

Decision 00-03-046 March 16, 2000

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of the Petition of AT&T Communications of California, Inc., for Arbitration Pursuant to Section 252 of the Federal Telecommunications Act of 1996 to Establish an Interconnection Agreement with GTE California, Incorporated.

Application 96-08-041  
(Filed August 19, 1996)

In the Matter of the Petition of MCI Telecommunications Corporation for Arbitration Pursuant to 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Pacific Bell.

Application 96-08-068  
(Filed August 30, 1996)

In the Matter of the Petition of MCI Telecommunications Corporation for Arbitration Pursuant to 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with GTE California, Incorporated.

Application 96-09-012  
(Filed September 19, 1996)

**O P I N I O N**

**Summary**

This decision adopts an all-party settlement agreement submitted by AT&T Communications of California, Inc. (AT&T), GTE California Incorporated (GTE), and MCI WorldCom, Inc. (MWCOM). The adopted agreement resolves the following two issues remanded to the Commission by the U. S. District Court for the Northern District of California ("the Court"): (i) Whether AT&T's remote

switching modules (RSMs)<sup>1</sup> collocated in GTE's central offices are actually used for interconnection or access to unbundled network elements (UNEs); and (ii) whether MWCOT's RSMs collocated in GTE's central offices are "necessary" for interconnection or access to UNEs as defined by the Federal Communications Commission (FCC).<sup>2</sup>

### **Procedural Background**

On August 19, 1996, AT&T filed Application (A.) 96-08-041 for arbitration with respect to a proposed interconnection agreement with GTE. On September 19, 1996, MWCOT filed A.96-09-012 for arbitration with respect to a proposed interconnection agreement with GTE. The Commission conducted the arbitrations in accordance with § 252 of the Telecommunications Act of 1996 ("the Act"). In Decision (D.) 97-01-022, the Commission adopted an interconnection agreement between AT&T and GTE. In D.97-01-045, the Commission adopted an interconnection agreement between MWCOT and GTE.

The parties to A.96-08-041 and A.96-09-012 filed complaints and cross-complaints with the Court seeking to overturn portions of D.97-01-022 and D.97-01-045. On September 29, 1998, the Court remanded to the Commission the following two issues: (i) whether AT&T's RSMs collocated in GTE's central offices are actually used for interconnection or access to UNEs, and (ii) whether

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<sup>1</sup> RSMs are switches that have no connection to the network except through a host switch. The host switch typically provides most processing and control functions for the remote switch.

<sup>2</sup> The Court also remanded to the Commission an issue regarding Customer Proprietary Network Information (CPNI). This issue is currently being addressed by the Commission.

MWCOM's RSMs collocated in GTE's central offices are "necessary" for interconnection or access to UNEs as defined by the FCC.<sup>3</sup>

In D.99-07-032, the Commission reopened and consolidated A.96-08-041 and A.96-09-012 for the purpose of deciding the RSM issues remanded by the Court.<sup>4</sup> Parties filed opening comments on September 30, 1999, and reply comments on October 12, 1999. After comments were filed, the parties informed assigned Administrative Law Judge (ALJ) Kenney that there was no need for a prehearing conference.

On January 6, 2000, the assigned ALJ issued a ruling that (i) instructed the parties to file written testimony on the RSM issues, and (ii) set an evidentiary hearing for the week of February 14, 2000. On February 3, 2000, the parties submitted a settlement agreement that purported to resolve the RSM issues remanded by the Court.

### **Regulatory Background**

Section 251(c)(6) of the Act requires incumbent local exchange carriers (ILECs) to allow competitors to physically collocate equipment on the ILEC's premises if the equipment is "necessary" for interconnection or access to UNEs. On August 8, 1996, the FCC released its First Collocation Order<sup>5</sup> in which the FCC

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<sup>3</sup> Order Regarding Parties' Cross Motions for Summary Judgement, [MWCOM], et al., v. Pacific Bell, et al., No. C 97-0670 SI; [GTE], v. P. Gregory Conlon, [AT&T], et al., C 97-1756 SI; and [GTE], v. P. Gregory Conlon, [MWCOM], et al., C 97-1757 SI; filed Sept. 29, 1998, U.S. Dist. LEXIS 17556.

