U S West rolls out advanced PCS

Services include mobile dial tone

NANCY GOHRING

US West last week introduced U S West Advanced PCS, a service that includes mobile dial tone and advanced routing and messaging capabilities.

"We tried to replicate the touch and feel of a home and office phone," said Sue Schaefer, vice president of marketing and sales for U S West.

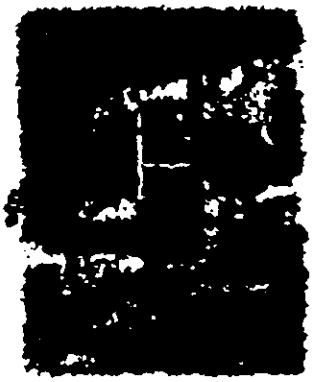
The dial tone service combines a handset-generated and a network-generated dial tone. The handset portion, available through an exclusive agreement with Qualcomm, allows users to press the talk button to hear a dial tone. Like using a cordless phone, they then dial a number that will connect the call immediately. The network generated portion allows users to hear a dial tone while they are initiating features.

"Our customers continue to tell us that dial tone means reliability and quality," Schaefer said. "They want the simplicity of the phone back."

Dial tone might be attractive to consumers who haven't used wireless phones and may feel more comfortable with a phone that operates like a landline phone, said Naqi Jaffrey, wireless analyst for Dataquest.

The service also includes a same number feature that routes calls made to a home, office or PCS number to the PCS phone. It can also route all messages to a single mailbox, notifying users of messages via an indicator light on the handset.

Schaefer believes that a variety of



customers will be interested in U S West Advanced PCS. One key group that can benefit is small business people, such as real estate agents or plumbers, who are "people whose phone is a lifeline to their business," she said.

Another group likely to show interest will be what Schaefer calls integrated users, which are "people who mix business and personal," she said. These users tend to buy from the consumer base but use mobile phones for both business and personal reasons. ☎

Go with the flow

JOAN ENGEBRETSON

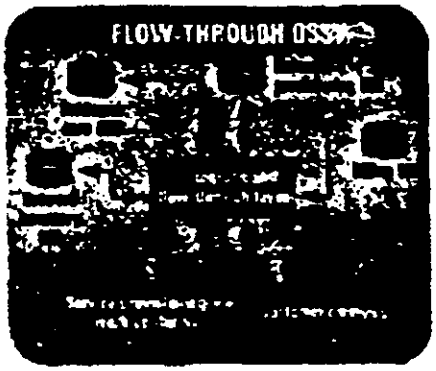
Although initial efforts to integrate operations support systems were driven by regulatory requirements, some telcos apparently have learned to love the process.

Recognizing that a higher level of "flowthrough" could streamline operations, for example, SBC Communications recently added reject adjudication capability to an internal system that assigns lines to customers and features to each line.

Previously, about 6% of orders coming from the March system, developed by Bellcore, were rejected by the switch, said Bill Fulhorst, area manager for SBC's Recent Change Memory Administration Center. Some of those rejects occurred because the customer was on the phone at that moment.

"The [adjudication] system has a mechanized way to handle about 40% of that fallout," said Fulhorst.

SBC has implemented the system, developed by OSS integrator Beechwood, throughout its original five-state territory, said Fulhorst. He estimates the carrier will save more than $1 million a year by eliminating the manual intervention previously required. The payback period will be less than two years, he said.



A prime goal of flowthrough OSSs is to empower customer service representatives, said Jeff Cotrupe, program manager for Dataquest. When a telco interconnects disparate systems, for example, representatives can correct bills rather than simply check status.

"Flowthrough is another name for what we call 'cross-process integration.' It is a key trend," said Cotrupe.

This week, Beechwood is expected to announce a partnership with DSET that will create an integrated local number portability and order management system. By interconnecting Beechwood's InterCom order management system with DSET's local service order administration system, carriers can eliminate manual intervention to process orders for customers who want to change carriers and keep their existing phone number.

Flowthrough is one of four growth opportunities that Beechwood sees in the carrier OSS interconnection market, along with post-merger information technology consolidation, new carrier systems integration and carrier-to-carrier OSS integration, said Jason Donahue, Beechwood's vice president of marketing. ☎

SBC SERVES END USERS WITH EASE

With massive mergers, aggressive acquisitions and increasing regulatory demands so common in the telecommunications industry, the needs of individual customers are often lost in the shuffle

SBC Communications is relying on its service negotiation system to stay focused on customer service and meet the challenges of the 1996 Telecommunications Act

The San Antonio, Texas-based Bell regional holding company provides the same system to competitive local exchange carriers that it uses internally.

Following its merger with Pacific Telesis in April 1997, SBC's local exchange region expanded to include more than 32 million access lines in seven states—Arkansas, California, Kansas, Missouri, Nevada, Oklahoma and Texas.

So the challenge was to maintain high levels of customer service while completing the merger and seeking federal permission—not yet granted—to enter the long-distance market. After launching efforts to consolidate operations, in January SBC announced its intention to merge with Southern New England Telecommunications. And the RHC broadened its merger plans in May, when it announced a proposed $6.2 billion stock swap deal with Ameritech.

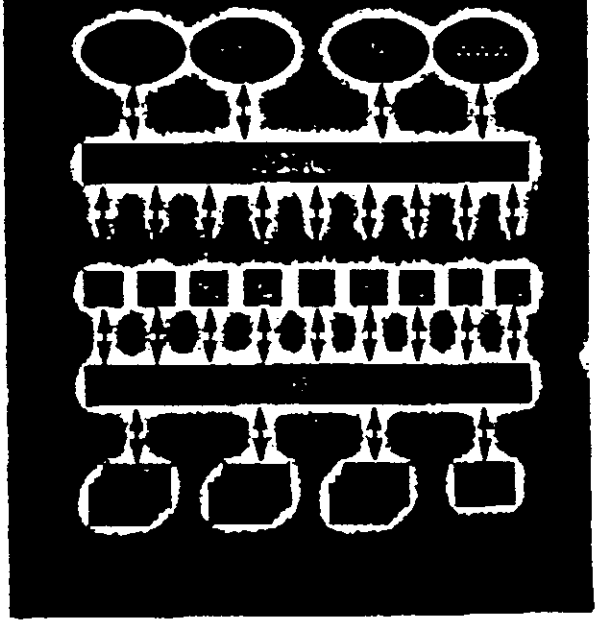
SBC has built a service negotiation system called Ease that had become an important component of the consolidation activities between SBC and Pacific Telesis. With customer service as its hub, the system trans-

continued on page 36

A partnership between business and information technology divisions paves the way to a strong service negotiation application

STEVE RENNIER and MARK STEINMETZ

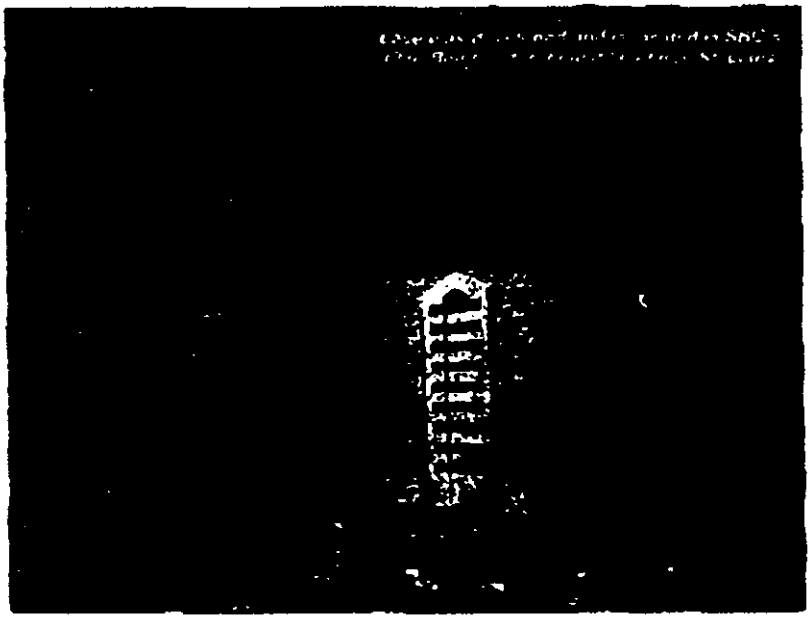
FIGURE 1
EASE SYSTEM



forms manual order-taking into a computerized sales process (Figure 1).

Under the old system, customer service representatives logged in and out of several operational applications to get information to complete an order. Now CSRs input order information directly into the Ease application, and the system automatically handles all connection and communications with the company's downstream operational support systems (OSSs).

This saves time and money and improves customer service.



To meet the need for system connectivity, speed, availability and extensibility, SBC uses a 96-processor Tandem Himalaya platform as the system's backbone. The hardware platform must be large because the application handles more than 660,000 transactions a day.

CSRs access downstream OSSs throughout the day to retrieve customer account information, determine product availability, assign telephone numbers and post service orders.

Connectivity is essential because CSRs must gather information on the fly. The system uses 28 interfaces to 10 back-end systems, including the corporate data warehouse, a premises address system, an order due date board, customer credit checks and the customer account database. These interfaces allow the system to synthesize and deliver information to service agents automatically and instantly.

Speed is another critical requirement. The system delivers a response time of 1.25 seconds or less, as measured by the end user. It does this while performing 20,000 database reads per second.

Ease meets essential availability and scalability requirements. SBC has scaled the system to support more than 8000 users. This number will continue to grow during the next three years, with more than 16,000 users expected as merger consolidation is consummated.

The system has become the backbone for sales operations at SBC, where it is cutting negotiation costs and improving customer relations.

Success factors

The system achieved a positive return on investment by reducing the average contact time and increasing sales effectiveness. In 1996, Ease won an international competition against 40 competitors to satisfy the needs of a top-ranked telecom company.

Five advantages are key to Ease's success: cost reduction, customiza-

continued on page 38

tion, shorter time to market, open front-end access and automated support for managing customer relations.

Ease reduces call center costs by simplifying the setup of specialized call centers for language groups and local and after-hours support.

Every call center can access customer information from any location in the country. For example, before the system was deployed, a CSR in the Missouri call center could access only the information on Missouri customers. Therefore, each state had to set up specialized call centers to handle its users' needs.

With the distributed database, CSRs anywhere in the company can access accounts across state boundaries. A single after-hours call center now handles phone calls from the seven-state coverage area from 2 to 3 a.m. A single language center serves Spanish speakers throughout the service territory. Corporate customers can enter their account numbers through SBC's interactive voice response system and be routed to special corporate call centers equipped with specific business applications.

By providing distributed access to information, each call center can be customized by region to maintain its local image. The architecture also provides a higher level of performance and availability during peak hours.

The Ease user interface hides the complexity of SBC's back-end systems, enabling the carrier to open its networks to CLECs without redesigning the system.

SBC offers local wireline, wireless, directories, advertising, video, Internet and enhanced calling. In each category, innovation is the name of the game.

Ease eliminates the need to develop interfaces to the front- and back-end systems for each new product and enables quick product introductions, cutting implementation costs and sales agent training time. Joint marketing for wireline and wireless subscribers, a recent offering, was rapidly implemented by adding new interfaces to the Cellular One systems.

Before SBC can compete in the long-distance market, it must offer CLECs access to its OSS with the same performance levels provided to its internal system users.

The Ease user interface hides the complexity of SBC's back-end systems, enabling the carrier to open its networks to CLECs without redesigning the system. By the end of 1997, the system had hundreds of external users in its client base.

The sales flows built into the Ease system support and encourage consultative selling. As product lines for residential and business markets become more complex, SBC would like to give CSRs an automated way to recommend products.

As competition emerges, the CSR's job becomes increasingly complex. Tomorrow's sales agents no longer will focus solely on landline products but will negotiate wireless, long-distance, messaging, satellite TV, Internet and home security products as well.

In addition, the labor market is tightening, and training is becoming more expensive. That means carriers will need marketing automation to support the sales agent as customer service evolves.

The system is also ideally suited for rate quotation. With today's wide variety of packaging and discounted pricing, rate quotation is a much more complex task, and an automatic quotation system is a business mandate.

The system, in combination with the data warehouse, lets service representatives customize service offerings based on unique customer needs. The sales agent can recommend and sell new services and notify customers of beneficial pricing packages using a needs-based selling approach.

Steve Renner is Director of Sales/Negotiation Systems and Mark Steinmetz is Director of Sales Operations Mechanization Support Customer Services at SBC Communications, San Antonio, Texas. They can be reached at s/09758@sbc.com.

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

APPLICATION OF COX OKLAHOMA TELCOM, INC., FOR A DETERMINATION OF THE COSTS OF, AND PERMANENT RATES FOR THE UNBUNDLED NETWORK ELEMENTS OF SOUTHWESTERN BELL TELEPHONE COMPANY.	)	CAUSE NO. PUD 970000213
IN THE MATTER OF THE JOINT APPLICATION OF SOUTHWESTERN BELL TELEPHONE COMPANY AND AT&T COMMUNICATIONS OF THE SOUTHWEST, INC. FOR A DETERMINATION OF COSTS AND PERMANENT RATES FOR CERTAIN SOUTHWESTERN BELL TELEPHONE COMPANY SERVICES.	)	CAUSE NO. PUD 970000442

REBUTTAL TESTIMONY OF RANDAL VEST

ROGER K. TOPPINS, OBA #15410
AMY R. WAGNER, OBA #14556
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Oklahoma City, Oklahoma 73102

MICHAEL C. CAVELL
220 East 6th Street, Room 515
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CURTIS M. LONG, OBA #5504
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ATTORNEYS FOR SOUTHWESTERN BELL TELEPHONE COMPANY

February 25, 1998

REBUTTAL TESTIMONY OF RANDAL VEST
SOUTHWESTERN BELL TELEPHONE COMPANY
CAUSE NOS. PUD 970000213 AND 970000442

1. Q. **Please state your name, business address, and employment.**

A. My name is Randal Vest, and I am employed by SBC Technology Resources Inc. at 9505 Arboretum Blvd., Austin, Texas, 78746.

