L/afm

MAIL DATE
5/22/00

Decision 00-05-051 May 18, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Petition of Pacific Bell for Arbitration of an Interconnection Agreement with MFS/WorldCom Pursuant to Section 252(b) of the Telecommunications Act of 1996.	Application 99-03-047 (Filed March 22, 1999)

ORDER MODIFYING DECISION 99-09-069 AND DENYING REHEARING

I. INTRODUCTION

Decision (D.) 99-09-069 approved an interconnection agreement between MFS/WorldCom[1] (MFSW) (now MCI WorldCom Communications, Inc.) and Pacific Bell. A total of 163 issues were presented for arbitration. The major issue in the arbitration, however, was the correct treatment of Internet Service Provider (ISP)-bound calls and the correct definition of local calls subject to reciprocal compensation. Also at issue was whether MFSW was entitled to tandem and common transport compensation. MFSW also challenged the use of Pacific's tariffs to establish prices for collocation. Both parties have filed applications for rehearing of the Decision, alleging violations of the Telecommunications Act of 1996 (Act), and rules and decisions of the Federal Communications Commission (FCC).

[1] WorldCom Technologies, Inc. was changed to MCI WorldCom Communications, Inc., effective August 10, 1999. Throughout the proceeding, WorldCom Technologies, Inc. was referred to as MFS WorldCom to indicate that the interconnection agreement being arbitrated was that formerly in effect between Pacific Bell and MFS Intelenet of California, Inc. Although the application for rehearing was filed by MCI WorldCom, Inc., it will be referred to as MFSW in order to be consistent with D.99-09-069.

Pacific contends that the determination to provide for reciprocal compensation for ISP-bound calls constitutes legal error. MFSW contends that the Decision errs by denying it reciprocal compensation for the call transport and termination service it provides to Pacific Bell at the tandem, common transport, and end office switching prices that Pacific charges MFSW for the same service. In doing so, MFSW argues that the Decision violates section 252(d)(2)(A) of the Act, ¶¶ 1085-1090 of the FCC's Local Competition Order,[2] and 47 CFR § 51.711(a). MFSW argues that the Decision also errs by setting many of the prices for collocation based on Pacific's tariff charges and failing to make those prices subject to true up and adjustment retroactive to the effective date of the interconnection agreement. As such, MFSW contends that many of the prices for collocation are not based on Total Element Long Run Incremental Cost (TELRIC), in violation of the pricing standard of § 252(d) of the Act, 47 CFR §§ 51.501, 51.503, and 51.505, and the Commission's own pricing standard adopted in D.98-02-106.

We find no legal error with respect to this issue raised by Pacific, and we accordingly deny Pacific's application for rehearing. We also find that the Decision does not err with respect to tandem compensation and deny MFSW's application for rehearing on this matter. While we agree that basing collocation prices on Pacific's currently effective Commission-approved tariffs without a true-up constitutes legal error, we resolve the matter by modifying the Decision to provide that Pacific's FCC-approved prices apply when MFSW orders collocation for intrastate purposes. These prices meet the FCC's pricing rules and do not require a true-up. As modified, we accordingly deny MFSW's application for rehearing.

---

[2] First Report and Order, Re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98 and 95-185, FCC 96-325 (rel. August 8, 1996).

II. DISCUSSION

A. Pacific Bell's Application for Rehearing

The basis of Pacific's application for rehearing is that the Commission was legally barred from treating calls to ISPs as local for reciprocal compensation purposes because such calls are jurisdictionally interstate calls under the FCC's February 26, 1999 Declaratory Ruling.[3] Pacific's arguments are similar to those raised by Pacific in other proceedings involving arbitrated interconnection agreements, and should similarly be rejected.

Section 251(b)(5) of the Act requires LECs to establish reciprocal compensation arrangements for the transport and termination of telecommunications. FCC regulations limit the scope of the reciprocal compensation requirement to "local telecommunications traffic." 47 CFR § 51.701(a). In the instant Decision, the Commission noted that the FCC's Declaratory Ruling allows state commissions to continue to determine whether reciprocal compensation is due for ISP-bound traffic. We also found that the Final Arbitrator's Report (FAR) properly based its resolution of this matter on generic Commission policy on reciprocal compensation in D.98-10-057, as modified by D.99-07-047. We upheld the FAR's finding that as long as the respective rate centers of the telephone number assigned to the calling party and to the ISP are within the same local calling area, the call shall be defined as a local call, and subject to reciprocal compensation provisions.

