either it or its advanced services subsidiary as Pacific's for purposes of compliance with the *UNE Remand Order*.

AT&T has also proposed § 5.2.8.2, which requires Pacific to provide, at AT&T's request, a "splitter" to separate voice and data to a particular frequency. AT&T argues that the *UNE Remand Order* (at ¶ 303) defines a splitter as part of the packet-switching UNE. Thus, just as Pacific must provide access to its DSLAM when AT&T is unable to collocate its own DSLAM in Pacific's remote terminal, it must also provide access to a splitter.

Pacific's Position:

Pacific contends that AT&T's request should be rejected. The FCC stated in the *UNE Remand Order* that the DSLAM is not part of the unbundled loop.⁴⁸

⁴⁸ *UNE Remand Order*, paras. 306-311.

Pacific asserts that the FCC did not require the unbundling of DSLAMs as a separate UNE. Pacific also contends that the FCC does require the unbundling of packet switching, including DSLAM equipment, but only in the most limited of circumstances. As a result of the FCC's Ameritech Merger Conditions, Pacific is required to transfer the provisioning of certain advanced services and equipment, including DSLAMs, to one or more separate affiliates. By the time this arbitration is completed, Pacific asserts that it will not own any DSLAMs, and Pacific cannot be compelled to provide unbundled access to equipment it does not own.

Discussion:

Pacific's proposed language in Section 5.1.4.1 is adopted. Pacific's language more closely follows the requirements in paragraph 313 of the *UNE Remand Order*. AT&T expressed concern that Pacific would attempt to evade its unbundling obligation once it transfers its DSLAMs over to its advanced services subsidiary and has no more DSLAMs of its own. In the FCC's SBC/Ameritech Merger Decision, a portion of footnote 682 reads as follows:

"Consistent with the Commission's rules, if SBC/Ameritech transfers to its separate advanced services affiliate a facility that is deemed to be an unbundled network element under 47 U.S.C. § 251(c)(3), the Commission's unbundling requirements will attach with respect to that element."⁴⁹

In other words, the unbundling obligation remains even when the advanced services subsidiary takes ownership of DSLAMs in the remote terminal.

In its Comments, AT&T agrees with the arbitrator's above conclusion that unbundling requirements remain even when Pacific's advanced service affiliate takes ownership of DSLAMs in the remote terminal. However, AT&T sees the

⁴⁹ SBC/Ameritech Merger Decision, FCC 99-279, footnote 682.

need to include that requirement in the ICA itself, and points to the arbitrator's rejection of its proposed § 5.11.2 which would have accomplished that. Section 5.11.2 does address that issue, but the section has other flaws which are addressed below. Instead, the requirement will be added to Section 5.1.4.1 to make this a binding contract term.

The following sections are consistent with the outcome described above:

Section 5.1.4.1: Pacific's language is adopted with modification. It is more consistent with the requirements in the *UNE Remand Order*. The following language shall be added: "To the extent that an affiliate of PACIFIC deploys DSLAM equipment in a remote terminal or acquires such equipment through an asset transfer, the obligation remains to unbundle these DSLAMs."

Section 5.2.8.2: In its Comments, AT&T asserts that it should be allowed access to any splitter or filtering device Pacific uses to separate voice and data communications. AT&T refutes the Draft's rejection of AT&T's proposed language on the grounds that it goes beyond the FCC's requirements. AT&T cites the *UNE Remand Order* ¶ 175 which specifically finds that all attached electronics come with a UNE loop. To the extent Pacific has attached a splitter to a loop, AT&T is entitled to use of the splitter as part of the purchase of the unbundled loop UNE.

The Final Arbitrator's Report in the Commission's Interim Arbitration for Line Sharing found that ILECs need not own a splitter. "It is difficult to see how a splitter is part of the loop if an ILEC is not required to own a splitter." (FAR at 35).

In its *Line Sharing Order*, the FCC states that if the ILEC retains control over the loop and splitter equipment and functions, it "shall provide to requesting carriers loop and splitter functionality that is compatible with any transmission technology that the requesting carrier seeks to deploy...." (47 C.F.R.

51.319(h)(4).) CLECs are allowed access to the ILEC's splitter, but the ILEC is not required to sell splitters to CLECs. In light of these FCC Rulings, Pacific should not be *required* to offer AT&T the option of purchasing a splitter. Section 5.2.8.2 is revised as follows:

“When AT&T orders DSL-capable Loops from PACIFIC, PACIFIC shall provide AT&T access to loop and “splitter” functionality. The splitter located in Pacific's Central Office is to be used by AT&T to separate voice and data communications to a specific and pre-defined “above voice frequency spectrum.” Prices for use of the splitter are set forth in Attachment 8.”

Section 5.11.1: AT&T's proposed language is rejected. AT&T's request goes far beyond what the FCC ordered in its *UNE Remand Order*.

Section 5.11.2: AT&T's proposed language is rejected. AT&T cannot unilaterally declare that Pacific's advanced services affiliate is an ILEC, in cases where AT&T is unable to collocate at the remote terminal.

Issue 65(b)

In order to make an unbundled loop available to AT&T when IDLC facilities are present, is Pacific required to make the IDLC available or allow AT&T to employ equipment in the remote terminal location or in the central office?

AT&T's Position:

AT&T's proposed language in §§ 5.10.1.1 and 5.10.1.4 of Attachment 6 would require Pacific to offer two methods, among a total of four, for Pacific to make available unbundled loops that Pacific provides over IDLC facilities. Pacific asserts that it cannot “technologically and physically . . . provide unbundled IDLC loops.” (*Response* at 72.) Pacific's testimony, however, describes two methods that Pacific could use to provide unbundled IDLC loops, one of which, it notes, employs a digital cross-connect system (DCS) and is particularly compatible with the IDLC technology that Pacific now deploys in its network.

Both Pacific and the FCC note that these possible methods for providing unbundled loops are very expensive. AT&T contends that it should be able to select from among the four methods, and AT&T will take the costs into account in making its choice. So long as AT&T is willing to pay the price for the unbundling, and there is a technically feasible method for accomplishing it, AT&T asserts that Pacific is obliged, under the Act, to make it available.

Pacific's Position:

AT&T's proposed language at Attachment 6, Section 5.10.1.4 would require Pacific to unbundle IDLC loops. However, Pacific contends that it is technologically and physically unable to provide unbundled IDLC loops. Pacific asserts that this issue is largely theoretical, since Pacific currently serves less than one percent of its total loops with IDLC. Thus, AT&T's unbundling rules for this situation are thus unnecessary, particularly since less burdensome alternatives are available.

Under Pacific's proposal if a customer is currently served by Pacific using IDLC, and AT&T converts that customer to its local service, Pacific will make a non-integrated DLC loop available for that customer, where possible. If no parallel copper pairs or non-integrated DLC facilities currently exist for providing the requested unbundled loop, Pacific will install the necessary alternate facility, at AT&T's expense. Pacific expects there will be few cases where an existing alternative facility is not available; in those cases, the BFR process provides a way for the CLEC to request the construction of the new facilities.

Discussion:

In its Comments, AT&T asserts that the draft errs in rejecting AT&T's § 5.10.1.1. AT&T points to FCC's definition of an unbundled loop in the *UNE Remand Order*:

The definition of a network element is not limited to facilities, but includes features, functions, and capabilities as well. Some loops, such as integrated digital loop carrier (IDLC), are equipped with multiplexing devices, without which they cannot be used to provide service to end users. Because excluding such equipment from the definition of the loop would limit the functionality of the loop, we include the attached electronics (with the exception of DSLAMs) within the loop definition. (*UNE Remand Order* at ¶ 175).

AT&T's interpretation of ¶ 175 is correct. AT&T is entitled to access to the IDLC equipment, as part of its access to the unbundled loop. AT&T's proposed § 5.10.1.1 is adopted.

Pacific's language in § 5.10.1.4 is adopted. AT&T's language goes beyond the packet switching unbundling required by the FCC. AT&T's proposed language is very general and allows AT&T to deploy any equipment in the remote terminal or central office that it needs to serve its customers in the same way Pacific treats its retail customers. The FCC permits a carrier to collocate one piece of equipment in a remote terminal--its DSLAM--and only if the ILEC does not unbundle its own DSLAMs. (*UNE Remand Order* ¶ 313).

Pacific's proposed language in § 5.16.2 is adopted. The BFR process is appropriate when there is a need to determine what is needed to provision service when no copper loop is available.

In its Comments, AT&T criticizes the use of the BFR process. However, AT&T's proposal that Pacific "use other methods to provide such Links" is too vague, Pacific is going to have to analyze the options available which necessitates the use of BFR process.

Issue 65(c)

What are Pacific's obligations when the loop facilities to a customer's premise pass through transmission equipment that prevents AT&T from offering xDSL service?

AT&T's Position:

Pacific objects to AT&T's language in § 5.8.3 of Attachment 6, specifying that, when loop facilities pass through transmission equipment that make it unsuitable for offering xDSL service, Pacific must offer facilities "of equivalent quality to those offered by PACIFIC or its affiliates." Although Pacific has not specified its objection, AT&T believes it relates to the reference to "its affiliates." AT&T contends that the Commission must ensure that Pacific's compliance with the SBC/Ameritech merger conditions does not allow it to avoid its obligations under the Act.

Pacific seeks to inject a reference to FCC Rule 319(c)(3)(B) into the options Pacific must offer when intervening transmission equipment renders a loop unfit for providing DSL service. The referenced new rule, promulgated in the *UNE Remand Order*, would govern when Pacific must offer packet switching, not its obligations regarding loops.

AT&T contends that § 5.8.3.2 requires Pacific to provide a loop and collocation space in Pacific's remote terminal. Pacific seeks to limit AT&T's use of such space to the deployment of a DSLAM. There is no basis for such a limitation, in fact the FCC's rules regarding collocation specifically prohibits Pacific from specifying how AT&T uses collocation space.

Pacific seeks to eliminate a third option that AT&T requests in § 5.8.3.3, a loop with electronics, including ATM transport, "necessary to provide xDSL capabilities of equivalent quality to those deployed by Pacific or its affiliates." AT&T asserts that Pacific's proposed alternative is yet another restatement of

AT&T's right to packet switching if it cannot place its own DSLAM in a Pacific remote terminal where Pacific has placed a DSLAM.

Pacific's Position:

Pacific asserts that AT&T's proposed language says it should be provided access to unbundled xDSL functionality anywhere it has been denied access to a remote terminal. AT&T's language does not accurately track the requirements in the FCC's *UNE Remand Order*, according to Pacific. The FCC was very specific on the limited situation that would warrant the unbundling of packet switching.

Pacific states that it has modified AT&T's proposed § 5.8.3.2 to clarify that, in accordance with the *UNE Remand Order*, the only purpose for which Pacific must make collocation space available in Pacific's remote terminal is for AT&T to deploy its own DSLAM.

Pacific also proposes to modify § 5.8.3 to reflect that Pacific's data affiliate cannot be required to unbundle its collocated equipment. The FCC order quoted above is very specific that unbundling obligations apply to the ILEC, not its data affiliates. Also, Pacific adds the word "or" to clarify that it is obliged to make available either the alternative in Section 5.8.3.1 or the alternative in Section 5.8.3.2, but not both.

Discussion:

Pacific's proposed language is adopted, with modification. AT&T's proposed phrase "of equivalent quality to those offered by PACIFIC or its affiliates" shall be adopted. Pacific is incorrect that the unbundling obligation does not apply to Pacific's data affiliate. See Issue 65(a). Pacific's proposed language tracks the requirements of the *UNE Remand Order*.

Issue 65(d)

What are Pacific's responsibilities if Pacific determines that intervening transmission equipment may be modified to accommodate xDSL loops?

AT&T's Position:

Section 5.8.5 of Attachment 6 relates to a situation where AT&T orders a loop that it intends to use to offer xDSL service and finds, through the ordering process, that the loop is unsuitable for xDSL because it is connected to intervening transmission equipment. AT&T contends that without this provision, AT&T would have to make repeated, chargeable requests to determine if the loop has become fit for use in providing xDSL service.

Pacific's Position:

Pacific is opposed to AT&T's proposed contract provision which would require Pacific to inform AT&T within five days of the removal or modification of the intervening transmission equipment. AT&T's proposed language is unreasonable because the time interval between when service is denied and the time the situation changes could be a month, a year or several years. In addition, Pacific would have to track the changes and report back to AT&T. Pacific contends that AT&T can review Pacific's pre-qualification information for free through Pacific's operating support systems. If Pacific changes its network and facilities, that pre-qualification information should be sufficient to provide AT&T with that information. If AT&T wants Pacific's technicians to make an in-depth review of the facilities that are available, AT&T can pay Pacific to conduct this loop qualification work.

Discussion:

AT&T's language in Section 5.8.5 is adopted, with modifications. It is not reasonable to expect AT&T to keep making queries about a particular loop, especially in light of the fact that checking is a chargeable request. However,

AT&T's proposed language is too open-ended. Pacific should not have to retain that information for months or years. It appears that the most important time would be close to the time when the customer makes the original request to AT&T for xDSL service. If AT&T is unable to provide xDSL service on that loop, the customer will seek a cable modem alternative, Pacific may make changes to the loop in order to serve the customer itself, or the customer may lose interest in high speed internet access. Section 5.8.5 shall be modified to limit the time during which Pacific has to provide AT&T with updated information about changes in a particular line to 60 days.

Issue 65(e)

Should Pacific be required to make available a website that lists all of its xDSL-capable offices?

AT&T's Position:

Section 5.8.4 would require Pacific to list on its web site the central offices from which CLECs can order xDSL-capable loops, and to update that list as it upgrades central offices to offer such capabilities. AT&T contends that this makes more sense than having the CLECs guess and incur the expense of submitting repeated orders to find out where they can obtain xDSL-capable loops.

Section 5.8.4 also requires Pacific to make arrangements in offices where collocation space is exhausted or approaching exhaust so that AT&T is able to obtain collocation for the purpose of accessing the same xDSL capabilities that are available in that central office to Pacific and its affiliates.

Pacific's Position:

Pacific contends that AT&T does not propose to compensate Pacific for providing a website. Pacific argues that AT&T should compile this information for itself.

Discussion:

It is reasonable for Pacific to place a list of xDSL capable offices on a website for reference by CLECs, and to keep the list up to date. This will be a minimal expense for Pacific which already operates websites to provide voluminous information for CLECs, such as the CLEC Handbook. Pacific surely has that information itself and should share it with the CLECs.

Therefore the first two sentences of AT&T's proposed § 5.8.4 are adopted. However, the remainder of Section 5.8.4 shall be deleted. AT&T asks for preferential treatment in COs where collocation space is at or near exhaust, but at which Pacific or its affiliates expands xDSL capability. Under the Commission's (and the FCC's rules), collocation space must be granted on a "first come, first served" basis. It is not appropriate for AT&T to jump to the head of the collocation line in the circumstances described.

Issue 66

Should Pacific's or AT&T's line sharing language be adopted?

AT&T's Position:

Pacific agrees to negotiate standard line sharing arrangements with AT&T, pursuant to § 5.13.1 of Attachment 6. However, Pacific objects to AT&T's requirement that it negotiate with AT&T regarding "reverse line sharing" in which AT&T is the voice provider and AT&T or its affiliate is the provider of xDSL services (§ 5.13.2), or regarding "voluntary line sharing" in which AT&T and a third-party carrier share a loop over which one provides voice service and the other xDSL service, with Pacific performing functions that facilitate such sharing. (§ 5.13.3) AT&T contends that the FCC's *Line Sharing Order*, did not require ILECs to offer either form of line sharing, but it did not "reject" them, as Pacific maintains.

Pacific also disputes AT&T's proposed § 5.13.4, specifying that in the event that negotiations over line sharing do not produce agreement after thirty days, either party may file an application for arbitration with this Commission. AT&T contends that this is precisely what the FCC directed in the *Line Sharing Order* (at ¶ 160) to facilitate issuance of an interim award.

AT&T's proposal at § 5.2.8.2 of Attachment 6 provides that Pacific provide AT&T the option of leasing Pacific's splitter in central offices where AT&T purchases xDSL loops. AT&T asserts that in its *Line Sharing Order*, the FCC directed that if an ILEC fails to provide splitter functionality to CLECs promptly, a CLEC may purchase and collocate its own splitter in the ILECs' central office. (¶ 79) AT&T argues that the FCC intends that ILECs are to make splitter functionality available for line sharing purposes to requesting CLECs.

Pacific's Position:

Pacific asserts that this issue should be deferred in its entirety to the line-sharing arbitration that is before ALJ Mattson in OANAD. Pacific contends that to ensure nondiscriminatory treatment across the industry, whatever arrangements are established in the line sharing arbitration should be imported into this agreement.

Pacific also contends that AT&T's request for unbundled splitter functionality, reverse line sharing and voluntary line sharing raise technical issues that go beyond the FCC's order.

Discussion:

Pacific's position is adopted, and AT&T's proposed sections 5.13.2 and 5.13.3 shall be deleted. In its line sharing rules, the FCC clarified that the ILEC is only required to unbundle the high frequency portion of a loop for which the ILEC

is the voice provider.⁵⁰ AT&T's request for voluntary and reverse line sharing goes beyond the FCC's unbundling requirement.

Issue 69

Should Pacific provide physical diversity for dedicated transport via the BFR process?

AT&T's Position:

AT&T contends that the cumbersome and lengthy BFR process should not be necessary to obtain diversity that is designed into Pacific's network. In its testimony, Pacific states, "To the extent existing facilities are designed to be fault protected, e.g., SONET based transport, unbundled dedicated transport provided to AT&T would also include that function." (Ex. 201 at 29.) In other words, the diversity that Pacific designs into its network "comes with" the dedicated transport UNE.

Pacific argues that AT&T can purchase diversity separately out of one of Pacific's interstate tariffs (Ex. 201 at 29). However, AT&T asserts that Pacific's own witness stated that all of the equipment, routing and other items necessary to make a UNE function according to the design specifications "come with" a UNE. (Ex. 203 at 44.) AT&T argues that it should not have to purchase anything additional to receive a "design UNE," in this case, transport with the same physical diversity as Pacific designs into facilities for its own use. Pacific also states that AT&T may purchase diversity at prices Pacific set in an "Accessible Letter." However, AT&T contends that the Commission has never approved Pacific's prices.

⁵⁰ Section 51.319 (h)(1) requires that the high frequency portion of the loop be unbundled. Subsection (3) limits the unbundling obligation to include access to "the high frequency portion of the loop if the incumbent LEC is providing, and continues to provide, analog circuit-switched voiceband services on the particular loop..."

AT&T asserts that there is no reason for Pacific to have a separate price for diversity. The FCC's UNE rules (47 CFR § 51.319(d)(2)(B)) state, with respect to all forms of the transport UNE, including dedicated transport, "The incumbent LEC shall: ...[p]rovide all technically feasible transmission facilities, features, functions and capabilities that the requesting telecommunications carrier could use to provide telecommunications services." AT&T contends that the Commission just adopted rates for the dedicated transport UNE and, under the above-cited rule, the costs that Pacific recovers include the 'design' level of diversity.

Pacific's Position:

Pacific asserts that physical diversity is not a UNE, but instead has been identified in the 271 process as ancillary equipment. Pacific provides diversity to CLECs under its FCC tariff. Pacific contends that AT&T wants TELRIC pricing for physical diversity, but under the Act, "cost-based" rates only apply to UNEs and interconnection.