2. Q. **Please state your educational and employment background.**

A. I am a native of Little Rock, Arkansas. I graduated in 1973 from the University of Arkansas at Fayetteville with a Bachelor of Science degree in Electrical Engineering. After a summer internship with Southwestern Bell in 1972, I began full time employment in 1973, and will have 25 years service this spring. I began work as a switching engineer in Little Rock and subsequently held positions as a transmission engineer and inventory manager before moving to the St. Louis SWBT staff in 1978. In St. Louis, my initial assignment was management of an operational support system for inventory control. Subsequently, I was promoted to supervise a group of operational system experts who managed systems which inventory and assign special services. This is the position I held during divestiture when many of the operational support systems had to be extensively altered for revised operations. I have experience with a variety of provisioning systems such as TIRKS, LFACS, and SWITCH. After divestiture, I was assigned a primary planning role for the complete portfolio of SWBT operational support systems. I served this function for 11 years from 1986 until last September, when I moved to Austin for a job with Technology Resources, Inc. the research and development subsidiary of SBC. My position at TRI is supervisor of a group of computing experts who provide expertise to

i. SORD completion triggers an update of the billing system CRIS. Like SORD, several RBOCs have billing systems with the same name, but this system is unique to SWBT.

j. In addition, the completion causes records of the service to be created for maintenance purpose.

SWBT Actions to Advance the Provisioning Process

7. Q. **How many total systems may be involved in provisioning of services?**

A. I have only described a few of the systems which have been developed to facilitate the provisioning process. In SWBT over 50 different support systems may be involved depending on the service type. Some of these, such as TIRKS, are among the largest data processing applications in the world.

8. Q. **How many of these systems are common to several telephone companies?**

A. Less than half are common. The common systems include SOAC, TIRKS, and others which I have briefly described in my outline of the provisioning process.

9. Q. **How active and progressive has SWBT been in the deployment of these common systems?**

A. SWBT has been a leader in many areas of support systems among the RBOCS. For example, the major new system added during the past seven years to this process has been the SWITCH system which provides the complex function of inventorying and assigning switch ports. It replaces the COSMOS system referenced in Mr. Segura's testimony. SWBT was the lead RBOC in this deployment, receiving new computer updates prior to any other company and

directing the vendor development process. SWBT was the first RBOC to completely replace its COSMOS computers with this advanced product. In a similar manner, SWBT was in the lead for deployment of the Work Force Administration family of products. There are other RBOCs who have yet to deploy this product line to its full capacity. In many areas where a common product has been deployed among RBOCs, I can state SWBT is viewed as a leader among system users.

10. Q. **You have testified that even though the same systems can be found in different companies, they may be uniquely utilized. Can you elaborate on this point?**

A. Yes. Even though a company is aggressive in advancing to the latest and best support systems, there are still many decisions related to how best to utilize these systems. In this regard also, I believe SWBT has achieved outstanding results. For example, our utilization of the TIRKS system to inventory and assign complex SONET equipment is a notable achievement. Likewise our flow process for mechanizing the provisioning of ISDN services has been a success. There are thousands of decisions to be made with the deployment of each common system. From my attendance at industry forums and contacts with peers in other companies, I receive feedback that SWBT makes some of the best decisions in the industry in the use of these support systems.

11. Q. **Can you describe some of the other systems in the provisioning process that are unique to SWBT ?**

A. Several of these and their functions were mentioned in my description of the provisioning process, including EASE, SORD, and CRIS. But let me describe two more especially notable and pertinent systems.

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REBUTTAL TESTIMONY OF ELIZABETH A. HAM

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ATTORNEYS FOR SOUTHWESTERN BELL TELEPHONE COMPANY

February 25, 1998

REBUTTAL TESTIMONY OF ELIZABETH A. HAM

SOUTHWESTERN BELL TELEPHONE COMPANY

CAUSE NOS. PUD 970000213 AND 970000442

1. Q. Please state your name, title and business address.

A. My name is Elizabeth A. Ham. I am Executive Director-Interconnection & Resale Technical Implementation for Southwestern Bell Telephone Company ("SWBT"). My business address is 530 McCullough, Room 03-AA-10, San Antonio, Texas 78215.

2. Q. Are you the same Elizabeth A. Ham that filed direct testimony in this Cause?

A. Yes, I am.

3. Q. What are your primary responsibilities?

A. I am responsible for the development of procedures which are used by SWBT personnel to process Competing Local Exchange Carriers ("CLEC") service requests and for assisting the Customers Services organization in the implementation of CLEC contracts in a manner consistent with State commission and Federal Communications Commission ("FCC") rules and regulations governing local exchange competition.

Facility Assignments ("CFA") which the CLECs pass to SWBT in order for SWBT to connect the UNE to the CLEC network. TIRKS is also used in order to provide the Detailed Record Layout ("DLR") to the CLEC. TIRKS has direct feeds to NSDB and WFA/C. NSDB is utilized for measurement data and WFA/C is the inventory system for tracking installation and repair. POTS associated OSSs simply are not currently suitable or able to perform this type of necessary UNE detail.

8. Q. **Is AT&T's fall-out rate of 2% for ordering reasonable? [Segura, p. 25, line 14 through p. 26, line 11; Tech App, p. 14, Flow Through and Fall Out]**

A. No. As of late last year, the average fall-out rate for inputting into the EASE system is as follows:

SWBT service representatives ordering SWBT retail residential service: 1%
SWBT service representatives ordering SWBT retail business service: 10%
SWBT LSC service representatives ordering Resold Service: 5%
CLEC service representatives ordering Resold Services: 30-50%.

For each order that falls out, manual intervention by SWBT is required to correct the error or perform the edit. As experience demonstrates, SWBT's residential EASE flow-through rate (i.e., 1%) cannot automatically be applied to CLEC's service representatives using EASE (i.e., 30-50%) -- nor to its use of the vastly different EDI and LEX. Although SWBT provides a CLEC with identical access to EASE (both retail residential and business) and has also provided the tools and

offered training on EASE for the Resold Services, many factors outside the control of SWBT contribute to whether a CLEC can achieve similar results, including the experience and training of a CLEC's own service representatives in the use of EASE. Moreover, the 99% residential EASE flow-through rate does not include customer migrations of the type Mr. Segura discusses for UNEs, [Segura Direct, p. 43; Segura Tech. App. p. 33.], which are more complicated service order types, especially when a migration is only partial (*e.g.*, a customer only transfers part of an account and its services to the CLEC). The above 99% flow-through rate achieved by SWBT's service representatives using the residential EASE ordering system does not support the proposition that OSS handling of all retail telecommunications services or UNEs -- to the extent an OSS capability exists at all -- can achieve the same flow-through rate.

EDI AND LEX

9. Q. What are the EDI and LEX systems?

A. EDI and LEX and their respective interfaces and flow-through capabilities are new developments. Since UNEs are a new product category, different and more complex than Resold Services, SWBT has no flow-through capability for any UNE order into SORD, the mechanized service order processor. Currently, all UNE

Rival chipmakers put pressure on Intel

By Paul Davidson
USA TODAY

Competition is posing the first real threat to Intel's computer-chip dominance and bringing more powerful personal computers into the sub-$1,000 market.

Compaq, the world's top PC maker, is expected today to unveil three new low-price PC models containing chips made by Advanced Micro Devices. Intel's chips will be relegated to pricier machines.

And Packard Bell-NEC, the leading maker of PCs for U.S. consumers, plans to veer from its Intel-only strategy and ship Cyrix-based PCs this year, according to *Computer Retail Week*. Company officials would not comment.

AMD and Cyrix routinely undercut Intel's prices by at least 25%. The companies have shared just 15% market share, analysts say. But the exploding popularity of under-$1,000 PCs is forcing manufacturers to turn to the upstarts to staunch a plunge in profit margins.

Intel is still setting the standard. But AMD and Cyrix are rolling out chips that operate at 233 megahertz, comparable to Intel's low-end Pentium II. The rivals "are now just a half-step behind Intel," says analyst Mike Gumport of Lehman Bros.

Intel still sets the standards for microprocessors, the brains of PCs. But AMD and Cyrix are rolling out chips that operate at 200-233 megahertz, comparable to Intel's low-end Pentium II. The rivals "are now just a half-step behind Intel," says analyst Mike Gumport of Lehman Bros.

Fred Hickey, publisher of *High Tech Strategist*, says AMD and Cyrix could double their combined market share to 30% by year's end. [illegible]

[illegible] pects just a 2% gain.

Experts say the challenge is forcing Intel to slash prices. The company last week said it's dropping the price of its 233-megahertz Pentium II chip by 33%, to $268 from $401. By year's end, the tab should fall to about $100, bringing the cutting-edge Pentium II into the sub-$1,000 PC market, says Intel spokesman Howard High.

High downplayed the impact of competition, saying the latest discount comes a month earlier than expected because the company is trying to jump-start normally sluggish post-holiday sales.

Analysts, however, say Intel is reeling from a dramatic slowdown in earnings growth. Despite the ubiquitous "Intel Inside" ad campaign, Hickey says consumers and businesses increasingly "don't care whose microprocessors run their PCs.

"They care that the machine has CD-ROM and access to the Internet," he says.

The burgeoning dogfight is a boon for customers. Until now, customers buying sub-$1,000 PCs have sacrificed speed, memory and elaborate multimedia features, Kay says.

But he adds, "Those little compromises are going to increasingly disappear."

Fighting back: Hewlett Packard unveiled a $799 PC on Monday that operates on Intel's 200 megahertz Pentium multimedia MMX chip.

SCHEDULE 14

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

AT&T COMMUNICATIONS OF CALIFORNIA, INC.,

Plaintiff,

v.

PACIFIC BELL, et al.,

Defendants.

/

No. C 97-0080 SI

Related Cases C 97-0670 SI
C 97-1756 SI
C 97-1757 SI

JUDGMENT

In accordance with this Court's May 11, 1998 Order Granting Plaintiff's Motion for Summar Judgment and Denying Defendants' Motions for Summary Judgment, this Court hereby enters judgmen in favor of plaintiff AT&T, and against defendants Pacific Bell and the CPUC.

IT IS SO ADJUDGED.

Dated: May 11, 1998

SUSAN ILLSTON
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

AT&T COMMUNICATIONS OF CALIFORNIA, INC.,

Plaintiff,

v.

PACIFIC BELL, et al.,

Defendants.

No. C 97-0080 SI

Related Cases C 97-0670 SI
C 97-1756 SI
C 97-1757 SI

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMEN AND DENYING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMEN

On November 18, 1997, this Court heard argument on cross motions for summary judgmen this case.[1] Having carefully considered the arguments of counsel and the papers submitted, the Co hereby GRANTS plaintiff's motion for summary judgment and DENIES the motions for summ judgment filed by defendants Pacific Bell and the CPUC.

BACKGROUND

1. The Telecommunications Act of 1996

The Telecommunications Act of 1996 ("Telco Act" or the "Act"), 47 U.S.C. § 251 et seq., se to promote competition in the nation's telecommunications system by opening up tradition monopolistic local exchange networks to new competitors. Prior to the Act's passage, local teleph

[1] On February 20, 1998, the Court heard argument on cross motions for summary judgmet the related cases of MCI v. Pacific Bell, C 97-0670 SI, GTE v. AT&T, C 97-1756 SI, and GTE v. M C 97-1757 SI. The two issues that are the subject of the instant order are also at issue in these cases, these matters were briefed in connection with the February 20, 1998 cross motions for summ judgment.

services were provided by local exchange carriers ("LECs") who were usually issued exclusiv geographic franchises by state licensing authorities. Each LEC operated its own local telephone network

Long distance telephone service was provided by long distance carriers, also known as inter exchange carriers. The inter-exchange carriers used the local telephone networks to provide long distanc service because the carriers did not want to duplicate the local infrastructure. In a typical long distanc call, the LEC transports the call across its network to a point of interconnection with the long distanc carrier; the long distance carrier in turn transports the call across its network to a point of interconnectio with the LEC servicing the recipient; and the call is completed over the second LEC's network. As such the LECs controlled a critical "bottleneck" in the provision of long distance telephone services.

To facilitate the introduction of new competing local exchange carriers ("competitors"), the Ac requires incumbent local exchange carriers ("incumbents") to provide the competitors with access to th incumbents' services and networks. Sections 251(c)(2)-(4) of the Act impose three specific requirement on incumbents to foster competition: (1) **interconnection** -- incumbents must allow competitors t interconnect with the incumbents' local exchange networks at fair, nondiscriminatory rates; (2) **lease c unbundled network elements**[2] -- incumbents must allow competitors to lease parts of the incumbent networks at fair, nondiscriminatory rates; and (3) **resale** -- incumbents must allow competitors t purchase telephone services at wholesale rates for resale to the competitors' customers.

Section 252 of the Act sets forth the "Procedures for Negotiation, Arbitration, and Approval c Agreements" that parties must follow when a competing carrier wishes to enter the loca telecommunications market. Pursuant to this section, if a competing carrier so requests, an incumbe

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[2] The Act provides the following definition of "network element":

> The term 'network element' means a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

47 U.S.C. § 153(29).

An "unbundled" network element is a single network element that a competitor may lease on i own, or if the competitor wishes, in combination with other elements.

must enter into negotiations to arrive at an interconnection agreement under which the competitor is provided access to the incumbent's network and services. If parties are unable to agree on the terms of an interconnection agreement, the parties are required to submit to mediation and/or compulsory arbitration. When parties submit to compulsory arbitration, as the instant parties did, the state Public Utility Commissions ("PUCs") are charged with resolving "any open issues and imposing conditions upon the parties to the agreement . . . that meet the requirements of section 251 . . . including the regulations prescribed by the Commission pursuant to section 251 . . . ." 47 U.S.C. § 252(c)(1). The state PUCs must approve all interconnection agreements in order for the agreements to be effective. When reviewing arbitrated agreements, the state PUCs are instructed to ensure that the agreement complies with section 251 and the FCC regulations promulgated thereunder. Section 252(e)(6) further provides that "[i]n any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement . . . meets the requirements of section 251 of this title and this section." 47 U.S.C. § 252(e)(6).