Pacific first argues that there is no evidence in the record to support a finding that any ISP-bound calls actually terminate in the same local calling area where the call originated, and that MFSW cannot determine where these calls are finally routed beyond the ISP's modem. Pacific argues that the FCC has ruled that ISP-bound calls do not terminate at the ISP's node, but rather at various websites

[3] In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, and Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling and Notice of Proposed Rulemaking, FCC N. 99-38, CC Dkts. 96-98 and 99-68, (rel. Feb. 26, 1999) (Declaratory Ruling).

located in other states and around the world. According to Pacific, the FCC has ruled that this type of traffic is non-local, interstate traffic. Pacific notes that the FCC has ruled that the reciprocal compensation obligations of the Act only apply to traffic that originates and terminates within a local area. Pacific defines "terminate" as the location which is ultimately accessed. Since ISP-bound calls are interstate and do not terminate on either MFSW's network or at the ISP's node, Pacific claims that requiring the payment of reciprocal compensation for this traffic violates the Act. According to Pacific, a finding of fact or evidence which suggests that an ISP-bound call actually terminates in the same local calling area where the ISP-bound call originated is essential for the Commission to mandate reciprocal compensation.

Pacific further argues that the Decision is in error as it relies on the earlier ISP Decision D.98-10-057. According to Pacific, since the ISP Decision is "patently erroneous", it was error for the Commission to rely on it. Pacific takes issue with the FAR's conclusion that D.98-10-057 "was an equitable outcome based on its consideration of the telecommunications network functions performed by carriers related to ISP communications and the costs incurred." As Pacific points out, the Decision also notes that the Commission has discretion to determine whether compensation is appropriate. Pacific argues that D.98-10-057 did not balance the equities, but rather ordered compensation because it found the traffic to be local.

Pacific also complains that the FAR is "notably vague concerning where this 'court of equity' authority is to be found in the Act." According to Pacific, a state commission may impose obligations only if that action is within the limits of the authority the Act itself delegates to state commissions. Otherwise, the state commission would be acting in excess of the authority granted it under the Act. Apparently Pacific argues that in arbitrating interconnection agreements, the Commission's duty is only to ensure that the provisions of the arbitrated agreements meet the requirements of § 251. Since § 251 does not require the

payment of reciprocal compensation for ISP-bound traffic (as it is non-local), the Commission cannot require it.

Pacific also claims that it is arbitrary and capricious government action for the FCC to exempt ISP-bound traffic from interstate access charges and the Commission to treat such traffic as local for reciprocal compensation.

Finally, Pacific argues that there is no factual basis to assert an "equitable" outcome regarding reciprocal compensation. According to Pacific, MFSW incurs cost of about $.001 to pass the calls to its ISP customers, and without reciprocal compensation for calls to ISPs, MFSW admits its service to ISPs is "close to break-even." Yet, Pacific complains, the FAR has Pacific paying MFSW about $.002 for every ISP-bound minute of traffic. Pacific takes issue with the FAR's justification for this payment on the basis that MFSW incurs costs that are unrecovered without reciprocal compensation, and MFSW would have to increase charges to the ISP to recover its costs of call termination. According to Pacific, paying MFSW more than its costs is not equitable.

B. Discussion

We have consistently rejected Pacific's arguments in the past, holding that the imposition of reciprocal compensation for ISP-bound traffic does not violate federal law. (See, e.g., In re Petition of Pacific Bell, Inc. for Arbitration of an Interconnection Agreement with Pac West Telecom, Inc., D.99-12-025; In re Competition for Local Exchange Service, D.99-07-047.) We have characterized Pacific's arguments as an incomplete and inaccurate reading of the FCC's Declaratory Ruling. Id. While the FCC found these calls to be "largely interstate" for jurisdictional purposes, the FCC also found "no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic...." Declaratory Ruling ¶ 21. The FCC further acknowledged that its "policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that [reciprocal] compensation is due

for that traffic." Id., ¶ 25. As the Fifth Circuit recently stated, "[c]learly, then, whether voluntarily negotiated or confected through arbitration, commission-approved agreements requiring payment of reciprocal compensation for calls made to ISPs do not conflict with §§ 251 and 252 of the Act or with the FCC's regulations or rulings." Southwestern Bell Telephone Co., v. Public Util. Comm'n of Texas, et al., Case No. 98-50787 (March 30, 2000).