Discussion:

It should not be necessary to use the BFR process to order physical diversity. Pacific's proposed language in Section 7.2.8.1, which states that physical diversity shall be obtained through the BFR process, is rejected. Pacific concedes that physical diversity has been identified as ancillary equipment in the 271 proceeding. According to Pacific, physical diversity is offered to CLECs, where available, at its existing FCC 128 tariff prices. Pacific does not explain why a tariffed service can be obtained only through the BFR process.

Also, in Appendix B of D.98-12-069, the Commission requires Pacific to provide ancillary equipment to make a UNE exceed its performance specifications or to combine UNEs at "cost-based rates." If physical diversity is required to make a UNE function as specified in the ICA, Pacific will provide it at no charge.

Issue 70

Is DCS a feature of the dedicated transport UNE (AT&T's position) or is it Ancillary Equipment (Pacific's position)?

AT&T's Position:

The Commission adopted specific rates for DCS, based on the TELRIC methodology the FCC requires for use in setting prices for UNEs, and in connection with the Dedicated Transport UNE. AT&T contends that in light of this action, it is clear that Pacific is wrong in claiming that DCS must be viewed as "ancillary equipment." AT&T further contends that DCS is a facility, feature, function or capability in connection with Dedicated Transport. Accordingly, DCS is part of the transport UNE.

Pacific's Position:

The OANAD pricing decision set a price for DCS before the *UNE Remand Order* excluded DCS as a UNE. Pacific contends that since DCS was not found by the FCC to have passed the "necessary and impair" standard, TELRIC pricing cannot be applied. Pacific argues that the FCC's *First Report and Order* requires Pacific to provide DCS capabilities to CLECs on an equal basis with those provided to IECs. Accordingly, Pacific offers DCS to CLECs through its wholesale tariff.

Discussion:

AT&T claims that Digital Cross Connect system (DCS) is part of the transport UNE. In its proposed § 7.3.2.1, AT&T defines DCS as follows:

"DCS is the function that provides electronic cross connection of Digital Signal level 0 (DS0) or higher transmission bit rate digital channels within physical interface facilities . . . "

AT&T says that since the Commission adopted specific rates for DCS, based on TELRIC methodology in its recent OANAD pricing decision, DCS must be viewed as a UNE, not as ancillary equipment.

Pacific insists that DCS is ancillary equipment. Pacific's definition of DCS is in Attachment 19, § 3.3.1:

"DCS is ancillary equipment ordered with DS1 or DS3 Unbundled Entrance Facilities or Unbundled Dedicated Transport. DCS provides electronic cross connection of Digital Signal (DS) 0 and DS1 to DS3."

The OANAD costing and pricing process was intended to provide final prices for elements included in the ICAs arbitrated at the end of 1996. However, the prices adopted in D.99-11-050 are appropriate only for elements which the FCC has determined meet the Act's "necessary and impair" standard. DCS is not included among the list of FCC-mandated UNEs.

The DCS is designed to replace or expand manual DSX frames and is used as a vehicle for digital interconnection and automatic rearrangement. It is not part of dedicated transport but it is employed to administer dedicated lines. As such, it should be considered ancillary equipment. Therefore, AT&T's proposed Section 7.3 relating to DCS shall be removed from Attachment 6, and Pacific's proposed Section 3.3 will be retained in Attachment 19.

In its Comments, AT&T asserts the Draft erred in finding that Pacific's digital cross-connect system is ancillary equipment rather than a part of the dedicated transport UNE. The FCC found in 1996 that DCS is part of the functionality ILECs must provide in connection with dedicated transport. The Draft refers to an alleged failure of DCS to meet the Act's "necessary and impair" standards. That is incorrect as well, according to AT&T. AT&T states the FCC found four years ago, that including DCS in the dedicated transport UNE meets both standards. (*Local Competition Order* at ¶¶ 446-447.)

Contrary to AT&T's assertion, the FCC merely states that ILECs must make DCS functionality available. "Therefore, we require incumbent LECs to

offer DCS capabilities in the same manner that they offer such capabilities to IXC's that purchase transport services." Clearly DCS is used in conjunction with the transport UNE, but that does not make DCS part of the transport UNE. Whatever analysis the FCC performed in 1996 to determine whether DCS meets the Act's necessary and impair standards is irrelevant. The whole purpose of the *UNE Remand Order* was to review determinations made in 1996, in light of the Supreme Court's finding that the FCC's earlier tests were not sufficiently rigorous.

Issue 74

Should the Arbitrator adopt Pacific's proposed Section 9.3.2.17 related to the scope of Pacific's LIDB offer?

AT&T's Position:

AT&T contends that Pacific is attempting to dictate in this section how AT&T can use the LIDB query UNE to serve its local customers in Pacific's territory. For service to local customers outside Pacific's territory or for interexchange customers that are not also local service customers, Pacific's proposed § 9.3.2.17 would require AT&T to pay for queries out of Pacific's interexchange carrier and resale tariff, at rates 10 times higher than those under its UNE Advice Letter. AT&T asserts that the Act and the FCC's regulations forbid the ILECs from restricting the CLEC's use of UNEs. (*Local Competition Order* at ¶292; 47 CFR §§ 319(a) and (b).)

Pacific's Position:

Pacific asserts that it provides access to LIDB on a nondiscriminatory basis. However, it is inappropriate for AT&T to claim access to Pacific's LIDB on an interexchange basis under the terms of a local interconnection agreement.

Discussion:

In its Comments, Pacific asserts the Draft erred in adopting AT&T's proposed language because nothing in the TA 96 entitles an interexchange carrier (IEC) to obtain access to and utilize UNEs such as unbundled access to Pacific's LIDB service, at TELRIC prices. Because AT&T is both a CLEC and an IEC, Pacific's proposed language in Section 5.3.2.17 merely clarifies that the LIDB service under this ICA is available to AT&T the CLEC, not AT&T the IEC.

The FCC has determined that there should be no restriction on the use of UNEs, except in the limited circumstances outlined in Issues 55 and 56, which relate to UNEs being used in lieu of special or switched access services. In this case, we are dealing with the database UNE, not special or switched access, so Pacific will not be permitted to place use restrictions on access to LIDB. Rule 319 that AT&T references from the *Local Competition Order* makes it clear that a telecommunications carrier may use UNEs to provide a telecommunications service. Access to the LIDB database enables AT&T to offer a telecommunications service to its customers.

AT&T's proposed § 9.3.2.17 includes the statement that AT&T will provide LIDB service under the ICA "when the end user has selected AT&T as its local service provider...." That is appropriate since this ICA relates to AT&T as a local service provider. AT&T's own language does not give it carte blanche to provide LIDB to one of its long distance customers, unless AT&T also provides local service to that customer. AT&T's proposed language is adopted.

Issue 75

Should the ICA contain language on Pacific's three methods of Access as Pacific proposes?

AT&T's Position:

AT&T contends that in D.99-11-050, the Commission determined that Pacific must provide all combinations of UNEs that AT&T requests. This means

that AT&T does not need the so-called "three methods of access" to Pacific's central offices for the purpose of combining UNEs on its own behalf. However, AT&T asserts that it could choose to do the combining itself in certain instances. All three methods boil down to just one method—collocation. There is no question that all three methods depend on the availability of Central Office (CO) space. Even if the arbitrator agrees with AT&T that the Commission has already determined in D.99-11-050, that Pacific must combine any UNEs AT&T requests, AT&T argues that Pacific's proposed § 2.26 should be rejected because of its anticompetitive effect. If the issue of combining UNEs is decided in Pacific's favor, it is imperative that AT&T not be limited to the essentially one method for making those combinations. There would need to be a process in place for combining UNEs in COs where space is already exhausted or nearly exhausted.

Pacific's Position:

Pacific contends that the three methods are a reasonable means for CLECs to do their own combining of UNEs. Pacific refutes AT&T's allegation that the three methods all boil down to collocation. None of Pacific's methods of access require the CLEC to pay for the cabling and equipment (as is required with collocation) and only one of the methods would even implicate a CLEC's own collocation space.

Discussion:

Section 2.26 outlines the methods that AT&T might use to combine UNEs since Issue 54 was resolved in AT&T's favor, and Pacific is required to combine elements for AT&T, § 2.26 is not necessary and will not be adopted. Section 2.26 should be deleted in its entirety.

Issue 76

Should adjacent location language be included in UNE Attachment 6, as proposed by Pacific, or in Collocation Attachment 10, as proposed by AT&T?

AT&T's Position:

AT&T contends that adjacent off-site collocation which the Commission is considering in the Collocation Phase of the OANAD proceeding is really collocation, and not an "interconnection arrangement" as Pacific contends. If adjacent off-site collocation is an interconnection arrangement, then the Act requires AT&T to negotiate regarding interconnection. AT&T asserts that it can simply obtain collocation out of a tariff because adjacent off-site collocation is a form of collocation. AT&T contends that the language regarding its provision belongs either in Attachment 10 (collocation) or in Attachment 18 (interconnection) – and not in Attachment 6 (UNEs).

Pacific's Position:

Pacific contends that its proposal for adjacent collocation and for its inclusion in Attachment 6 is reasonable for the reasons set forth in Pacific's Position on Issue 152.

Discussion:

AT&T's position is adopted, and Pacific's proposed § 2.28 in Attachment 6 will be deleted. Pacific's proposed language in Attachment 6, Section 2.28 presumes that adjacent location collocation would be used solely for accessing UNEs. While the adjacent off-site collocation could be used for accessing UNEs, it could also be used for interconnection, and therefore should not be placed in an Attachment relating strictly to UNEs. The parties dispute whether the adjacent off site facility should be termed "collocation" or "interconnection."

Issue 77

Should Attachment 6 include Pacific's provisioning and maintenance sections?

AT&T's Position:

AT&T contends that Pacific's proposed language in §§ 12 and 13 of Attachment 6 are duplications of provisions that already appear in Attachment 9 and should be rejected.

Pacific's Position:

Pacific contends that there are provisioning and maintenance terms and conditions that apply specifically to UNEs to which the provisioning and maintenance provisions in Attachment 9 would not apply.

Discussion:

AT&T's position is adopted; §§ 12 and 13 will be deleted. Pacific's proposed language is one-sided and potentially discriminatory. For example, Section 12.1 gives Pacific total discretion over routes, technologies and facilities used for access to UNEs. Section 12.7 requires AT&T to give Pacific forecasts by UNE type, at the LATA, and eventually the wire center level, which would force AT&T to share its business plan with its chief competitor.

Issue 79

Should the Arbitrator adopt Pacific's or AT&T's definition and other contract language relating to the Enhanced Extended Link (EEL)?

AT&T's Position:

AT&T asserts that Pacific's EEL definition is lengthy, convoluted, difficult to understand, and does not comply with the *UNE Remand Order*, while AT&T's proposed language is a direct paraphrase of the language in the order. AT&T contends that the definition must meet the FCC's 1999 definition, and not the Commission's much less exacting 1998 definition found in D.98-12-069. Finally,

as mentioned above concerning Issues 55, 56 and 68, AT&T contends that FCC Rule 309 forbids ILECs from imposing use restrictions on UNEs.

Pacific's Position:

Pacific contends that the FCC's rules do not require Pacific to provide the EEL, except as a condition to be granted a limited exception to the unbundled switching requirement.⁵¹

Pacific argues that AT&T's proposed contract language inappropriately expands the FCC's definition of EEL by proposing that it be used as a private line connecting two customers' premises together or connecting the customer to the AT&T Point of Presence (POP) to bypass Pacific's special access service. Pacific asserts that this violates the FCC's restriction on use of UNEs to bypass special access/private line services.

Discussion:

Since AT&T's § 3.1 was adopted in Issue 54, AT&T's language relating to the Enhanced Extended Loop in § 3.1.1 is adopted, in lieu of Pacific's language in § 3.2.

With regard to § 5.2.6, the language proposed by both AT&T and Pacific, presented problems. Pacific agrees to provide AT&T with extended loop functionality under the terms outlined in the Commission's 271 decision, which are much narrower than those in the *UNE Remand Order*. However, Pacific's use restriction is appropriate, in light of the FCC's *Supplemental Order Clarification*, FCC 00-183, adopted May 19, 2000. The ILEC is allowed, on an interim basis, to constrain the use of combinations of unbundled loop and transport network elements as a substitute for special access services. AT&T's proposed § 5.2.6 is

⁵¹ *Id.*, ¶ 278.

broader than the FCC's *UNE Remand Order* which limits transport to that between the end user and the ILEC's serving wire center. AT&T's proposed language allows AT&T to determine where the transport goes, including to any AT&T switch or collocation space. In its Comments, AT&T asserts that the draft commits legal error by rejecting key portions of AT&T's proposed definition of an EEL. In the *UNE Remand Order*, the FCC ruled, "An enhanced extended link (EEL) consists of a combination of an unbundled loop, multiplexing/concentrating equipment, and dedicated transport." Failure to list these components could lead to disputes between AT&T and Pacific over the mandated functionality of an EEL. AT&T also states that the definition should include the FCC's findings regarding the function of an EEL, namely, that it is designed to eliminate the need for collocation at each end-office. AT&T's proposed language adds needed clarity to §5.2.6 and will be adopted.

AT&T asserts the draft is deficient because it fails to include AT&T's statement, "AT&T shall not be required to collocate in order to purchase an EEL." That statement is much too general and subject to misinterpretation. The purpose of the EEL is to allow AT&T to serve a customer in an office where AT&T does not have a collocation arrangement. As AT&T itself says in its Comments, the EEL "is specifically designed to eliminate the need for collocation at each ILEC end-office." (AT&T's Comments at 90). It will add clarity to include a statement relating to collocation. The statement below relating to collocation is based on the FCC's language in *UNE Remand Order*, ¶ 288, and its *Supplemental Order Clarification*, ¶ 22.

Section 5.2.6 is rewritten as follows:

"An Enhanced Extended Loop (EEL) consists of a combination of an unbundled loop, multiplexing/concentrating equipment, and dedicated transport. The EEL allows AT&T to serve a customer by extending a customer's loop from the end-office serving that

customer to a different end-office in which AT&T is already collocated. EEL will only be available to AT&T when AT&T provides a significant amount of local exchange service, as defined by the FCC in *Supplemental Order Clarification*, ¶ 22.”

Issue 80

Should the Arbitrator adopt Pacific's Sections 2.16-2.26 which Pacific describes as General Terms and Conditions relating to UNEs?

AT&T's Position:

Pacific's proposed language should be rejected. There is no point in a contract reciting that particular provisions meet particular statutory or Federal regulatory obligations, since the courts or relevant regulatory agencies will make those determinations, and without regard to such "recitals" in the ICAs. AT&T contends that Pacific would attempt to use a clause like § 2.16 to evade its obligations under the agreement.

AT&T also argues that these sections impact other issues: Pacific's proposed § 2.17 attempts to enshrine Pacific's interpretation of FCC Rule 315 regarding an ILEC's duty to combine UNEs, and § 2.19 enshrines Pacific's "as is" approach to NIDs. Proposed § 2.20 creates a "back door" exception to Pacific's fundamental obligation to provide UNEs at parity with the facilities and functions Pacific provides to itself. Proposed § 2.21 requires Pacific to treat all CLCs equally, but does not require Pacific to serve its own operations in an equivalent manner. AT&T contends that this proposed section violates the Act's nondiscrimination requirements.

AT&T also contends that proposed Section 2.22 is truly unnecessary, since it goes to the definition of UNE, which is set out with far greater accuracy and detail in relevant FCC regulations. Pacific's proposed § 2.23 violates certain

findings in the *UNE Remand Order* that permit CLECs to combine UNEs with non-UNE services. (See e.g., ¶¶481, 486-488). AT&T contends that all of the clauses Pacific proposes are either duplicative of other contract sections or attempts to codify a distorted notion of the requirements of the Act or the FCC's rules.

Pacific's Position:

Pacific contends that §§ 2.16-2.26 are general terms and conditions that rightly belong in the UNE attachment. They set out essential basic terms of the UNE attachment that are required from a business perspective to make the attachment work as intended and are consistent with the law.

Pacific contends that AT&T wants a single global, general terms and conditions section at the beginning of the ICA. AT&T fails to recognize that there are circumstances where global terms simply do not adequately address all possible matters.

Discussion:

AT&T's position is adopted, and §§ 2.17-2.25 will be deleted. Most of the issues Pacific has addressed are addressed in some form elsewhere in Attachment 6. Indeed, as AT&T pointed out, some of Pacific's general provisions are in conflict with the specific language adopted elsewhere in the ICA. For example: § 2.19 states that NIDs will be available on an "as is" basis. In its Comments, Pacific states that § 2.16 was adopted in Issue 53(b). Since § 2.16 was adopted in Issue 53(b), it will not be reconsidered under Issue 80.

Issue 81

Should Attachment 6 include Pacific's cross-connect language?

AT&T's Position:

Pacific's proposal to add § 2.27 to the ICA relates to Pacific's position that it is not obliged to combine whatever UNEs AT&T requests, but that AT&T will have to forge all "new" combinations of UNEs itself.

Pacific's Position:

Pacific contends that under the *UNE Remand Order*, Pacific is currently not required to combine UNEs for AT&T. Consequently, it is appropriate for the ICA to include the methods of access Pacific makes available to AT&T for the purpose of combining UNEs itself.

Discussion:

AT&T's position is adopted. Since Issue 54 was decided in AT&T's favor, Pacific is required to combine UNEs for AT&T. Thus, there is no need for the cross connect language.

Issue 82

Should AT&T's "Replacement of Services with Unbundled Network Elements" clause be adopted (Section 2.27 of the marked up contract submitted with Pacific's response, which appears as Section 2.13 of AT&T's filed contract)?

AT&T's Position:

AT&T proposes to replace services that it currently purchases from Pacific with combinations of UNEs. Pacific says that it is illegitimate for AT&T to replace switched or special access with UNEs. (Ex. 201 at 33.) AT&T refutes that claim under Issues 55 and 56 above.

Pacific claims that AT&T's language in proposed § 2.13 is contrary to the OANAD decision and that AT&T's proposed charges differ from the non-recurring migration charge guidelines adopted by the Commission. AT&T

responds that its proposed § 2.13.2.2 is an accurate summary of D.99-11-050's guidelines. For example, in describing the replacement of a service that is comprised of a DS-1 Loop and Dedicated DS-1 transport – i.e., a special access circuit – the Commission has ruled that the only nonrecurring charge that applies is the sum of the service order charges. This is precisely what AT&T's proposed language would accomplish.

Pacific's Position:

AT&T's proposed language is contrary to the FCC's orders that restrict AT&T from replacing switched and special access services with UNEs. Pacific asserts that resale is the only service that AT&T purchases from Pacific that can be replaced by UNEs.

AT&T proposes migration charges that are different from the non-recurring migration charge guidelines adopted by the Commission. AT&T's language also proposes that AT&T can simply send a written or electronic notice rather than submitting service orders to migrate resale lines to the UNE-Platform. If AT&T sends a written notice, rather than a mechanized service order, then the OANAD order requires manual service order charges that apply to a migration.

Discussion:

In its Reply Comments relating to Issues 54⁵² and 82, AT&T criticizes the draft for eliminating § 2.13 solely on the basis that it refers to the replacement of access services with UNEs. This section is necessary because access services are not the only services that AT&T is empowered by the Act to replace with UNEs. According to AT&T, the provisions of § 2.13 are essential to prevent disputes between the parties about the terms that apply to such conversions.

⁵² Section 2.13 is listed in the Matrix to apply to both Issues 54 and 82. It will be disposed of in Issue 82.

AT&T is correct. Since § 2.13 applies to services other than special access (e.g. resale service), it needs to be included in the ICA. Section 2.13 will be adopted, with the following modifications:

1. Section 2.13.1: the phrase “including but not limited to Access Service” shall be replaced with the phrase, “excluding Access Service.”

