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Decision 99-01-009 January 7, 1999

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Petition of PDO Communications, Inc. for Arbitration Pursuant to Section 252 of the Federal Telecommunications Act of 1996 to Establish an Interconnection Agreement with Pacific Bell.	Application 98-06-052 (Filed June 15, 1998)

O P I N I O N

I. Summary

By this decision and pursuant to Section 252 of the Telecommunications Act of 1996 we approve an interconnection agreement between PDO Communications, Inc. (PDO) and Pacific Bell. This agreement was filed with the Commission on December 8, 1998, pursuant to an Arbitrator's Report issued on November 16, 1998.

II. Procedural Background

PDO filed a Petition for Arbitration (Petition) on June 15, 1998 to institute an arbitration proceeding with Pacific Bell. This Petition was filed pursuant to § 252 of the Telecommunications Act of 1996 and Commission Resolution ALJ-174 (ALJ-174). On July 7, 1998, Pacific Bell filed a motion to reject the petition, contending that the petition had various procedural infirmities. These infirmities were resolved and the motion was denied by ALJ Ruling on August 11, 1998. On July 10, Pacific Bell filed its response to the petition along with a motion for leave to file portions of the response under seal. This motion was granted on August 3, 1998. On July 17, PDO and Pacific Bell filed a revised statement of unresolved issues as required by Rule 3.7 of ALJ-174, which notes

on an issue-by-issue basis where the parties have reached agreement subsequent to the filing of the Petition and where disagreement still exists. This revised statement of unresolved issues defines the universe of disputed issues for which arbitration is sought in this proceeding.

An initial arbitration meeting was held on July 31, 1998, pursuant to Rule 3.8 of ALJ-174. Although this initial arbitration meeting was held on short notice, insufficient for all but PDO and Pacific Bell to participate, no prejudice to other potential parties occurred. The initial arbitration meeting was solely concerned with the schedule for the proceeding, the opportunity for additional discovery and the nature of the record that would be utilized to resolve this proceeding. All parties on the larger service list utilized at the initial stages of an arbitration were given adequate notice of the adopted schedule and process and the opportunity to indicate their interest in participation in the proceeding.

A. Senate Bill 960 and Senate Bill 779

In an Administrative Law Judge's Ruling following the initial arbitration meeting, it was determined that the schedule and procedural elements mandated for arbitrations pursuant to the § 252 of the Telecommunications Act of 1996 are incompatible with the schedule and other procedural requirements imposed by Senate Bill (SB) 960 (Ch. 856, Stats. 1996). The requirements of the Telecommunications Act of 1996 require much faster processing of petitions for arbitration and shorter intervals between steps than does SB 960, but retains comparable opportunities for Commissioner involvement. For these reasons, while the purposes behind SB 960 are fully supported, arbitrations will necessarily be conducted under the requirements of the Telecommunications Act of 1996 and ALJ-174, rather than under the requirements established to implement SB 960.

This decision comes before the Commission subsequent to the effective date of SB 779 (Ch. 886, Stats. 1998). This bill, in addition to a variety of other provisions, requires that a Commission agenda item not meeting specified criteria must be served on the parties and made available for public review and comment for a minimum of 30 days before the Commission may vote on the matter. (Public Utilities (PU) Code § 311(g).) The Telecommunications Act of 1996 requires that agreements submitted by parties that have been arrived at as a result of an arbitration conducted pursuant to the Telecommunications Act of 1996 must be approved or rejected by the Commission within 30 days after the agreement is submitted. (§ 252(e)(4).) This establishes a conflict between the requirements of the Telecommunications Act of 1996 and SB 779.

Pursuant to Rule 81 of the Commission's Rules of Practice and Procedure, this qualifies as an "unforeseen emergency situation" meaning it is a matter "that requires action or a decision by the Commission more quickly than would be permitted if advance publication were made on the regular meeting agenda." It qualifies as such by involving "[d]eadlines for Commission action imposed by legislative bodies, courts, other administrative bodies or tribunals, the office of the Governor, or a legislator." (Rule 81(g).)

B. Schedule and Conduct of the Arbitration

Pursuant to the Telecommunications Act of 1996, § 252(b)(1), petitions for arbitrations must be filed between day 135 and day 160 after the initiation of negotiations between the parties. Once the arbitration petition is filed with the state commission, all issues are required to be resolved by the end of the 9th month following the initiation of negotiations. Pursuant to the

discussion in Resolution ALJ-168[1], the resolution of all issues is deemed to have occurred when the parties file an agreement with the Commission that conforms with the resolutions contained in the Final Arbitrator's Report. (Res. ALJ-168, § 3.11, at pp. 7-8.) In this proceeding the petition indicates that negotiations commenced on January 6, 1998, the petition was filed on the 160th day following the start of negotiations, which would have required all matters to be resolved by October 6, 1998.