Pacific's argument concerning allegedly conflicting treatment of ISP-bound traffic by the Commission and the FCC overlooks the many court cases which have upheld state commission decisions imposing reciprocal compensation provisions as harmonious with both the FCC's Declaratory Ruling and the Act. The Seventh Circuit in Illinois Bell Telephone Co., d/b/a Ameritech Illinois v. WorldCom Technologies, et al. (7th Cir. 1999) __ F.3d __, 1999 U.S. App. LEXIS 13668 ("Illinois Bell"), for example, affirmed the decision of the Illinois Commerce Commission ("ICC") requiring Ameritech to pay reciprocal compensation for ISP-bound traffic. The Court found the ICC decision fully consistent with the FCC's Declaratory Ruling: "The ICC's conclusion –that reciprocal compensation should apply to traffic Ameritech bills as local traffic – does not violate the Act or the FCC's interpretation of the Act." 1999 U.S. App. LEXIS 13668, *18-19. The Seventh Circuit accepted both the FCC's and the ICC's legal analyses, which taken together allow ISP-bound traffic to be treated as interstate for FCC jurisdictional purposes, but as local for purposes of reciprocal compensation.

The courts have also upheld state commission decisions which relied on the "two call theory" in determining whether reciprocal compensation was appropriate for ISP-bound traffic. The Fifth Circuit recently upheld a Texas PUC decision which had divided Internet traffic into two components to determine where the call "terminates." Citing the Declaratory Ruling, the Court stated, "[p]erceiving such calls as terminating locally for compensation purposes is

clearly condoned by the FCC." Southwestern Bell Telephone Co., v. Public Util. Comm'n of Texas, et al., Case No. 98-50787 (5th Cir.) (March 30, 2000).

Moreover, the FCC recognized that sufficient authority exists under § 252 to authorize state regulatory commissions to require reciprocal compensation for ISP-bound traffic.[4] Section 252 confers jurisdiction on state commissions to resolve open issues in an arbitration, and extends to issues not addressed by § 251(b)(5). The Supreme Court also has recognized that the Act cannot divide the world of domestic telephone service "neatly into two hemispheres," one consisting of interstate service, over which the FCC has plenary authority, and the other consisting of intrastate service, over which the states retain exclusive jurisdiction. Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 360, 106 S.Ct. 1890, 1894 (1986). The Fifth Circuit in Southwestern Bell, supra, held that the Texas PUC properly exercised its jurisdiction regardless of any interstate aspect of the subject telecommunications.

Based on the foregoing reasons, we have consistently rejected Pacific's arguments in the past. Now, however, there is another basis for denying Pacific Bell's application for rehearing. On March 24, 2000, the D.C. Circuit Court of Appeals vacated the FCC's Declaratory Ruling. In Bell Atlantic Telephone Companies v. Federal Communications Commission, Case No. 99-1094 (March 24, 2000), the D.C. Circuit found the FCC did not provide a satisfactory explanation why LECs that terminate calls to ISPs are not properly seen as "terminat[ing]...local telecommunications traffic," and why such traffic is "exchange access" rather than "telephone exchange service."

The D.C. Circuit found fault with the FCC's application of the "end-to-end" jurisdictional analysis to determine whether ISP-bound traffic is "local" for purposes of its regulation limiting § 251(b)(5) reciprocal compensation to local traffic. The Court stated there was no explanation why the end-to-end inquiry is

[4] The D.C. Circuit Court of Appeals did not reach the objections of incumbent LECs that § 251(b)(5) preempts state commission authority to compel payments to the competitor LECs.

relevant to discerning whether a call to an ISP should fit within the local call model of two collaborating LECs or the long-distance model of a long-distance carrier collaborating with two LECs.

The Court found that the cases the FCC relied on for using the end-to-end analysis were not on point, as they involved a single continuous communication, originated by an end-user, switched by a long-distance communications carrier, and eventually delivered to its destination. The Court stated that even if the difference between ISPs and traditional long-distance carriers is irrelevant for jurisdictional purposes, it appears relevant for purposes of reciprocal compensation. The FCC had not satisfactorily explained why the original communication does not "terminate" at the ISP, and why an ISP is not, for purposes of reciprocal compensation, a communications-intensive business end user selling a product to other consumer and business end-users.