2. Section 2.13.2.2: The word “costs” must be replaced with “charges.” The word “charge” reflects the fact that the price includes the mark-up for Pacific’s shared and common costs, as adopted by the Commission in D.99-11-050. In addition, as Pacific points out, AT&T’s charges do not conform to the requirements of D.99-11-050. In discussing pre-assembled UNE platforms, the Commission states: “Pacific is clearly obliged to provide CLECs with any such platform that it uses itself, and is not entitled to any additional compensation “beyond a ‘service order’ charge for doing so.” (*Id.* at 137). It is not clear what is included in AT&T’s proposed “record change” element or how that relates to the elements adopted in OANAD. To ensure consistency with D.99-11-050, Section 2.13.2.2 shall be changed to include the specific OANAD language: “...total element long-run incremental *service order charges*.”

3. Section 2.13.3 shall be modified as follows: “AT&T may request the conversion of any existing service, *excluding special access*, . . .” The end of § 2.13.3 shall include the following: “If AT&T sends a written notice, rather than a mechanized service order, AT&T will be subject to a manual service charge for the service migration.”

4. Section 2.13.5 shall be deleted. While parties did not comment specifically on this provision, it appears that AT&T expects to include resale service converted to UNEs in the calculation of purchases that apply toward volume requirements. That would mean that AT&T could use UNE purchases to qualify for resale volume discounts for toll service. That is not appropriate. The resale toll

discounts do not apply once the customer is converted to UNEs and no longer served via resale.

In its Comments, AT&T also asserts that the Draft rejects § 2.14. In fact, the disputed language in § 2.14 was not addressed by the arbitrator because that section was not included in the Matrix of Disputed Issues. Neither party has provided substantive comments regarding this contract section.

In § 2.14, AT&T proposes to avoid or minimize early termination penalties set under tariff or contract, when customers are transitioned to UNEs from resale services with minimum service terms. AT&T's proposed language is rejected. If the customer does not fulfill the term commitment under a specific tariff or contract term, Pacific should be able to assess the early termination penalty.

Issue 83

Should Pacific's or AT&T's language regarding charges for a single point of interconnection be adopted?

AT&T's Position:

AT&T contends that Pacific's position on a single point of interconnection (SPOI) is an effort to make the sub-loop UNE unusable by needlessly driving up the costs of using it. Pacific contends that the *UNE Remand Order* allows it to charge non-TELRIC prices for any construction necessary to provide a SPOI. AT&T contends that the *UNE Remand Order* at ¶ 226 clearly requires that implementation of the SPOI be based on forward-looking pricing principles.

Pacific also proposes an edit to § 5.17.1 of Attachment 6 that attempts to delay the time when AT&T may request a SPOI. The FCC ruled that its sub-loop unbundling provisions would go into effect 120 days after publication of the implementing regulations in the *Federal Register*. That rule becomes effective on May 17, 2000.

Pacific's Position:

Pacific asserts that the *UNE Remand Order*, at several places, such as in discussing loop conditioning and single point of interconnection, indicates that the TELRIC principles applied to network modifications require recognition of the network that exists today. Therefore, Pacific contends that the correct price for a plant rearrangement to create a SPOI is Pacific's time and material charges applied to the hours required to make the cable modification.

Discussion:

AT&T's language in § 5.17 is adopted. As AT&T states, paragraph 226 of the FCC's *UNE Remand Order* requires that LEC's costs to implement the requirement to have a SPOI shall be based on "forward-looking pricing principles..." Pacific does not claim that its time and material charges are based on forward-looking pricing principles. The FCC's rules requiring the SPOI will be in effect before the Final Arbitrator's Report is issued.

Issue 87

Should Attachment 6 contain language on service performance measures relating to DSL, as Pacific proposes, or should Section 14 of the Preface, referring to the Commission's performance measures docket, be the only contract provision on service performance measures, as AT&T proposes?

AT&T's Position:

AT&T contends that Pacific's proposal is an attempt to make an "end run" around the performance measures and incentives that the Commission is developing. Pacific's proposed § 5.5 is its attempt to codify its notion of what performance measures should apply to DSL loops, rather than wait for the Commission to issue its final performance measures and incentives. AT&T also points out that Pacific has agreed to the language of § 14.1 of the Preface to the ICA, which states: "The service performance measures ordered for reporting by the state commission that approved this Agreement under Section 252 of the Act,

including any subsequently commission-ordered modifications, are incorporated by reference into this Agreement and shall apply to Pacific's performance under this Agreement."

Pacific's Position:

If AT&T does not order the loop conditioning recommended by Pacific, Pacific cannot assure that the DSL loop will perform as desired by AT&T.

Discussion:

AT&T's position is adopted. The proper place to make adjustments to the performance measures adopted by the Commission is in the Commission's generic investigation on performance measures and incentives. The parties have agreed to the language in Section 14.1 of the Preface, and Pacific should not be permitted to amend that section here.

Issue 90

Should the Arbitrator adopt AT&T's proposed time frame for an arbitration proceeding if the parties fail to agree on line sharing. (see Issue 66)?

AT&T's Position:

AT&T's arguments are included in its discussion of Issue 66.

Pacific's Position:

Pacific contends that the arbitration time period should not be shortened. Line sharing obligations are currently under review by the Commission, and AT&T will be able to address its concerns in that proceeding rather than rush the arbitration process under the ICA.

Discussion:

Pacific's position is adopted for § 5.13.4. In its line sharing order, 99-355, ¶164, the FCC strongly encourages states to expedite the implementation of line sharing on an interim basis so that line-sharing could be a reality within 180 days

after the release of the order. This Commission has done that, and is presently conducting an arbitration on line sharing, and AT&T is a party to that arbitration. If AT&T had been in a hurry to implement line sharing, it would have made specific proposals in this arbitration. Instead, AT&T was willing to address the issue later. The FCC's proposal to expedite the initial line sharing was intended to enable CLECs to take advantage of line sharing as soon as possible after the release of the order. AT&T chose to defer the issue.

Issue 91

Should AT&T's Technical Specification language for ADSL loops be adopted?

AT&T's Position:

AT&T contends that its proposed use of the term "ADSL-equipped loop" in § 5.12.1 is a more specific reference to § 5.11.1's "xDSL-equipped loops." AT&T contends that Pacific must provide an xDSL-equipped loop wherever Pacific deploys its equipment that provides xDSL functionality in a remote terminal to which AT&T cannot obtain access for the placement of AT&T's DSLAM. (See discussion of sub-issue (a) of Issue 65, above.)

Pacific's Position:

Pacific contends that AT&T's use of the term "ADSL-equipped loop" in Attachment 6, Sections 6.11.2 and 6.11.4 is an inappropriate reference to unbundled packet switching. Under the *UNE Remand Order*, Pacific is only required to provide access to packet switching in certain limited conditions, which will not be applicable to Pacific.

Discussion:

In its Comments, AT&T refutes the Draft's rejection of AT&T's proposed language. According to AT&T, it is appropriate for Pacific to meet industry standards for data transport rates. AT&T's proposed language requiring Pacific to

adhere to industry standards is rejected, as it has been on other issues. The appropriate place to raise the issue of which standards Pacific should adhere to in its network is in one of the Commission's generic proceedings.

Issue 92

Should the arbitrator adopt additional language changes proposed by Pacific?

AT&T's Position:

AT&T's proposed language is clear without Pacific's edits. AT&T contends that Pacific has not provided any substantive support in testimony for its edit.

Pacific's Position:

The simple language change Pacific has proposed in Attachment 6, § 9.5.1.1 is necessary to clarify the meaning of each section.

Discussion:

AT&T's position on § 9.5.1.1 is adopted. Pacific is not specific about the reasons for its change to AT&T's proposed language.

Issue 294

Should Pacific's or AT&T's Technical Requirements language be adopted?

AT&T's Position:

AT&T contends that §§ 7.2.11.2.4, 7.2.11.2.5, and 7.2.11.2.6 merely describe the technical standards that will apply to the functioning of digital cross connects which Pacific has agreed to provide between dedicated transport and AT&T's collocation arrangement. In § 7.2.11.2.6, Pacific proposes to substitute technical standards from its own technical publication for standards set by industry standard-setting organizations. AT&T argues that Pacific did not explain why its proprietary standards – which Pacific can change unilaterally – should prevail over industry standards.

Pacific's Position:

Pacific contends that AT&T's proposed language requires Pacific to offer SONET interfaces for DCS which go beyond the requirements of the Act, since DCS is not a UNE.

Discussion:

Pacific's position is adopted. AT&T proposes to require Pacific to use industry standard interfaces, rather than Pacific's own proprietary standards. Pacific must be allowed to manage its own network, and cannot implement differing standards for different CLECs. If AT&T believes that particular industry standards should be deployed in Pacific's network, AT&T should raise that issue in one of the Commission's generic proceedings, where the issue can be addressed on a comprehensive basis. It is not reasonable, or even technically feasible, for Pacific to implement varying standards for the same equipment in its network.

Issue 296

Should AT&T's "Standards for Network Elements" section be adopted?

AT&T's Position:

AT&T contends that, with the exception of § 11.6, which is new, all of § 11 is identical to language in the currently-effective ICA. Section 11.6 requires Pacific to provide data, upon AT&T's reasonable request, necessary for AT&T to determine whether Pacific is complying with the ICA. AT&T asserts that this is a standard clause in commercial agreements.

AT&T points out that Pacific's sole objection to § 11 is that it is "overreaching and duplicative of other sections in Attachment 6." AT&T contends that a section that has been in effect for over three years and about which the parties have had no disputes cannot be fairly characterized as "overreaching."

AT&T does not know of any other passage in the ICA that provides these particular obligations and remedies.

Pacific's Position:

Pacific contends that this section is overreaching and duplicative of other sections of Attachment 6.

Discussion:

AT&T's position is adopted with modification. As AT&T says, since Section 11 was included in the 1996 ICA between the parties, it is difficult to see how it could be "overreaching and duplicative." Pacific is not specific about which sections in Attachment 6 are duplicated by the language in Section 11. However, AT&T's proposed new Section 11.6 should be deleted. That section could be seen as "overreaching" because it is so open-ended about the information AT&T can request from Pacific. Section 11.3 covers the same issue, namely, what should AT&T do if it believes that the requirements of this attachment are not being met. However, Section 11.3, with its "meet and confer" approach, is a more balanced result.

Issue 297

Should Pacific's Reservations of Rights section be adopted?

AT&T's Position:

AT&T contends that Pacific's "Reservation of Rights" § 15 duplicates the "Intervening Law" section of the Preface. Such duplication creates ambiguities that may lead to the gutting of the ICA itself.

Pacific's Position:

This section only reflects that particular facilities covered by Attachment 6 (dark fiber, sub-loop) are still the subject of litigation and provides a procedure on how to deal with those particular facilities once the litigation reaches a result. Pacific contends that the proposed procedure is reasonable and consistent with

Pacific's overall approach for dealing with ongoing litigation. The language also places "pick and choosing" CLECs clearly on notice that Attachment 6 facilities now being litigated are subject to this procedure.

Discussion:

AT&T's position is adopted. The Intervening Law provision in the Preface governs the entire ICA. Therefore, it is not necessary to have specific Reservations of Rights clauses in particular attachments.

Issue 298

Should Pacific's DSL liability and indemnification sections be adopted?

AT&T's Position:

Pacific's proposed § 5.1.7.1 is actually an indemnification clause that would require either party to indemnify the other in the event it causes damage to the other party's network or property through use of a non-standard DSL technology. AT&T contends that this clause is unnecessary and duplicative, because the Preface of the ICA already has a clause providing for indemnity for all services, not just DSL.

AT&T asserts that Pacific's proposed § 5.1.7.2 should be rejected because Pacific has not produced any evidence showing potential harm to Pacific's network from actions of AT&T that might justify, as this clause would allow, termination of Pacific's service to AT&T and interruption of service to AT&T's customers. The current ICA does not include this clause.

Pacific's Position:

Pacific contends that there are liability issues specific to DSL which this language addresses. For example, one CLEC's DSL technology could interfere with another CLEC's, putting Pacific in the middle.

Discussion:

In its Comments, AT&T points out that some of the clauses contain extremely vague and overbroad phrasing, which is to the detriment of both parties. AT&T states that two clauses (§§ 5.1.7.10 and 5.1.8.1) use the term “non-standard” DSL technology without providing a definition of that term. AT&T suggests that both sections be amended to include the following definition for non-standard DSL technology as “a DSL technology not authorized in Section 5 of Attachment 6 of this Agreement.”

AT&T also criticizes Pacific’s overbroad DSL indemnification clause in § 5.1.7.1. AT&T contends that the contract language must clearly state that the indemnifying party commits to indemnify the other party for damages that the indemnifying party *causes*. Pacific uses the phrase “associated with” instead of “cause.” AT&T proposes the following language for §5.1.7.1:

Each Party, whether AT&T or PACIFIC, agrees that, should it cause any non-standard xDSL technologies to be deployed or used in connection with or on PACIFIC facilities, the Party (“Indemnifying Party”) will compensate the other Party for actual costs it incurs, as a result of the Indemnifying Party’s use of non-standard xDSL technology, causing damage, service interruption, DSL service degradation or damage to the other Party’s facilities.

In its Comments, AT&T also suggests the § 5.1.7.2 be modified so that it reads, “for any *DSL* technology,” to make it clear the section applies to DSL only.

Pacific’s proposed §§ 5.1.7 and 5.1.8 are adopted, with the modifications suggested by AT&T. AT&T’s suggested changes provide needed clarification. This is one area where specific liability provisions are warranted. DSL is a new technology and various carriers are implementing different flavors, some of which disturb other services. Pacific’s language is a reasonable approach to settling

interference issues and holding Pacific harmless in cases where one CLEC's implementation of DSL conflicts with another CLEC's.

**F. Attachment 7: Operator Services,
Directory Assistance Services and
Directory Assistance Data**

Issue 93

Should Attachment 7 include AT&T-proposed Section 1.3?

AT&T's Position:

AT&T requests that Attachment 7 begin with AT&T's proposed § 1.3. This language does nothing more than require Pacific to fulfill its obligations under the FCC's *UNE Remand Order*. AT&T contends that the FCC's order requires that "if an incumbent LEC does not provide customized routing to requesting carriers that use the incumbent's unbundled switching element, it must provide unbundled access to its OS/DA service." (*UNE Remand Order*, at ¶220.)

AT&T contends that customized routing is part of the unbundled switching element; it does not exist as a stand-alone feature. If Pacific refuses to offer the unbundled local switching element – whether by reason of the *UNE Remand Order*'s "4-line exception" or otherwise – Pacific is not, by definition, offering customized routing. If Pacific is not offering unbundled switching/customized routing, AT&T asserts that Pacific is not entitled to avoid unbundling OS/DA as a network element offered at TELRIC prices.

Pacific argues that customized routing is available to CLECs for resale and unbundled switch ports throughout Pacific's territory, and thus TELRIC pricing is inapplicable. Ex. 211 at 17. At the present time, custom routing is being offered on an ICB basis. Pacific says that it "offers" customized routing, but it provides no evidence that it is actually providing customized routing to any carrier.

Without § 1.3, AT&T contends that Pacific could unilaterally withdraw OS and DA as UNEs based on its own interpretation of “providing” customized routing.

Pacific’s Position:

Pacific asserts that it is not necessary or appropriate for AT&T to attempt to reduce to contract Pacific’s obligation under the *UNE Remand Order*. Customized routing has been, and continues to be available to CLECs through resale and unbundled switch ports throughout Pacific’s serving area. Pacific contends that TELRIC pricing is no longer applicable to OS and DA pursuant to the *UNE Remand Order*. Therefore, Pacific argues that it violates the Act to order contract language that specifies TELRIC pricing.

Discussion:

. As Pacific says, there is no need to include the terms of the *UNE Remand Order* in this ICA. Those obligations exist, whether or not the terms are included in an ICA. In attempting to determine whether Pacific is actually “providing” custom routing, the arbitrator relied on language in the *UNE Remand Order* in which the FCC referred back to its order denying Ameritech’s application to provide long distance service pursuant to Section 271 of the Act. The *UNE Remand Order* itself does not include a definition of what “provide” means in regards to custom routing. However, in its Ameritech Order, “the Commission concluded that the term ‘provide’ requires incumbent LECs to ‘make available’ to requesting carriers the checklist item in question upon reasonable demand.”⁵³ AT&T has presented no compelling evidence that Pacific has not made custom routing available, when requested by CLECs.

⁵³ *UNE Remand Order*, at ¶329.

However, in its Comments, AT&T claims that silence regarding the FCC's new OS/DA requirements would suggest that Pacific never has the obligation to unbundle OS/DA as a network element. That is not the case. The *UNE Remand Order* specifies new rules as to when an ILEC must unbundle OS/DA (and offer it at TELRIC prices), and when an ILEC need not do so. It is irrelevant whether Pacific currently qualifies to avoid the obligation to unbundle OS/DA as a UNE. Pacific may not qualify in the future, so the agreement must make clear that Pacific has a continuing obligation to comply with the customized routing requirements of the *UNE Remand Order* if it intends to provide OS/DA as a non-UNE. AT&T proposes that Attachment 7 begin with a new first sentence: "The terms and conditions relating to OS/DA stated in this Attachment and the prices relating to OS/DA set forth in Attachment 8 are subject to the requirements of the *UNE Remand Order* (at ¶¶ 438-64)."

Given the complexities of the FCC's rules relating to OS/DA, it is appropriate to include AT&T's clarifying language in the ICA. AT&T's proposed language cited above will be adopted and will replace the current language in § 1.3.

Issue 95

Should the ICA contain Pacific's section on the "Handling of Emergency Calls to the Operator"?

AT&T's Position:

AT&T contends that the Commission should not include Pacific's proposed language regarding the handling of emergency calls to the operator in proposed § 2.6.4 of Attachment 7. This issue relates to Issues 196 and 50, which concern Pacific's obligation to provide AT&T with the list of 10-digit emergency contact numbers that Pacific provides to its own operator services organization.

Pacific's Position:

Where AT&T is contracting for Pacific to provide Operator Services to AT&T's facilities-based end user customers, Pacific contends that AT&T must provide Pacific with an Operator Service Translation Questionnaire. This document is the method for AT&T to provide the default emergency agency numbers to Pacific appropriate for the dedicated NXXs served by AT&T. Pacific agrees to ask the caller for the name of his/her community and transfer the caller to the emergency facility associated with that community as provided on the questionnaire by AT&T. Pacific contends, however, that it is not reasonable for Pacific to be held responsible for misdirected calls due to incorrect numbers furnished by AT&T.

Discussion:

While AT&T sees this issue as related to Issues 50 and 196 (which were resolved in AT&T's favor), the requirement in Issue 95 is broader. In Issues 50 and 196, the determination was made that Pacific must provide AT&T with the emergency public agency telephone numbers linked to each NPA-NXX. Therefore, the language in Pacific's proposed § 2.6.4 that requires *AT&T* to provide that information to Pacific is to be deleted. The other portions of Pacific's proposed § 2.6.4 describe Pacific's agreement to ask the caller his/her community and transfer the caller to the appropriate emergency agency, and to involve another carrier's operator when necessary. That provision is reasonable and should be adopted.

In its Comments, AT&T asserts that the final sentence of § 2.6.4 which reads, "AT&T agrees to indemnify Pacific for any misdirected calls," should be deleted. According to AT&T that sentence conflicts with the outcome of Issue 15. AT&T is correct. The final sentence of § 2.6.4 shall be deleted.

Issue 98

Should Pacific's section on Rate and Reference information be adopted?