2. The FCC Implementing Regulations and Ensuing Litigation

Section 251(d)(1) directed the Federal Communications Commission ("FCC") to promulgate regulations implementing the Act's local competition provisions within six months after February 8, 1996. Unless and until an FCC regulation is stayed or overturned by a court of competent jurisdiction, the FCC regulations have the force of law and are binding upon state PUCs and federal district courts. See Anderson Bros. Ford, v. Valencia, 452 U.S. 205, 219-220 (1981); Sierra Club v. Sigler, 695 F.2d 957, 972 (5th Cir. 1983), reh'g denied, 704 F.2d 1251 (5th Cir. 1983). Pursuant to 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a), review of FCC rulings is committed to the exclusive jurisdiction of the United States Courts of Appeals; as such, this Court may not inquire into the validity of an FCC regulation.

On August 8, 1996, the FCC issued In re Implementation of Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499 (1996) [hereinafter "Local Competition Order"]. This document contains the FCC's findings and rules pertaining to the local

competition provisions of the Act.[3] Soon after the FCC issued this report, numerous telecommunications companies and state PUCs filed suit seeking a stay of the regulations, contending that the FCC exceeded its jurisdiction in issuing certain regulations, and that other regulations violated the Telco Act. These actions were consolidated in the Court of Appeals for the Eighth Circuit in Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997), amended on reh'g, 1997 WL 658718 (Oct. 14, 1997). The Eighth Circuit initially stayed certain of the regulations,[4] and later issued a final decision vacating some regulations and upholding others. On January 26, 1998, the Supreme Court granted certiorari, AT&T Corp. v. Iowa Utilities Board, 118 S. Ct. 879 (1998).

The FCC's Local Competition Order, and the Eighth Circuit's treatment of these regulations in Iowa Utilities Board, is relevant to the instant case in several ways. First, the Eighth Circuit vacated the FCC's intrastate pricing regulations on jurisdictional grounds without addressing the merits of the FCC's pricing regulations. The court found that the Act did not grant the FCC authority to promulgate regulations in this area, and that the Act's pricing standards were to be interpreted by state commissions subject to the review of federal district courts. Second, the Eighth Circuit left in place other regulations contained in the Local Competition Order that touch on the two issues presented in the instant case levying of interstate switched access charges and conditions on resale of volume-discounted services. The FCC's regulations and the Iowa Utilities Board decision will be discussed more fully in the relevant sections of this Order.

3. Procedural Background of the Instant Case

AT&T sought to enter the local telecommunications market and invoked its rights under the Act by requesting that Pacific Bell enter into an interconnection agreement. The parties negotiated from March to August of 1996, and on August 20, 1996, AT&T filed a petition to arbitrate with the California Public Utilities Commission ("CPUC"). Arbitration took place from September 23 to 27, 1996. The

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[3] The FCC's rules are codified in scattered sections of Title 47, Code of Federal Regulations.

[4] The Court of Appeals initially stayed the operation and effect of only the pricing provisions and the "pick and choose" rule contained in the Local Competition Provisions. See Iowa Utilities Board v. FCC, 109 F.3d at 421 & nn.3-4.

arbitrator issued a decision on October 31, 1996, and submitted it for approval to the CPUC. The CPUC approved the agreement with some modifications on December 9, 1996.

On January 8, 1997, AT&T filed this suit against Pacific Bell and the CPUC alleging that two provisions of the interconnection agreement approved by the CPUC violate the Act. First, AT&T challenges a provision in the agreement which allows Pacific Bell to impose switched access charges on AT&T's use of Pacific Bell's unbundled network elements. Second, AT&T objects to the CPUC's decision prohibiting AT&T from aggregating the toll usage of its end customers in order to qualify for discounts as a high volume purchaser.

AT&T and defendants Pacific Bell and the CPUC have filed cross motions for summary judgment on each of AT&T's claims. In addition to the parties' briefs, MCI Telecommunications Corporation ("MCI") and the FCC have filed amicus curiae briefs in support of AT&T, and GTE California Incorporated ("GTE") has filed an amicus curiae brief in support of Pacific Bell and the CPUC. Because there is "no genuine issue as to any material fact," this case may be decided on summary judgment pursuant to Federal Rule of Civil Procedure 56(c).

DISCUSSION

1. Standard of Review

The Telecommunications Act is silent regarding the appropriate standard federal district courts should apply when reviewing the decisions of state commissions. The Court is aware of three federal district court decisions addressing this question; all three courts have concluded that a state PUC's interpretations of federal law are reviewed de novo, while findings of fact are reviewed with substantial deference. See, e.g., U.S. West Communications, Inc. v. MFS Intelinet, Inc., No. C 97-222WD (W.D. Wash. Jan. 7, 1998); GTE South, Inc. v. Morrison, No. 3:97CV493 (E.D. Va. Dec. 17, 1997); U.S. West Communications, Inc. v. Hix, et al., 986 F. Supp. 13 (D. Colo. 1997). In U.S. West Communications, the court analyzed the framework of the Act and concluded that district courts should review de novo the question of whether a state PUC's action was "procedurally and substantively in compliance with the Act and the implementing regulations." Id. at 19. The court reasoned,

> [S]tate commissions, while having experience in regulating local exchange carriers in

> intrastate matters, have little or no experience in implementing federal laws and policies and do not have the nationwide perspective characteristic of a federal agency. . . . Further, . . . state commissions do not have extensive experience or expertise in the specific mandate of the Act -- promoting competition in the local exchange market . . . .

Id. at 17. With respect to federal court review of all other issues -- namely those not involving the question of whether the PUC acted in compliance with the Act and its attendant regulations -- the court held that the appropriate standard of review was "arbitrary and capricious." Under that standard, the "'agency's action is presumed valid if a reasonable basis exists for its decision.'" Id. at 18, (quoting Amisub (PSL), Inc. v. State of Colorado Dept. of Social Servs., 879 F.2d 789, 800 (10th Cir. 1989), cert. denied, 496 U.S. 935 (1990)). Applying this standard of review, the court found, would give proper deference to the technical expertise of the state PUCs, while still ensuring that the state agencies are appropriately applying federal law.

This Court agrees with the reasoning of the U.S. West Communications decision, and likewise finds that the proper standard of review of state agencies' decisions on matters of federal law is de novo and on all other matters, arbitrary and capricious. Section 252 of the Act empowers federal district courts to determine "whether the agreement . . . meets the requirements of sections[s] 251 [and 252] of the Act." 47 U.S.C. § 252(e)(6). While the state PUCs certainly have expertise in regulating telecommunications industries that this Court will not ignore, the PUCs do not have expertise in interpreting and applying federal law. The Court finds unconvincing the CPUC's argument that federal courts should accord state agencies substantial deference on all matters pursuant to Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Chevron held that federal courts must defer to a federal agency's interpretation of a statute that it is entrusted with administering. "Chevron's policy underpinnings emphasize the expertise and familiarity of the federal agency with the subject matter of its mandate and the need for coherent and uniform construction of federal law nationwide. Those considerations are not apt [to a state agency.]'" Orthopaedic Hospital v. Belshe, 103 F.3d 1491, 1495-96 (9th Cir 1997) (quoting Turner v. Perales, 869 F.2d 140, 141 (2d Cir. 1989)), cert. denied, 118 S. Ct 684 (1998).

The Court finds that both matters presently before it involve the CPUC's interpretation of federal law, and therefore this Court reviews these issues de novo.

2. Switched Access Charges on Lease of Unbundled Network Elements

A. FCC Regulations

The Act requires incumbents to lease unbundled network elements to competitors at "just reasonable, and nondiscriminatory" rates. 47 U.S.C. § 251(c)(3). The Act mandates that these rates shal be based on the cost of providing the network element, without reference to a rate-of-return or othe rate-based proceeding, and may include a reasonable profit. Id. at § 252(d)(1). In implementing the loca competition provisions of section 251, the FCC directed state commissions to use a specific forward looking, replacement cost methodology known as the "total element long-run incremental cost" ("TELRIC") to calculate the rates incumbents can charge for providing access to unbundled networl elements. See Local Competition Order ¶¶ 620, 672-732. The FCC's pricing rules provided tha incumbents could not levy switched access charges[5] in addition to the TELRIC computation for eithe intrastate or interstate services: "Neither the interstate access charges . . . nor comparable intrastat access charges shall be assessed by an incumbent LEC on purchasers of elements that offer telephon exchange or exchange access services." 47 C.F.R. § 51.515(a). However, the FCC allowed a grac period for the imposition of interstate access charges until June 30, 1997. See 47 C.F.R. § 51.515(b)

These interim interstate access charges were challenged and upheld by the Eighth Circuit i: Competitive Telecommunications Association v. FCC, 117 F.3d 1068 (8th Cir. 1997) [hereinafte "Comptel"]. The Comptel court recognized that the levying of access charges deviated from the Act' cost-based mandate. Id. at 1074. The FCC justified these temporary charges by arguing that they wer necessary to ensure a smooth transition to implement another of the Act's mandates, the reform o universal service.[6] The Telco Act mandates the elimination of subsidies for universal service, lon

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[5] Switched access charges refer to the charges incumbents assess against a competitor when competitor uses unbundled network elements to provide exchange access to the competitor's loca telephone customers when they place toll or long distance calls.

[6] "Universal service" refers to the goal of providing quality service and access to all customers "including low-income customers and those in rural, insular, and high cost areas . . . at rates that ar reasonably comparable to rates charged for similar service in urban areas." 47 U.S.C. § 254(b)(3). I order to provide such service, incumbents have provided residential service at below cost, and charge business customers, among others, substantially above cost. These subsidies for universal service hav been shifted not only across different categories of customers, but also across time and geographical area (i.e. urban vs. rural). Switched access charges have long been used to subsidize the provision of univers

provided in the form of access charges, so that support for universal service will be "explicit." See 4 U.S.C. § 254(e). Congress directed the universal service reform rules to be adopted by May 8, 1997 The FCC argued in Comptel that the interim access charges were necessary to subsidize universal servic for the nine months from August 1996 to May 1997 before the universal service reforms were complete

The Comptel court upheld § 51.515(b), finding the FCC's justification for the interim interstat charges reasonable. "We do not think it contrary to the Act to institute access charges with a fixe expiration date, even though such charges on their face appear to violate the statute, in order t effectuate another part of the Act." 117 F.3d at 1074. In reaching its decision, the court emphasized th "brief life" of the charges and the deference that interim rules command. Id. at 1075.

In contrast, in a later decision the Eighth Circuit struck down the FCC's intrastate pricing rule finding that the Telco Act did not grant the FCC the authority to promulgate pricing regulation pertaining to intrastate telephone service. See Iowa Utilities Board v. FCC, 120 F.3d 753, 794 (8th Ci 1997). The court rejected the FCC's argument that § 251(d)(1) of the Act, which states that "[w]ithi 6 months after February 8, 1996, the Commission shall complete all actions necessary to establis regulations to implement the requirements of this section," supplies the FCC with the authority t regulate all aspects of § 251. The FCC argued that because subsection 251(c) requires rates fo interconnection and unbundled access to be "just, reasonable, and nondiscriminatory," the FCC has th power to regulate these rates and any other rates mentioned in § 251. In rejecting the FCC's argumen the court held that § 251(d)(1) "operates primarily as a time constraint, directing the Commission t complete expeditiously its rulemaking regarding only the areas in section 251 where Congress expressl called for the FCC's involvement." Id. at 794. The court noted that these areas where the FCC wa authorized to promulgate rules included subsections 251(b)(2) (number portability), 251(c)(4)(B (prevention of discriminatory conditions on resale), 251(d)(2) (unbundled network elements), 251(e (numbering administration), 251(g) (continued enforcement of exchange access), and 251(h)(2 (treatment of comparable carriers as incumbents). See id. at n.10. The court concluded that § 251 di not grant the FCC pricing authority over local telephone services, and therefore the FCC was actin

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service.

outside of its jurisdiction when it prohibited intrastate switched access charges and directed state PUC to use the TELRIC cost methodology. However, as in Comptel, the court upheld the FCC's rule regarding interstate pricing, finding that the FCC had jurisdiction to regulate in this area. See id. at 80 n.21.

On May 7, 1997, the FCC issued an order specifically concerning the imposition of interstate switched access charges, In the Matter of Access Charge Reform; Price Cap Performance Review fo Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Live Charges, CC Docket No. 96-262 (Federal Communications Commission, May 7, 1997), codified at, 47 C.F.R. §§ 61 69 [hereinafter "Access Charge Order"]. In that order, the FCC expressly prohibited the assessment o interstate access charges on the use of unbundled network elements. The FCC concluded that thes access charges are inconsistent with the cost-based mandate of the Act: "[P]ayment of cost-based rate represents full compensation to the incumbent LEC for use of the network elements that carrier purchase. . . . Allowing incumbent LECs to recover access charges in addition to the reasonable cost of such facilities would constitute double recovery because the ability to provide access services is alread included in the cost of the access facilities themselves." Access Charge Order ¶ 337. The FCC foun that excluding access charges from unbundled network elements would allow incoming carriers t provide services at competitive rates, thereby promoting the underlying goals of the Act. As with th FCC's Local Competition Order, various parties filed suit challenging the regulations, and th consolidated action is currently pending in the Court of Appeals for the Eighth Circuit, SBC Communications, Inc. v. FCC, No. 97-2618 (8th Cir. pending, filed June 16, 1997). The Eighth Circui has not stayed these regulations pending appeal.

B. CPUC Decision

In its December 9, 1996 decision approving the interconnection agreement between AT&T an Pacific Bell, the CPUC allowed Pacific Bell to levy switched access charges when AT&T leases Pacifi Bell's unbundled network elements to provide exchange access to AT&T's local telephone customers The CPUC noted that there was no FCC rule in force that prohibited the assessment of intrastate acces charges, as the Eighth Circuit Court of Appeals in Iowa Utilities Board had at that time stayed the pricin

regulations. The CPUC stated,

> We have not had the opportunity to examine the legal argument presented by parties that allowed the FCC to conclude that access charges should not be assessed on the unbundled element. Therefore, this Commission cannot adequately determine if the FCC's legal interpretation is correct. AT&T has noted that the C.F.R. § 51.515(a) was stayed and therefore the FCC was prevented from enforcing its legal interpretation. Thus, we have retained authority to set intrastate switch access rates. Access charges have always played a complex and critical role in the recovery of embedded network costs. We believe it is unwise to modify these charges at this time.