The FCC tried to counter that although the call from the ISP to an out-of-state website is information service for the end-user, it is telecommunications for the ISP, and thus the telecommunications cannot be said to "terminate" at the ISP. The Court rejected this argument, noting that the mere fact that the ISP originates further telecommunication does not imply that the original telecommunication does not "terminate" at the ISP.

The Court also noted a series of FCC rulings dealing with enhanced service providers (ESPs), of which ISPs are a subclass, which indicate that calls to ISPs are not like long-distance calls and have been treated as local for regulatory purposes:

> [The FCC has] referred to calls to information service providers as local … When accused of inconsistency in the present matter, the [FCC] flipped the argument on its head, arguing that its exemption of ESPs from access charges actually confirms "its understanding that ESPs in fact use interstate access service; otherwise, the exemption would not be necessary." … This is not very compelling. Although, to be sure, the

> Commission used policy arguments to justify the "exemption," it also rested it on an acknowledgment of the real differences between long-distance calls and calls to information service providers.

Bell Atlantic, 2000 WL 273383 at *7.

The D.C. Circuit's decision has a number of implications. First, since many of Pacific's arguments are predicated on the Declaratory Ruling, it may be argued that Pacific's allegations have been rendered moot or legally irrelevant in light of this recent development. For example, now that the FCC's order has been vacated, the Commission's earlier analysis in D.98-10-057 concluding that this traffic does indeed "terminate" at the ISP's modem is no longer inconsistent with any existing FCC determination. Since there currently is no classification of this traffic at the FCC level, there can be no conflict between this Commission's Decision and any FCC rule or regulation, as Pacific alleges.

Second, the vacatur of the FCC's Declaratory Ruling leaves open the possibility that reciprocal compensation is in fact *required* for ISP-bound calls pursuant to §§ 251 and 252 of the Act. Although this Commission utilized the "two-call theory" in D.98-10-057 and found that the telecommunications portion of the call terminates at the ISP's modem, that decision never stated that reciprocal compensation was required as a result of § 251(b)(5) of the Act. (Instead, in an independent analysis the Commission found that reciprocal compensation provisions did apply to ISP-bound traffic in California based on other legal and equitable reasons.) Section 251(b)(5) and federal rules require reciprocal compensation for the transport and termination of local telecommunications traffic. The D.C. Circuit indicated that calls to ISPs appear to meet the FCC's regulatory definition[5] of "termination": "Calls to ISPs appear to fit this definition [of termination]: the traffic is switched by the LEC whose customer is the ISP and

---

[5] Call termination for reciprocal compensation purposes is defined as "the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises." 47 CFR § 51.701(d).

then delivered to the ISP, which is clearly the 'called party.'" Bell Atlantic at 5, 2000 WL 273383 at *5. Accordingly, it may be argued that reciprocal compensation is in fact required for ISP-bound traffic pursuant to the Act.

Whether reciprocal compensation is in fact required for this traffic need not be addressed at this time in order to resolve Pacific's application for rehearing. There is currently no classification of ISP-bound communications at the FCC level. As discussed above, neither the Act nor any federal rules prohibit requiring reciprocal compensation for ISP-bound traffic. Moreover, this Commission's earlier decisions relating to the appropriate treatment of IS-bound traffic remain in effect.[6] Accordingly, Pacific has failed to establish legal error in the Decision.

There is also no merit in Pacific's argument that the Decision is inequitable by requiring Pacific to pay MFSW $.002 a minute to terminate calls to ISPs. According to MFSW, Pacific does not accurately portray the facts concerning the costs MFSW's incurs to terminate calls to ISPs. As MFSW's witness testified, he was not aware of any cost study done to identify MFSW's costs of terminating calls to ISPs. In addition, the cash flow analysis to which he testified identified profitability at $.002 per minute. In any case, under the FCC's rules the ILEC's costs are to be used as a proxy for the costs of the competitive local exchange carrier. 47 CFR § 51.711(a)(1). D.99-09-069 is consistent with that requirement as it uses Pacific's costs of termination at the end office level as a proxy for MFSW's costs of termination.

In light of the above discussion, Pacific's application for rehearing should be denied. Pacific has failed to meet its burden of establishing legal error in the Decision.

---

[6] Call termination for reciprocal compensation purposes is defined as "the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises." 47 CFR § 51.701(d).