AT&T's Position:

In Attachment 7 (§§ 2.6.1.1.2, 2.6.3 and 3.4.2), AT&T contends that Pacific seeks to mandate a service that should be optional, and, a service that Pacific does not even offer yet. That service would have Pacific respond to rate inquiries from AT&T customers. AT&T should not have to accept a non-existing service. The service in place today is warm transfer, and AT&T has a contractual right to that service under the current ICA. AT&T contends that Pacific seeks to take away the right under the ICA to warm transfers, stating that when Pacific has the capability to quote specific AT&T rates, the transfer option will be eliminated. AT&T does not agree to eliminate the existing transfer service.

AT&T wants to speak with its own customers to answer their rate questions. AT&T might choose to use Pacific's service in the future, but AT&T should have that option and the use of Pacific's Rate and Reference service should not be mandated.

AT&T also contends that the federal operator services consumer protection regulation (47 CFR § 64.703(a)(3) and related statute 47 USC 226(b)(1)(C) do not, as Pacific suggested in negotiations, prohibit warm transfers. Nothing in that regulation and statute requires Pacific to quote rates for other carriers, as the Kansas Corporation Commission recently held, in rejecting an identical argument made by SWBT.

Pacific's Position:

Pacific's rate/reference language provides the ability for Pacific's operators to respond to AT&T end user customers' requests for rate information when Pacific is providing OS and/or DA service on behalf of AT&T. Specifically, Pacific can respond to AT&T's end users with the rates AT&T will charge as well

as AT&T's repair bureau and business office contact number. As with all CLECs, 30 calendar days are needed for the initial load of Rate/Reference information and 14 days to implement rate reference changes.

Discussion:

Section 2.6.3: AT&T's position is adopted to the extent that Pacific's provision of rate/reference information must be optional. AT&T must continue to have the option of having Pacific transfer the AT&T end user to AT&T's operator service so that AT&T can quote its own rates. Section 2.6.3.1.5: The initial phrase "in the interim" shall be deleted. The final sentence shall be deleted. Section 2.6.3 shall begin with the following new sentence:

"Pacific shall respond to rate requests from AT&T End Users, at AT&T's option, either by providing the Rate/Reference service described below or by providing a warm transfer of the AT&T End User to AT&T."

Other portions of § 2.6.3 are adopted. Those same changes shall be made to § 3.4.2.

Issue 99

Should Pacific's one-year exclusivity requirement for OS and DA be adopted?

AT&T's Position:

Pacific's proposed language that it be the sole provider of OS and DA services to AT&T for an entire year is anti-competitive and should be rejected. The Commission should not permit Pacific to lock AT&T into such exclusive and lengthy arrangements. AT&T argues that there is no basis in the Act or any Commission policy for such a requirement.

Pacific's Position:

AT&T has indicated that it wishes to select the time, volume and type of traffic it sends to Pacific. However, to properly forecast and provision the

services, Pacific contends that it is necessary for Pacific to be able to project call volumes and mix of traffic, and therefore, provide an adequate number of operators to ensure quality service for all end user customers. OS and DA services are recognized as competitive on a wholesale basis, and AT&T can obtain these services from itself or a third-party provider. However, where AT&T contracts with Pacific to provide these services, Pacific contends that it is reasonable for Pacific to ask for a one-year sole provider commitment.

Discussion:

As Pacific indicates, it needs to have estimates of the volume and type of traffic it will carry in order to properly forecast and provision the service. Pacific must be able to estimate the number of operators it will need to ensure an acceptable level of service for all end users, including AT&T's. Based on these needs, it is reasonable to require a term commitment from AT&T and to require that Pacific be the sole provider of OS/DA service during that time, so that call volumes can be accurately estimated. However, the one-year term Pacific proposes is excessive, and Pacific has provided no compelling argument why it needs that long a term to be able to ensure adequate staffing. Therefore, the term will be reduced to 3 months. Sections 2.7.1 and 3.5.1 are adopted as proposed by Pacific. However, § 5.1 is modified to change both references to "12 months" to "3 months." Other portions of Pacific's proposed § 5 are adopted.

Issue 100

Should Pacific's or AT&T's language on trunking requirements for branding and OS/DA services be adopted?

AT&T's Position:

AT&T is willing to accept Pacific's language in §§ 2.6.2.1 and 3.4.1.3 that Pacific cannot provide branding for AT&T OS and DA calls over local interconnection serving arrangement (LISA) trunks. AT&T contends however, that Pacific's proposed language for §§ 2.7.2 and 3.5.2, is anti-competitive.

Pacific proposes to eliminate LISA trunks for OS and DA, at which time AT&T will have to provide for direct trunks to each Pacific operator switch in order to obtain OS and DA services. AT&T asserts that such direct trunks would require that AT&T use Pacific exclusively for its OS and DA services.

AT&T also contends that Pacific's proposal to reject language allowing AT&T to send other types of telecommunications services over trunking to Pacific's operator switches would harm competition.

Pacific's Position:

Pacific contends that its position on this issue was adopted in the MFS WorldCom arbitration. The technology used to implement call branding and advanced DA services requires Automatic Number Identification (ANI) information, which is not available on LISA trunking arrangements, but is available over direct trunking to Pacific's operator switches. All of Pacific's 5ACD operator switches have been replaced and LISA trunking is no longer appropriate. Direct trunking to Pacific's operator switches allows the end user's ANI to be transmitted with the call. With direct trunking, Pacific can provide not only branding, but also offer national directory assistance and other services that are or will be offered to Pacific's end users and other carriers' end users. Pacific contends that this is parity.

Pacific asserts that it is not reasonable for AT&T to send any type of telecommunications service over the trunking to Pacific's operator switches. From a technical point of view, AT&T's proposal is not workable. Pacific argues that these trunks and switches are designed and technically equipped to handle Operator Service and Directory Assistance services only.

Discussion:

AT&T's language in § 1.4, 2.7.2 and 3.5.2 is adopted, with modification. Pacific seems to be forcing parity on AT&T that AT&T does not want. AT&T is

willing to accept the fact that there are technical limitations to the use of LISA trunks, and accepts the fact that it will not be able to have Pacific brand the calls it sends over LISA trunks. AT&T should not be forced to upgrade its trunks to obtain a functionality it does not want. However, AT&T's language that it may transmit "any type of telecommunications service over the trunk groups connected to Pacific's OS/DA platform" shall be deleted. AT&T is not clear about the traffic it intends to transmit or why it would "harm competition" not to be able to send that traffic. Such open-ended language could conflict with the fact that Pacific says that the trunks and switches are only equipped to handle OS/DA traffic.

Issue 101

Should Pacific's language on responsibility for costs for OS/DA facilities be adopted?

AT&T's Position:

AT&T contends that Pacific's proposed language in Attachment 7, §§ 2.7.3 and 3.5.3 is overbroad and vague and should be rejected. AT&T believes that further talks will allow the parties to create less broad and more reasonable language that would allow the parties to settle this issue.

Pacific's Position:

Pacific's proposed language simply states that each party shall bear the costs for its own facilities and equipment. Where AT&T chooses Pacific to be the provider of OS and/or DA service for its end users, Pacific contends that it is reasonable that each party be responsible for its own network. For example where AT&T is providing local service via its own end-office switch and routes OS and/or DA traffic to Pacific's operator switch, AT&T is responsible for the trunks required to transport that traffic to Pacific's switch.

Discussion:

Pacific's proposed §§ 2.7.3 and 3.5.3 indicate that each party will bear its own costs of facilities and equipment in the provision of OS and DA services. Those sections shall be adopted, except that if the phrase "using standard trunk traffic engineering procedures" conflicts with AT&T's right to continue to use LISA trunks, as determined in Issue 100 above, that phrase shall be omitted.

Issue 102

Should Pacific's liability and term sections be adopted?

AT&T's Position:

AT&T objects to the inclusion of Pacific's proposed Section 5 regarding the term of the agreement. That language would lock AT&T into a year-long contract for OS/DA and would require that AT&T contract exclusively with Pacific for these services. Pacific's proposal also includes an onerous termination charge that would require AT&T to pay all amounts due, plus "estimated monthly charges for the unexpired portion of the term." AT&T has offered a one-year contract term to Pacific with a right to terminate the agreement on 60 days' notice at any time during the term. An early termination charge would apply only if AT&T failed to provide the 60 days' notice.

AT&T also believes that Pacific's proposed "Liability" language found in § 4 of Attachment 7 should not be included in the attachment. Instead, such general terms should appear in the Preface. AT&T refers to the discussion of Issue 5 above.

Pacific's Position:

Pacific contends that its position on this issue was adopted in the MFS WorldCom arbitration. The proposed language is fair in that it indemnifies Pacific for damages from problems caused by AT&T employees and equipment. Pacific

asserts that it should not be held responsible for problems caused by another carrier.

Pacific asserts that the liability language in the Preface does not specifically address the OS and DA services that AT&T is asking Pacific to provide on its behalf. AT&T fails to identify elsewhere in the agreement where appropriate liability language exists to cover OS and DA service provisioning.

Discussion:

Section 4: In its Comments, AT&T points out that the Draft would approve a contract clause that says the opposite of what Pacific's Brief stated it said. Pacific's Brief says the clause indemnifies Pacific for damages from problems caused by AT&T employees and equipment. The actual text of § 4.2 does the opposite; it requires AT&T to indemnify Pacific for problems that Pacific causes. This language is inconsistent with the treatment of indemnification issues elsewhere in the ICA, namely that each carrier must assume responsibility for its own actions. Section 4.2 places responsibility on the wrong party. The general indemnification terms in the Preface are adequate to cover the provision of OS and DA service. AT&T's position in § 4 is adopted.

Issue 103

Should Pacific's language on standard trunking for the provision of OS and DA be adopted?

AT&T's Position:

See AT&T's position in Issue 100 above.

Pacific's Position:

To ensure that the objective grade of service is met in the provision of DA services, Pacific requires the use of standard trunk traffic engineering procedures for all facilities.

Discussion:

AT&T's proposed § 1.4 is adopted. This section provides that the parties will agree on the trunking arrangements used to support OS and DA service, rather than mandating the trunks that AT&T is to use. This provision will leave the door open should AT&T chose to upgrade from its current LISA trunking arrangements.

Sections 2.7.3 and 3.5.3 were addressed under Issue 101.

G. Attachment 8: Pricing

Issue 105

Should the ICA include Pacific's three-zone proposal or AT&T's four-zone proposal for deaveraged loop rates, and should those rates be superseded by deaveraged loop rates subsequently adopted by the Commission?

AT&T's Position:

AT&T's proposal that loop rates be deaveraged into four zones better reflects the realities of relevant cost differences between wire centers in California. AT&T contends that its proposal is superior to Pacific's in that it does a better job of reflecting geographic variations in Pacific's forward-looking costs of unbundled loops. Under AT&T's four zone proposal, Zone 1 would include Pacific's wire centers with an average per-loop cost for a basic unbundled loop of less than \$7.00.

Pacific proposes only three zones, and Pacific's proposed Zone 1 would include wire centers with a total loop cost of less than \$10.00. AT&T asserts that its four-zone deaveraging proposal leads to more precise, cost-reflective prices than does Pacific's proposal. AT&T contends that Pacific's proposal clearly masks important cost variations, particularly at the low end of its cost-per-wire-center spectrum.

Pacific's Zone 1 contains over 65% of its total loops. In so grouping its loop zones, AT&T contends that Pacific hides the substantially lower loop costs in urban areas. AT&T's proposal breaks down this enormous grouping of loops into more granular categories that more accurately reflect the costs of loops.

Pacific's Position:

Pacific adopted AT&T's deaveraging proposal from OANAD, because, on the whole, it was reasonable. Pacific's three-zones roughly break the state into metropolitan areas, high-cost rural areas, and "ex-urban" areas between these two. CLECs in Zone 1 see a reduction in the unbundled loop price from \$11.70 to \$10.03, making this a more attractive avenue for competing for local customers.

Pacific contends that AT&T's four-zone proposal is flawed and should not be adopted. As AT&T acknowledged, the data contained in its proposal strays from the approved OANAD data set. The recently-issued Order Instituting Investigation (OII) on geographic deaveraging starts from the OANAD-approved wire center costs contained in the AT&T proposal that Pacific adopts in this case. Accepting AT&T's new proposal here using non-OANAD costs would cause unnecessary inconsistencies between the two proceedings. Also, AT&T's proposal contains four zones, while the OII favors three zones.⁵⁴

Pacific also contends that the new AT&T proposal creates a very low-priced zone covering just downtown financial districts, and which includes primarily business customers. AT&T's four-zone proposal makes it clear that its business plan is still primarily aimed at large business, not residential customers.

⁵⁴ I.00-03-002, *supra*, pp. 6, 9 (stating that the starting point for the Geographic Deaveraging OII is AT&T's June 4, 1999 three-zone proposal); see also Administrative Law Judge's Ruling in I.00-03-022, dated Mar. 22, 2000, *mimeo*, p. 4 (stating preliminary statement of issues as "Respondent's UNE loop rates will be deaveraged into three geographic zones").

Pacific contends that the Commission should not carve out a business district zone at a very low price. That will have the effect of shutting off competition entirely to customers in Zones 3 and 4. It will also shut off infrastructure development in Zone 1.

Discussion:

Pacific's proposal to deaverage loop rates into three zones is adopted and should be reflected in Appendix A-1. In light of the Commission's recently-initiated investigation to set permanent deaveraged loop prices, the rates set on an interim basis in this arbitration should not make an "end run" on the issues to be decided in the Commission's generic proceeding. Certainly one such issue is whether to deaverage loop prices into three or four zones (or some other number of zones). The FCC requires that loop rates be deaveraged into a minimum of three zones, so either proposal would meet the FCC's deaveraged loop requirement. However, if the Commission were to adopt AT&T's four-zone proposal in this arbitration, it could place pressure on the Commission to adopt AT&T's four zone proposal in its generic proceeding. Arbitration cases decided by the Commission are not precedent-setting, and should not be allowed to have an impact on the Commission's generic proceedings.

In its Comments, AT&T argues that the Draft does not give substantive reasons for rejecting AT&T's four-zone proposal. Contrary to what the Draft says, adoption of either proposal, arguably, would "place pressure on the Commission to adopt it in the Commission's generic proceeding," says AT&T. The only other bases mentioned in the Draft for rejecting AT&T's proposal are concerns Pacific expressed regarding the dataset on which AT&T relied for its four-zone proposal. According to AT&T, Pacific's cost witness agreed that he did not think there would be a major difference in cost if AT&T had used Pacific's dataset instead of its own.

While AT&T would minimize the problems with the dataset, Pacific does point out problems with use of that dataset. Pacific also asserts the Commission's OII on geographic deaveraging starts from the OANAD-approved costs contained in the AT&T proposal that Pacific adopts in this case. That serves to validate the dataset Pacific uses. There was no opportunity in this arbitration case for the Commission to examine the two datasets to ascertain the significance of any differences. That type of analysis can only be performed in the context of a generic proceeding.

Pacific expressed concerns that the new AT&T proposal creates a very low-priced zone covering just downtown financial districts, and which includes primarily business customers. Pacific urges the Commission not to carve out a business district zone at a very low price. That will have the effect of shutting off competition entirely to customers in Zones 3 and 4 and will shut off infrastructure development in Zone 1.

The policy consequences of AT&T's Zone 1 Business District proposal warrant Commission scrutiny prior to being adopted. The rigorous scrutiny needed can only be performed in the context of a generic Commission proceeding.

Pricing – Appendix A-1

AT&T submitted a lengthy Appendix A-1 with its proposals for conforming the Attachment 8 pricing attachment. AT&T asks that this appendix be used as the starting point for finalizing the Attachment 8 to be included in the FAR.

Pacific opposes AT&T's recommendation to use AT&T's Appendix A-1 as the starting point. AT&T is incorrect that Pacific has a burden of proof to identify every item, and if an item is not identified, Pacific automatically loses. The items raised in Appendix A-1 will be examined on a case-by-case basis.

However, a few general rules will apply to expedite resolution of this item.

1. If AT&T did not ask for a particular UNE in Attachment 6, it should not include a price for that item in Attachment 8. The parties should only price those UNEs which Pacific is obligated under the ICA to provide. See, for example, item 4 which deals with coin ports.

2. If AT&T does not request rates for a particular service or UNE, those rates should not be included in the ICA. There is no reason to clutter up the ICA with rates for UNEs or other services that AT&T does not intend to purchase.

3. Whatever rule is adopted for the recurring charge for a particular item, will also apply to the nonrecurring charge for that item.

Item 1: Pacific finds AT&T's clarification that digital link rates apply to either copper or fiber links to be ambiguous. Pacific does not know if AT&T is referring to a situation where digital links are partially carried over fiber or over all-fiber loops. The latter interpretation is inconsistent with the OANAD definition of these loops as being four-wire digital loops. These loops are copper by definition. This definition should be consistent with the OANAD definition.

Item 2: AT&T may include the rate for coin loops, as long as AT&T requested coin loops in Attachment 6.

Item 3: In its Reply Comments, Pacific points out that AT&T has deaveraged loops into 4 geographic zones. That needs to be changed to conform to the outcome on Issue 105.

Item 4: See general statement above. If AT&T did not ask for coin ports in Attachment 6, it shall not include a price for that UNE in Attachment 8.

Item 5: According to Pacific, AT&T seeks a rate for overflow tandem switching although it does not request it in Attachment 6. AT&T's request is denied, for the reasons listed above.

Item 7: According to Pacific, this item (as well as several others) relates to AT&T's request for optical level transport, multiplexing and entrance facilities at

OC 48 and OC 192 levels. However, unbundled facilities at these OC-levels was not specifically provided for in Attachment 6. Rather, Attachment 6 follows the FCC rules that facilities at higher speed levels be offered as they are installed in the network for the ILEC's internal use.

AT&T failed to establish that Pacific is using facilities above OC 48, and in fact, it does not, says Pacific. Under the FCC's rules, Pacific is not required to offer OC 48 since that is its highest speed and would require Pacific to offer AT&T an entire facility, which is not required. Pacific states the parties should employ the BFR process once these higher-speed transport systems are placed in use.

In the *UNE Remand Order*, the FCC reiterated its support for unbundling of all technically feasible high-capacity transmission services. Pacific shall be required to provide OC 48, since it is using those facilities in its network. Pacific does not cite a particular FCC rule in support of its position that it does not have to unbundle OC 48, and the FCC has clearly stated its support for unbundling of high-capacity transmission. Therefore, if such a rule exists, this Commission will require Pacific to unbundle OC 48 under its own state authority. While Pacific does not now offer OC-192, it may well do so during the life of this contract. All items relating to OC 48 and OC 192 shall be handled as follows: All prices shall be shown as TBD. OC 48: remove the phrase "not offered." OC 192: remove the phrase "not offered" and replace it with "when available."

Item 9: Pacific asserts the parties have agreed that Option C LSNE should be at ICB rates, rather than the TBD rates which AT&T proposes. Pacific refers to Attachment 6, Section 6.5.3.2. Pacific is correct.

Item 13: It is not appropriate to include OANAD-approved rates for DCS since, in Issue 70, the FAR determined that DCS is not a UNE.

Item 15: Dark fiber will be priced on a per foot basis (as AT&T requested), with the rate marked as TBD. Pacific's fee for dark fiber inquiries has been adopted, as a nonrecurring charge.

Item 16: It is possible that, during the life of this ICA, Pacific could be required to offer OS/DA as UNEs. AT&T requests that the TELRIC rates be included in the ICA. However, Pacific states the Draft's resolution of Issue 93 deletes language requiring Pacific to offer OS or DA as a UNE. Therefore, prices should not be included in Attachment 8. However, Issue 93 has been changed to reflect the fact that OS/DA could be considered UNEs at some time during the life of the ICA. Therefore, it is appropriate to include those alternative TELRIC rates in the ICA.