<sup>4</sup> D.99-09-012 also reopened A.96-08-068 and consolidated this proceeding with A.96-08-041 and A.96-09-012 for the purpose of deciding the CPNI issue remanded by the Court.

<sup>5</sup> *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order*, CC Docket Nos. 96-98 and 95-185, FCC No. 96-325.

interpreted § 251(c)(6) to mean that equipment is "necessary" for interconnection or access to UNEs if the equipment is "used or useful" for this purpose.<sup>6</sup>

In D.97-01-022, the Commission held that AT&T may collocate RSMs in GTE's central offices so long as the collocated RSMs are capable of being used for interconnection. In D.97-01-045, the Commission held that MWCOM may not collocate RSMs since GTE had demonstrated during the arbitration that RSMs are not required for interconnection or access to UNEs.

The parties appealed the Commission's decisions regarding the collocation of RSMs. In its decision, the Court found that the Commission had failed to determine (i) if AT&T's RSMs are actually used for interconnection or access to UNEs, and (ii) if MWCOM's RSMs are "necessary" for interconnection or access to UNEs as defined by the FCC. The Court then remanded these two issues to the Commission.

On March 31, 1999, the FCC released its Second Collocation Order<sup>7</sup> in which the FCC took a number of actions that are relevant to this proceeding. First, the FCC held that RSMs are "used or useful" for interconnection and access to UNEs. Second, the FCC concluded that because RSMs are used or useful for interconnection and access to UNEs, they are also "necessary" for this purpose. Third, the FCC ruled that because RSMs are "necessary," Section 251(c)(6) of the Act requires ILECs to allow competitors to physically collocate RSMs.<sup>8</sup> Finally,

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<sup>6</sup> Ibid., ¶ 579.

<sup>7</sup> *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability, First Report and Order and Further Notice of Proposed Rulemaking*, CC Docket 98-127, FCC No. 99-48.

<sup>8</sup> We have doubts about the FCC's determination that RSMs are "necessary" for interconnection and access to UNEs pursuant to § 251(c)(6) of the Act because RSMs are "used or useful" for this purpose. Several U.S. District Courts have found that the

(Footnote continued on next page.)

the FCC ruled that ILECs must allow competitors to use all the capabilities of their collocated RSMs.<sup>9</sup>

Following the issuance of the FCC's Second Collocation Order, MWCOM petitioned the Court to reconsider its earlier decision to remand the issue of whether RSMs are "necessary" for interconnection or access to UNEs. According to MWCOM, the FCC's Second Collocation Order rendered this issue moot. On October 19, 1999, the Court ruled that while the FCC's Second Collocation Order may simplify the Commission's resolution of the issue remanded by the Court, the Court nonetheless considered it "appropriate for the CPUC to ascertain whether [MWCOM's] RSMs will be actually used and are necessary, as defined by the FCC, for use at GTE's premises."

### **The Settlement Agreement**

On February 3, 2000, AT&T, GTE, and MWCOM jointly filed a settlement agreement. The salient provisions of the settlement agreement are as follows. First, the settlement states that "RSMs are actually used or would be used for interconnection or access to [UNEs] when collocated by AT&T or MWCOM in a GTE central office." Second, the settlement allows AT&T and MWCOM "to collocate and use all the features and functionalities of RSMs." Third, the settlement states that if a court of competent jurisdiction modifies or rejects the "used or useful" standard adopted by the FCC, then GTE may seek to (i) remove previously collocated RSMs, and (ii) challenge the use of all the features and

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Act does not require ILECs to allow physical collocation of RSMs that are "used or useful," but not "necessary," for interconnection or access to UNEs. (See 46 F. Supp. 2d 1004; 46 F. Supp. 2d 1068; 55 F. Supp. 2d 968; and 41 F. Supp.2d 1157.)