A schedule that would accommodate this resolution date was discussed by the Arbitrator with the parties at the initial arbitration meeting on July 31, 1998. At the parties' suggestion, a schedule was developed and discussed that would allow the resolution of all issues to exceed the nine-month requirement. The Arbitrator made clear to the parties that such a variation from this requirement could only be considered if this Commission obtained explicit written waivers of this requirement and acceptance of the resulting revised schedule. The advantages of such a schedule extension would be to permit an opportunity for desired discovery by the parties, supplemental testimony addressing certain matters, a less severe briefing schedule and certain other benefits.

The Arbitrator determined that such a waiver should be permissible under the Telecommunications Act of 1996. The language setting forth the nine-month conclusion requirement is as follows:

> "The State Commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement

[1] ALJ-168 was an earlier Commission resolution establishing arbitration rules pursuant to Section 252 of the Telecommunications Act of 1996. ALJ-174 is the current version, but definitions in the earlier version are still generally applicable.

> subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section." (§ 252(b)(4)(C).)

In the event that this Commission "fails to act to carry out its responsibility under this section in any proceeding or other matter under this section" then the potential effect is for the Federal Communications Commission (FCC) "to issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice of such failure)...." (§ 252(e)(4).)

The intent of this provision is to protect the parties, particularly the petitioner, from the risk of a state commission failing to act in a timely fashion. In this arbitration, there is no question that the California Public Utilities Commission could and would resolve this matter within the imposed time limits. However, if the party for whom the protection is established wishes to knowingly, voluntarily and explicitly waive that protection for a reasonable purpose, such a waiver seems clearly permissible.

Subsequent to the initial arbitration meeting, the Arbitrator was informed that both PDO and Pacific Bell would prefer the expanded schedule. On August 14, 1998, both parties provided explicit written waivers of the nine-month time resolution requirement, noting their acceptance of the scheduled conclusion date and that such acceptance was with full knowledge of the time limit established in § 252 and was entered into voluntarily and at their own request.

During the initial arbitration meeting the parties also indicated that they might be willing to proceed without the need for hearings, i.e., this proceeding would be resolved based on written submissions. Testimony (and

other exhibits) would be received in written form subject to written objections. Three days were reserved for hearings if they proved necessary. Subsequently, the Arbitrator was informed that the parties wanted to proceed without hearings but wished to have an oral argument before the Arbitrator after the submission of briefs for the purpose of addressing any questions that might remain. This proposal was accepted by the Arbitrator with a schedule set for discovery, the distribution of supplemental testimony by both PDO and Pacific Bell, single concurrent briefs and oral argument. The oral argument was held on October 9, 1998 before both the Arbitrator and Commissioner Henry Duque, the Assigned Commissioner.

Dates for the conclusion of the proceeding were also set which, although they exceeded the nine-month requirement of the Telecommunications Act of 1996, maintained the milestone intervals required by ALJ-174 following the submission of briefs. In this fashion, the additional time beyond what would have otherwise been required to meet statutory deadlines, was solely that taken by the various activities of the parties -- discovery, supplemental testimony preparation and briefs.

A Draft Arbitrator's Report was filed and served on October 15, 1998. A Ruling was also issued on that date denying two motions by PDO requesting that additional materials be received into evidence in this proceeding. This denial was premised on the late submission of voluminous highly technical materials that could not be timely considered within the restrictions of an arbitration schedule and were not critical to the resolution of the disputes in this proceeding.

Comments on the Draft Arbitrator's Report were served on October 26, 1998 and filed on October 27, 1998. On November 2, 1998, PDO also

filed a motion for reconsideration of the ruling which denied their two motions requesting that additional materials be received into evidence.

The Final Arbitrator's Report was filed and served on November 16, 1998 and directed the parties to file their interconnection agreement within seven days. A request from PDO, representing that Pacific Bell concurred, requested a delay in submitting the agreement until December 4, 1998. The Arbitrator directed that the filing be delayed for four additional days, until December 8, 1998, in order to ensure that the Commission had two regularly scheduled Commission meetings within the thirty days authorized by the Telecommunications Act of 1996 for consideration of the filed interconnection agreement .

On December 9, 1998, an interconnection agreement which conformed to the Final Arbitrator's Report and which was executed by both PDO and Pacific Bell, was filed with the Commission. It was filed one day late due to the San Francisco city-wide power outage on December 8.

On various dates in December 1998, PDO engaged in *ex parte* communications with each of the Commissioner's offices, urging that a vote on the filed agreement be delayed from the scheduled December 17 Commission meeting premised on PDO's contentions of errors in the Final Arbitrator's Report and pending changes in or clarifications of FCC policy that could affect the perception of the proposed service. A number of letters from members of the California Legislature were also received urging a vote delay, and suggesting that a wider input should be sought prior to making a decision in this proceeding.