C. MFSW's Application for Rehearing

1. Tandem Interconnection Rate

MFSW contends that D.99-09-069 errs by denying MFS WorldCom reciprocal compensation for the call transport and termination service it provides to Pacific at the tandem, common transport, and end office switching prices that Pacific charges MFS WorldCom for the same service. By doing so, MFS argues that the Decision violates § 252(d)(2)(A) of the Act, ¶¶ 1085-1090 of the FCC's Local Competition Order[7], and 47 CFR § 51.711(a).

The Act requires that parties to interconnection agreements pay each other reciprocal compensation -- each party must pay the other for transporting and terminating on its network calls that originate on the other's network. 47 U.S.C. §§ 251(b)(5) & 252(d)(2)(A). The compensation must be based on the cost of transporting and terminating the call. Id. The cost of transporting a call through a tandem switch and then to an end office switch is more than the cost of transporting a call directly to an end office switch.

The FCC in its First Report and Order determined that where a CLC's switch or other technology serves a geographic area comparable to the incumbent's tandem switch, then the CLC is entitled to be compensated at the higher tandem rate:

> States may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to an end office switch. In such cases, states shall also consider whether new technology (e.g. fiber rings or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all of the calls terminated on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch. Where the interconnection

[7] First Report and Order, Re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98 and 95-185, FCC 96-325 (released August 8, 1996).

> carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate.

First Report and Order ¶1090; 47 C.F.R. § 51.711(a)(3).

Thus, the relevant inquiry in determining whether MFSW can charge Pacific the full tandem rate for all local and ISP-bound calls Pacific terminates to MFSW is whether MFSW's network functions as a tandem switch and whether it covers a comparable geographic area as Pacific's tandems.

The Draft Arbitrator's Report (DAR) found that MFSW was entitled to charge Pacific the full tandem rate for local traffic. The DAR found that MFSW's SONET ring network architecture provided switching and transport functions which are functionally equivalent to the service that Pacific provides and serves a comparable geographic area as do Pacific's tandems. The DAR reasoned:

> In contrast to Pacific's network, MFSW's local loops can traverse several serving wire center territories to get between a customer and the serving switch. Thus, MFSW's SONET rings connect the switching node to the transport nodes, providing a similar functionality to Pacific's "common transport."
>
> The fact that MFSW's costs may be lower in providing equivalent functions does not justify the payment of a lower level of compensation to MFSW in comparison to Pacific. The FCC has concluded that "it is reasonable to adopt the [ILEC's] transport and termination prices as a presumptive proxy for other telecommunications carriers' additional costs of transport and termination." (FCC First Report and Order ¶ 1085). By setting the compensation levels at parity, a carrier is able to be rewarded for any efficiency gains resulting from utilizing advanced network architectures, thereby promoting carriers' incentives to become more innovative and competitive. Accordingly, MFSW is entitled to receive compensation for providing those tandem and transport functions to Pacific on a reciprocal basis.

> MFSW thus shall be compensated at the same tandem and common transport rates that it pays to Pacific.

DAR at 76-77.

The FAR reversed this position. The FAR found that where MFSW provides no tandem or common transport functions and thus incurs no such costs, it is not entitled to compensation for those functions and costs. The FAR concluded that MFSW's switches do not serve the same or comparable area as Pacific, and thus MFSW's claim that it is entitled to reciprocal compensation for those functions was rejected:

> Even if MFSW's switch served a comparable geographic area to that of Pacific, the cited language would only justify payment of the tandem rate, but not also the common transport or end office rates as sought by MFSW. Moreover, while the payment of the tandem rate requires that the switches of each carrier serve a comparable area, MFSW has not shown that its switches will meet this requirement. MFSW has not established interconnection points throughout the tandem serving area, but generally requires Pacific to provide the bulk of the transport between each carrier's switches by its choice of interconnection points. Although MFSW witness Sigle contends that the area served by MFSW's switches and fiber ring facilities is generally the same area as served by Pacific's tandem, the support offered for this claim is unconvincing. Any similarity in the size of serving areas will soon go away when MFSW's new switches are in place. Moreover, many of MFSW's customers are not served by these fiber rings. For example, the ISPs which make up a significant portion of MFSW's business are actually collocated with MFSW's switch.

FAR at 80.