<sup>9</sup> Ibid., ¶¶ 28-31.

functionalities of collocated RSMs.<sup>10</sup> Finally, the settlement states that it resolves the RSM issues remanded by the Court.

### **Discussion**

The two RSM issues remanded by the Court are (i) whether AT&T's RSMs collocated in GTE's central offices are actually used for interconnection or access to UNEs, and (ii) whether MWCOT's RSMs collocated in GTE's central offices are "necessary" for interconnection or access to UNEs as defined by the FCC. The task before us is to decide if the all-party settlement agreement submitted by AT&T, GTE, and MWCOT resolves the RSM issues remanded by the Court.

We have carefully reviewed the all-party settlement agreement. Based on this review, we find that the settlement resolves the RSM issues remanded by the Court. We also find that the settlement agreement satisfies our requirements pertaining to settlements set forth in Article 13.5 of our Rules of Practice and Procedure, including Rule 51.1(e) which states that the Commission will not approve a settlement unless the settlement is "reasonable in light of the whole record, consistent with law, and in the public interest." We further find that the settlement satisfies the criteria set forth in D.92-12-019 which states an all-party settlement may be approved if (i) all affected interests are adequately represented, (ii) the settlement does not contravene any statutory provision or Commission decision, and (iii) the settlement, together with the record in the proceeding, convey sufficient information for the Commission to make an informed evaluation.

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<sup>10</sup> GTE has challenged the FCC's "used and useful" standard in the D.C. Circuit Court of Appeals. The court has not yet acted on GTE's challenge.

For the forgoing reasons, we shall adopt the all-party settlement agreement submitted by AT&T, GTE, and MWCOM. The adopted agreement is attached to this decision as Appendix A.

**Closure of A.96-08-041**

In D.99-07-032, the Commission reopened A.96-08-041 for the purpose of deciding the RSM issues remanded by the Court. Since this decision resolves the RSM issues, we hereby close A.96-08-041. The other two dockets reopened by D.99-07-032, A.96-08-068 and A.96-09-012, shall remain open pending our resolution of the CPNI issue remanded by the Court.

**Pub. Util. Code § 311(g)(2)**

This is an uncontested matter in which the decision grants the relief requested. Therefore, pursuant to Pub. Util. Code § 311(g)(2), the otherwise applicable 30-day period for public review and comment is waived.

**Findings of Fact**

1. The Court remanded to the Commission the following issues: (i) whether AT&T's RSMs collocated in GTE's central offices are actually used for interconnection or access to UNEs, and (ii) whether MWCOM's RSMs collocated in GTE's central offices are "necessary" for interconnection or access to UNEs as defined by the FCC.

2. The FCC has determined that (i) RSMs are necessary for interconnection and access to UNEs, (ii) ILECs must allow competitors to collocate RSMs, and (iii) competitors may use all the capabilities of their collocated RSMs.

3. On February 3, 2000, all the parties to the RSM issues remanded by the Court filed a settlement agreement that includes the following provisions: (i) AT&T's and MWCOM's RSMs collocated in GTE's central offices are used, or would be used, for interconnection or access to UNEs; (ii) AT&T and MWCOM may collocate their RSMs in GTE's central offices; (iii) AT&T and MWCOM may

use all the capabilities of their collocated RSMs; and (iv) the settlement resolves the RSM issues remanded by the Court.