Item 19: According to AT&T, Pacific inadvertently entered NRC instead of recurring charges. Pacific did not respond to this issue, so AT&T's proposal will be adopted.

Item 20: AT&T states that it cannot locate the DCS rate in Pacific's tariff. AT&T asks that the rate be set forth in the ICA or the tariff section should be identified with greater specificity. Pacific shall give a more complete tariff reference for DCS.

Item 21: AT&T requests TBD pricing for network reconfiguration. AT&T claims it is unable to locate these rates in Pacific's tariff although Pacific gave a complete tariff reference. AT&T also incorrectly states those rates should be set at TELRIC. Network reconfiguration is not a UNE, says Pacific, and it is not required to be priced at TELRIC. Pacific's tariff reference is not exact, and should be changed to refer to the exact section of the 175T tariff that applies. Those rates are per the tariff, not TBD.

Item 22: AT&T claims there are no terms provided for diverse routing. AT&T is incorrect, says Pacific. Those terms and conditions are correctly

referenced to Pacific's FCC Tariff No. 128. Pacific's tariff references shall be retained. The rates will not be marked TBD.

Item 23: AT&T claims there are no terms and conditions providing for CLEC message exchange billing and settlement charges. That is incorrect, says Pacific. Appendix II of Attachment 14 of the ICA contains those terms and conditions. Pacific's position is adopted.

Item 24: AT&T is correct. Reciprocal compensation arrangements are not UNEs and should not be included in the UNE section.

Items 26, 36 and 45: AT&T is contesting Pacific' nonrecurring rates for the DID number blocks. Those rates were adopted in the OANAD decision. Pacific's position is adopted.

Item 27: AT&T argues that its listing of switch establishment nonrecurring charges be adopted. However, it does not track the listing of switch establishment charges adopted in the OANAD decision, says Pacific. Pacific also states it does not list the nonrecurring charge for switch establishment where Option C is selected. This charge is ICB, as AT&T agreed to in Attachment 6, Section 6.5.3.2. These rates shall be modified to track the switch establishment charges in the OANAD decision. Option C shall be added as ICB.

Items 54-55: Pacific has added rates for items which AT&T did not request. Those rates will be deleted from Attachment 8.

Item 56: This issue was addressed elsewhere. Pacific is entitled to charge a fee for dark fiber inquiries.

Item 57: According to AT&T, Pacific has added rates for OS/DA and BLVI trunk installation in Appendix A-1, but those rates are for trunk installation when OS/DA is offered as a non-UNE. The rates are included in Appendix H, and should not appear again here in the UNE rate appendix. AT&T is correct. Those rates should be deleted from Appendix A-1.

Item 61: Pacific has added a line item for resale services. Nonrecurring charges for resale services are already addressed in Section 2.3 of Attachment 8 and should not be added to the UNE pricing appendix. AT&T is correct. Those references should be removed from the UNE appendix. The same rationale applies to Items 62 and 64.

Item 63: AT&T states Pacific has added a slamming investigation fee. The terms and conditions of the ICA do not provide for an inquiry fee, and Pacific has never identified this as an issue. This rate element will be deleted.

Issue 106

Should AT&T be required to pay a DSL loop qualification charge?

AT&T's Position:

AT&T contends that Pacific has failed to provide any cost basis for its proposed loop qualification charge of \$18.25. The FCC has ordered that ILECs must provide CLECs with access to all information relating to loop qualification for DSL-based services. Because Pacific has failed to carry its burden of providing information to support its proposed charge, the Commission should determine that Pacific's costs for loop qualification are zero.

In the long term, Pacific is required to make this loop information available to AT&T in an electronic format. (See, 47 CFR § 51.313(c); Ex. 121 at 39.) The forward- looking cost of providing this loop information should amount to the cost of supplying a few additional fields of data through Pacific's Operations Support Systems. AT&T believes that the additional capacity required to process this information would likely not even be measurable on a per-order basis.

Pacific's Position:

Pacific clarifies that it offers loop "pre-qualification" for no charge. What is at dispute here is the OSS UNE known as DSL loop qualification. DSL loop

qualification is the activity Pacific undertakes to determine what loop conditioning will be required to make the loop DSL-capable.

In the MFS WorldCom arbitration, the arbitrator adopted Pacific's rate of \$18.25, stating that Pacific had made a reasonable showing that it does not presently have in place a fully automated electronic system for determining DSL loop qualification. The MFS WorldCom award was premised on a TELRIC cost study submitted by Pacific and approved by the arbitrator. Pacific asserts that the state of mechanization is the same as at the time of the MFS WorldCom arbitration. Pacific's loop qualification process is not fully mechanized at this point—nor is it planned to become so.

Discussion:

In its Comments, AT&T asserts the Draft errs legally in adopting a charge for which there was no evidentiary basis on the record of this case. It is immaterial that Pacific supplied a cost study in the MFS WorldCom arbitration, and the arbitrator in that case approved it, says AT&T. Under § 1701.2(a) of the Public Utilities Code, the Commission must base its decisions on evidence of record in the case in which the decision is made. There is no basis for Pacific's \$18.25 loop qualification charge on the record of this case.

AT&T's position is adopted. AT&T is correct that Pacific's cost study for its proposed loop qualification charge was not examined in this proceeding. The fact that an arbitrator in another case adopted the rate is irrelevant here. An arbitration case is not like a generic proceeding where many parties have an opportunity to be heard and have input into the Commission's decision. AT&T was not a party to the MFS WorldCom arbitration case, and has never had an opportunity to examine the cost study Pacific provided in that arbitration to justify its \$18.25 loop qualification charge. In this case, AT&T has not had a meaningful opportunity to be heard on the underlying cost study Pacific prepared. It would

constitute legal error to adopt Pacific's proposed rate, based on a cost study never entered into evidence in this arbitration proceeding, and which AT&T did not have an opportunity to examine.

AT&T asserts the forward-looking costs of providing loop qualification information would be close to zero. However, the final rate for loop qualification is still to be determined. Since AT&T has proposed that there be no loop qualification charge, the charge will be set at zero on an interim basis. That rate will be subject to true-up once the Commission adopts a final loop qualification charge.⁵⁵

Issue 107

Should AT&T be required to pay a DSL loop conditioning charge?

AT&T's Position:

AT&T contends that it should not be required to pay a separate non-recurring charge for DSL loop conditioning because prices based on TELRIC would not include an additional non-recurring rate element for DSL-related conditioning. (Ex. 121 at 28-32.) The recurring charge for unbundled DSL-capable loops would already include the cost of providing loops that are free of DSL inhibitors. Accordingly, AT&T asserts that allowing a separate and additional non-recurring charge would amount to double recovery of costs.

AT&T contends that the premise that Pacific must remove equipment from its loops, like load coils or repeaters, in order to provide DSL-based services has no place in a forward-looking cost proposal. AT&T asserts that the recurring

⁵⁵ The ICA retains references to the adopted loop qualification charge. While the charge is currently set at zero, that could change during the life of this ICA. Therefore, it is appropriate to retain those references.

charge for unbundled DSL-capable loops already includes the cost of providing loops that are free of load coils and other DSL inhibitors.

AT&T asserts that the *UNE Remand Order* provides guidance on a cost basis for conditioning charges. Specifically, §§ 51.319(a)(3)(B) and (C) of the FCC's modified pricing rules state that recovery of "conditioning" costs must be "in accordance with the Commission's forward-looking pricing principles promulgated pursuant to section 252(d)(1) of the Act" and in compliance with rules governing non-recurring costs in § 51.507(e). Section 51.507(e) provides that state commissions may require ILECs to recover non-recurring costs through recurring charges over a reasonable period of time. Those charges must be allocated among carriers, and "shall not permit an incumbent LEC to recover more than the total forward-looking economic cost of providing the applicable element." AT&T contends that if the recurring loop cost study reflects all of the forward looking costs of providing such a loop, the *UNE Remand Order* would prevent Pacific from adding a non-recurring charge for loop conditioning.

With regard to the question of whether Pacific's pricing proposal complies with the Commission's decision in the Pricing Phase of OANAD, it does only with regard to loops under 17,500 feet. Pacific offers loop conditioning for loops over 17,500 at ICB pricing. AT&T contends that this does not comply with D.99-11-050, which makes no distinction at all about the length of a loop. Also, Pacific's proposed charge violates the Commission's finding that Pacific should receive compensation only for the nonrecurring cost associated with providing unbundled ISDN loops until the Commission later determines that some other charge is appropriate.

Pacific's Position:

The Commission established an interim charge for loop conditioning in the OANAD pricing decision, D.99-11-050, pending a generic Commission

investigation. In setting the interim charge for conditioning at the ISDN non-recurring rate, the Commission said it did so because "it would be unfair to Pacific to furnish loops that require conditioning without receiving some compensation for this work..." (D.99-11-050). Pacific states that the parties appear to agree that this is the applicable interim price for loops up to 17,500 feet in length. Since 17,500 feet is the maximum distance from the central office that DSL can be reliably provisioned, Pacific contends that conditioning loops longer than the range of the service should be TBD.

Pacific further contends that neither the FCC nor the CPUC has agreed with AT&T's line of reasoning that no charge should apply because an imaginary forward-looking network would eliminate the need for conditioning. Rather, the FCC has held that work activities undertaken by the LEC to condition the loop for DSL service are recoverable, even if a forward-looking network would avoid this type of conditioning.⁵⁶

Discussion:

AT&T's proposed language in § 3.3 that there be no charge for loop conditioning shall be deleted. In D.99-11-050, the Commission found that the loop conditioning charges which Pacific proposed in OANAD were very high. The proposed loop conditioning charges were taken from the ADSL tariff Pacific had filed with the FCC. Commission staff reviewed the FCC tariff and determined that the loop conditioning charges in it were based on embedded rather than forward-looking costs. The Commission rejected Pacific's cost study and decided that, until the Commission could adopt final TELRIC-based costs and prices for loop conditioning, Pacific should receive the non-recurring charge applicable to

⁵⁶ *First Report and Order*, para. 382; *UNE Remand Order*, paras. 192-193; *Advanced Services Order*, para. 82.

ISDN loops to cover conditioning costs for all 2-wire loops used to provide DSL service.⁵⁷

The FCC's Rule 51.319(a)(3)(B) and (C) endorse the requirement that line conditioning charges must be based on forward looking costs and require that ILECs recover the cost of line conditioning in compliance with the rules governing nonrecurring costs in Rule 51.507(e). Rule 51.507(e), provides in its lead in statement: "State commissions may, where reasonable, require nonrecurring costs through recurring charges over a reasonable period of time . . ." Thus, the recovery of nonrecurring charges through a recurring charge is at the discretion of the state commission. This Commission has not had an opportunity to make that determination.

AT&T is correct that if the recurring cost study includes all forward-looking costs of providing the loop, there should be no nonrecurring charge. Clearly, the Commission needs to review both recurring and nonrecurring cost studies to determine the proper treatment for line conditioning. In the interim, there is no evidence that Pacific's costs of line conditioning are captured in the recurring costs of the loop. Until the Commission makes a final determination on the proper treatment of line conditioning, the ISDN nonrecurring charge will be applied to capture line conditioning costs. Since the ISDN nonrecurring charge is admittedly only a very rough proxy, those charges will be subject to true-up, once a final decision is made by the Commission. The OANAD decision did not make a distinction for loops over 17,500 feet in length so the ISDN rate will apply to all loops, regardless of length.

⁵⁷ D.99-11-050, *mimeo*, at 112-113.

Issue 108

Should the arbitrator adopt the switch usage rates approved in OANAD (Pacific's proposal) or the lower rates proposed by AT&T?

AT&T's Position:

AT&T's proposed switch usage rates represent the true forward-looking rates for switch usage. AT&T contends that switch prices have dropped dramatically over the past few years. In fact, a US Telephone Association (USTA) report (cited in the FCC's recent *UNE Remand Order*) notes that switch prices have declined by at least 12% between 1996 and this year. (Ex. 111 at 5.) AT&T contends that the Commission should update the prices for Pacific's port to reflect the forward-looking analysis embodied in the record here.

Pacific's Position:

Pacific contends that the OANAD rate should be adopted. D.99-11-050 explicitly set rates for UNEs and instructed that they be used in ICAs for the next three years. There, the Commission approved Pacific's switching costs and rejected AT&T's proposed switch costs.⁵⁸

Discussion:

Pacific's position is adopted. Decision 99-11-050 recognized that the costs the Commission adopted in D.98-02-106 were based largely on data that has not been updated since 1994, and there is evidence that some of the costs may be changing rapidly. The Commission endorsed the need to update costs through a generic proceeding, "...any general reexamination of Pacific's TELRIC costs should take place in a generic proceeding in which all parties can be represented."

The Commission then established an annual cost reexamination process in D.99-11-050 which allows a CLEC or Pacific to reexamine individual UNE costs

⁵⁸ D.98-02-106, *mimeo*, pp. 22-52.

where the CLEC or Pacific can demonstrate that there has been a very substantial cost change. If a requesting carrier believes that a UNE price is lower than the one adopted for a particular network element, based on a reduction in the costs for that element of at least 20% from the costs approved in D.98-02-106, the CLEC may nominate that UNE as a candidate for reconsideration. Nominations should be submitted between February 1 and March 1 of each year, beginning in 2001. AT&T should use this established process as the place to seek a reduction in the switching rate. The Commission has stated its preference for making cost changes in generic proceedings, where all parties have a voice. An arbitration proceeding involving only two parties is not the appropriate vehicle for revisiting approved costs.

Issue 109

Should all switching vertical features be made available to AT&T as part of the switch-port UNE, and, if so, at what price?

AT&T's Position:

AT&T asserts that the Commission in its recent OANAD pricing order violated the FCC's requirement that the unbundled switching element include all of the features and functionality of the switch. In its *UNE Remand Order*, the FCC reiterated the definition of switching which it had adopted in the Local Competition First Report and Order. That is, the definition of the local switching element "encompasses all the features, functions and capabilities of the switch." In setting rates for vertical features in OANAD, AT&T asserts that the Commission violated these FCC's requirements by approving charges for vertical features, separate from and in addition to the port element of the switch. Moreover, the Commission approved recurring charges for only 31 of the vertical features of Pacific's switch. (See D.99-11-050, Appendix A.) AT&T argues that this is an extremely small portion of the number of vertical features that are

available, since Pacific's switches have the capability of providing approximately 1000 vertical features.

AT&T contends that many features and functions, which would enable competitors to offer new and creative services to customers, are not available to competitors. The Commission should include all switch features and functionality in the switching UNE and rule that Pacific include all vertical features the switch is capable of providing as part of the UNE port element, (Ex. 111 at 8-9.)

Pacific's Position:

Pacific is not required to offer a port price that includes vertical features. In the Commission's decision approving the first arbitrated agreement between Pacific Bell/AT&T, the Commission noted that the FCC's *First Report and Order* permits state commissions to separately price ports from vertical features.⁵⁹

Pacific contends that including the vertical features in the port UNE creates a different cost structure than the one approved in OANAD. Also, bundling features into the port will accelerate exhaustion of the switches, greatly increasing switch costs.

Discussion:

Paragraph 414 in the FCC's *First Report and Order* allows state commissions the discretion to separately price ports from vertical features, and this Commission has determined that that pricing structure is appropriate. While OANAD has costed and priced only those vertical features most in demand, other features would be available to AT&T through Pacific's BFR process.

In its Comments, AT&T asserts the Draft mischaracterizes its position on this issue. AT&T says it has not taken the position that it violates the Act for

⁵⁹ D.96-12-034, *mimeo*, p. 17 (citing the FCC's *First Report and Order*, para. 144).

Pacific to price vertical features separately. AT&T's point is that, were AT&T to purchase all of the vertical features Pacific has priced, it would be paying for the entire vertical-feature functionality of the switch, while receiving less than that entire functionality. This means that Pacific's vertical features are priced above their forward-looking economic costs.

AT&T suggests that whenever AT&T pays the UNE switch usage rate, it should receive all the vertical feature functionality embedded in Pacific's switches. According to AT&T, the total of all switching charges must yield access to all vertical features, including those Pacific has not deployed to its own end users. Otherwise, says AT&T, Pacific's rates will not be TELRIC-compliant.

As Pacific states in its Brief, including the vertical features in the port UNE creates a different cost structure than the one approved in OANAD. Pacific's cost studies for the port do not include *any* vertical features. Pacific prepared separate cost studies for each of the 30 vertical features included in OANAD. Pacific did not prepare cost studies for other vertical features. The total of all switching charges will yield access to all vertical features, only if all vertical features have been costed and those costs are added to the equation. In that case, the sum of the switch port, switch usage, and all 1000 vertical features would yield total costs for switching.

If Pacific is required to provide access to all vertical features of the switch whenever AT&T pays the switch usage charge adopted in OANAD, Pacific is not going to recover the costs for those vertical features, since their costs are not included in the TELRIC for switch usage.

Pacific's position is adopted.

Based on the outcomes in Issues 105, 108 and 109, Pacific's proposed § 3.1 is adopted.

Issue 110

How should rates for UNEs for which no cost studies were submitted in the OANAD be established?

AT&T's Position:

AT&T contends that the cost studies which Pacific proposes for the first time in this arbitration should be rejected. They have not been subjected to the customary scrutiny that the Commission devotes to cost studies. During the negotiation process, on September 2, 1999, AT&T requested copies of all cost studies that supported the prices that Pacific was proposing in the negotiations. After repeated queries, Pacific revealed for the first time on December 20 that it was undertaking new cost studies. The studies that Pacific relies on were provided to AT&T between December 21, 1999 and January 7, 1999, less than a month before AT&T ultimately filed its Application for Arbitration. Moreover, Pacific did not provide AT&T with its workpapers and back-up information that AT&T requested at the time Pacific released the study results. Pacific submitted its study results (but not its supporting workpapers and complete set of calculations) along with the testimony of its pricing witness on February 18, 2000. AT&T asserts that there has been no opportunity to probe the basis for the studies and their conformity with the Commission's Consensus Costing Principles or the FCC's TELRIC methodology.

AT&T contends that all of the rates that Pacific proposes for the first time in this arbitration should be designated as TBD under § 14 of Attachment 8.

Pacific's Position:

Pacific submitted TELRIC cost studies for UNEs for which there is currently not a price set by OANAD. The proposed prices for these items are all set at the OANAD-approved levels, TELRIC plus 19%. A roadmap to the costs or other basis underlying Pacific's proposed prices for UNE and non-UNE functions is attached to the testimony of Pacific's pricing witness.

Discussion:

In its Comments, Pacific asserts the Draft should not have adopted AT&T's position that Pacific's TELRIC studies submitted in this arbitration at the end of 1999 should be rejected for lack of time to review. In her Additional Direct Testimony, AT&T's witness Cabellon withdrew AT&T's issues around these cost studies from this arbitration. However, in its Brief, AT&T argued these cost studies should be rejected. However, what is on the record and what is binding on AT&T, is the sworn testimony of its witness Cabellon that AT&T had accepted Pacific's proposed prices and had withdrawn these issues from this arbitration.

According to Pacific, AT&T had an adequate amount of time to review the studies. Pacific gave AT&T the new studies as soon as they were completed. The only question here is whether AT&T had enough time to review them, says Pacific. That question was answered by the parties' agreement in connection with AT&T's motion to compel. There, AT&T agreed to withdraw its motion, in part because it was given an additional three weeks to review the cost studies.