On December 10, 1998, each Commissioner also received an *ex parte* communication in the form of a letter from Pacific Bell summarizing their view that the Final Arbitrator's Report was correct and the reasons for that view.

On December 18, 1998, a document entitled "Motion of PDO Communications, Inc. to Reject Conformed Interconnection Agreement and for Remand" was filed with the Commission. In this pleading PDO requests that the filed agreement be rejected and that the Arbitrator further consider the matter. PDO makes several arguments for its request including its own erroneous citation to a standard for rejection of an agreement that is applicable to negotiated agreements, but not to those arrived at through arbitration as this one was. PDO also suggests that a great value would come from having broader input into the questions raised in the arbitration.

On December 23, 1998, a "Memorandum" in support of the PDO December 18 motion was filed by the High Speed Access Coalition. The "Memorandum" notes that its "organizing members" include Infoseek, InterVU, ISP Networks, IXS Net, and Mach One Communications. March One is also the parent of PDO.

III. Standard for Review

Pursuant to § 252(e)(1) an interconnection agreement adopted by negotiation or arbitration for operation in California must be submitted for approval to this Commission, which shall approve or reject the agreement, providing written findings as to any deficiencies. Grounds for rejection of an agreement reached as a result of arbitration conducted under § 252(b) are limited to the Commission finding that the agreement doesn't meet the requirements of § 251, including the regulations prescribed by the FCC pursuant to section 251, or doesn't meet the standards set forth in § 252(d), which relates to pricing standards.

The standards contained in § 251 relate to the obligations of local exchange carriers in responding to requests for negotiation and interconnection with carriers desiring access and interconnection. Among the duties identified are

those for interconnection, § 252(c)(2), and unbundled access, § 252(c)(3), which read as follows:

> "(2) Interconnection.—The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—
>
> (A) for the transmission and routing of telephone exchange service and exchange access;
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> (B) at any technically feasible point within the carrier's network;
>
> (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and
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> (D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.
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> (3) Unbundled access.—The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service."

Pursuant to § 252(e)(4), if the state commission does not act to approve or reject an agreement within 30 days after submission by the parties of an agreement adopted by arbitration, the agreement shall be deemed approved.

IV. Issues Presented for Arbitration

When initially filed, nearly 30 separate issues were presented as being in dispute. By the time the testimony was filed, several of these items had been resolved by the parties.

In many respects this arbitration concerns one primary issue around which others revolve. That issue is whether Pacific Bell as the incumbent local exchange

carrier (ILEC) can be compelled to make available as a separate unbundled network element a portion of the capacity of a local loop which Pacific Bell is currently using to provide voice communications or other services to its own end user/customer. PDO requests Pacific Bell to make available this portion of the existing local loop to allow PDO, by various connection methods, to provide a high-speed data service known as DSL or digital subscriber line, used for internet connection or other high-capacity data exchange purposes. In one interconnection method proposed, data and voice service would be able to be provided simultaneously. In the other interconnection method proposed, there would be a "temporal division" of the usage of the local loop with the data and voice service provided at separate times.

Pacific Bell is willing to provide PDO with its own loops to end users as unbundled network elements, but objects to having to share the loops it currently uses to provide service. It is also willing to provision the separate loops it would make available to PDO to accomplish the technical configurations necessary for PDO to provide DSL or other services to its own end users.

Beyond the question of whether Pacific Bell must, as an incumbent local exchange carrier, share capacity on existing local loops are an array of technical questions regarding the manner in which such sharing of a local loop would be accomplished. These include such questions as the specific hardware configurations that would be required to allow both Pacific Bell and PDO to establish and maintain their individual end user services, means to avoid interference of one service with the other, pricing issues related to both the purchase of a portion of a local loop capacity and the related hardware configurations, and contract/regulatory issues concerning the relationship of the end user to Pacific Bell and PDO and Pacific Bell and PDO to each other in the

event of an end user/customer default or dispute regarding the service of only one of the two providers sharing the loop.

Assuming one were to acknowledge the appropriateness of the physical connection arrangement, the pricing and regulatory/contract issues remain controversial.

First, PDO contends that the price PDO would pay Pacific Bell for the loop, defined as the total estimated long-run incremental cost or TELRIC of the loop, is zero. This is premised on PDO's contention that since Pacific Bell is already providing voice grade service on the same loop, the incremental cost of allowing PDO to provide data service on the loop is zero. PDO does not propose to share the cost of the loop.