In the Matter of the Petition of AT&T Communications, Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Pacific Bell, Decision 96-12-034, (Dec. 9, 1996), 19-20 [hereinafter "CPUC Decision"]. The CPUC then adopted Pacific Bell's proposed clauses regarding levying of switched access charges. Although the CPUC's discussion of the imposition of access charges focused on intrastate charges, Pacific Bell's proposed clauses, which the CPUC adopted wholesale by reference, covered both intrastate and interstate access charges.

AT&T contends that allowing Pacific Bell to levy any access charges in addition to the price of the unbundled network elements violates §§ 251(c) and 252(d) of the Telco Act as well as binding FCC regulations. Defendants respond that (1) AT&T's claims regarding the levying of interstate access charges are not ripe for review; and (2) the CPUC has plenary authority over intrastate pricing; the intrastate access charges are reasonable and consistent with the Act; and the intrastate access charges are an appropriate interim measure.

1. Ripeness

Before turning to the substance of the parties' arguments, the Court first addresses whether it is proper for the Court to resolve the issue of interstate access charges at this time. Both defendants oppose AT&T's challenge to the levying of interstate access charges, arguing that the issue is not ripe for a variety of reasons. The CPUC argues that AT&T has waived this argument by failing to specifically plead that the CPUC acted in excess of its jurisdiction by approving these charges. Pacific Bell, on the other hand, requests that this Court dismiss without prejudice AT&T's complaint to the extent that it addresses interstate access charges. Pacific Bell argues that given the FCC's recent Access Charge Orde

prohibiting interstate access charges and the pending challenge to the order in the Eighth Circuit, it would be premature for this Court to rule on the issue. Pacific Bell states that until the Access Charge Order is overturned or stayed by a court of competent jurisdiction, Pacific Bell will not assess interstate access charges when AT&T leases unbundled network elements from Pacific Bell. Pacific Bell further notes that AT&T requested renegotiation on the Agreement on this issue, and therefore this Court should wait until that process is complete.

In response, AT&T argues that the issue of interstate access charges is ripe for review because the CPUC "has made it abundantly clear that it plans to do nothing to address this unlawful provision and Pacific has made no offer to waive the provision, and, as a monopolist, has no incentive to do so." AT&T's Reply, 4:25-28.

The Court concludes that the issue is ripe for review. The Court does not find it necessary that AT&T have specifically pled that the CPUC acted in excess of its jurisdiction in order to bring a challenge to the interstate access charges. AT&T's claim is not a jurisdictional one; rather, AT&T argues that the CPUC's decision violates the provisions of the Act and FCC regulations. As to Pacific Bell's arguments the Court notes that the CPUC denied AT&T's petition to modify the interconnection agreement, despite its recognition that it may have inadvertently exceeded the reach of its jurisdiction in allowing the assessment of interstate access charges. See Opinion and Order Denying Petition for Modification Application 96-08-040 (CPUC Nov. 5, 1997); Order Dismissing Application for Rehearing of Decision 96-12-034 and Treating Application as Petition to Modify, Dec. 97-09-119 (Sept. 24, 1997). In addition although Pacific Bell has maintained the position in both this action and the related action of MCI Telecommunications Corp. v. Pacific Bell, C 97-0670 SI, that it will not assess interstate access charges pending the Eighth Circuit's resolution of the pending challenge to the Access Charge Order, the fact remains that under the current interconnection agreement, Pacific Bell retains the authority to impose such charges. The Eighth Circuit has not stayed the Access Charge Order pending the challenge in SBC Communications, Inc. v. FCC, No. 97-2618, and therefore that Order remains in force and is binding upon the state PUCs and this Court. This Court has the duty to ensure that the interconnection agreement complies with the Act, and the fact that an appeal covering the same issue is currently pending in another circuit does not obviate that responsibility. The Court concludes that the issue is ripe for

review, and turns to the parties' substantive arguments regarding the imposition of switched access charges.

2. Propriety of Switched Access Charges

AT&T contends that the plain language of § 252(d)(1) mandates a cost-based standard for pricing and forecloses the imposition of any charges that do not reflect the actual costs incurred in providing unbundled network elements to competitors. Section 252(d)(1) reads in relevant part:

> **(d) Pricing standards**
>
> **(1) Interconnection and network element charges**
>
> Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for the purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section --
>
> **(A)** shall be --
>
> (i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and
>
> (ii) nondiscriminatory, and
>
> **(B)** may include a reasonable profit.

AT&T alleges that in arbitrating the rates for unbundled network elements, the CPUC imposed access charges which impermissibly allow for recovery of Pacific Bell's historical costs as well as subsidies for universal service. The CPUC's arbitrator used Pacific Bell's suggested cost model, Total Service Long Run Incremental Cost ("TSLRIC"), as the basis for setting prices. The arbitrator concluded that the TSLRIC model allowed Pacific Bell to recover its costs plus a reasonable profit. In reviewing the arbitrator's decision, the CPUC permitted Pacific Bell to recover not only the TSLRIC amount, but also allowed Pacific Bell to charge AT&T per-minute switched access charges whenever AT&T uses the network elements to originate and terminate either interstate or intrastate long distance calls. AT&T argues that "subsidy-laden access charges, whatever their origin or purpose, [do not] have anything at all to do with Pacific's cost of providing network elements." AT&T's Reply, 6:3-6.

AT&T argues that both the Eighth Circuit in Comptel and the FCC's Access Charge Orde

explicitly prohibit incumbent LECs from levying interstate access charges in addition to cost-based rate for the lease of unbundled network elements. AT&T argues that the Eighth Circuit's and the FCC's reasoning is equally applicable to the imposition of intrastate access charges. "[The Eighth Circuit and the FCC] recognized that § 252(d) limits rates for unbundled elements to the full costs of the facility (and its underlying functionalities) and prohibits the assessment of other charges in addition to those cost-based rates." AT&T's Motion, 10:18-20. While the state commissions may have sole authority to determine the specific pricing methodologies governing intrastate telecommunications services, the state commissions are still bound by general standards as set forth in the Act. Section 252, AT&T contends prohibits state commissions from allowing incumbents to assess non-cost based charges on the use of network elements. Whether a charge is levied for interstate or intrastate access, AT&T argues the effect is the same: to allow for double recovery in violation of the Telco Act. AT&T argues that it is irrelevant that Iowa Utilities Board decision vacated the FCC regulation prohibiting the levying of intrastate access charges because that decision rested solely on jurisdictional grounds.

AT&T's final argument against the imposition of access charges is that these charges contravene another provision of the Act, § 251(c)(3), which allows new entrants to use unbundled network element without discrimination or impairment. AT&T argues that because Pacific Bell does not pay access charges when using its own network to provide exchange access, it is plainly discriminatory to require AT&T and other competing LECs to pay these charges to use the same network elements to provide the same exchange access services. For the same reason, the access charges violate a binding FCC rule, 47 C.F.R. § 51.309(a), that bars incumbents from imposing any "limitations, restrictions, or requirement on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends." AT&T argues that the access charges impair AT&T's ability to offer exchange access and long distance service because it has a higher cost than Pacific Bell of providing these services.

In their motions for summary judgment, the CPUC and Pacific Bell focus on the imposition of intrastate access charges only, since they both contend that the issue of interstate access charges is not ripe for review. In its reply, Pacific Bell briefly argues that the CPUC did not exceed its jurisdiction i

imposing interstate access charges. However, as discussed earlier, AT&T's challenge is not a jurisdictional one; AT&T maintains that both the interstate and the intrastate access charges violate the Act's pricing standard as set forth in § 252. With respect to the merits of the CPUC's assessment of charges, defendants essentially advance the same arguments. First, citing Iowa Utilities Board, defendants contend that the CPUC has plenary authority to decide the pricing of intrastate services. Because the Eighth Circuit struck down the FCC's regulations regarding intrastate access charges, defendants argue that the CPUC therefore has the authority to impose such charges. Defendants argue that "[i]n light of the CPUC's clear authority to regulate intrastate pricing, this Court should give deference to the CPUC's decision governing intrastate access charges." Pacific Bell's Motion, 22:5-7.

Defendants' argument misses the mark. The Iowa Utilities Board decision vacated the FCC regulations pertaining to intrastate pricing solely on jurisdictional grounds; it did not speak to the merits of these regulations or express any opinion on the validity of imposing intrastate switched access charges. AT&T does not challenge the CPUC's authority over intrastate pricing matters; rather, AT&T argues that the levying of access charges violates the federal standard for pricing unbundled network elements as set forth in section 252. It is true that the state commissions have exclusive jurisdiction to determine intrastate pricing. However, state commissions are still required to ensure that their decisions comply with the Act, a matter that the Court will review de novo.

Defendants next contend that the CPUC's decision to allow access charges in addition to unbundled network element costs is reasonable and consistent with the Act. In reviewing the arbitrator's decision, the CPUC determined that access charges have long been used to recover embedded costs associated with building the network. The CPUC concluded that since the Eighth Circuit had stayed the FCC regulations prohibiting assessment of these charges, the CPUC was not prohibited from imposing them. In their briefs, defendants have expanded on the CPUC's reasoning in its decision, arguing that the cost model used by the arbitrator would not adequately compensate Pacific Bell for the use of its system. The switched access charges allow Pacific Bell to recover historical costs, as well as overhead costs related to providing universal service. Defendants argue that these access charges are cost-based and therefore allowable under section 252(d)(1). In addition, defendants argue that the Act does not expressly prohibit the assessment of access charges, and that there is no requirement in the Act that

incumbents necessarily be fully compensated solely through the unbundled element prices. According to defendants, if Pacific Bell were not allowed to levy access charges, Pacific Bell would be under-compensated and would be placed at a competitive disadvantage. Furthermore, prohibiting Pacific Bell from levying these charges would adversely affect Pacific Bell's ability to continue to provide universal service.

Finally, defendants argue that the access charges are a temporary measure, and as such should be upheld during the transition to a competitive local exchange market. The agreement is only in effect for three years, at the end of which time the CPUC will reexamine its holding. Defendants argue that the instant case is similar to the situation presented in Comptel, 117 F.3d 1068 (8th Cir. 1997), where the court upheld access charges as an appropriate interim mechanism to help complete the reform of universal service.

The Court concludes that the CPUC improperly allowed Pacific Bell to assess switched access charges that are not based on the "cost . . . of providing . . . the network element." 47 U.S.C. § 252(d)(1). The Court is not convinced that the access charges cover "costs" that Congress intended to provide for when it drafted section 252. Rather, the Court believes that section 252(d)(1) directs state commissions to set prices that account only for the specific costs incurred in providing the network elements, along with a reasonable profit. After reviewing the evidence, the arbitrator in this matter used Pacific Bell's cost model as the basis for setting prices, and determined that the model allowed for Pacific Bell to recoup its costs plus a reasonable profit. The CPUC erred when it allowed for other amounts to be imposed in addition to these costs. Indeed, the CPUC itself has recognized that the challenged access charges are "not a cost-based item and [do] not recover the costs for any specific transport function." Re Open Access to Bottleneck Services and a Framework for Network Architecture Development of Dominant Carrier Networks, Dec. 95-12-020, 1995 WL 767850, at * 5 (CPUC Dec. 6, 1995).

Section 252's pricing standard does not allow for incumbents to assess charges to subsidize universal service. Indeed, to allow incumbents to continue to levy access charges to pay the costs of providing universal service runs counter to the Act's specific mandate that hidden subsidies for universal service be replaced with explicit funding. See 47 U.S.C. § 254(e). This determination is consistent with

the Eighth Circuit's decision in Comptel, in which the court found that the assessment of access charges to subsidize universal service was contrary to section 252's cost-based mandate. See 117 F.3d 1068, 1073-75.

In addition to violating the pricing standards set forth in the Act, the imposition of interstate access charges is contrary to binding FCC regulations. The FCC's Local Competition Order clearly prohibits the levying of interstate access charges, finding that these charges allow for double recovery by incumbent carriers. The Local Competition Order was promulgated on August 8, 1996, and was effective at the time the CPUC approved the interconnection agreement, and remains in force to this day. As discussed earlier, the FCC's rules prohibiting interstate access charges were not overturned by the Eighth Circuit. Moreover, although not binding on the CPUC at the time it rendered its decision on the AT&T/Pacific Bell interconnection agreement, the FCC's Access Charge Order is clear that interstate charges are not to be assessed by incumbents on competitors.

Finally, the Court rejects the defendants' argument that these access charges are similar to the interim charges in Comptel, and that therefore the charges are an appropriate transitional measure. The Comptel court found it significant that the access charges at issue could be collected no later than June 30, 1997, and that the measure lasted for only a nine month period. Unlike the FCC regulations at issue in Comptel, which were specifically designated as "a temporary transitional mechanism," the Pacific Bell/AT&T agreement is in effect for three years, and by denying AT&T's request for modification, the CPUC has confirmed that it does not intend to modify its holdings. As such, defendants' argument that the access charges are temporary is unpersuasive.

For the foregoing reasons, the Court concludes that the imposition of switched access charges does not comply with the Act's cost-based mandate, and therefore this provision is unlawful. The Court hereby GRANTS AT&T's motion for summary judgment on this issue, and accordingly DENIES the motions for summary judgment filed by defendants Pacific Bell and the CPUC.

3. Aggregation of End User Volume to Qualify for Volume Discounts

A. FCC Regulations

The Act imposes on incumbents the duty to "offer for resale at wholesale rates any

telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. § 251(c)(4)(A). Incumbents are prohibited from imposing "unreasonable or discriminatory conditions or limitations" on the resale of such services. Id. at § 251(4)(B).