AT&T's witness Cabellon's testimony related to new cost studies for entrance facilities and direct transport for OC3 and OC12, and multiplexing for OC3, OC12 and OC48. Other studies that Ms. Cabellon agreed were not to be arbitrated by the Commission included: ISDN PRI Port, Ancillary Services, Directory Assistance, Operator Services, Optical EISCC, and Centrex Optional Features. Since AT&T's witness agreed to the prices for those items, Pacific's proposed prices will be adopted.

AT&T's proposal that all other rates that Pacific presented for the first time in this arbitration be designated as TBD under § 14 of Attachment, will be adopted. According to AT&T, Pacific did not provide supporting workpapers and a complete set of calculations with its cost studies. Without that information, AT&T would not be able to make a meaningful analysis of the cost studies.

Pacific asserts that AT&T conducted no discovery on the cost studies, but as Pacific is aware, discovery ends once a party files a request for arbitration. Given the limited amount of time AT&T had to review some of Pacific's cost studies, it is appropriate to classify those services as TBD in the ICA.

Issue 111

How should the transit rate be established?

AT&T's Position:

This rate has not yet been set in the OANAD proceeding. AT&T suggests setting it at the tandem switching rate.

Pacific asks the Commission to adopt the transit price adopted in the MFS WorldCom arbitration, based on the adopted TELRIC for the elements used by a transit call. (Ex. 201 at 41.) AT&T contends, however, that Pacific did not identify which OANAD TELRICs should form the transit rate, so the arbitrator has no way of knowing whether the numbers appearing in Pacific's version of Appendix A-1 to Attachment 8 conform to any particular OANAD TELRICs. AT&T also contends that it was not a party to the MFS WorldCom arbitration and has not had access to whatever proprietary studies Pacific may have submitted in that arbitration. Furthermore, the Arbitrator's Report in the MFS WorldCom arbitration does not show whether the arbitrator made any determination about OANAD TELRICs, which Pacific says is the appropriate basis for the transit rate. Instead, AT&T contends that Pacific made a variety of calculations that the arbitrator accepted after (1) Pacific volunteered a correction to its initial calculations, and (2) the arbitrator directed yet another. AT&T argues that there is no evidence in the Arbitrator's Report that the ultimate rate adopted was based on the adopted TELRIC for the elements used by a transit call. Thus, the arbitrator has no choice but to accept AT&T's proposed transit rate recommendation, which

is to set the rate temporarily at the tandem switching rate, until the Commission sets a final rate for tandem transit.

Pacific's Position:

Pacific contends that the transit rate should be the same as adopted in the MFS WorldCom arbitration. The rate was based on a TELRIC cost study.

Discussion:

In its Comments, AT&T asserts the Draft admits that the TELRIC study on which Pacific's transit rate is based was submitted in the MFS WorldCom arbitration, and not in this case. Since AT&T was not a party to that arbitration, and Pacific refused to submit the cost study in this case, AT&T had no way to know whether that cost study was actually TELRIC-compliant. According to AT&T, it is not only a violation of AT&T's due process rights to adopt a rate based on studies AT&T has never seen, but a violation of §1701.2(a) of the P.U. Code, since the Draft's resolution on this issue is based entirely on matters outside the record of this case.

Also, says AT&T, the Draft was incorrect in asserting that AT&T does not present any reason why it is appropriate to set the transit rate equal to the tandem switching rate. AT&T's pricing witness testified that AT&T's proposed network architecture calls for the delivery of transit traffic to Pacific's tandem switches. Thus, in serving transit traffic, Pacific will provide only tandem switching, and not transport. The appropriate interim rate to apply to such traffic then, is the tandem switching rate the Commission adopted in OANAD.

AT&T's proposed language in § 5.4 is adopted, for the same reasons discussed in Issue 106 above. There is no evidence in the record of this proceeding to adopt Pacific's proposed transit rate.

Issue 112

Should a "conversion" charge (also known as a "change-over" or "migration" charge) apply when an existing user converts to AT&T resale service?

AT&T's Position:

AT&T contends that Pacific's claims regarding a "conversion" charge, when one of its end users switches to AT&T resale local service, are confusing and inaccurate. First, Pacific claims that the Commission has set an interim rate, but Pacific did not indicate in what forum the Commission took such action, nor does it identify a rate. Second, AT&T asserts that Pacific's proposed provision states that the conversion charges would appear in Appendix A-1 in the "Other (Resale)" category, but nowhere in that appendix is there an element titled "conversion charges."

According to AT&T's testimony, it established that the Commission has not set a rate for "conversion," although Pacific has filed such a rate in an Advice Letter which has not yet been approved. The only charge the Commission has ever mentioned as being applicable to this situation is the mechanized service order charge. (Ex. 108 at 5.) The OANAD pricing decision, D.99-11-050, sets this rate at sixteen cents per order.

AT&T contends that because neither Pacific's testimony or its contract proposal provide any basis for such a charge, and because there is no basis in any Commission decision for such a charge, the arbitrator must reject Pacific's version of § 2.3.2 of Attachment 8.

Pacific's Position:

When an existing Pacific customer migrates from Pacific to AT&T's resale service, Pacific asserts that real work is required to ensure that all of Pacific's record, billing, and maintenance systems reflect the new status of the account. Pacific contends that D.96-03-020 and Pacific's tariffs provide for recovery of

these costs. A Pacific Advice Letter adjusting this rate remains pending before the Commission. The current tariff rate should continue to apply until this advice letter is processed.

Discussion:

Pacific's proposed § 2.3.2 is adopted. As Pacific says, the company incurs costs when a Pacific customer migrates from Pacific to AT&T. The Commission recognized that fact in D.96-03-020, when it adopted interim changeover charges for Pacific. Those charges will remain in effect until the final costs developed in OANAD are approved.

In its Comments, AT&T asserts that adoption of Pacific's proposed conversion charge violates the "binding precedent" in the 1996 arbitration between Pacific and AT&T, which rejected any conversion charge. AT&T attempts to contrast its position to Pacific's references to the MFS WorldCom arbitration, by stating "this prior arbitration between the precise two parties to this arbitration remains binding on the parties." (Comments at 115). AT&T is incorrect. The Commission is not bound by a provision it adopted in the 1996 arbitration decision. As stated previously in this FAR, arbitration decisions are *not* binding on the Commission.

AT&T asserts there is no legal significance to the interim changeover charges the Commission adopted in D.96-03-020, since Commission action in the 1996 arbitration takes precedence over the earlier action. Again, AT&T is incorrect. The decision in an arbitration case can never take precedence over a decision in a generic Commission proceeding. The interim changeover charge was adopted in the Commission's Local Competition proceeding (not the OANAD proceeding, as AT&T asserts). In D. 97-08-059 in the Local Competition docket, the Commission re-affirmed its interim changeover charges, with the following statement:

“We agree that the nonrecurring charges adopted in D.96-03-020 for CLC/LEC customer transfer warrant reexamination. We shall transfer this issue to the wholesale pricing phase of the OANAD proceeding. Until we reach resolution there, the charges adopted in D.96-03-020 shall remain in effect.” ”
(*Mimeo* at 74).

AT&T points to Conclusion of Law 27 of D.96-03-020 which states that the interim rates would be superseded by wholesale rates established in the OANAD proceeding. AT&T then looks to D.99-11-050 which it erroneously terms the “conclusion of Phase III of the OANAD proceeding” and points to the fact that no changeover charges were adopted in that decision. AT&T is correct that no changeover charges were adopted in D.99-11-050. However, the Commission did review changeover cost models in the OSS/NRC Phase of OANAD, and in D.98-12-079, the Commission adopted Pacific’s changeover cost model with some modifications, and ordered Pacific to file the modified changeover model pursuant to the General Order 96-A Advice Letter process. Pacific made that Advice Letter filing, and the Advice Letter is currently pending. The Commission stated it would determine proper cost recovery for the changeover costs in the Resale Phase of OANAD. (D.98-12-079, *mimeo* at 37). Until that determination is made, the changeover charges adopted in D.96-03-020 are in effect.

AT&T also alleges that Pacific’s proposed §2.3.2 would allow Pacific to recover service order charges in addition to the conversion charge. AT&T is mistaken. A careful reading of §2.3.2 shows that if an end user switches its existing service to AT&T without any additions or changes, only the conversion charge applies. However, if the end user makes changes to its service at the time of the conversion, “the normal service order charges and/or non-recurring charges

associated with said additions and/or changes will be applied in addition to the conversion charge.”

There is no legal error in requiring adoption of a changeover charge. The Commission’s interim ruling in D.96-03-020 is in effect and will be used to set the changeover charges in this ICA.

Pacific must ensure that its Commission approved-changeover charges are listed in the Pricing Appendix.

Issue 113

Should Pacific’s hourly labor charges for test and maintenance work related to services, network elements and ancillary functions provided under the ICA be established in the ICA or by tariff?

Issue 114

Should Pacific’s or AT&T’s proposed rates, terms and conditions for labor charges be adopted?

ISSUE 113 AND ISSUE 114

AT&T’s Position:

In the OANAD proceeding, Pacific costed UNEs in a manner that included all labor required for their installation, maintenance and testing. It also proposed separate non-recurring charges for UNEs that would include the cost of “converting” services to UNEs. AT&T contends that the arbitrator must add the modifier “special” that AT&T seeks to include in the first sentence of § 9 of Attachment 8. Otherwise, Pacific’s language would result in double-recovery of its labor costs in association with the installation, maintenance and testing and the “conversion” to UNEs and associated equipment. In addition, the arbitrator should adopt the phrase, “for which there is an hourly charge under this Agreement” to clarify that Pacific may not charge for all labor in connection with UNEs, but only that labor for which the ICA has provision for special hourly labor rates.

AT&T further contends that Pacific proposes labor rates out of its 175-T tariff, which this Commission did not set based on TELRIC costs. AT&T contends that the work associated with UNEs, UNE combinations or associated equipment must be set at TELRIC. Since those 175-T labor rates are not set at TELRIC, they do not closely approximate the cost of labor to Pacific in performing maintenance on its own behalf. The arbitrator should adopt AT&T's language referring to Appendix B of the ICA for such labor rates and reject Pacific's language incorporating its 175-T tariff labor rates by reference, and the reference to the non-TELRIC labor rates it has proposed in Appendix A-1 for work associated with microwave collocation.

AT&T seeks to include a provision requiring Pacific to charge overtime or premium rates only when AT&T authorizes work to be undertaken during hours when such charges would apply. Without such a provision, AT&T asserts that Pacific could schedule its own work during regular business hours and work for AT&T after hours, when overtime or premium rates apply. This would impose unnecessary costs on AT&T.

ISSUE 113 AND ISSUE 114

Pacific's Position:

Pacific contends that these labor rates are set forth in Pacific's tariffs. The tariffed labor rates were adopted for use in the MFS WorldCom arbitration. In order to ensure nondiscriminatory treatment among CLECs, the tariffed rates should be adopted.

Pacific contends that AT&T's proposal is unreasonable and unworkable. AT&T has proposed to include a one page rate table in Attachment 8 that shows labor rates for basic time, overtime and premium time. However, the page omits any definition of the work hours that are considered basic, overtime or premium.

Nor does AT&T include the necessary language to explain when the charges apply. The tariff does this.

Additional charges such as overtime only occur when the customer requests the service. Pacific asserts that AT&T's language would allow AT&T to refuse to pay overtime charges, by claiming Pacific should have had more employees scheduled on the day AT&T wanted service. A review of AT&T's own tariff shows that AT&T follows the same practices as Pacific related to overtime and premium charges.

Discussion:

Pacific's position is adopted, with modification. While non-recurring charges for installation of UNEs clearly must be set at TELRIC prices, the generic labor charges set forth in Attachment 8, Section 9 relate to "installation, maintenance, conversion, testing, escort or similar services" which need not be set at TELRIC prices. However, Pacific shall add AT&T's proposed word "special" in front of installation to ensure that routine installation work, which is covered by nonrecurring charges, is not subject to the adopted labor charges.

Also, Pacific's proposed § 9 shall be amended to include part of one sentence from AT&T's proposed language: "...all charges shall be at the "basic time" rate unless AT&T requests that work be performed outside the "basic time" period and approves the charges in advance." Inclusion of that sentence provides protection for both parties, and should serve to reduce disputes.

In its Comments, AT&T states the Draft failed to address the issue of whether Pacific has an obligation to schedule and assign its employees in a non-discriminatory manner as between work for itself and work for AT&T. It does no good to require that Pacific only charge AT&T overtime for such work as AT&T approves, if Pacific schedules its own work in such a way as to make it necessary for Pacific to undertake overtime work in order to meet AT&T-requested

completion dates, says AT&T. AT&T asks that the second sentence of its proposed Section 9 be adopted. That sentence which reads, "PACIFIC will manage and apply such charges in a non-discriminatory manner that is equivalent to Pacific's internal management and assignment of these costs," shall be adopted. This reflects the Act's non-discrimination requirements and is appropriate to be included. However, AT&T's final sentence of Section 9 will not be adopted. That sentence reads: "In no event shall AT&T be billed overtime or premium rates for work that could have been performed during 'basic time' hours had sufficient personnel been available to complete the work during that time." That sentence is a recipe for disputes since parties could have occasion to dispute whether "sufficient personnel" had been available. Those disputes could be frequent and difficult to resolve.

In its Comments, AT&T also states the arbitrator should supplement the discussion to make it clear that Pacific is not authorized any additional labor charges for any work routinely required for the installation, maintenance, testing or conversion of UNEs. Otherwise it would result in double-recovery of Pacific's costs because all those costs are recovered in the nonrecurring charges applied to UNEs. It is appropriate to add that language. Parties are directed to add such language to the final version of Section 9.

In its Comments on Issue 129, AT&T points out that the last sentence in Pacific's §9 must be modified to substitute "Appendix B" which contains AT&T's collocation rates, including associated labor rates, for "Appendix A-1" which contains Pacific's rejected rates for collocation-associated labor. Parties shall make that change in Section 9.

Issue 115

Should Pacific be required to compensate AT&T when Pacific places equipment used for local interconnection in AT&T's central offices, and if so, should AT&T be required to provide cost support to Pacific for any costs AT&T identifies to be higher than Pacific's collocation rates for provisioning of AT&T's Space License arrangements?

AT&T's Position:

Pacific has already agreed that AT&T can charge higher rates than Pacific's collocation rates if they are "justified by higher costs that AT&T incurs" in providing space in AT&T switching centers. AT&T opposes Pacific's language requiring AT&T to "justify and demonstrate" to Pacific such higher costs. However, AT&T will do so in any case in which Pacific disputes charges.

Pacific's Position:

Pacific contends that if Pacific collocates in AT&T facilities, it should compensate AT&T for its costs. The compensation AT&T receives should be the same as Pacific receives under its current offering.

Discussion:

Pacific's proposed language in § 5.2.1 is adopted. AT&T says that it is willing to justify higher costs any time Pacific disputes charges, but AT&T does not want that requirement in the ICA. Since AT&T agrees to justify its rates if Pacific disputes charges, it makes sense to include that provision in the ICA.

Issue 116

Should Pacific's or AT&T's proposed collocation rates be adopted?

AT&T's Position:

The parties have agreed that the Commission will set permanent rates for collocation in the Collocation Phase of OANAD. (Ex. 127 at 9; Ex. 217 at 5.) The parties also agree that the Assigned Commissioner has accepted AT&T's Collocation Cost Model (CCM) as the basis for determining the costs on which final collocation prices will be derived. (Ex. 127, Tr. 719-720.) The only dispute,

therefore, is over interim prices to be applied between the effective date of the ICA and the effective date of any final Commission Order adopting permanent collocation rates.

Pacific's proposed interim rates are based on what Pacific describes as "its current collocation rates." (Ex. 217 at 5.) Pacific's witness testified that Pacific's current rates are a blend of existing tariff rates for physical collocation and advice letter rates that came out of the Advanced Services Order, as well as some specific negotiated rates discussed in Pacific's response to AT&T's petition. (Ex. 217 at 5.) AT&T contends that it is a matter of public record that Pacific's current collocation tariff was adopted in December 1995 so the rates adopted there are not TELRIC-based. AT&T also points out that Pacific's witness acknowledged that the Commission has not approved the rates in the advice letter. (Tr. 721.) Pacific's witness was unable to explain what was meant by the phrase "some specific negotiated rates." In sum, AT&T contends that all of Pacific's "current rates" either fail to comply with TLERIC or are merely unapproved proposals; and none have been "negotiated" with AT&T or any CLEC.

AT&T claims that its proposed interim rates are rates that were produced by undertaking a "run" of the CCM that the Commission has accepted as the basis for setting permanent rates. AT&T asserts that its rates are a superior basis for setting interim rates.

Pacific argues that the rates it is attempting to impose on CLECs unilaterally through a so-called "Accessible Letter" should form the basis for collocation rates. AT&T contends that this is an attempted end-run around ALJ Walwyn's ruling in the Collocation Phase of OANAD that the Commission would not approve interim collocation rates for general use in that case. Also, Pacific's unilateral offering violates the requirement of § 251(c)(1) that Pacific negotiate terms of interconnection with CLECs. In addition, the "Accessible Letter" is an

“end run” on the Commission’s tariff approval process. AT&T also states that the rates in Pacific’s “Accessible Letter” are not identical to the rates AT&T proposes, although both are based on the CCM.

AT&T is the author of the very complex CCM, and it is entirely possible that Pacific misused the model or modified its inputs in unknown ways to achieve its desired results. AT&T asserts that its “run” of its own model is a more authoritative representation of the intended outputs of the model.

Pacific’s Position:

Pacific proposes that interim prices be taken from its Accessible Letter CLECC00-54, dated March 3, 2000. The prices listed in the Accessible Letter are the same prices that AT&T proposed earlier in this arbitration. The only difference is that they have been modified to reflect a 19% mark-up in compliance with D.99-11-050. In other words, the Accessible Letter converts costs to prices based on the Commission’s approved mark-up. During cross-examination, AT&T’s collocation witness admitted that AT&T would not be opposed to the Accessible Letter if it does not differ from the CCM.⁶⁰ Pacific contends that it does not.

Because Pacific adopted AT&T’s interim pricing proposal after it filed its response to AT&T’s petition for arbitration, the pricing language in Attachment 8 does not reflect Pacific’s acceptance of AT&T’s interim rates. Pacific contends that the Commission should substitute the current Pacific language in Attachment 8, Section 4.1 with the following:

4.1 (PAC) Physical Collocation includes standard cage, shared cage, cageless, adjacent structure and other technically feasible collocation

⁶⁰ 8 Tr. 860 (Ms. Fettig for AT&T).

arrangements as described in the FCC's First Report and Order, FCC 99-48. CC Docket No. 98-147, released March 31, 1999. The charges for a Physical Collocation arrangement shall be as set forth in Pacific's FCC Tariff No. 128, Section 16 and Pacific's Schedule Cal. P.U.C. No. 175-T, Section 16. To the extent charges for a specific form of Physical Collocation are not contained in Pacific's Schedule Cal. P.U.C. No. 175-T, Section 16, the charges set forth in Pacific's Accessible Letter CLECC00-054, dated March 3, 2000, shall be applicable on an interim basis.

(PAC) The interim charges for a Virtual Collocation arrangement shall be the rates set forth in Pacific's Accessible Letter CLECC00-054, dated March 3, 2000.

(PAC) With the exceptions noted below, all charges for Virtual Collocation and all forms of Physical Collocation are subject to true-up to the Effective 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, BFR and ICB pricing. Any collocation rates approved by the Commission for Virtual Collocation and 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 effective.

(PAC) The non-recurring charges for Microwave Collocation shall be on an ICB basis.