Second, questions arise as to what happens to service on the loop if the end user/customer defaults in some fashion with respect to only one of the two carriers providing that customer service on the shared loop, e.g., failing to pay properly incurred charges to Pacific Bell while paying PDO. What obligations would exist? PDO proposed in its Petition for Arbitration and the Joint Statement of Unresolved Issues that under such a circumstance Pacific Bell remain obligated to maintain service on the line for PDO even if Pacific Bell received no revenue and even if Pacific Bell was no longer the end user's voice service provider. (Joint Statement at 5-6, referencing the interconnection agreement appended to its Petition for Arbitration, Appendix D at page 33.) PDO refers in its motion for reconsideration of the ruling denying admission of additional evidence to the fact that located somewhere within those materials that were not admitted is a data request from this past August that changes that position and agrees that "[PDO] would not be able to provide service to end user customer if Pacific disconnects that customer's POTS service, either temporarily or permanently, for non-payment." (PDO Motion of November 2, 1998 at 13.)

The Arbitrator resolved the questions regarding subloop unbundling against PDO and concluded that while PDO could purchase its own loops from Pacific Bell, it could not compel Pacific Bell to share the loop that Pacific Bell was itself using to provide service to its own voice customers.

The Arbitrator reached his conclusions based on an extensive review of the nature of unbundled network elements, whether subloop unbundling had been authorized as an element that could be unbundled and the pending proceedings at the FCC that are addressing such questions. Reference to the Final Arbitrator's Report is useful to understand these issues.

In the FCC's First Report and Order implementing the local competition provisions of the Telecommunications Act of 1996, the FCC adopted a regulation specifically on point. Section 51.309 (codified as 47 CFR 51.309) governs the use of unbundled network elements. That section states in relevant part:

> "(c) A telecommunications carrier purchasing access to an unbundled network facility is entitled to exclusive use of that facility for a period of time, or when purchasing access to a feature, function, or capability of a facility, a telecommunications carrier is entitled to use of that feature, function or capability for a period of time. A telecommunications carrier's purchase of access to an unbundled network element does not relieve the incumbent LEC of the duty to maintain, repair, or replace the unbundled network element."[2]

There is no dispute that a local loop is itself an unbundled network element. (47 CFR 51.319(a).)

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[2] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket Nos. 96-98 and 95-185, FCC 96-325 (Released August 8, 1996) (hereafter the First Report and Order), Appendix B "Final Rules" at B-17.

The rationale given by the FCC in its discussion in the First Report and Order concerning the reasons for giving a carrier exclusive use of a local loop provides a great deal of light on the subject. The FCC stated the following:

> "We decline to define a loop element in functional terms, rather than in terms of the facility itself. Some parties advocate defining a loop element as merely a functional piece of a shared facility, similar to capacity purchased on a shared transport trunk. According to these parties, this definition would enable an IXC [interexchange carrier] to purchase a loop element solely for purposes of providing interexchange service. While such a definition, based on the types of traffic provided over a facility, may allow for the separation of costs for a facility dedicated to one end user, we conclude that such treatment is inappropriate. Giving competing providers exclusive control over network facilities dedicated to particular end users provides such carriers the maximum flexibility to offer new services to such end users. In contrast, a definition of a loop element that allows simultaneous access to the loop facility would preclude the provision of certain services in favor of others. For example, carriers wishing to provide solely voice-grade service over a loop would preclude another carrier's provision of a digital service, such as ISDN or ADSL, over that same loop. We note that these two types of services could be provided by different carriers over, for example, separate two wire loop elements to the same end user."[3]

Pacific Bell has relied upon this commentary in support of its position. PDO provided an interpretation of this FCC discussion that contended that it related solely to the exclusive rights of a competitive local carrier to a local loop but that such exclusivity did not apply to the loops utilized by an incumbent local exchange carrier. At the oral argument PDO went further and seemingly

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[3] First Report and Order, ¶ 385, page 186.

contended that the sole reason the FCC made its cautionary statement about loop sharing was a then erroneous assumption that from a technical standpoint a loop could not be shared by multiple service providers since voice and data services would interfere with each other.

The Arbitrator found PDO's interpretation highly strained. He concluded that the primary point of the FCC's concern appears to be the whole array of constraints that might exist on one carrier from sharing a loop with another. The policy reasons noted by the FCC for maintaining exclusive use – the ability of a carrier to offer an array of services without constraint by a sharing carrier and the potential incompatibility of various voice and data services – appear as applicable to the loops operated by the incumbent local exchange carrier as those leased by a competitive local carrier.