In implementing this section, the FCC prescribed a general regulation directing that an "incumbent LEC may impose a restriction [on resale] only if it proves to the state commission that the restriction is reasonable and nondiscriminatory." 47 C.F.R. § 51.613(b). In addition, in its Local Competition Order, the FCC determined that the resale requirements of § 251(c)(4) apply to volume-discounted services. "If a service is sold to end-users, it is a retail service, even if it is priced as a volume-based discount off the price of another retail service." Local Competition Order ¶ 951. The FCC recognized that reasonable restrictions could be placed on the resale of volume-discounted services, and concluded that "the substance and specificity of rules concerning which discount and promotion restrictions may be applied to resellers in marketing their services to end users is a decision best left to state commissions." Id. at ¶ 952. However, the FCC specifically concluded as follows:

> [I]t is presumptively unreasonable for incumbent LECs to require individual reseller end users to comply with incumbent LEC high-volume discount minimum usage requirements, so long as the reseller, in aggregate, under the relevant tariff, meets the minimum level of demand. The Commission traditionally has not permitted such restrictions on the resale of volume discount offers. We believe restrictions on resale of volume discounts will frequently produce anticompetitive results without sufficient justification. We, therefore, conclude that such restrictions should be considered presumptively unreasonable. We note, however, that in calculating the proper wholesale rate, incumbent LECs may prove that their avoided costs differ when selling in large volumes.

Id. at ¶ 953.

The Iowa Utilities Board decision left these regulations pertaining to resale of volume-discounted services untouched, finding that "we have recognized that subsection 251(c)(4)(B) authorizes the Commission to issue regulations regarding the incumbent LECs' duty not to prohibit, or impose unreasonable limitations on, the resale of telecommunications services." 120 F.3d at 819. The court did vacate FCC pricing rules that dictated a specific methodology for state PUCs to use in determining wholesale rates on the same jurisdictional grounds as described above. However, the court found that the FCC possessed the authority to promulgate rules restricting the ability of incumbents to circumvent

their resale obligations under the Act.

B. CPUC Decision

The arbitrator's report setting forth the terms of the interconnection agreement between AT&T and Pacific Bell provided that AT&T "shall receive the same volume discounts from [Pacific Bell] for services based on its wholesale volume that [Pacific Bell] provides to its retail customers based on their retail volume without regard to the number of customers to which [AT&T] resells such service . . . ." Arbitrator's Report, 31. The arbitrator rejected Pacific Bell's argument that allowing this aggregation would cause substantial revenue loss, finding that this claim is "not cognizable under the Act." Id. (citing Local Competition Order ¶ 953 and 47 C.F.R. § 51.613).

The CPUC's decision approving the interconnection agreement overturned the arbitrator on this point, holding instead that AT&T may only qualify to purchase the volume-discounted services if the end users themselves would qualify for the volume discount. The CPUC first concluded that nothing in the Act required that the CPUC find in favor of AT&T on this issue. See CPUC Decision, 8. The CPUC noted that § 251(c)(4)(B) "imposes a broad duty not to prohibit resale, but permits that a state may 'consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.'" Id. at 8-9 (quoting § 251(c)(4)(B)). Thus, the CPUC suggested that by prohibiting aggregation, the CPUC was simply prohibiting AT&T from selling a telecommunications service that is available at retail "only to a category of subscribers" -- i.e. high volume users -- to a different category of subscribers -- i.e. low volume users.

As for the FCC regulations, the CPUC noted the following:

> More broadly, we note that the FCC regulations adopted in 47 C.F.R. Section 51.613 explicitly permit restrictions on resale. In particular, 47 C.F.R. Section 51.613(b) states that "an incumbent LEC may impose a restriction only if it proves to the state commission that the restriction is reasonable and nondiscriminatory." Once again, we find codified in FCC regulation the statutory standard that all our decisions to open local telecommunications markets must meet.
>
> We note that there is no unstayed regulation in the FCC's First Report and Order [Local Competition Order] that adopts a blanket prohibition on resale restrictions. The stay of the Eighth Circuit Court squarely limits the ability of the FCC to impose pricing regulations on intrastate services. Furthermore, the FCC

> recognized that different resale margins might apply when a party resells a volume-discounted service. [Citing Local Competition Order ¶ 953]. We note that the resale rules that we are considering here deal centrally with the pricing of toll services that are resold to individual customers. In particular, the issue is not whether the service may be resold, but whether the fact that they are resold by a single company should permit that company to qualify for the discount for which the individual purchasers could not qualify. This pricing issue falls squarely into our jurisdiction.
>
> * * *
>
> To sum up, there is no statutory or regulatory basis that compels the arbitrator to jettison our current regulatory structure, which imposes only those resale restrictions that we find reasonable. Moreover, the FCC's requirement for permissible resale restrictions -- that a state find the specific resale limitations to be both reasonable and nondiscriminatory -- is the standard for California review of all tariffs, including resale provisions. (Public Utilities Code 453(a)). We find no new federal requirement that would compel us to further alter our resale policies, that, consonant with the Act, contain only a minimum of resale restrictions.

Id. at 9-10.

AT&T contends that the CPUC's decision is contrary to several interrelated provisions of the Ac as well as the FCC's Local Competition Order. For the reasons set out below, the Court concludes tha the CPUC applied the incorrect standard when deciding the "reasonableness" of the resale restrictions As such, the Court finds it unnecessary to reach AT&T's statutory arguments.[7]

AT&T argues that the CPUC's decision flatly contradicts the FCC's Local Competition Orde and that the CPUC ignored these regulations when issuing its decision. AT&T argues that the CPUC' contention that resale restrictions are a matter of the state's pricing authority is incorrect, as the Ac makes clear that the determination whether resale restrictions on categories of customers are reasonabl is a subject for regulation by the FCC. Section 251(c)(4)(B) provides in relevant part:

> [A] State commission may, consistent with regulations prescribed by the [FCC] under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

47 U.S.C. § 251(c)(4)(B) (emphasis added). The Court agrees, finding that the FCC has jurisdictio to promulgate rules regarding restrictions on resale of telecommunications services, and that an indication to the contrary in the CPUC's decision is incorrect.

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[7] The Court notes, however, that the FCC's Local Competition Order, which provides th resale restrictions on volume-discounted services are "presumptively unreasonable," suggests th there are limited circumstances under which these restrictions may be justified under the Act.

The parties disagree on what standard governs the imposition of restrictions on resale. AT&T contends that the FCC's Local Competition Order controls, and that therefore resale restrictions on volume discounted services are "presumptively unreasonable" in accordance with ¶ 953. In contrast, defendants argue that the proper standard is contained in 47 C.F.R. § 51.613(b), which provides that "an incumbent LEC may impose a restriction only if it proves to the state commission that the restriction is reasonable and nondiscriminatory." Defendants argue that the FCC's Local Competition Order is not binding on the CPUC because it was not codified in the Code of Federal Regulations.

The Court concludes that the FCC's Local Competition Order is enforceable and binding on the CPUC. The FCC is empowered to announce its rulings by order rather than codified regulation, and its orders have the full force and effect of law. See Wilson v. A.H. Belo Corp., 87 F.3d 393, 397-98 (9th Cir. 1996). Moreover, with regard to the Local Competition Order specifically, the Eighth Circuit in Iowa Utilities Board, 120 F.3d 753, 803 (8th Cir. 1997), found that the order constituted a "final" action by FCC, and that therefore the matter was ripe for review by the court. Since the Eighth Circuit did not vacate any of the FCC's regulations concerning restrictions on resale contained in the Local Competition Order, these regulations are enforceable and binding on the CPUC.

AT&T argues that although the CPUC's decision cites ¶ 953 of the Local Competition Order, the CPUC does not address the FCC's "presumptively unreasonable" standard, focussing instead only on whether the restriction was "reasonable" and "nondiscriminatory." Additionally, AT&T argues that Pacific Bell did not made the requisite showing to overcome the FCC's presumption of "unreasonableness;" according to AT&T, in order to rebut the "presumption of unreasonableness," Pacific Bell was required to show that their avoided costs differ when selling in large volumes. See Local Competition Order ¶ 953.

Defendants respond that the CPUC's restrictions on resale are tenable because they comply with ¶ 952 of the Local Competition Order, which provides that "there may be reasonable restrictions on promotions and discounts." Defendants also rely heavily on ¶ 952's statement that the "substance and specificity of rules concerning which discount and promotion restrictions may be applied to resellers in marketing their services to end-users is a decision best left to state commissions." Defendants argue that the CPUC carefully considered evidence on the issue of imposing restrictions on resale and found that

such restrictions were reasonable.

Defendants' reading of the Local Competition Order is too selective. It is true that the FCC recognized that "reasonable" restrictions could be placed on promotions and discounts, and that generally these matters were best left to the state commissions for determination. However, in the next paragraph, the FCC set forth its specific findings that resale restrictions on volume discount offerings were "presumptively unreasonable." Defendants focus on ¶ 952's general language regarding "reasonable restrictions," while ignoring ¶ 953's much more specific language dealing with the issue presented in the instant case: resale restrictions on volume discounted services. For these reasons, the Court finds that ¶ 953's "presumption of unreasonableness" is the controlling standard.

Defendants alternatively argue that the CPUC discussed, and rejected, arguments advanced by another competitor based on the "presumptively unreasonable" language contained in ¶ 953. Prior to issuing its opinion on the AT&T/Pacific Bell interconnection agreement, the CPUC solicited comments from numerous telecommunications companies. One company, ICG Telecom Group, Inc., argued in favor of allowing aggregation on the ground that loss of revenue to incumbents was not sufficient to "rebut the presumption of unreasonableness." The CPUC rejected ICG's arguments, concluding that ICG's approach would result in substantial revenue losses to Pacific Bell and that permitting resale would remove any incentive by Pacific Bell to offer discounts to its large volume customers, thereby running counter to the pro-competitive goals of the Act. Defendants argue that by considering and rejecting ICG's arguments in favor of aggregation, the CPUC evidenced its awareness of ¶ 953's standard.

The Court concludes that the CPUC's decision is ambiguous as to whether the CPUC believed that it was bound by ¶ 953, and that even if the CPUC did not "ignore" ¶ 953, the CPUC did not apply ¶ 953 correctly. Although the CPUC rejected ICG's arguments rebutting the "presumption of unreasonableness," in the section of the decision setting forth the CPUC's conclusions, the CPUC mentions only the "reasonable" and "nondiscriminatory" standard contained in 47 C.F.R. § 51.613(b). The CPUC never addressed the language of ¶ 953, and never found that Pacific Bell had rebutted the presumption of unreasonableness set forth in ¶ 953.

Moreover, assuming arguendo that the CPUC understood that ¶ 953 governed, the Court finds that the CPUC misapplied that section. The CPUC decision states that Pacific Bell advanced three

arguments in support of its position: (1) aggregation would jeopardize Pacific Bell's financial stability and cause substantial revenue loss; (2) aggregation would remove any incentive by Pacific Bell to offer discounts to large volume customers, therefore producing an anti-competitive result; and (3) additional resale requirements are inconsistent with a recent decision by the CPUC. See CPUC Decision, 7-9. The first two arguments were considered by the FCC in connection with the FCC's local competition proceedings, and the FCC nevertheless determined that resale restrictions on volume discount offerings were "presumptively unreasonable." See Local Competition Order, ¶¶ 940-47. The third rationale – the existence of a prior CPUC decision – does not provide a valid basis for overcoming the presumption against resale restrictions.

In sum, the Court concludes that the FCC's Local Competition Order, including ¶ 953, is enforceable and therefore binding on the CPUC; it is unclear whether the CPUC recognized that ¶ 953's "presumption of unreasonableness" regarding restrictions on resale of volume discounted offerings applied in the instant case; and finally, even if the CPUC recognized the applicability of ¶ 953, the CPUC misapplied that standard. As a result, the CPUC's action on this provision, which overturned the arbitrator's determination, is vacated and the arbitrator's determination – i.e., that that AT&T "shall receive the same volume discounts from [Pacific Bell] for services based on its wholesale volume that [Pacific Bell] provides to its retail customers based on their retail volume without regard to the number of customers to which [AT&T] resells such service . . . ." , Arbitrator's Report, 31 -- is reinstated.

However, since ¶ 953 recognizes there are situations in which incumbents can successfully rebut the presumption of unreasonableness that attaches to aggregation restrictions on resale, Pacific Bell may seek modification from the CPUC by presenting such evidence and the CPUC may evaluate such evidence in accordance with ¶ 953.

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CONCLUSION

For the foregoing reasons and good cause shown, the Court hereby GRANTS AT&T's motion for summary judgment and DENIES the motions for summary judgment filed by defendants Pacific Bell and the CPUC.

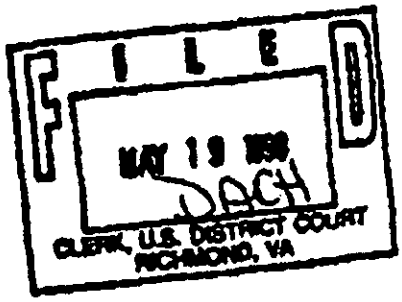
IT IS SO ORDERED.

Dated: May 11, 1998

SUSAN ILLSTON
United States District Judge

United States District Court
For the Northern District of California

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION



GTE SOUTH INCORPORATED,

Plaintiff.

v.

THEODORE V. MORRISON, JR.; HULLIHEN WILLIAMS MOORE; and I. CLINTON MILLER; (In Their Official Capacities as Commissioners of the Virginia State Corporation Commission)

and

COX FIBERNET COMMERCIAL SERVICES, INC.,

and

MCI TELECOMMUNICATIONS CORPORATION; and MCIMETRO ACCESS TRANSMISSION SERVICES INC.,

and

AT&T COMMUNICATIONS OF VIRGINIA, INC.,

Defendants.

Civil Action Number 3:97CV493

FINAL ORDER

THIS MATTER comes before the Court on cross motions for summary judgment pursuant to Rule 56 of the *Federal Rules of Civil Procedure*. Each party to this action has moved for summary judgment on its behalf. For the reasons stated in the accompanying Memorandum Opinion, the Court GRANTS summary judgment for Theodore V. Morrison, Jr.; Hullihen Williams Moore; and I. Clinton Miller who have been sued in their official capacity as

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Commissioners of the Virginia State Corporation Commission ("SCC"). The Court FINDS that the MECPR pricing methodology violates the Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56 (1996). The COURT further FINDS that 47 U.S.C. § 251(d)(1) is best read to exclude historical costs. GTE's taking claim is not ripe for adjudication and is hereby DISMISSED WITHOUT PREJUDICE. Similarly, the Court DISMISSES Count II(A) of the Complaint WITHOUT PREJUDICE. The Court DIRECTS implementation of the Interconnection Agreement as approved by the SCC.