Pacific indicates that there appears to be no dispute between the parties on final prices—both parties agree that the final prices adopted in the Collocation Phase of OANAD should govern this ICA.

Discussion:

AT&T's proposed § 4 is adopted. While the rates in Pacific's Accessible Letter were based on a run of AT&T's CCM model, other collocation rates are based on its current approved tariff. Pacific's proposed § 4.1 above makes it clear that Accessible Letter CLECC00-54 merely supplements Pacific's tariff offering

for collocation. AT&T alleges, and Pacific does not refute, that its current tariff rates for physical collocation are not TELRIC-based. AT&T's proposed collocation rates, on the other hand, were developed using the CCM, and according to AT&T, are TELRIC-compliant.

Both AT&T and Pacific used the CCM to generate interim collocation rates, but came up with different results. AT&T attributes that to Pacific's lack of familiarity with AT&T's complex model, but Pacific states that the difference is that Pacific modified the costs to reflect the 19% markup for shared and common costs adopted by the Commission in D.99-11-050, and AT&T did not. The arbitrator has no way to verify if Pacific's supposition is correct. However, if AT&T's proposed interim rates in Appendix B do not include the 19% markup, they shall be adjusted to include that required markup.

In its Comments, AT&T confirmed that its proposed rates do not include the 19% markup. AT&T asserts that in footnote 70 to D.99-11-050 (*mimeo* at 72), the Commission noted that, to produce the 19% allocator, it divided all of Pacific's shared and common costs by its total costs, excluding collocation costs. Thus, by marking up the UNE rates by the resulting fraction of 19%, the Commission gave Pacific the chance to recover all of its shared and common costs through UNEs. According to AT&T, adding the 19% mark-up to collocation rates would allow Pacific to over-recover its shared and common costs.

AT&T ignores two key points contained in footnote 70: (1) Collocation costs were excluded only because at that time the Commission did not have a reliable estimate of collocation costs, and (2) Collocation costs were expected to be "only a fraction of NRCs." Collocation costs would have to be more than "de minimis" to impact the calculation of the 19% allocator. The 19% allocator should appropriately be added to the costs based on the CCM to generate

collocation rates. This result will not allow Pacific to over-recover its shared and common costs.

All of the adopted collocation rates will be subject to true-up, once the Commission adopts final rates in the Collocation Phase of its OANAD proceeding.

Issue 118

What rates should apply for access to listings in Pacific's directory assistance database until the Commission adopts permanent rates in the OANAD proceeding?

AT&T's Position:

Pacific claims that the FCC "is occupying the field to recommend reasonable rates for Directory Assistance Listings." (Ex. 212 at 32.) Pacific appears to be saying that, because the FCC, in its Docket 96-98 (Local Competition) is considering "proxy" rates for access to, and the use of, ILECs' directory assistance databases, state utility commissions are forbidden from setting rates of their own in the meantime. AT&T contends that the "Proxy rates" establish a rate that the ILECs can adopt immediately, pending their state regulatory commissions setting a permanent TELRIC rate for such access. The FCC is taking action because of the failure of many states to set TELRIC rates for access to ILEC directory assistance databases and listings.

AT&T also asserts that Pacific makes the incorrect assertion that, in the *UNE Remand Order*, the FCC "states that DA listings no longer have to be offered as unbundled network elements at cost-based rates." In fact, the *UNE Remand Order* concludes (in its Executive Summary [§ 11 of the *Order*]), "Incumbent LECs, . . . remain obligated under the nondiscrimination requirements of section 251(b)(3)...to provide directory assistance listing updates in daily electronic batch files." In other words, the FCC has done nothing to change the status or availability of directory listings or nondiscriminatory access to directory assistance databases.

Pacific seeks to apply its "DALIS" tariff as the price for access to its directory assistance databases. The DALIS tariff took effect in December 1996. AT&T contends that the DALIS tariff is not TELRIC based, and that the Commission has still not established TELRIC rates for access to directory assistance databases.

Also, the DALIS tariff establishes a rate of two cents per listing furnished to AT&T, plus a charge of five cents per listing each time AT&T gives out a listing to one of its customers through its own Directory Assistance service. AT&T states that it has no mechanism in place to track the number of times it hands out each individual telephone number obtained from Pacific's directory assistance database (which is one of hundreds of databases on which AT&T relies) and has never paid the five-cent charge to Pacific. Thus, AT&T contends that the tariff is inappropriate because it is entirely unworkable in practice. In AT&T's proposed § 11.2, it proposes to pay Pacific two cents for each listing AT&T obtains from Pacific's directory database (which, as noted above) is the primary charge in the DALIS tariff.

Pacific's Position:

As indicated in Pacific's reply comments in response to an August 16, 1999 ALJ Ruling in OANAD, Pacific contends that the FCC is occupying the field and recommending rates for Directory Assistance Listings.⁶¹ Until the FCC issues an order in its *Notice of Proposed Rulemaking* (NPRM), Pacific asserts that it is appropriate to cite Pacific's DALIS tariff in the ICA.

⁶¹ "Reply Comments of Pacific Bell Pursuant to ALJ ruling of August 16, 1999," filed Nov. 10, 1999 in OANAD (R.93-04-003/I.93-04-002).

Pacific also contends that the FCC's *UNE Remand Order* (effective February 17, 2000) states that DA listings no longer have to be offered as unbundled network elements at cost-based rates.⁶² This, coupled with the FCC's consideration of presumptively reasonable rates for DA listings, indicates that it is appropriate not to address the price of DA listings outside the DALIS tariff provisions.

Discussion:

In its Comments, Pacific argues that the arbitrator erred in determining directory assistance listings to be a UNE. According to Pacific, there is nothing in the *UNE Remand Order* finding directory assistance listings to be a UNE. Access to directory listings is governed, not by Section 251(c)(3), but rather by the nondiscriminatory access provisions of Section 251(b)(3), entitled "dialing parity." The critical distinction between the two sections is that TELRIC pricing does not apply to directory listings made available pursuant to the "dialing parity" section. The key legal requirement for the provision of directory assistance listings is that they be made available on a nondiscriminatory basis.

Pacific alleges that the arbitrator's decision to depart from Pacific's DALIS tariff moves the industry in the opposite direction. AT&T gets listings under this agreement at a reduced price, while other parties must buy under the tariff at a different, higher price. According to Pacific, the only way to maintain nondiscriminatory treatment is to apply the DALIS tariff to all providers, including AT&T.

Pacific is correct that directory assistance listings are not a UNE and not subject to the TELRIC pricing required pursuant to Section 251(c)(3). However,

⁶² *UNE Remand Order*, paras. 454-457.

Pacific's allegation that the only way to maintain nondiscriminatory treatment is to apply the DALIS tariff in all cases does not hold water. Both AT&T's proposal and Pacific's DALIS tariff include a rate of two cents per listing furnished. However, according to AT&T, the DALIS tariff requires AT&T to pay Pacific five cents every time AT&T passes out a listing received from Pacific. AT&T says it has never paid the five-cent charge because it has no way to track the information. In its Comments, Pacific does not refute AT&T's claim that it does not pay the five-cent charge.

AT&T's proposed § 11.2 is adopted. It is not a reasonable outcome to refer to a tariff that includes an unenforceable provision.

Issue 119

Should the ICA reflect Pacific's or AT&T's proposed prices for DSL-capable loops?

AT&T's Position:

AT&T contends that this issue is complicated by the fact that the parties are offering two competing loop de-averaging proposals under Issue 105, above. It is also confused by the parties' competing definitions of DSL-capable loops under Issue 65 above. It is further complicated by the fact that the Commission in the OANAD proceeding has not yet determined the appropriate pricing for all of the different types of DSL-capable loops. In D.99-11-050 (*mimeo* at 112-114), the Commission concluded that what Pacific describes in its proposal as a "2-Wire Analog/Digital Basic or Assured/ISDN" loop is also an ADSL-capable loop and should be charged at the rates it established for the 2-wire loop. AT&T has proposed prices (based on its four geographic zones) for that same loop, which AT&T describes as a "2-Wire Bus., Res., ADSL, Assured Link." For the reasons discussed in connection with Issue 105 above, AT&T contends that the Commission should adopt AT&T's nomenclature and proposed rates for this loop type.

Similarly, in D.99-11-050 (*Id.*), the Commission determined that what Pacific describes in its proposal as a "4-Wire Analog" loop is also an HDSL-capable loop and should be charged at the rates it established for the 4-Wire loop. AT&T proposes geographically deaveraged rates for that same loop, which AT&T describes as a "4-Wire Basic Link and HDSL Option." AT&T asks that its nomenclature and proposed rates for this loop type be adopted.

Pacific proposes DSL-capable loop prices for six of the PSD masks used to provide DSL service, even though the Commission in OANAD did not sets rates for these differing PSD masks. However, Pacific does not offer geographically-deaveraged prices for these DSL-capable loops. Further, none of the cost studies Pacific proposed in this arbitration were for DSL-capable loops. AT&T asserts that Pacific's proposed DSL loop charges should be rejected and marked in the contract as "TBD."

Pacific's Position:

Pacific contends that AT&T's proposal is incomplete because it does not show prices for all DSL-capable loops that are listed in the UNE Attachment. AT&T only prices 2-wire ADSL and 4-wire HDSL loops in the price table. AT&T also inappropriately proposes to de-average the loop prices into four zones. Pacific asserts that its proposal should be adopted.

Discussion:

According to AT&T, Pacific has not provided cost studies for six of the PSD masks used to provide DSL service, even though the Commission has not yet set rates for these differing PSD masks. Pacific does not specify the cost basis for the six PSD masks. Adopted loop rates which have not already been approved by the Commission must be based on TELRIC studies that are reviewed and approved. Those six PSD masks will be marked TBD and their prices determined at a later date.

AT&T's nomenclature for DSL loops is adopted.

For the reasons discussed in Issue 105, loops will be deaveraged into the three zones proposed by Pacific.

Issue 120

Should the ICA reflect Pacific's proposed charges for Ancillary Equipment?

AT&T's Position:

Pacific concedes that the prices it has proposed for ancillary equipment apply only when the equipment is not necessary to make UNEs function. Where Ancillary Equipment is necessary to make UNEs function, Pacific agrees to provide it at no additional charge. (*Response* at 102.) AT&T does not intend to order ancillary equipment from Pacific unless that equipment is necessary to make the UNEs function, and AT&T has informed Pacific of this. Nonetheless, AT&T contends that Pacific seeks to clutter and confuse the contract by including not only rates, but also terms and conditions (see Issue 275) for ancillary equipment that AT&T does not want and will not order. Pacific does not have the right to force AT&T to include contract terms for this or any other item that AT&T does not wish to purchase from Pacific. AT&T contends that the arbitrator must rule against inclusion of rates for ancillary equipment in Attachment 8, and against the inclusion of Pacific's proposed Attachment 19 which sets forth terms and conditions for ancillary equipment that is not necessary to make UNEs function.

Pacific's Position:

Pacific contends that AT&T wrongly claims that all ancillary equipment is always included within the price of the UNE. That is not correct. Ancillary equipment is subject to TELRIC cost rules and included in UNE prices only where that equipment is required for the UNE to function as specified in the ICA. Where ancillary equipment is necessary to make UNEs function, Pacific has agreed to

provide it at no additional charge. However, CLECs have also required optional ancillary equipment. Pacific contends that optional ancillary equipment is not subject to TELRIC cost rules. While Pacific has agreed to offer certain types of ancillary equipment under the 271 process, AT&T's proposed language, which would require Pacific to provide ancillary equipment at no additional cost under all circumstances is erroneous and should be rejected.

Pacific's proposed prices for the ancillary equipment is set forth in Attachment 8, Appendix A-1. These prices are based on TSLRIC costs. Cost studies were provided to AT&T in late December, 1999. AT&T did not conduct discovery of these costs, nor did it file testimony addressing the studies. Pacific contends that its prices should be adopted.

Discussion:

In its Comments, AT&T points out that the outcome on this issue is inconsistent with that for Issue 54. Since a UNE or Combination includes whatever Ancillary Equipment that UNE or Combination needs to operate properly, the ICA already contains all necessary terms and conditions for such included Ancillary Equipment. On the same basis, the ICA already contains all pricing related to the Ancillary Equipment that AT&T seeks, which is Ancillary Equipment that makes a UNE or Combination function and therefore is included in the UNE's or the Combination's price.

AT&T reiterates that it has no intention of ordering Ancillary Equipment in any other circumstances.

Issue 54 addresses Section 2.10 which includes agreed-upon language as follows: "In provisioning a Network Element or Combination, PACIFIC shall provide all ancillary equipment necessary to make the Network Element or Combination function as defined in this Agreement or in the technical references listed in Appendix A to this Attachment 6." The agreed-upon language in Section

2.11 also includes the following statement: "PACIFIC shall supply, at no additional charge, all ancillary equipment necessary to make the Network Element or Combination function as defined in this Agreement..." Clearly, all necessary Ancillary Equipment "comes with" a UNE or Combination and does not have a separate charge.

The Ancillary Equipment prices in Appendix A-1 shall be deleted. AT&T says it has no intention of ordering Ancillary Equipment which would be subject to those charges. There is no reason to include a price list for items which AT&T does not intend to purchase.

Issue 122

Should Pacific's prices for the three methods of access for accessing and combining loops, switch ports and dedicated transport be adopted?

AT&T's Position:

Pacific concedes that the Commission has not ruled on the cost studies Pacific filed in the Collocation Phase of OANAD in support of its proposed prices for methods for accessing UNEs. (*Response* at 101.) Nor has there been any scrutiny of, or adjustment to, the cost studies submitted by Pacific, as generally occurs in a generic proceeding. AT&T therefore contends that the rates should be shown in the ICA as "TBD" as explained in the discussion of Issue 110. If AT&T needs to order one of these optional methods of access before the Commission has approved rates for them, an interim rate will be established following the procedures set forth in § 14 of Attachment 8. When and if the Commission adopts rates, those rates will be substituted for the interim rates.

Pacific's Position:

Pacific filed TELRIC cost studies for these methods of access in the OANAD Collocation Phase. Given the current posture of that case, Pacific contends it is unclear whether the Commission will rule on those cost studies.

However, it is important that these methods of access be available to CLECs should the courts rule they are responsible for doing their own combining of UNEs, so Pacific has resubmitted the studies in this arbitration. Pacific contends that these studies follow the Commission's Consensus Costing Principles and utilize OANAD-approved cost values where applicable. Pacific's price proposal includes the 19% mark-up over TELRIC ordered by the Commission for UNE prices.

AT&T offers no price proposal of its own for the three methods of access. Nor does it offer a critique of Pacific's offering. Instead, AT&T's witness Ms. Cabellon claims ignorance about what they are. (Ex. 107, p. 12)

Discussion:

AT&T's position is adopted. Pacific's proposal in Issue 75 to include its three-methods of access that CLECs could use for combining UNEs, was rejected. Since Pacific is required to combine UNEs for CLECs, there is no need to adopt the three methods. Since the three methods of access have been deleted from the ICA, there is no need to include prices for the three methods.

Issue 124

Should the ICA reflect TELRIC prices for UNE combinations (AT&T's proposal) or non-TELRIC prices (Pacific's proposal)?

AT&T's Position:

This issue concerns disputed language in § 1.1 of Attachment 8 stating that charges for UNEs, UNE combinations, and certain ancillary functions will be nondiscriminatory and will be based on TELRIC. AT&T contends that Pacific proposed to eliminate this language entirely, leaving it free to charge non-TELRIC rates for any UNEs or combinations that the FCC does not currently require ILECs to provide, including any that might be ordered by this Commission. AT&T contends that this cannot be allowed.

Pacific's Position:

Pacific asserts that it is only required to charge TELRIC prices for UNEs established by the FCC and for required combinations of UNEs. Pacific contends that it is not required to tear down existing combinations, and to offer the EEL, as defined by the FCC. The prices for these combinations are based on TELRIC. Any other combinations that Pacific has agreed to provide voluntarily would be priced under the Ameritech merger conditions and would be priced according to those conditions.

Pacific is opposed to AT&T's language because it is too vague and broad, and is not needed. Pacific contends that the FCC's TELRIC pricing requirements are comprehensive and speak for themselves. These rules require TELRIC pricing for any UNEs passing the "necessary and impair" test, yet no such limits appear in AT&T's language, which refers to things like "Ancillary Functions," a term not normally associated with UNEs.

Discussion:

Pacific's position is adopted. AT&T's proposed additional language in § 1.1 is vague and not necessary.

Issue 125

Should the ICA reflect AT&T's or Pacific's proposal regarding charges that are not provided for or not contained in the ICA?

AT&T's Position:

Section 1.2 of Attachment 8 addresses situations where the ICA requires Pacific to perform certain functions in connection with a service that it is providing, but where those functions are simply part of the service and not chargeable as separate items. An example would be the following from Attachment 4, § 1.3.2:

As set forth in Attachment 15, where PACIFIC has control of directory listings and/or directory assistance for NXX codes

containing ported numbers, PACIFIC will retain the directory listings for ported numbers in its directory assistance data base if requested by AT&T. AT&T will indicate whether or not it wishes PACIFIC to retain a particular ported number in its directory assistance database through the process described in Attachment 9.

The ICA does not provide for a charge for retaining the ported numbers in the database, separate and apart from the various types of compensation (direct or imputed) Pacific receives in connection with directory listings. This is in contrast to Attachment 9, § 6.3, which provides in pertinent part:

When an AT&T End User for which PACIFIC is the switch provider has changed to another local service provider...PACIFIC shall notify AT&T of such changes...Pacific will provide this information through a Local Disconnect Report, at the rate set forth in Attachment 8.

While the parties disagree about the rate itself, there is no dispute in this instance that Pacific will be paid a separate charge for the Local Disconnect Reports. Conversely, AT&T contends that the ICA should be clear that Pacific will not be paid a separate charge for retaining ported numbers in its database, which is the purpose of the language proposed by AT&T in § 1.2.

Pacific's Position:

Pacific contends that AT&T seeks to prevent Pacific from charging AT&T for network elements, services or any other items unless expressly provided for in the ICA. However, Pacific contends that it is impossible to ensure that there is a contract price in every instance. Prices in those situations should be "TBD," and this flexibility must be included in the contract.

Pacific contends that AT&T has proposed contract language for reports and information that exceed the reports and data Pacific normally provides itself. Meeting AT&T's request would require additional work by Pacific for which Pacific should be compensated.

Pacific asserts that any contract language that suggests that AT&T can receive a service from Pacific without paying for the service violates the Act and should be deleted or revised.

Discussion:

In its Comments, Pacific disputes the Draft's outcome on this Issue. According to Pacific, CLECs are not legally permitted to obtain facilities or services from the ILECs for free. That would be a taking inconsistent with the Act and constitutional prohibitions. Pacific recommends that proposed language of both parties be stricken. This would leave the issue to the general law of contract and interpretation of the Act. Pacific's proposal is rejected, for the reasons stated below. This is too important (and potentially contentious) an issue to be omitted from the ICA. There is no taking since both parties had ample opportunity to request rates and charges for functions performed under this ICA.

AT&T's proposed language in § 1.2 is adopted. See also Issue 135 and Issue 167. There is too much room for dispute if Pacific's position is adopted. The parties had an obligation to negotiate all prices for services rendered under this ICA, and both parties deserve the certainty that the prices are as listed in the ICA with no changes or surprises down the road.

Issue 127

Should the arbitrator adopt AT&T's proposed language in the second and third paragraphs of Section 3.1 regarding deaveraged loops, switching rates and vertical features?