The Arbitrator found that any potential opportunity for PDO's interpretation was lost, however, when the FCC issued its notice of proposed rulemaking (NPRM) on advanced technologies on August 6, 1998. The FCC called for comment on "whether two different service providers should be allowed to offer services over the same loop," exactly the proposal of PDO. The clear import of the NPRM is that different service providers are <u>not</u> currently permitted to offer services over the same loop. The entire question, as framed by the FCC is as follows:

> "We also seek comment on whether two different service providers should be allowed to offer services over the same loop, with each provider utilizing different frequencies to transport voice or data over that loop. xDSL technology, for example, separates a single loop into a POTS channel and a data channel, and can carry both POTS and data traffic over the loop simultaneously. A competitive LEC may want to provide only high speed data service, without voice service, over an unbundled loop. Should the competitive LEC have the right to put a high frequency signal on the same loop as

> the incumbent LEC's voice signal? If a competitive LEC takes an entire loop, could the competitive LEC sell the voice channel back to the incumbent LEC or to another carrier? Should the competitive LEC be allowed to lease the loop for data services and resell the voice service of the incumbent LEC? Commenters should address with particularity the advantages and disadvantages of these various possibilities, and what practical considerations would arise in each situation. For example, which entity would manage the frequency division multiplexing equipment if two carriers are offering services over the same loop? We tentatively conclude that any voice product that the incumbent LEC provides to its advanced services affiliate would have to be made available to competitive LECs on the same terms and conditions. For example if the advanced services affiliate leases the loop and resells the incumbent's voice service, the competitive LEC must be allowed to do likewise."[4]

The comment period on this NPRM called for opening comments on September 21, 1998 and reply comments on October 13, 1998. According to the Arbitrator, a decision is not anticipated for several months.

PDO's response to the statement in this NPRM was to contend at the oral argument that this was merely an effort by the FCC to clarify the First Report and Order which, according to PDO, did not prohibit what PDO proposes. The Arbitrator expressed difficulty in seeing how an FCC question asking whether what PDO proposes "should be allowed," coupled with a prior unambiguous statement of the policy reasons why it shouldn't be allowed, should now be interpreted, according to PDO as: "And so, as far as we're concerned, the FCC is

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[4] In the Matters of Deployment of Wireline Services Offering Advances Telecommunications Capability, et al., CC Docket No. 98-147, et al., Memorandum Opinion and Order, and Notice of Proposed Rulemaking, FCC 98-188 (Released August 7, 1998) (hereafter NPRM), ¶ 162, page 73.

acting to clarify its first report and order, which we think did not prohibit what we're asking for here." (Oral Argument Tr. 13:14-16.)

In its comments to the Draft Arbitrator's Report, PDO contends that there is no intention on the part of the FCC to constrain shared access to local loops. PDO states:

> "The *First Report and Order* did *not* prohibit shared loop access by means of spectrum, or frequency, division of the line. First, in defining the local loop UNE as a transmission facility between the customer premises and the central office, the FCC ruled that 'the ability to offer various digital loop functions in competition with incumbent LECs may be particularly beneficial to small entities by allowing them to serve niche markets,'" (emphasis in original) citing ¶380 of the First Report and Order.

PDO cites this to demonstrate that to the extent the FCC was imposing restraints on carrier activity, those restraints were being imposed on the incumbent local exchange carriers and not the CLCs. However, the cited section reinforces the position that the local loop is the unbundled network element and no where is there any indication that the local loop can be further broken down to allow a sharing of that loop by multiple carriers – whether on a spectrum or temporal basis. The cited section clearly appears to support the proposition that making local loops available to the competitive carriers will be the important step that ensures their ability to compete.

In its comments on the Draft Arbitrator's Report, PDO argued that the FCC rules require "features, functions, and capabilities" of a local loop as network elements that must be unbundled by an incumbent local exchange carrier. (PDO Comments at 5-6.) For example, PDO states:

> "Second, Section 51.5 of the FCC's rules includes the 'features, functions, and capabilities that are provided by means of [loop] facilities' in the definition of 'network element,'" citing 47

> C.F.R. § 51.5 (bracketed used of loop in PDO's text). (PDO Comments at 5.)

However, as the Arbitrator noted in the Final Arbitrator's Report, this is simply wrong. The term loop doesn't appear anywhere in this section. In fact, what that section says is:

> "Network element. A 'network element' is a facility or equipment used in the provision of a telecommunications service. Such term also includes but is not limited to, features, functions, and capabilities that are provided by means of such facility or equipment, including but not limited to, 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 C.F.R. § 51.5, definitions.)

Thus the particular types of elements to which the "features, functions, and capabilities" language refers is not local loops, but those types of elements for which it clearly makes sense for a CLC to only purchase the components that they need -- such as information services or switch capabilities.

In numerous provisions of the First Report and Order, the FCC makes it clear that it is has considered the question of whether unbundling "components" of a local loop further is appropriate and, at least as of this time, rejects such suggestions. (See the sections noted previously as well as the discussion, generally in the First Report and Order, ¶377 et seq.) The local loop, as a whole, is defined as an "unbundled network element" in 47 C.F.R. §51.319 (a). As noted earlier in this discussion the FCC clearly stated "We decline to define a loop element in functional terms, rather than in terms of the facility itself." (First Report and Order, ¶385.)