Let the Clerk send a copy of this Order to all counsel of record.

And it is SO ORDERED.

James R. Spencer
UNITED STATES DISTRICT JUDGE

MAY 19 1998
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

GTE SOUTH INCORPORATED,

Plaintiff.

v.

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and

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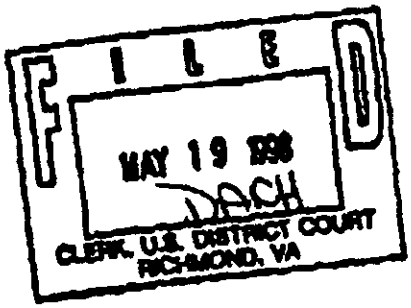
and

AT&T COMMUNICATIONS OF VIRGINIA, INC.,

Defendants.



Civil Action Number 3:97CV493

MEMORANDUM OPINION

THIS MATTER comes before the Court on cross motions for summary judgment pursuant to Rule 56 of the *Federal Rules of Civil Procedure*. Each party to this action has moved for summary judgment on its behalf. For the reasons stated below, the Court GRANTS summary judgment for Theodore V. Morrison, Jr.; Hullihen Williams Moore; and I. Clinton Miller who have been sued in their official capacity as Commissioners of the Virginia State Corporation Commission

("SCC"). The Court DIRECTS implementation of the Interconnection Agreement as approved by the SCC.

INTRODUCTION

The Telecommunications Act of 1996 is "an Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Telecommunications Act of 1996, preamble, PL 104-104, 110 Stat. 56 (1996). Congress endeavored to deconstruct the previous regulatory regime which granted seven Regional Bell Operating Companies ("RBOCs") a local monopoly protected by the Modification of Final Judgement settlement.[1] To achieve this end, Congress developed a framework to promote competition in the local telephone markets and implemented it through the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996)("the 1996 Act").

The 1996 Act prescribes three interrelated methods a new entrant may use to compete in the local market. First, a new entrant may interconnect its own facilities and equipment with the local exchange carrier's network. See 47 U.S.C. § 251(c)(2). Next, the new entrant may pay the local exchange carrier for unbundled network elements which include the facility or equipment used to provide telecommunications service. See 47 U.S.C. § 251(c)(3); 47 U.S.C. § 153(29). As a third

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[1] See United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), aff'd, 460 U.S. 1001 (1983). Prior to 1974, AT&T dominated both the local and long-distance markets. The Department of Justice brought an antitrust suit against AT&T which resulted in the Modification of Final Judgment ("MFJ") settlement. See id. The MFJ settlement required AT&T to withdraw or divest from the local phone market but allowed AT&T to continue its long distance services and telephone equipment manufacturing plants. See H.R. Rep. No. 104-204, at 48-49 (1996). AT&T's withdrawal from the local market led to the creation of the RBOCs. The Telecommunications Act of 1996 combines the RBOCs with other local telephone providers such as GTE and refers to them collectively as incumbent local exchange carriers ("ILECs").

alternative, a new entrant may purchase at wholesale rates from the local carrier "any telecommunications service the local carrier provides at retail to subscribers who are *not* telecommunications carriers." 47 U.S.C. § 251(c)(4).

To facilitate this process, the 1996 Act provides procedures for negotiation, arbitration and approval of agreements between the local exchange carrier and the new entrant. See, generally, 47 U.S.C. § 252. An agreement, commonly referred to as the interconnection agreement, may be reached through voluntary negotiations, mediation or compulsory arbitration. Once the parties reach an interconnection agreement, the state commission shall approve or reject the agreement. See 47 U.S.C. § 252(e). Should the state commission decline to consider the agreement or fail to render a disposition within ninety days after its submission, the Federal Communications Commission ("FCC") may approve or reject the agreement. See 47 U.S.C. § 252(e)(4)-(5). When the state commission has made a determination under § 252, any party aggrieved by that determination may bring an action in Federal district court. 47 U.S.C. § 252(e)(6).

FACTUAL BACKGROUND

Cox Fibernet Service, Inc. ("Cox"), pursuant to § 252(a) of the Act, initiated negotiations with GTE for interconnection of telecommunications networks and the purchase of unbundled network elements ("UNEs").[2] These negotiations proved unsuccessful in many respects; therefore Cox petitioned the SCC to arbitrate the unresolved issues with GTE. See 47 U.S.C. § 252(b). The SCC docketed the matter and consolidated this arbitration with relevant aspects of three additional failed negotiations involving GTE. These additional negotiations included arbitration of unresolved

[2]Cox is a facility-based competitor which means that Cox has installed its own switches, fiber-optic cables and other telephone network equipment.

issues with AT&T of Virginia ("AT&T"), MCI Telecommunications Corporation ("MCI") and Sprint Communications Company L.P. ("Sprint").[3] GTE and Cox eventually reached an agreement approved by the SCC; however, GTE maintains that this agreement sets prices for access to its UNEs and customer services at a rate considerably lower than its actual costs. Consequently, GTE brings this action pursuant to section 252(e)(6) of the 1996 Act to challenge final arbitration determinations made by the SCC.

The SCC reached these final determinations after an organized and deliberate process. The SCC conducted hearings in two phases, a pricing phase and a non-pricing phase. Each phase proceeded as a panel consisting of a designated witness or witnesses for each party and the SCC Staff. Expert witnesses gave opening statements which were followed by witnesses posing questions and receiving responses from other panel members. Once this period of cross examination concluded, each party and the SCC Staff made closing remarks. Throughout this process, the SCC Commissioners freely interjected questions.

The first phase focused on pricing issues and elicited comments on policy, economics, cost and pricing from sixteen witnesses. The SCC proceedings began on November 19, 1996 and continued for six days. The second phase centered on non-pricing issues such as combining network elements, services required to make available at resale and GTE's duty to provide collocation. This hearing began on December 2, 1996 and continued for four days. Combined, the administrative record of these proceedings include thousands of pages of transcripts, exhibits, prepared testimony and cost studies.

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[3]Sprint is not a party to this action.

Subsequent to these proceedings, the SCC issued its orders resolving the matters in dispute. On December 11, 1996, the SCC issued its Order Resolving Rates for Unbundled Network Elements and Interconnection, Wholesale Discount for Services Available for Retail and Other Matters, PUC 9600117; PUC960118; PUC 960124 and PUC 960131 ("Consolidated Order"). Later, on December 16, 1996, the SCC issued its Order Resolving Non-Pricing Issues and Requiring Filing of Interconnection Agreement, PUC 960118 ("Cox Order"). The SCC found, in part, that GTE based its proposed wholesale discount on nationwide data as opposed to Virginia specific data. Rec., p. 29443 (Consolidated Order, p.3); Rec., pp. 1202-03 (Staff Report--Wholesale, pp.4-5). The Record further indicated that GTE's cost study for network elements and interconnection lacked supporting data for modeling assumptions. Id., p. 1151. GTE's cost study also contained "user-defined inputs" which did not permit independent testing. Id., pp. 1151-58. Once considered in the context of the criticism of the alternative models, the SCC declined to set permanent prices on incomplete data. Instead, the SCC set interim prices pending receipt of additional information. Rec. pp. 29444-45 and pp. 29450-51.

After the arbitration, GTE and Cox signed an interconnection agreement (the "Agreement") documenting the prices and other terms resolved through arbitration and negotiation. By Order entered May 30, 1997, the SCC approved the Agreement. GTE challenges certain provisions of this Agreement as violative of the sections 251 and 252 of the 1996 Act and applicable FCC regulations. See 47 U.S.C. §§ 252(e)(6) and (e)(2)(b)(interconnection agreements must comply with FCC regulations).

JURISDICTION AND VENUE

The Court has jurisdiction over this matter pursuant to 47 U.S.C. § 252(e)(6) and 28 U.S.C. §§ 1331 and 1337.

Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) and (c). A significant portion of GTE's property is located in the Eastern District of Virginia. Defendants Morrison, Moore and Miller reside in the Eastern District of Virginia. Cox's registered agent is located in Richmond, Virginia. Finally, a substantial part of the events and omissions giving rise to this action occurred in Richmond, Virginia. Venue is proper in this division pursuant to Rule 3 of the Local Rules for the United States District Court, Eastern District of Virginia.

STANDARD OF REVIEW

Summary judgment is proper if, viewed in the light most favorable to the nonmoving party, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Ross v. Communications Satellite Corp., 759 F.2d 355, 364 (4th Cir. 1985). The essence of the inquiry that the court must make is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S. Ct. 2505, 2512 (1986).

SCOPE OF REVIEW

Since 47 U.S.C. § 252(e)(6) does not set forth the standard, procedure or scope of judicial review, this Court shall look to controlling precedent to determine the scope of review. In United States v. Carlo Bianchi and Co. 373 U.S. 709, 715 (1963), the Supreme Court held that the a federal

statutory provision calling for federal judicial review which fails to indicate the standards to be used or procedures to be followed limits federal judicial review to the administrative record and prohibits de novo proceedings. See also, Smith v. Chater, 99 F.3d 635, 638 (4th Cir. 1996); United States v. A.S. Holcomb, 651 F.2d 231, 236 (4th Cir. 1981).

A. Standard of Review for Factual Findings

In the absence of a statutory authority defining the type of review, "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); see also Clark v. Alexander, 85 F.3d 146, 151-52 (4th Cir. 1996)(looking to the APA and applying a federal standard of review where relevant federal statute contained no explicit standard of review); Guaranty Sav. & Loan Ass'n v. Federal Home Loan Bank Bd., 794 F.2d 1339, 1342 (8th Cir. 1986)(proper to look to the APA and apply the arbitrary and capricious standard where statute did not define the type of review).

Under this standard, a court evaluates the agency's decision to determine whether relevant factors support that decision and whether the agency has made a clear error of judgment. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). A court may only uphold agency actions on the basis articulated by the agency itself. See Motor Vehicle Mfrs. Ass'n. v. State Farm Mut., 463 U.S. 29, 50 (1983). Therefore, a court must find a rational connection between the facts found and the decision rendered. Id. at 43.

B. Standard of Review for Legal Determinations

The federal district court must determine whether state commission statements and agreements meet the requirements of section 251 of the 1996 Act. 47 U.S.C. § 252(e)(6). While

courts may grant a level of deference to a federal agency's interpretation of federal law, the same does not apply to state commissions. See Ritter v. Cecil County Office of Hous. & Comm. Dev., 33 F.3d 323, 327-28 (4th Cir. 1994)(granting some deference to the state agency's legal interpretation of federal law because that interpretation had been reviewed and approved by the Department of Housing and Urban Development). Therefore, the court reviews de novo whether a state agency's interpretation of the 1996 Act is consistent with federal law. Id. at 328.

Issues Before the Court

The issues presented in the case at bar fall under one of two categories. First, the Court must examine the consistency between the SCC's pricing determinations and the 1996 Act. The issues related to this category include the wholesale discount rate, the use of the forward looking cost methodology and GTE's Taking claim. The second category relates to the effect of binding FCC Regulations on GTE's non-pricing claims. Within this claim are issues relating to the rebundling of network elements to evade resale provisions, ordering GTE to sell at wholesale prices services beyond the scop of 47 U.S.C. § 251(c)(4) and an alleged unlawful expansion of the duty to provide collocation. The Court shall address these issues in turn.

Cross Motions for Summary Judgment

A. Consistency Between Pricing Determinations and the 1996 Act

Given its reservations on setting permanent prices without complete data, the SCC set interim prices pending receipt of additional information. R. pp.29444-45 (interim wholesale discount), and pp. 29450-51 (interim prices for unbundled elements). GTE has not shown that the SCC erroneously interpreted the 1996 Act. As noted above, the arguments presented in the cross motions for summary judgment focus on the wholesale discount rate set by the SCC, the forward-looking cost

methodology adopted by the SCC, and the "taking" of GTE's property without just compensation.

(1) Count I(A): Wholesale Price of Services for Resale

Section 252(d)(3) provides a formula for calculating wholesale rates. "A State commission shall determine wholesale rates on the basis of retail rates charge[d] to subscribers for the telecommunications services requested, excluding the portion thereof attributable to any marketing, billing, collection and other costs that will be avoided by the local exchange carrier." 47 U.S.C. § 252(d)(3). GTE challenges the SCC determination of the wholesale discount rate on three grounds which the Court shall review under the arbitrary or capricious standard. First, GTE claims that the SCC falsely assumed that it would exit the retail market completely in setting the wholesale discount rate. Second, GTE argues that the SCC committed legal error in rejecting GTE's evidence of actual costs GTE will avoid and improperly relied on information which was neither state specific nor GTE specific. Finally, GTE contends that the SCC erred by refusing to set different prices for different services. GTE's arguments are without merit. The SCC's effort to reach the wholesale discount rate was well thought out with § 252(d)(3) firmly in mind.

(a) False Assumptions Regarding GTE's Continued Participation in the Market

The SCC properly applied the "wholesale only" construct. The SCC used the model to identify reasonably avoided costs as it pertains to GTE's provision of wholesale services. This is essential inasmuch as GTE offers telephone services at retail and wholesale. GTE's cost of services associated with the provision of retail services should not be used to establish the wholesale discount rate. The only revenue GTE loses by providing wholesale services will be offset by reductions in cost for the same. The "wholesale only" model properly envisions this paradigm; otherwise, wholesale purchasers would be forced to subsidize GTE's retail services in violation of § 252(d)(3).

Such an anti-competitive subsidy would not comport with the goal of the 1996 Act to increase competition in local markets.