AT&T's Position:

AT&T has proposed loop and switching rates that differ from the rates established in D.99-11-050. AT&T contends that the arbitrator should adopt, as interim rates, AT&T's proposed deaveraged loop rates, which should remain in effect until the Commission adopts deaveraged loop rates in a generic proceeding. AT&T's proposed switch usage rates should serve as interim rates until the

Commission lowers switch usage rates in accordance with the procedures described in D.99-11-050 at 172-173.

Pacific's Position:

AT&T's proposed language states that these terms will not change over the course of the contract, regardless of legal developments. Pacific contends that this should not be allowed. The rates for UNE loops and switch usage may change over the term of this ICA. Costs for loop conditioning costs for DSL will be considered during this period, as will geographic deaveraging. Pacific asserts that any rate changes arising from these proceedings should be incorporated into the ICA so that the ICA remains in conformance with the Act.

With respect to switch usage, AT&T is asking that all vertical features be included in the port, and that the resulting price also be firm for the term of the contract. However, as Pacific's witness testified, including vertical features in the port price would require new cost studies and a new port price. Pacific disagrees that vertical features should be included, but if it were to occur, new prices would need to be set during the term. Pacific notes that AT&T is being selective about which prices are to be firm for the term. It excluded collocation prices, for example, where prices are expected to decrease during the term.

Discussion:

Pacific's position is adopted. For the same reasons discussed in Issue 53, AT&T's proposal that rates be firm for the life of the contract, with no regard for legal developments cannot be allowed. While AT&T's proposal would allow for Commission updates in prices, it does not allow for mandated FCC changes, or changes which result from legal challenges. Pacific's proposed § 3.1 is adopted.

Issue 128

What level of non-recurring charge (*i.e.*, manual, semi-mechanized or mechanized) should apply to supplemental orders--the same level as the original order (AT&T's proposal) or the semi-mechanized rate in all cases (Pacific's proposal)?

AT&T's Position:

AT&T contends that supplemental orders should be charged at the same non-recurring rate as the original order they relate to. Pacific has not yet implemented order "flow-through" for any type of supplemental orders, and has stated in Change Management Process meetings that it has encountered difficulties in identifying system solutions necessary to do so. Because Pacific has not yet implemented flow-through, under Pacific's proposal, all supplemental orders will be charged at the "manual" or "semi-mechanized" rate. AT&T asserts that the delays and errors caused by this unnecessary manual handling of supplemental orders already disadvantages AT&T and other CLECs. They should not be further penalized by incurring substantial additional charges for processing supplemental orders.

Pacific's Position:

There are three types of non-recurring charges for processing local service requests submitted by CLECs. Each charge is based on the level of manual intervention required by Pacific's Local Service Center (LSC) representatives. Pacific contends that the problem with AT&T's proposed language is that supplemental orders always require some level of manual intervention, even if the original order was processed at a fully-mechanized level. At Pacific's Quarterly and Side-Bar Change Management Process meetings, CLECs (including AT&T) specifically requested that Pacific not process supplemental orders in a fully mechanized manner but instead take the time to manually intervene. These orders often require manual treatment in order to be processed properly and timely. Pacific asserts that it is in the CLECs' interest to have Pacific process

supplemental orders in a semi-mechanized or manual manner. Indeed, for this reason, Pacific has not implemented any processes and does not have the capability to allow supplemental orders to flow-through Pacific's ordering and provisioning systems in a fully mechanized way.

Pacific contends that regardless of how the original order was handled, if the supplemental order is processed in a semi-mechanized or manual way, it should be priced accordingly so that Pacific can recover the costs it actually incurs.

Discussion:

Pacific's position is adopted and AT&T's proposed language in § 3.4 is rejected. Under basic rules of cost causation, Pacific should be allowed to recover the costs it incurs in processing AT&T's orders. It makes no difference whether the original order was processed in a fully mechanized way. Supplemental orders often require special handling to be processed correctly, and should be billed in accordance with the way Pacific actually processes them.

Issue 129

Should Pacific's prices for escort and supervision of installation be adopted?

AT&T's Position:

AT&T's labor rates are based on the approved CCM, while Pacific's are based on its Tariff 175-T rather than the approved CCM. The additional reasons discussed in Issue 116 above apply here as well.

Pacific's Position:

Pacific asserts that the use of Pacific's 175-T tariff rates ensures non-discriminatory treatment among CLECs. In addition, the rates in the tariff for these functions are reasonably close to the labor rates established in the TSLRIC/TELRIC approved OANAD cost studies.

Discussion:

This issue was addressed under Issues 113 and 114 above.

Issue 130

Should E-911 rates in Pacific's Schedule A-9 apply under the ICA only on an interim basis until the Commission adopts permanent rates, or have the rates in Schedule A-9 already been established as permanent rates?

AT&T's Position:

The FCC has determined that E911 databases are UNEs.⁶³ Therefore, AT&T asserts that the rates for access to the database must be based on TELRIC, and Pacific's tariff rates are not. In Attachment 8, Appendix E, AT&T has agreed to pay for 911 services at the rates in Pacific's tariff until the Commission adopts TELRIC rates.

Pacific's Position:

Pacific contends that the rates have already been established as permanent rates in Pacific's Commission-approved A9 tariff.

Discussion:

See Issue 197. AT&T is entitled to use UNE transport at TELRIC prices to access Pacific's 911 router. Appendix E should be modified accordingly.

Issue 131

Should rates, if any (see Issue 137), for enhanced and additional listings be stated in the ICA or in Pacific's tariff?

AT&T's Position:

As explained in the discussion of Issue 118, AT&T contends that there should be no charge for additional listings because Pacific receives imputed compensation through AT&T's agreement to forego reimbursement when Pacific

⁶³ *Id.*, para. 406.

sells additional listings for AT&T's customers to third parties. Rates for enhanced listings should be set forth in the agreement, for the reasons explained in the discussion of Issue 118.

Pacific's Position:

Pacific contends that the ICA should reference Pacific's tariffs for enhanced and additional listings. Referencing the tariff where applicable ensures non-discriminatory treatment among carriers and cuts down on redundant arbitrations covering the same issue.

Discussion:

This issue is tied to the outcome of Issue 37, not Issue 118, as stated. Issue 118 deals with AT&T's cost of obtaining directory assistance information from Pacific. In issue 37, AT&T's position is adopted, which provides that AT&T will not pay Pacific for its customers' enhanced listings; instead Pacific will be able to provide those enhanced listings to third party vendors without charge to AT&T. The entire analysis of Issue 37 is adopted here by reference.

AT&T's proposed language in § 11.1 of Attachment 8, which shows no charge for caption listings, is adopted. It is not appropriate to reference Pacific's tariff, since the tariff contains a rate for enhanced listings which would not apply in this case.

Issue 133(a)

Should the arbitrator adopt Pacific's proposal to reference its switched and special access tariffs in the ICA?

AT&T's Position:

AT&T asserts that this issue is unlike others in which Pacific and AT&T dispute references to tariffs. In the other cases, Pacific proposes to reference its tariff as a replacement for contract terms. In this case, the tariff does not replace contract terms, but is simply irrelevant to the contract. Switched and special

access services are not the subject of an ICA. They are provided under tariffs. Since the ICA does not govern the provision of access services, AT&T contends that it is unnecessary and inappropriate to reference these tariffs.

Pacific's Position:

This another instance where the parties are disputing the use of tariffs in connection with ICAs. As discussed above, Pacific's position is that the use of tariffs is economical and ensures non-discriminatory treatment among CLECs.

Discussion:

Pacific's language in the third bullet under § 12 of Attachment 8 is adopted. That reference merely states the particular tariffs where Pacific's switched and special access rates and terms are located. There is no harm to including the tariff reference, and it could provide clarification if there are portions of the ICA which reference Pacific's switched or special access tariffs.

Issue 133(b)

How should charges associated with the provision of service quality in excess of parity be determined?

AT&T's Position:

The issue concerns § 13 in Attachment 8, which is identical to § 7 in Attachment 8 of the existing ICA. AT&T contends that Pacific seeks to eliminate service quality in excess of parity from the scope of this clause. Further, Pacific is incorrect in asserting that service quality in excess of parity "should not be determined at TELRIC." (*Response* at 106.) If AT&T requests a UNE at higher quality than Pacific provides to itself, AT&T should pay the incremental TELRIC of providing the higher quality. A request for a higher-quality UNE should not become an excuse for abandoning TELRIC. AT&T contends that the FCC's *Local Competition Order* (at ¶¶ 672, *et seq.*) requires that all UNEs be provided at TELRIC-based rates.

Pacific's Position:

Pacific contends that such charges should not be determined at TELRIC, since provision of services in excess of parity is not required by the UNE provisions of the Act.⁶⁴ Prices should reflect the value of the services rendered and should be addressed through the BFR process, rather than in a CPUC proceeding.

Discussion:

Pacific's proposed § 13 in Attachment 8 is adopted. In its opinion in *Iowa v. FCC*, the Eighth Circuit vacated the FCC's "superior quality" rules in Rules 51.305(a) and 51.311(c), stating that the FCC violated the plain terms of the Act when it issued the rules. The Court states: "Finally, the fact that incumbent LECs may be compensated for the additional cost involved in providing superior quality interconnection and unbundled access does not alter the plain meaning of the statute, which, as we have shown, does not impose such a burden on the incumbent LECs."⁶⁵ In light of the Eighth Circuit's decision, Pacific is not obligated to offer UNEs at a higher quality. AT&T's assertion that a higher quality UNE should be offered at the incremental TELRIC is clearly at odds with the Eighth Circuit's decision.

In its Comments, AT&T asserts it is not necessary to reach the conclusion that Pacific is not required to offer superior quality services at an incremental TELRIC rate in order to rule on the disputed contract language. AT&T is mistaken. In its Brief, AT&T raises the issue that it should pay only the "incremental TELRIC" to obtain superior quality services. It is entirely

⁶⁴ *Iowa Utilities Bd. v. FCC*, 120 F.3d at 812 (vacating FCC's "superior quality" rules), *rev'd on other grounds sub nom AT&T v. Iowa Utilities Bd.*, 119 S.Ct. 721 (1999).

⁶⁵ *Id.*

appropriate to cite the current legal status of the FCC's superior quality rules in disposing of this issue.

AT&T says the disputed language is identical to language that appears in the 1996 ICA. The current status of the FCC's "superior quality rules" is disputed and unclear, and will likely remain that way until the Eighth Circuit issues a decision, says AT&T.

AT&T concludes the uncertain state of the superior quality rules makes the language in § 13 as appropriate today as it was in 1996. The parties still dispute the method of cost recovery. The language in the ICA allows the broader decision on superior quality to be postponed until there is an actual request for superior quality service, creating the need for a decision.

AT&T's arguments are not convincing. In light of the stay of the superior quality rules, Pacific's proposal to use the BFR process for requests for UNEs of higher quality is appropriate. There is no compelling reason to postpone the issue until a request is made. It is better to have the process in place *before* any request is made. Any subsequent court decisions will be reflected in this ICA pursuant to the terms of Preface §8.3, "Material Changes in Law."

Issue 134

Are there circumstances under which AT&T should not be required to pay for warm line transfer, or should Pacific's tariff charges always apply?

AT&T's Position:

This issue is related to Issue 52. AT&T contends that its proposal in Attachment 5, warm-line transfers will be without charge for OS/DA customers requesting intraLATA rate information, must be retained in § 12 of Attachment 8 to clarify that Pacific's tariff rates do not apply in this situation.

Pacific's Position:

Pacific contends that the tariff rates should apply. Application of the tariff ensures non-discriminatory treatment.

Discussion:

Pacific's language in bullet one of § 12 is adopted. The outcome is consistent with that in Issue 52, and the discussion under Issue 52 is incorporated by reference. AT&T shall pay tariff rates for warm line transfers.

Issue 135

If one party charges the other for a service or functionality provided under the ICA, may the other party charge for that service or functionality?

AT&T's Position:

AT&T contends that it should be obvious that if one party charges for a service or functionality under the ICA, the other party should be able to charge as well. *Pacific's position on the mutual right to charge is simply unsupportable given the positions it has taken about referencing its tariffs instead of negotiating contract terms, and its view that it should be able to charge AT&T for items that are not identified in the ICA as chargeable (Issue 125).* Taken together, Pacific's positions mean that it can charge AT&T for items that are not identified in the ICA, that are not necessarily identified in a tariff today, and in any case where it was never negotiated. However, AT&T cannot charge Pacific when AT&T provides that same item to Pacific. Nothing could be more unfair.

Pacific's Position:

Pacific contends that if AT&T wanted the ability to charge Pacific for certain services or functionalities, it should have negotiated prices with Pacific for those items. Instead, AT&T seeks to include this overly broad language in the ICA. A party should only be able to charge for a service or functionality that

specifically is offered under the terms of its ICA. Otherwise, the parties should negotiate the price, terms and conditions for offering the service or functionality.

Discussion:

Pacific's position is adopted, and AT&T's proposed § 1.3 of Attachment 8 is rejected. AT&T's proposed language is much too broad. If AT&T had wanted a particular functionality, it should have placed that item on the negotiation table. This is consistent with the outcome in Issue 125.

Issue 137

Should Pacific be able to charge AT&T non-TELRIC rates for combining network elements that are not already assembled on a pre-existing platform, or should charges be limited to the nonrecurring charges established in D.99-11-050 associated with the Network Elements used?

AT&T's Position:

AT&T contends that under the terms of D.99-11-050, Pacific is required to combine network elements and to do so in accordance with the stand-alone service order or non-recurring charge approach described at pages 143-144 and in Appendix C to D.99-11-050.

Pacific's Position:

Pacific contends that it should be able to charge non-TELRIC rates. Pacific is not required to combine network elements for AT&T. The pricing and non-recurring charge principles adopted by the Commission in OANAD only apply to network elements that are currently combined and to the extended loop that the Commission required in the 271 decision.⁶⁶

⁶⁶ D.99-11-050, *mimeo*, at 154 (requirement for Pacific to continue combining UNEs only applicable to existing interconnection agreements, not to new ones such as this one.)

Discussion:

AT&T's § 3.2 in Attachment 8 is adopted. In Issue 54 Pacific is required to combine UNEs for AT&T. AT&T's proposed language complies with the Commission's directive in D.99-11-050, namely that the compensation ILECs are to receive for combining UNEs is "the sum of the full stand-alone nonrecurring charges applicable to all of the UNEs in the platform."⁶⁷ Pacific's proposed language, while referring to D.99-11-50, is not clear about how the combining charge would be calculated.

Issue 141

Should Pacific's proposed "nonrecurring charges" section be adopted?

AT&T's Position:

AT&T contends that Pacific's proposed language on non-recurring charges in § 17 is unclear, unnecessary and inaccurate. For example, § 17.1 states "Nonrecurring Charges are applicable for all categories of rates." That obviously is not true. The ICA contains rates for directory assistance listings, labor charges, 911 arrangements and many other categories of rates for which there are no non-recurring charges.

AT&T also contends that § 17.2 is a broad-brush approach to the non-recurring charges for UNEs, which the Commission addressed in D.99-11-050 with great care and detail. Section 17.3 is unnecessary and AT&T cannot understand Section 17.4. All of these sections should be disallowed.

Pacific's Position:

Pacific's language reflects standard industry practice.

⁶⁷ *Id.*, at 140.

Discussion:

AT&T's position is adopted, and Pacific's proposed § 17 is rejected. As AT&T states, § 17.1 is clearly incorrect, and the OANAD decision addresses the issues found in Section 17.3, with more specificity. The meaning and intent of § 17.4 is not clear so it should not be included in the ICA.

Issue 143

Should the arbitrator adopt additional language changes proposed by Pacific?

AT&T's Position:

AT&T contends that this is a non-issue because Pacific has not identified a substantive AT&T position with which it disagrees or given any reason for its disagreement. Because of that, it is impossible for AT&T to state a substantive position and impossible for the arbitrator to choose between the parties' positions.

Pacific's Position:

Additional changes were made to AT&T's proposed language to add clarity or to make the language consistent with the intent of changes made by Pacific in response to specifically identified issues.

Discussion:

Neither party is the model of clarity in describing what this issue is all about. The matrix points to Sections 3.1, 5.4 and 11 as the sections in question. Section 3.1 is identified under Issues 105, 108, 109, 127, and 142, and to some extent, was addressed under all of those issues. Section 3.1 will not be reviewed again under Issue 143, given that the parties have given no specific direction. Section 5.4 was addressed under Issue 111. Section 11 has three subsections. Of those, subsection 11.1 is covered by Issue 131, and subsection 11.2 was addressed in Issue 118. Subsection 11.3 has no disputed language.

The arbitrator invited parties to clarify the issues to be addressed in Issue 143 in their Comments. However, the parties did not present any substantive comments relating to Issue 143. Therefore, the arbitrator makes no determination on that Issue.

H. Attachment 9: Access to Operations Support Systems and Related Functions

Issue 144

Should the ICA include Pacific's or AT&T's proposed section on rates, where those sections differ as to whether Pacific has rights that it can reserve to seek Commission approval to charge CLECs for access to OSS?

AT&T's Position:

AT&T contends that Pacific seeks to reserve its right to ask this Commission to impose a charge on CLECs for accessing OSS. This issue has been resolved by Pacific's own deliberate decision not to seek recovery of charges for access to OSS. In D.98-12-079, the Commission rejected Pacific's OSS recurring cost studies and referred Pacific and GTEC to seek compensation in the implementation cost phase in the Local Competition proceeding if the companies believe the costs qualify for recovery as implementation costs.

Pacific submitted its compliance filing on Implementation Costs on August 24, 1999. In that letter to ALJ Pulsifer, Pacific specifically stated:

“Although the CPUC in D. 98-12-079 allowed Pacific to seek recovery of recurring costs associated with access to OSS, Pacific has chosen not to seek recovery of recurring OSS access costs in this proceeding.”

Thus, Pacific itself determined that it would not pursue recovery of any recurring OSS costs through a tariff filing with this Commission.

Pacific is not seeking recovery of OSS charges in this contract. However, it does include language that it is “reserving the right” to seek recovery of those

costs at some later date. If Pacific could seek later recovery of these costs, it would have to seek recovery in the form of an end-user surcharge, as is applicable to all implementation costs in the Local Competition docket.

The SBC/Ameritech merger conditions specify that SBC would not impose any flat-rated charges for access to OSS for a three-year period.⁶⁸ Thus, this issue is moot for almost the entire period this ICA will be in effect. Accordingly, the ICA should state that there are no charges associated with Pacific's OSS.

Pacific's Position:

Pacific states that its proposed language preserves Pacific's right to recover charges for access to OSS. In OANAD, the Commission rejected Pacific's cost studies for access to OSS; consequently, the Commission has not set a rate for access to OSS. In its decision, the Commission suggested that Pacific seek recovery of its costs for access to OSS as an implementation cost. However, OSS is a UNE that the Act requires to be based on cost. Pacific has filed an Application for Rehearing of the OANAD pricing decision, on the ground that the Commission failed to set a rate in accordance with the Act.

Discussion:

AT&T's proposed language in Attachment 8, § 8 is rejected, and Pacific's proposed language in Attachment 9, § 10 is adopted. Pacific has the right to pursue its administrative remedies to encourage the Commission to adopt a nonrecurring charge for access to OSS. Pacific argues that the implementation cost recovery phase of the Local Competition proceeding is not the appropriate place for recovery and instead has filed for rehearing of the OANAD pricing decision. The Commission will determine which method of cost recovery is

⁶⁸ Memorandum Opinion and Order, *In re: Application of Ameritech Corp. and SBC Communications, Inc.*, CC Docket No. 98-141 (Released Oct. 8, 1999) ¶384.