What is of as much significance, however, particularly in light of the various *ex parte* communications that have occurred, the Legislative inquiries

which we have received and the recent pleading of PDO asking us to reject the conformed agreement, is what the Arbitrator explicitly did not determine.

The Arbitrator did not determine that this Commission could not establish unbundled network elements beyond those identified by the FCC. The Arbitrator determined that he did not want to make such a major change in the confines of an arbitration proceeding. He stated: "The Draft [Arbitrator's] Report and this Final [Arbitrator's] Report endeavor to make rational decisions based on the best information available. The Commission may wish to consider in the context of a broader-based proceeding, with full opportunity for all interested parties to participate, whether loop sharing under various circumstances may be appropriate." (Final Arbitrator's Report at 16.)

The Arbitrator even noted that the FCC may alter its present position.

In PDO's motion to reject the conformed agreement, PDO essentially requests the broader examination the Arbitrator also proposes, but suggests that it take place in this arbitration. PDO states: "While the Arbitrator suggests such participation in the context of a broader-based proceeding, that suggestion is unnecessary. The issue of line sharing is properly before the Commission in this proceeding and because consumers and carriers have a direct interest in the matter, they must be given ample opportunity to be heard at this time and not some unspecified time in the future." (PDO Motion of 12/18/98 at 4.) Similarly, PDO states: "The Commission has the issue of line sharing squarely before it and, once it has enough information in the record (including possible FCC opinion) and has provided further opportunity for public comment, it should decide the matter expeditiously." (Id. at 7.)

PDO misunderstands the nature of arbitrations under § 252 of the Telecommunications Act of 1996. Arbitrations are by their mandated schedules expeditious proceedings intended to resolve the limited issues identified by the

parties. Participation in arbitration conferences and hearings is strictly limited to the parties that were negotiating an agreement pursuant to §§ 251 and 252 of the Telecommunications Act of 1996 (Res. ALJ-174, Rule 3.15) although members of the public are welcome to attend arbitration conferences and hearings unless they have been closed as the result of a properly based request. (Id., Rule 3.16.) While there is provision for comment of a limited nature in the case of tendered negotiated agreements (Id., Rule 4.3.2), there is no provision for the type of broad based public involvement in an arbitration as suggested by PDO.

Rather, as has been done in every arbitration considered by this Commission to date, provision is made for all agreements reached through arbitration to be subject to modification in the event the Commission resolves a related matter in one of the broader proceedings addressing telecommunications issues. In these proceeding wide-spread input from all interests is not only permissible, but strongly encouraged.

We believe the Arbitrator has reached a rational and thoughtful conclusion. Authorizing sub-loop unbundling would represent a major change in the consideration of what constitutes an unbundled network element. It may be that such a change will be appropriate. However, it is an issue that should receive careful consideration. While arbitrations are generally non-precedential in terms of being binding on the Commission in subsequent decisions, they do constitute precedents in the market place by a provision in the Telecommunications Act of 1996 that requires a local exchange carrier to "make available any interconnection, service, or network element provided under an agreement approved under this section [§ 252] to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." (See § 252(i).)

We will ask the Telecommunications Managing Commissioner to determine in which of our various telecommunications restructuring proceedings this matter should be considered in order to address it in the most timely and effective manner. Based on the outcome of that consideration we invite PDO and/or Pacific Bell to petition to reopen this arbitration proceeding to seek modification to their agreement or utilize the modification provisions of the agreement itself. They are also invited to seek such modification when the FCC concludes its on-going examination of the issue of sub-loop unbundling, if it determines that such unbundled network elements necessarily include sub-loop unbundling.

Until such time as either the FCC or this Commission has resolved this issue, we endorse the Arbitrator's determination that sub-loop unbundling will not be authorized in this proceeding at this time.

Correspondingly, the motion of PDO to reject the conformed interconnection agreement and remand the matter to the Arbitrator is denied.

This agreement as filed by the parties conforms to the requirements of the Telecommunications Act of 1996 and is therefore approved.

Findings of Fact

1. The petition for arbitration was filed on June 15, 1998.
2. A motion to reject the petition was filed by Pacific Bell on July 7, 1998, based on procedural infirmities and was denied by an ALJ Ruling on August 11, 1998, following resolution of the infirmities.
3. Pacific Bell filed its response to the petition on July 11, 1998.
4. A revised statement of unresolved issues was filed on July 17, 1998.
5. An initial arbitration meeting was held on July 31, 1998.

6. The Telecommunications Act of 1996 requires matters submitted for arbitration to be concluded within nine months after the initiation of negotiations.

7. The Telecommunications Act of 1996 requires the Commission to approve or reject an interconnection agreement arrived at through arbitration within 30 days after the interconnection agreement is filed.

8. The parties commenced negotiations on January 6, 1998 and the petition for arbitration was filed on the 160th day following the start of negotiations.

9. The Commission was prepared to conclude this arbitration within the nine month time limit established by the Telecommunications Act of 1996.