The SCC calculation of the wholesale discount rate was not arbitrary and capricious. In its Consolidated Order, the SCC explains the process by which it calculated the 20.6% discount when GTE provides directory assistance and call completion services and the 23.4% discount when GTE does not furnish those services. The SCC Staff examined GTE's expense categories to determine which categories would be eliminated. Rec. pp. P-329-32, 337-40 (Staff Report--Wholesale, pp.7-9, 15-18). The SCC reviewed its Staff findings and methodology and made adjustments where appropriate. Rec. 5432-34; Consolidated Order, pp. 4-6. The Record and the Consolidated Order indicates a reasoned and reasonable approach to setting the wholesale discount rate.

(b) Legal Error in Rejecting GTE's Evidence of Actual Costs

The 1996 Act does not require the SCC to accept the incumbent local exchange carrier's cost study. Instead, the 1996 Act permits the SCC to arbitrate the matters submitted for its consideration. A hallmark of effective arbitration involves evaluation and circulation of relevant information. As arbitrator, the SCC was under no obligation to accept GTE's evidence. The Record reveals the SCC's carefully consideration of competing facts and its reasoned selection of the best data.

The SCC properly relied on "data that is Virginia specific or at least tailored for Virginia." Rec. 5431; Consolidated Order, p. 3. As a state commission, the SCC should attend to setting rates which reflect costs associated with providing wholesale service in Virginia. Indeed, focus on Virginia specific information minimizes the potential for distortions. See GTE Mem. Tab 3, p. 183. Despite GTE's argument to the contrary, the Record indicates a consistent use of Virginia specific information. Staff member and witness, Mr. Cody, used Virginia-specific data for every other

expense category for which it was available. SCC Mem. in Opposition, p. 20 (citing Rec. pp. 1408-12, 1455 (SCC Staff Witness Cody); Rec., pp. P-357 (Attachment 9 to Staff Report–Wholesale); Rec., p. 1203; Rec. pp. 1390-91 (AT&T witness Dionne)(criticizing GTE's use of nationwide data)). Moreover, all parties except GTE used GTE Virginia specific data submitted to the FCC to calculate avoided cost. When necessary, SCC Staff secured additional information directly from GTE. Rec. 17266; Tr. (November 19, 1996) at 181 (Cody (Staff)). To the extent GTE's cost study did not provide Virginia specific information, the SCC properly disregarded that information where specific information was available.

In all other respects, the Record offers ample evidence to support SCC determinations. To reach its conclusions, the SCC juxtaposed all of the information and studies the parties and its own staff presented. As opposed to arbitrarily or capriciously adopting one study or argument over another, the SCC's Order indicates a reasoned approach to calculating the wholesale discount rate. The SCC explains, "As a result of treating all the accounts as indicated above, we calculate the wholesale discount by placing the total avoidable costs in the numerator and dividing by a denominator consisting of revenue corresponding to the services represented in the numerator." Rec. 5435; Consolidated Order, p. 7.[4] The SCC's decision to rely on Virginia specific information, which resulted in a disregard for GTE's cost study, was not arbitrary and capricious.

(c) Refusing to Set Different Prices for Different Services

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[4]The application of this formula properly disregarded GTE's attempt to secure "resale opportunity costs" because there is no statutory basis to account for these costs. Moreover, these costs are analogous to future profits which if awarded would have a chilling effect on competition in local markets.

The 1996 Act neither forbids nor mandates setting the wholesale discount on a "service-by-service" basis. GTE has failed to cite any controlling case law which would indicate otherwise. Moreover, even GTE proposed a single discount rate in connection with its "modified" cost analysis. Rec. 17230-31; Tr. (Nov. 19, 1996) at 185-186 (Wellemeyer (GTE)). As noted above, the SCC calculated a discount of 20.6% when GTE provides directory assistance and call completion services and 23.4% when GTE does not. Rec. 5435; Consolidated Order, p. 7. While the SCC did not set rates on a "service-by service" basis, the adoption of two discount rates provides evidence of the SCC's consideration of factors which would warrant separate rates. The Record indicates no SCC predisposition against setting the wholesale discount rate on a "service-by-service" basis. In sum, as long as the wholesale discount rate or rates are not in conflict with the policy behind the 1996 Act, the SCC could use a basis other than "service-by-service" to arrive at the discount rate. The Court GRANTS summary judgment for the SCC on the issue of the wholesale discount rate because the Court finds that the SCC did not act in an arbitrary or capricious manner in reaching the rates. The Court has reviewed and now AFFIRMS the SCC's determinations.

(2) Count I(B)-(J):Forward Looking Cost Methodology

The State commission shall determine pricing standards for interconnection and network element charges which are just and reasonable. 47 U.S.C. § 252(d)(1). This section further provides that the rate shall be based on the cost of providing the interconnection or network element, be nondiscriminatory and may include a reasonable profit. 47 U.S.C. § 251(d)(1)(A)-(B). GTE challenges the use of forward-looking costs for three reasons. First, GTE contends the Hatfield-based prices do not compensate GTE for its incremental costs. Next, GTE argues that SCC Staff adjustments to the Hatfield-based model fail to correct "fatal flaws" within the model. Finally, GTE

alleges that the SCC failed to account for its historical costs in violation of the 1996 Act. As discussed below, GTE's arguments are without merit.

(a) Procedurally Abandoned Claims

To secure summary judgment, a party must assert the grounds alleged in the complaint; otherwise, they are deemed abandoned. See Resolution Trust Corp. v. Dunmar Corp., 43 F.3d 587, 599 (11th Cir. 1995)(internal citations omitted). The Court is under no obligation to fathom all the possible arguments based on the information and pleadings before it. Id. Rather, that obligation falls on the party moving for summary judgment. Id. GTE has failed to assert certain claims which the Court shall consider abandoned. Specifically, GTE has failed to assert or offer any argument supporting summary judgment for the following claims: Count I(C): Price of Transport and Termination; Count I(D): Price of Additional Features and Functions; Count I(E): Non-recurring Charges; Count I(F): End-User Surcharge; Count I(G): Price of Interim Number Portability; Count I(H): Price of Collocation; Count I(I): Price of Access to Poles, Ducts, Conduits and Rights of Way. Similarly, GTE has defaulted on certain claims within the remaining counts. These include in Count I(A), ¶¶96(c), (e), (f); Count I(B), ¶¶100, 100(b), 100(c), 100(e)-(g), 100(i), 102. The Court GRANTS summary judgment for the Defendants on these claims.

(b) The Hatfield Based Model or HAI Model[5]

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[5]The firm that developed prior versions of the Hatfield Model, Hatfield Associates, Inc., no longer performs telecommunications consulting. The staff of Hatfield Associates, Inc. who were actively involved in developing the Hatfield Model have formed a successor firm, HAI Consulting, Inc.("HAI"), which continues to improve and upgrade the Hatfield Model. The model is now named the HAI Model. HAI Model, Release 5.0a, Model Description (February 2, 1998), p. 1 n.1.

Initially, the Hatfield Model calculated the Total Service Long Run Incremental Cost for basic local telephone service. *Utilizing the "greenfield" methodology, this model assumed all* network facilities would be built without consideration of the location of existing wire centers. HAI later compared its model to a model developed by MCI, NYNEX, Sprint and US West called the Benchmark Cost Model and incorporated certain loop investment data. These adjustments replaced HAI's greenfield model with the "scorched node" methodology of assuming that network wire centers would remain in their current locations. In 1996, HAI further expanded the HAI Model to estimate the costs of UNEs based on forward-looking economic costs. HAI submitted its model to the FCC which the FCC placed into the record of CC-Docket No. 96-45 to assist it in determining the forward-looking economic costs of universal service. See HAI Model, Release 5.0a, Model Description (February 2, 1998), Appendix A, p.1. In its subsequent orders, the FCC adopted a methodology termed the "Total Element Long Run Incremental Cost" ("TELRIC") which is consistent with the methodology of the HAI Model. Both, AT&T and MCI relied on the HAI Model to calculate prices for unbundled network elements in cases pending before state commissions including Virginia's State Corporation Commission.

In addition to the HAI Model, the SCC considered two additional alternatives. GTE submitted a TELRIC model which utilized a Market-determined Efficient Component Pricing Rule ("M-ECPR") methodology. The SCC also considered its Staff model which was based on the HAI Model but offered certain modifications to account for perceived weaknesses in the HAI Model. The SCC found the evidence presented by advocates of each model insufficient to choose either and adopted its Staff's modified model. Consolidated Order, p. 10; Rec. 5438.

The Court reviews the SCC's decision under the arbitrary and capricious standard and finds no violation. According to its Consolidated Order, GTE failed to heed requests for access to its model. Consolidated Order, p.8; Rec. 5436. The parties and the Commission Staff sought "to determine the reasonableness or validity of its assumptions and inputs, or to run it with revised input data and assumptions." Id. at 9, Rec. 5437. Unable to do so, the model was labeled a "black box" because its operation and assumptions could not be tested or effectively challenged by others. Id. The Consolidated Order further indicates that the SCC considered the parties' respective criticisms before determining the applicable model. Id. at 10, Rec. 5438. Indeed, the meritorious criticisms of each proffered model and the limited record in the proceeding supported the emergence of the Staff model as "the only reasonable option presented for unbundled network elements." Id.

Both GTE and the defendants criticize the opposing party's cost studies. GTE further challenges the adoption of the Staff adjusted HAI model. GTE highlights certain "fatal flaws" based on the fill factors[6] and assert that the model violates the 1996 Act because it is not compensatory. GTE cites the SCC's failure to explain its reasons for not modifying the Staff based model as arbitrary and capricious. These criticisms and challenges are most relevant to the proceedings for developing a permanent rate.

Nonetheless, the SCC's decision to adopt the modified HAI model as presented by its Staff was not arbitrary and capricious. Section 252(b)(4)(c) imposed a ninety day deadline to resolve the unresolved issues pertaining to the unbundled network element and the interconnection prices. The Consolidated Order indicates due consideration of GTE and the defendants' criticism. The SCC

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[6] "Fill Factors" are the proportion of a telecommunications device which is actually in use.

notes, "[T]he models presented each have flaws, and there was limited time and opportunity for analysis and possible modification of the models by the parties, the Staff, and the Commission." Consolidated Order, p. 11; Rec. 5439. The SCC properly balanced the interests of the parties and the 1996 Act's time constraints when setting the interim prices.

GTE's criticisms of the HAI model may be presented to the SCC during the process for setting permanent rates. As the SCC explained, "Although, in the current proceeding, the Staff's proposed rates are based on outputs of the Hatfield [HAI] model, the Commission's decision herein *is not an approval of the Hatfield model for purposes of determining permanent rates.*" Consolidated Order, p. 11; Rec. 5439. The SCC has not foreclosed the application of other cost models provided GTE and all other parties "make their models readily available to the parties to operate and include Virginia-specific data to the extent practicable and appropriate." Id. In this regard, GTE's challenge is premature. The Court GRANTS summary judgment for the SCC on this claim.

However, the SCC did find as a matter of law that the M-ECPR is not consistent with § 252(d)(1) of the 1996 Act and the Court shall review this determination de novo. See Consolidated Order, p. 12; Rec. 5440. As discussed above, § 252(d)(1) directs rates for network elements and interconnection agreements based on cost and possibly including a reasonable profit. Besides its provision that costs be "determined without reference to a rate-of-return or other rate-based proceeding," section 252 places no qualifiers on the term "cost." However, the absence of a qualifier does not grant a license to include any cost the ILEC seeks to recover. Instead, relevant costs are those which are consistent with the goal of the 1996 Act to increase competition in local markets.

GTE's M-ECPR method is based on the sum of its TELRIC plus its opportunity costs, as constrained by market forces. GTE seeks "opportunity costs" to insulate it from market-based losses

while capturing all of its expected profits and revenues. As applied, this method can increase cost to the LEC.[7] The SCC properly notes, "Prices set at a market-determined level as envisioned by the M-ECPR method could actually result in over or under recovery of costs because the market-based price could be above or below GTE's cost." Consolidated Order, 12; Rec. 5440. Moreover, the FCC has explained "The existing retail prices used to calculate GTE's incremental opportunity costs under ECPR are not cost based." In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 3195 (1996)("Local Competition Order") at ¶ 709. Therefore, allowing opportunity costs impedes progress towards greater competition by sustaining GTE's monopoly revenue.

The Court agrees with the SCC and FINDS as a matter of law that the MECPR methodology violates 47 U.S.C. § 252(d)(1).

(c) Historical Costs

GTE argues that the forward-looking TELRIC model precludes recovery of historical costs because it is based on incremental costs.[8] According to GTE, this pricing methodology violates the

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[7]"Assume a 'monopoly input' with TELRIC of $3. Assume further that the remaining cost of retailing a service with that input is also $3, and that the current retail price is $10. In this setting, the M-ECPR price of the input is $7 ($3 for the TELRIC plus $4 for the opportunity cost). Thus an entrant can obtain input for $7." GTE's Post-Hearing Brief, p. 28. R. 3859. Excluding opportunity cost would result in a total cost of $6.00.

[8]AT&T offers a concise definition of "forward looking" costs and "historic costs."

> "Forward-looking" costs and "historic" cost are simply two different ways to estimate 'cost' of the same wires and equipment. The forward-looking approach is premised on the fact that the cost of providing facilities today is their replacement cost--the true economic cost that constrains rates in competitive markets--not what was spent in the past. The historic cost approach, by contrast, looks to the company's accounting books and is based on the level of expenditures (less depreciation). AT&T's Brief in Support of Its Motion for Summary Judgment, p. 12.

1996 Act because it is not based on all of GTE's costs. GTE considers historical costs, real costs, inasmuch as they are a cost of providing a particular service. Additionally, GTE interprets § 252(d) of the 1996 Act as requiring recovery of historical costs because Congress did not expressly act to limit or deny historical costs. GTE further supports this interpretation by reference to the provision allowing for a reasonable profit to argue that a profit could not be obtained without an accounting of all costs. Finally, GTE argues that disallowance of historical costs prevents it from recovering a fair rate of return to its investors.