### **Conclusions of Law**

1. The settlement agreement conforms to the FCC's determination that (i) RSMs are necessary for interconnection and access to UNEs, (ii) ILECs must allow competitors to collocate RSMs, and (iii) competitors may use all the capabilities of their collocated RSMs.
2. The settlement agreement is an all-party agreement.
3. The settlement agreement, together with the record in this proceeding, convey sufficient information to permit the Commission to make an informed evaluation of the agreement.
4. All affected interests were adequately represented in arriving at the settlement agreement.
5. The settlement agreement is reasonable in light of the whole record, consistent with law, and in the public interest.
6. The settlement agreement conforms to Article 13.5 of the Commission's Rules of Practice and Procedures.
7. The settlement agreement satisfies the all-party settlement criteria set forth in D.92-12-019.
8. The settlement agreement resolves the following issues remanded by the Court: (i) whether AT&T's RSMs collocated in GTE's central offices are actually used for interconnection or access to UNEs, and (ii) whether MWCOCOM's RSMs collocated in GTE's central offices are "necessary" for interconnection or access to UNEs as defined by the FCC.
9. The settlement agreement should be adopted.



10. A.96-08-041 should be closed.
11. This following order should be effective immediately.

## O R D E R

**IT IS ORDERED** that:

1. The settlement agreement filed by AT&T Communications of California, Inc., GTE California Incorporated, and MCI WorldCom, Inc. is approved. The approved agreement is attached to this decision as Appendix A.
2. The parties to the approved settlement agreement shall comply with the terms of the agreement.
3. Application 96-08-041 is closed.
4. Application 96-08-068 and A.96-09-012 remain open pending this Commission's resolution of the Customer Proprietary Network Information issue remanded by the U.S. District Court for the Northern District of California.

This order is effective today.

Dated March 16, 2000, at San Francisco, California.

RICHARD A. BILAS  
President  
HENRY M. DUQUE  
JOSIAH L. NEEPER  
CARL W. WOOD  
LORETTA M. LYNCH  
Commissioners

**APPENDIX A**  
**ADOPTED SETTLEMENT AGREEMENT**

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

**FILED**  
PUBLIC UTILITIES COMMISSION

FEB -3 00

SAN FRANCISCO OFFICE

In the Matter of the Petition of AT&T )  
Communications of California, Inc., for )  
Arbitration Pursuant to Section 252 of the Federal )  
Telecommunications Act of 1996 to Establish an )  
Interconnection Agreement with GTE California, )  
Incorporated. )

Application 96-08-041  
(Filed August 19, 1996)

In the Matter of the Petition of MCI )  
Telecommunications Corporation for Arbitration )  
Pursuant to Section 252(b) of the Federal )  
Telecommunications Act of 1996 to Establish an )  
Interconnection Agreement with Pacific Bell. )

Application 96-08-068  
(Filed August 30, 1996)

In the Matter of the Petition of MCI )  
Telecommunications Corporation for Arbitration )  
Pursuant to Section 252(b) of the Federal )  
Telecommunications Act of 1996 to Establish an )  
Interconnection Agreement with GTE California, )  
Incorporated. )

Application 96-09-012  
(Filed September 19, 1996)

**SETTLEMENT AGREEMENT**

Filed: Thursday, February 03, 2000

Richard A. Chaplin  
AttorneyDate 1/31/00

## SETTLEMENT AGREEMENT

This Settlement Agreement (Agreement) is made between GTE California Incorporated (GTE), AT&T Communications of California, Inc. (AT&T) and MCI WorldCom, Inc. (MWCOW), with reference to the following:

## RECITALS

- A. On August 19, 1996, AT&T filed Application (A.) 96-08-041 for compulsory arbitration over a proposed interconnection agreement with GTE.
- B. On August 30, 1996, MCI Telecommunications Corporation (MCI), MWCOW's predecessor, filed A. 96-08-068 for compulsory arbitration over a proposed interconnection agreement with Pacific.
- C. On September 19, 1996, MCI filed A. 96-09-012 for compulsory arbitration over a proposed interconnection agreement with GTE.
- D. On January 13, 1997, after conducting an arbitration, the California Public Utilities Commission (Commission) issued Decision (D.) 97-01-022, which imposed an arbitrated interconnection agreement between AT&T and GTE.
- E. On January 23, 1997, after conducting an arbitration, the Commission issued D. 97-01-039, which imposed an arbitrated interconnection agreement between MCI and Pacific.
- F. On January 23, 1997, after conducting an arbitration, the Commission issued D. 97-01-045, which imposed an arbitrated interconnection agreement between MCI and GTE.