10. On August 14, 1998, PDO and Pacific Bell provided explicit written waivers of the nine month time resolution requirement, noting their acceptance of the scheduled conclusion date and that such acceptance was with full knowledge of the time limit established in § 252(b)(4)(c) and was entered into voluntarily and at their own request.

11. The parties determined and advised the Arbitrator that they wanted to proceed without hearings but wished to have a final oral argument after the submission of briefs.

12. Oral argument was held on October 9, 1998 before both the Arbitrator and Commissioner Henry Duque.

13. A Draft Arbitrator's Report was filed and served on October 15, 1998.

14. Comments on the Draft Arbitrator's Report were served on October 26, 1998 and filed on October 27, 1998.

15. The Final Arbitrator's Report was filed and served on November 16, 1998 and directed the parties to file their interconnection agreement within seven days.

16. At the parties request and in consultation with the Arbitrator, a delay was granted for the filing of the interconnection agreement to December 8, 1998.

17. On December 9, 1998, an interconnection agreement which conformed to the Final Arbitrator's Report and which was executed by both PDO and Pacific Bell, was filed with the Commission.

18. On various dates in December 1998, PDO engaged in *ex parte* communications with each of the Commissioners' offices urging that a vote on the filed agreement be delayed from the scheduled December 17 Commission meeting, premised on alleged errors in the Final Arbitrator's Report and pending changes in FCC policies.

19. On December 10, 1998 each Commissioner also received an *ex parte* communication in the form of a letter from Pacific Bell summarizing their view that the Final Arbitrator's Report was correct.

20. On December 18, 1998, PDO filed a motion to reject the conformed interconnection agreement and for remand in which PDO requested that the filed agreement be rejected and that the Arbitrator reconsider the matter; PDO asserts there would be value in having a broader opportunity for public input on the issues of this proceeding.

21. The primary disputed issues in this arbitration is whether Pacific Bell as the incumbent local exchange carrier can be compelled to make available as a separate unbundled network element a portion of the capacity of a local loop which Pacific bell is currently using to provide voice communications or other services to its own end user/customer, generally referred to as sub-loop unbundling.

22. The FCC issued a Notice of Proposed Rulemaking on August 6, 1998 that requests comments on whether two different service providers should be allowed to offer services over the same loop.

23. The Arbitrator did not determine that this Commission could not establish unbundled network elements beyond those identified by the FCC but determined that he did not want to make such a major change in the confines of an arbitration proceeding.

24. The Arbitrator concluded that the Commission may wish to consider in the context of a broader-based proceeding, with full opportunity for all interested parties to participate, whether loop sharing under various circumstances may be appropriate.

25. Authorizing sub-loop unbundling would represent a major change in the consideration of what constitutes an unbundled network element.

Conclusions of Law

1. The short notice provided for the initial arbitration meeting did not prejudice PDO, Pacific Bell or any member of the public since PDO and Pacific Bell agreed to the date, it was solely concerned with procedural matters and other potentially interested parties were given adequate notice of the adopted schedule and procedure.

2. Arbitrations are conducted under the schedule requirements of § 252 of the Telecommunications Act of 1996, which generally requires faster processing times than required by SB 960 or SB 779.

3. This matter comes before the Commission as an unforeseen emergency situation pursuant to Rule 81 due to the conflict between the agenda schedule requirements of PU Code § 311(g) and those of § 252(e)(4) of the Telecommunications Act of 1996.

4. Waiver of the nine-month time limit for concluding arbitrations under the Telecommunications Act of 1996 is permissible if approved by the party for whom the time limit protection is provided – the petitioning party – and if done voluntarily and with full knowledge of the consequences of such waiver.

5. Section 252(e)(2)(A)(ii) of the Telecommunications Act of 1996, cited by PDO as a standard for measure of the agreement filed in this proceeding, is set out as a standard applicable to agreements reached through negotiation and not through arbitration.

6. Grounds for rejection of an agreement reached as a result of arbitration conducted under § 252(b) of the Telecommunications Act of 1996 are limited to the Commission finding that the agreement doesn't meet the requirements of § 251, including the regulations prescribed by the FCC pursuant to section 251, or doesn't meet the standards set forth in § 252(d), which relates to pricing standards.

7. Arbitrations are by their mandated schedules expeditious proceedings intended to resolve the limited issues identified by the parties.

8. Participation in arbitration conferences and hearings is strictly limited to the parties that were negotiating and agreement pursuant to §§ 251 and 252 of the Telecommunications Act of 1996.

9. There is no provision in an arbitration for the type of broad based public involvement in an arbitration as suggested by PDO.

10. Agreements reached through arbitration are subject to modification in the event the Commission resolves a related matter on an generic basis.