This Court may not consider arguments not raised before the administrative agency involved. See Pleasant Valley Hosp. v. Shalala, 32 F.3d 67, 70 (4th Cir. 1994). As previously held, this Court's review is limited to the administrative record below. Order at 2, GTE South, Inc. v. Morrison et al, 97CV493, (December 17, 1997). As a matter of fact, the administrative record reveals that GTE advocated a forward-looking measure of cost before the SCC. "GTE's cost studies, by contrast, are firmly and reliably rooted in the realities of GTE's operations on a forward looking basis." GTE's Post -Hearing Brief on Cost and Pricing, p. 7; Rec. 3838; see also, id. at 10, Rec. 3840 ("GTE's cost study results are forward-looking. They represent, to the extent possible, the future costs expected to be incurred by GTE."); Pricing Order at 7-8; Rec. 5435-36 ("GTE argued that its cost model represented GTE's forward-looking costs, or Total Element Long Run Incremental Costs."). Based on these prior concessions, GTE has waived its right to argue for historical costs.

Nevertheless, § 252(d)(1)(A) is best read as not allowing historical costs. First, § 252(d)(1) does not provide for recovery of historical cost but excludes it. Costs shall be "determined without reference to a rate-of-return or other rate-based proceeding." § 252(d)(1)(A). Historical costs are

determined in a rate-of-return or other rate based proceeding. See Illinois Bell Telephone Co. v. F.C.C., 988 F.2d 1254, 1258-59 (D.C. Cir. 1993). Therefore, they are excluded by § 252(d)(1)(A). GTE argues that § 252(d)(1)(A) only limits the type of proceeding as opposed to excluding historical costs altogether. However, GTE has failed to offer a credible alternative for determining historical costs.

Next, GTE urges this Court to construe § 252(d)(1) in a manner which gives effect to all of its provisions as opposed to an interpretation which would render certain provisions superfluous. GTE's Opposition to Defendants' Motion for Summary Judgment, p. 13 (citing Pennsylvania Dep't of Public Welfare v. Davenport, 495 U.S. 552, 562 (1990)). While true, the Supreme Court has also recognized a court's duty to refrain from reading a phrase into a statute when Congress has left it out. Keene Corp. v. U.S., 508 U.S. 200, 208 (1993). Courts must recognize that Congress acts intentionally and purposely in the disparate inclusion or exclusion of particular language. See, Russello v. United States, 464 U.S. 16, 23 (1983). Although Congress defined cost as "actual capital cost" in § 254(d)(1), Congress did not offer such specificity with regard to "cost" as used in § 252(d)(1)(A). Having indicated its willingness to define or otherwise modify the term "cost," the Court declines to read into § 252(d)(1)(A), a term Congress has not explicitly included.[9]

GTE offers three additional misplaced arguments for including historical cost. First, GTE contends that the statute provides for a reasonable profit which logically could not occur unless all of GTE's cost were taken into consideration. Next, GTE relies on Iowa to support its claim that the

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[9]As early as 1944, Congress had notice that courts will not interpret "just and reasonable" as mandating the use of a specific cost method. See Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 602 (1943)("Under the statutory standard of 'just and reasonable' it is the result reached and not the method employed which is controlling.").

rates must reflect its "actual" costs and requires the historical cost approach. Third, GTE attempts to deduce the meaning of "cost" in § 251(d)(1) based on its use in the Rail Passenger Service Act ("RPSA").

The forward-looking cost methodology can provide GTE the opportunity to earn a "reasonable" profit because it includes a forward-looking cost of capital as well as the costs of purchasing, installing, maintaining and operating the necessary assets. See AT&T Motion for Summary Judgment, p. 24 (citing AT&T Arb. Ex. ATT/TLM-30 (Murray) at 13-14; R. 7753-54). The forward-looking cost of capital is equal to a normal profit which suffices for purposes of § 252(d)(1). See Local Competition Order ¶ 700. As the Seventh Circuit notes in MCI Communications Corp. v. American Tel. &Tel. Co., 708 F.2d 1081, 1117 (7th Cir. 1983), "long-run incremental cost has been approved as an economically relevant measure of average total cost." Historical costs are not relevant because they are "sunk", unavoidable and bear little relation to current pricing decisions. Id. at 1117.

GTE mistakenly relies on Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997) and National R.R. Passenger Corp. v. ICC, 610 F.2d 865, 872 (D.C. Cir. 1979)(discussing the Rail Passenger Service Act, 45 U.S.C. § 562 (a) (the "RPSA"). The Eight Circuit's decision in Iowa does not support GTE's claim for an award of "actual costs" based on the historical cost approach. The Eight Circuit declined to review the pricing rules on their merits, Iowa, 120 F.3d at 800. The circuit court vacated the FCC pricing rules on jurisdictional grounds. Id. Consequently, the underlying pricing methodology remains valid and instructive. GTE's reference to other portions of the opinion

is similarly unavailing."[10] Nothing in Iowa requires an historical cost approach. Similarly, the RPSA does not support GTE's position. It is not relevant in this context because interpretive inferences should be drawn from different sections in the same Act as opposed to different Acts. See Russello, 464 U.S. at 23. To the extent the RPSA parallels the 1996 Act, those similarities are second to interpretive inferences which may be drawn within the 1996 Act. As discussed above, Congress did not expressly define or modify cost in § 252(d)(1)(A) and the Court is under no obligation to read into the statute what Congress has left out.

Not only did GTE fail to argue for recovery of historical costs as it pertains to the cost of providing interconnection or network elements, the arguments it now presents to this Court are unavailing. Section 252(d)(1) is best read as not allowing historical cost. The Court GRANTS summary judgment for the SCC on this claim.

GTE'S TAKING CLAIM

According to GTE, the SCC's approval of the agreement effects an unconstitutional taking. Two elements of a ripe takings claim include: (1) the administrative agency has arrived at a final, definitive position regarding how it will apply the regulation at issue; and (2) the plaintiff has sought compensation through the procedures the State has provided. Williamson Co. Regional Planning v. Hamilton Bank, 473 U.S. 172, 191, 194 (1985). Neither element is present in the case at bar.

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[10]GTE attempts to justify an award of historical costs on the Eighth Circuit's statement, "We also agree with the petitioner's view that subsection 251(c)(3) implicitly requires unbundled access only to an incumbent LEC's existing network--not to a yet unbuilt superior one." Iowa, 120 F.3d at 813. GTE has offered this statement out of context. This statement occurs in the circuit court's discussion of the FCC's unbundling rules. The circuit court rejected the FCC rule which requires superior quality when requested because it was not supported by the language of the 1996 Act. Id. at 812-813. This statement offers no direction on the relevance of historical costs in pricing.

The SCC has only set interim rates and GTE has not sought just compensation through existing statutory mechanisms. Accordingly, the Court DISMISSES GTE's taking claim WITHOUT PREJUDICE.

THE EFFECT OF BINDING FCC REGULATIONS ON GTE'S NON-PRICING CLAIM

GTE challenges the Commission's determinations and the Interconnection Agreement on seven non-price operational issues which according to GTE violates sections 251 and 252 of the 1996 Act. This Court's October 22, 1997 Order dismissed without prejudice four of the seven claims which were not ripe for adjudication. The remaining three claims, now challenged on summary judgment, include: Count II(A)--Allowing "Rebundling" of Network Elements to Evade Resale Provisions; CountII(C)--Ordering GTE to Sell at Wholesale Prices Services Beyond the Scope of Section 251(c)(4); and Count II(E)--Unlawful Expansion of Duty to Provide Collocation. The Court shall consider each in turn.

(1) Allowing "Rebundling" of Network Elements to Evade Resale Provisions

According to GTE, the SCC's determinations impermissibly allow competing local exchange carriers ("CLECs") such as Cox, AT&T and MCI to evade the 1996 Act's pricing standards and other restrictions governing the purchase of retail services for resale. GTE propounds that these provisions violate sections 251(c)(4) and 252(d)(3) by allowing CLECs "to purchase all network elements necessary to provide completed telephone service on an unbundled basis and to "rebundle" them to provide completed local telephone service." Complaint ¶ 136. GTE challenges the Commission's determinations as arbitrary and capricious and unsupported by the record. Complaint ¶ 138.

This claim is not ripe for the Court's consideration because GTE did not pursue it before the SCC; therefore, the Interconnection Agreement does not address it. The Court DISMISSES Claim II(A) WITHOUT PREJUDICE.

Without deciding the merits of this claim, it is the Court's opinion that FCC regulations and federal law would bar GTE's claim. Pursuant to 47 CFR § 51.315(a), "[a]n incumbent LEC shall provide unbundled network elements in a manner that allows requesting telecommunications carriers to combine such network elements in order to provide a telecommunications service." 47 CFR § 51.315(a). Moreover, according to the FCC's Local Competition Order, carriers are not required to own facilities in order to gain access to unbundled elements. See Local Competition Order, CC Docket No. 96-98 at ¶ 330. Furthermore, in Iowa, the court considered and rejected a similar argument. The Eighth Circuit held that "a requesting carrier is entitled to gain access to all of the unbundled elements that, when combined by the requesting carrier, are sufficient to enable the requesting carrier to provide telecommunications services." Iowa, 120 F.3d at 815.

Had the Court reached the merits of this claim, it would be compelled to award summary judgment for the Defendants.

(2) Ordering GTE to Sell at Wholesale Prices Services Beyond the Scope of Section 251(c)(4)

GTE contends that SCC's determinations unlawfully expand the scope of GTE's duty to offer services at wholesale prices. According to GTE, § 251(c)(4) requires it to offer for resale at wholesale prices "only those telecommunications services that [it] provides at retail to subscribers who are not telecommunications carriers." Complaint ¶ 148 (internal quotations omitted). By imposing a duty to sell below-cost services, promotional services, individual case services, services

to the disabled, public and pay phone lines, GTE argues that the SCC has transcended the legitimate scope of §251(c). The Court reviews the legal scope of the SCC's actions de novo.

Given the FCC's Local Competition Order and the Eight Circuit's decision in Iowa, GTE's argument lacks merit. The FCC expressly "declined to limit the resale obligations with respect to certain services where the 1996 Act does not specifically do so." Local Competition Order at ¶ 956.[11] Moreover, the FCC's interpretation of §251(c)(4) and rulings contradict GTE's argument. Section 251(c)(4), according to the FCC, "makes no exception for promotional or discounted offerings, including contract and other customer specific offerings." Local Competition Order at ¶ 948. Additionally, "below cost services are subject to the wholesale rate obligation under section 251(c)(4)," Id. at ¶ 956. Finally, the FCC held "that the services independent public pay phone providers obtain from incumbent LECs . . . should be available at wholesale rates to telecommunications carriers." Id. at ¶ 876. The Eighth Circuit has upheld the FCC's jurisdiction to issue these rulings. Iowa, 120 F.3d at 819. The FCC Order and the Eighth Circuit's decision categorically reject GTE's argument to the contrary.

The Court FINDS that the SCC acted within the scope of § 251(c) and GRANTS summary judgment on its behalf.

(3) Unlawful Expansion of the Duty to Provide Collocation

GTE challenges the SCC's determinations for impermissibly allowing collocators to provide their own interconnection facilities if their collocating cages abut one another. See Complaint ¶ 157(d). According to GTE, this determination violates §251(c)(6) of the Act which allows an

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[11]The 1996 Act does not limit the resale obligations with respect to any of the services GTE has highlighted.

incumbent LEC to provide for "virtual collocation" where it has demonstrated that physical collocation is not practical. See id. at ¶ 155. GTE contends that the effect of the SCC determination amounts to a taking of its property within the meaning of the Fifth and the Fourteenth Amendments. GTE argues in favor of a narrow reading of §251(c)(6) in order to avoid an unauthorized taking of its property.

Notwithstanding GTE's argument, the SCC's determination is in accord with federal law. A binding FCC rule requires:

> an incumbent LEC [to] permit a collocating telecommunications carrier to interconnect its network with that of another collocating telecommunications carrier at the incumbent LEC's premises and to connect its collocated equipment of another telecommunications carrier within the same premises.

47 C.F.R. § 51.323(h). A narrow reading of the section would not comport with this binding FCC rule or the Eight Circuit's ruling upholding the rule. See Iowa, 120 F.3d at 818 & n.38.

Moreover, the Cox Order provides that GTE shall abut collocation facilities where "feasible and where space permits." Cox Order at ¶ 1 (Rec. 5453). This language does not mirror a taking in which the property owner has no control. Where collocation cages do directly abut one another, the Cox Order limits collocators right to provide their own interconnection facilities. Such connections are limited to "circumstances that do not adversely impact GTE's coordination and technical management of the collocation space." Cox Order at ¶ 1 (Rec. 5454-53).

The SCC properly applied federal law in its determination that these provisions promote competition while protecting GTE's interest. The Court GRANTS summary judgment for the SCC on this issue.

CONCLUSION

In conclusion, the Court GRANTS summary judgment for the SCC on all issues pending before this Court. There are no genuine issues as to material facts which would warrant proceeding to trial. The Court has applied the arbitrary and capricious standard to GTE's pricing claims and FINDS that the SCC articulated the basis for its decisions. The decisions are supported by substantial evidence in the Record. The SCC's decision to set interim prices for network elements and interconnection based on the forward-looking HAI model, as adjusted, was not arbitrary and capricious. Moreover, the SCC properly rejected GTE's cost study. The Court reviews de novo the SCC's determination that the MECPR pricing methodology violates the 1996 Act and FINDS that the MECPR pricing methodology does violate the 1996 Act as a matter of law. Furthermore, GTE is not entitled to historical costs because GTE failed to raise the matter before the SCC. Additionally, the Court FINDS that §251(d)(1) is best read to exclude historical costs. GTE's taking claim is NOT RIPE for adjudication. With regards to GTE's non-pricing claims, the Court DISMISSES Count II(A) WITHOUT PREJUDICE because GTE did not pursue this claim in the proceedings below. Binding FCC regulations warrant summary judgment for the SCC on the remaining non-pricing claims. The Court DIRECTS implementation of the Interconnection Agreement as approved by the SCC.

Let the Clerk send a copy of this Memorandum Opinion to all counsel of record.

And it is SO ORDERED.

James R. Spencer
UNITED STATES DISTRICT JUDGE

MAY 19 1998
DATE