G. For various reasons, the parties to these interconnection agreements filed appeals in Federal District Court (District Court) seeking to overturn portions of the foregoing decisions. See *MCI Telecommunications Corp., et al. v. Pacific Bell, et al.*, No. C 97-0670 SI; *GTE California Incorporated v. P. Gregory Conlon, AT&T Communications of California, et al.*, C 97-1756 SI; and *GTE California Incorporated v. P. Gregory Conlon, MCI Telecommunications Corp., et al.*, C 97-1757 SI.

H. On September 29, 1998, the District Court remanded two issues to the Commission for further consideration. One of the issues was whether physically collocated remote switching modules (RSMs) are used for interconnection and access to unbundled network elements (UNEs). This issue arose from the appeal of the AT&T/GTE and the MCI/GTE arbitrations, not the MCI/Pacific arbitration.

I. On remand, in D. 99-07-032, the Commission reopened and consolidated MCI's and AT&T's applications for arbitration to decide the remanded issues. Through that decision, the Commission also solicited comments on the scope, schedule and expected outcome of the remand proceeding.

J. In its comments, GTE contended, among other things, that it is a violation of the Telecommunications Act of 1996 (Act) to require the physical collocation of RSMs that are "used or useful," but not "necessary," for interconnection or access to UNEs. More specifically, GTE contended that the Supreme Court's decision in *Iowa Utilities Board v. FCC*, 119 S. Ct. 721 (1999), implicitly rejects as unsustainable the FCC's "used or useful" standard set forth in the FCC's: (1) First Report and Order, *In Re Implementation of the Local Competition Provisions in the*

*Telecommunications Act of 1996*, 11 FCC Rcd 15499 (Local Competition Order), *modified on recon.*, 11 FCC Rcd 13042 (1996), *vacated in part*, *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8<sup>th</sup> Cir. 1997), *rev'd in part, aff'd in part sub nom.*, *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999); and (2) First Report and Order, and Further Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 4761 (1999) (Advanced Services Order). AT&T and MWCOCM disagreed with GTE, contending, among other things, that the "used or useful" standard adopted by the FCC in the Local Competition and Advanced Services Orders is proper and lawful. The Administrative Law Judge did not adopt GTE's position and issued a scoping decision seeking evidence and briefing on whether RSMs are "used or useful" for interconnection or access to UNEs.

K. On May 10, 1999, GTE Service Corporation and US West filed a petition in the United States Court of Appeals for the District of Columbia Circuit challenging several aspects of the Local Competition and Advanced Services Orders, including the meaning those orders ascribe to the term "necessary" within the meaning of 47 U.S.C. § 251(c)(6). That proceeding is still pending.

NOW, THEREFORE, in consideration of the covenants set forth below and to conserve resources while the interpretation of 47 U.S.C. 251(c)(6) is pending in the District of Columbia Circuit, GTE, AT&T and MWCOCM hereby agree as follows:

## AGREEMENT

1. For purposes of this remand proceeding only, GTE agrees with AT&T and MWCOC that RSMs are actually used or would be actually used for interconnection or access to unbundled network elements when collocated by AT&T or MWCOC in a GTE central office.
2. Notwithstanding the language of Article IX, ¶ 5.1 of the GTE/MCI interconnection agreement approved by the Commission in D. 97-01-045, under the interconnection agreements that were approved by the Commission in D. 97-01-022 and D. 97-01-045, AT&T and MWCOC shall each be allowed to collocate and use all of the features and functionalities of RSMs.
3. To the extent a Court of competent jurisdiction modifies or rejects the "used or useful" standard adopted by the FCC in the Local Competition and Advanced Services Orders, GTE retains the right to seek the removal of previously collocated RSMs and to challenge the collocation and/or use of all features and functionalities of RSMs. AT&T and MWCOC, however, retain the right to oppose any attempt by GTE to seek the removal of previously collocated RSMs and/or challenge the collocation and/or use of all features and functionalities of RSMs.
4. GTE, AT&T and MWCOC represent that they have carefully read this Agreement; know the contents thereof; have had the advice of counsel of their choosing in connection with this matter; have signed this Agreement freely and voluntarily; and have not been influenced to any extent whatsoever in doing so by any representations, statements or promises regarding anything made by any party hereto or by any other person or entity, except for those

representations, statements and promises expressly set forth herein.

5. This Agreement resolves an issue on remand from the District Court. However, this Agreement shall not constitute approval of, or precedent regarding, any principle or issue in any other proceeding.

6. This Agreement shall be interpreted, construed and governed according to the laws of the State of California. The Agreement shall not be interpreted or construed to abrogate or modify any of the collocation provisions of the interconnection agreements at issue other than the provisions relating to what type of equipment may be collocated or used. In interpreting and construing this Agreement, it shall be deemed to have been drafted jointly by counsel for GTE, AT&T and MWC.COM.

7. This Agreement may be executed in any number of counterparts, which together shall constitute one document. Fax signatures shall be as valid and binding as original signatures and the Agreement shall be effective at such time as the parties exchange executed signature pages to this Agreement.

8. Should any action be brought to enforce this Agreement, the trier may, in its discretion, award reasonable attorneys' fees to any party in said action, taking into account the extent of the claim, the circumstances giving rise to the claim and the result of the litigation engendered by the filing of the action.

9. The terms, conditions, and provisions of this Agreement shall be binding upon and shall inure to the benefit of the parties and their respective successors and assigns.

10. If any provision of this Agreement or its application to any person or circumstance




is invalid or unenforceable, then the remainder of this Agreement or the application of such provision to other persons or circumstances shall not be affected thereby. If any provision or application of this Agreement is invalid or unenforceable, then a suitable and equitable provision shall be substituted in order to carry out, so far as may be valid and enforceable, the intent and purpose of the invalid and/or unenforceable provision.

11. All prior and contemporaneous conversations, negotiations, possible and alleged agreements, representations, covenants and warranties concerning the subject matter hereof are merged herein. This is an integrated agreement that contains the entire agreement between the parties hereto regarding the subject matter hereof and may not be modified or amended except by an instrument in writing and signed by each of the parties hereto.

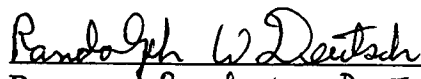
Dated: January 31, 2000

GTE California Incorporated

  
By: Jeffrey A. Maldonado  
Its: Assistant Secretary

Dated: February 1, 2000

AT&T Communications of California, Inc.

  
By: RANDOLPH DEUTSCH  
Its: ATTORNEY

[Signatures Continue On Next Page]

Dated: February 2, 2000

MCI WorldCom, Inc.

William C. Harrelson  
By: William C. Harrelson  
Its: Attorney

**CERTIFICATE OF SERVICE**

I, Michelle deVillers, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

At the time of service, I was at least 18 years of age and not a party to this action.

My business address is 201 Spear Street, 9<sup>th</sup> Floor, San Francisco, California 94105.

On this date, I served copies of the:

**SETTLEMENT AGREEMENT**  
**[A.96-08-041, A.96-08-068 & A.96-09-012]**

to the attached service list.

Executed this 3<sup>rd</sup> day of February 2000.



Michelle N. deVillers  
MCI WorldCom  
201 Spear Street, 9<sup>th</sup> Floor  
San Francisco, CA 94105  
Tel: (415) 228-1199  
Fax: (415) 228-1094

(END OF APPENDIX A)