11. The Telecommunications Act of 1996 requires a local exchange carrier to make available any interconnection, service, or network element provided under an agreement approved under § 252 to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

12. The Telecommunications Managing Commissioner should determine in which of our telecommunications restructuring proceedings the question of

sub-loop unbundling should be considered in order to address it in the most timely and effective manner.

13. PDO and/or Pacific Bell should be authorized and encouraged to seek modification to the agreement based on either the outcome of our generic proceeding which addresses sub-loop unbundling or in the event the FCC concludes its on-going examination of the issue of sub-loop unbundling and determines that unbundled network elements necessarily include sub-loop unbundling.

14. PDO's December 18, 1998 motion to reject the interconnection agreement which it and Pacific Bell executed and filed on December 8, 1998 should be denied.

15. The executed agreement filed by the PDO and Pacific Bell on December 8, 1998 conforms to the requirements of the Telecommunications Act of 1996 and should be approved.

ORDER

1. The December 18, 1998 motion of PDO Communications, Inc. to reject the December 8, 1998 interconnection agreement is denied.

2. The fully executed arbitrated interconnection agreement filed on December 9, 1998, in response to the Final Arbitrator's Report dated November 16, 1998, between PDO Communications, Inc. and Pacific Bell is approved pursuant to the requirement of the Telecommunications Act of 1996, and effective as of the date of this order.

3. The parties shall within 10 days provide to the Director of the Telecommunications Division a version of the executed agreement in electronic form in hyper text markup language format.

4. This order is effective today.

Application 98-06-052 is closed.

Dated January 7, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners

We will file a concurring opinion.

/s/ HENRY M. DUQUE
Commissioner

/s/ RICHARD A. BILAS
Commissioner

Commissioners Bilas and Duque, concurring:

We concur with the action taken in today's decision to decline to order Pacific to share its loops with PDO for free while ordering Pacific to meet all of PDO's request for loop conditioning. This result, reached by the arbitrator, is the only one possible with the record now before us. We file this concurrence because of our desire to note the limit that the Commission has confronted in this proceeding.

Our decision resolves an important matter that affects California's information infrastructure. PDO has a vision of offering its service to customers over the same lines that Pacific now uses to provide its customers with voice services. This seems like a great idea, and PDO appears to have a marketable product. If this were the computer industry, within a month PDO's service would be in the market – either through a strategic alliance with another company; or through the purchase of PDO by a major company that can overcome the obstacles that delay bringing such a service to market.

The issues in this proceeding, however, fall at the juncture of the fast moving computer industry and the slow moving utility industry. As Commissioners serving on the Public Utilities Commission, we must decide telecommunications issues based on law and facts, not on our beliefs in the promise of a new technology. What are the law and facts in this particular case? Clearly, neither Federal law nor FCC regulation require sub-loop unbundling. FCC orders, which do not preclude states from requiring sub-loop unbundling, cast doubt on the wisdom of such a policy. The FCC stresses that granting a single company full and exclusive use of a facility provides the serving carrier maximum flexibility to offer new services. Moreover, the FCC has an open docket on this matter, and has hesitated to order sub-loop unbundling. To our knowledge, no state has taken the step of ordering such unbundling.

The arbitrator's report, in addition to its analysis of the law, lists a host of technical and marketing problems that the joint provision of DSL and voice service over a single loop through spectrum or temporal division would raise. Suppose a customer decides not to pay Pacific Bell for its voice service, can Pacific Bell disconnect the line thereby disrupting the data service? Will signal interference arise? If interference arises, how should it be resolved?

The request of PDO shows the real limits that constrain this Commission. Spectrum or temporal sharing of the local loop appear to be effective ways of providing data services at high speeds over existing copper wires. PDO appears to have an interesting and promising technology. It would be good to give it a try. Nonetheless, the uncertainties surrounding PDO's proposal are profound: Will it interfere with voice services? Will the provision to PDO of free access to Pacific's loops harm other carriers? The answers to these questions are not clear. While two companies working together might solve these issues, these two companies, linked only by litigation, have not produced a record that enables us to order sub-loop unbundling. Moreover, the market for this

advanced data service is clearly a national market. Action by California would be inferior to national action by the FCC.

Perhaps legislative action that fashions a plan that benefits everyone or federal action to create a national policy offer the best ways to resolve the issues surrounding sub-loop unbundling. Such legislation or federal action, however, is lacking for this issue is far too new.

In this situation, the decision offers the only other routes that could lead to sub-loop unbundling: a quick revisiting by this Commission should the FCC act; or the opportunity for a wider proceeding involving all facilities-based carriers in California so that the implications of this action are fully assessed before it is ordered. We lament that this is all we can do at this time concerning these issues.

Richard A. Bilas
President

Henry M. Duque
Commissioner

January 7, 1999
San Francisco, California

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Richard A. Bilas
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January 7, 1999
San Francisco, California