MCI first argues that the Commission erred as a matter of law as it failed to correctly apply 47 CFR § 57.711(a). MFSW argues that instead of performing the relevant inquiry, the Commission instead looked at whether the CLC actually provided a tandem or common transport function. As MFSW points

out, the Decision states that MFSW's position "would provide tandem and common transport compensation to MFSW even when Pacific does not incur those costs." D.99-09-069 at 16. MFSW argues the Commission erred by looking at whether MFSW **actually** provides tandem and common transport instead of looking at whether MFSW's technologies perform functions **similar** to those performed by and ILEC's tandem switch.

MFSW also alleges the Commission misinterpreted the FCC rule in determining whether MFSW served a comparable geographic area to Pacific. The FAR reasoned that "the issue of whether MFSW is serving a comparable geographic area applies to the transport between the point of interconnection and MFSW's switch (or equivalent) serving the called customer." MFSW argues that the rule requires that the Commission consider whether MFSW's network provides similar functionality as Pacific's tandem switch on the MFSW network side of MFSW's switch, not between MFSW's switch and Pacific's switch from the point of interconnection.

MFSW faults the Decision for noting that many of MFSW's customers are not served by fiber rings, and noting that ISPs served by MFSW are actually collocated with MFSW's switch. MFSW claims this consideration is not permitted by the FCC's rule. According to MFSW, the FCC rule does not contemplate a customer by customer determination of the geographic reach of MFSW's switches, but the overall reach of its switches to all the customers served by its switches.

MFSW also takes issue with the FAR's reasoning that MFSW's proposal is in conflict with the Commission's and FCC's prohibition on recovery of reciprocal compensation for nontraffic-sensitive loop costs. "Although the addition of new customers will require the addition of loop plant costs, the level of traffic, itself, does not increase loop costs. Thus, MFSW shall not be entitled to reciprocal compensation for its loop plant." (FAR at 80.) MFSW argues that the FCC does not recognize any such conflict. According to MFSW, the FCC's

prohibition on recovery of non-traffic sensitive loop costs applies to the incumbent LEC's loop plant from an incumbent LEC's end office switch to its customers. MFSW argues it has never been applied to the network of switching, transport nodes and long loops which constitute the new and different network architecture of MFSW.

MFSW's arguments are unconvincing. As the above paragraphs from the DAR and the FAR demonstrate, the Commission did correctly consider whether MFSW's network provides similar functionality and is geographically comparable to Pacific's. MFSW provides no support for its narrow interpretation of the FCC rules. Whether a switch performs as a tandem or end office switch is a factual determination expressly delegated to state commissions. The rules do not specifically lay out what factors are relevant in determining functional equivalency or geographic comparability.[8] Nor do the rules specify which portions of a carrier's network must be compared in considering geographic coverage.

The factors of which MFSW complains are all relevant to determining the functional and geographic similarity of MFSW's switch to Pacific's network. The Commission's consideration of the fact that many of MFSW's customers were collocated is relevant to the question of location of customers and geographic area actually served by MFSW's switch. Moreover, whether customers are served by fiber rings is relevant to whether MFSW's switch acts as a tandem for these customers. MFSW's assertion that the FCC's rule does not permit consideration of these facts is unsupported.

[8] For example, in MCI Telecommunications v. Michigan Bell Telephone, 79 F.Supp.2d 768 (E.D. Mich. 1999), MCI argued the state commission should have compared the capacity of its fiber ring with just one of the ILEC's tandem switches, rather than all of the ILEC's tandem switches. The court noted that "the language of the FCC regulation is not clear on this point. It refers to the incumbents tandem switch as though there is just one." Id., at 791, fn. 15. In U.S. West Communications, Inc. v. PSC of Utah, 75 F.Supp.2d 1284 (Dist. Utah 1999), U.S. West argued it was impermissible for the Texas PSC to compare the CLC's switch with U.S. West's tandem switches and end office switches, as they operate together, rather than just the tandem switches standing alone. The court found that U.S. West approached the matter "too myopically," finding that in performing a functional similarity analysis, state commissions are not limited to considering only the first layer of an ILEC's system. Id., at 1290.

MFSW's arguments really boil down to a dispute over the weight of the evidence supporting the Decision's findings on this matter. The Commission heard evidence presented by both parties and did not find MFSW's evidence convincing. MFSW simply did not produce sufficient evidence that its switch functioned similarly to or served an area comparable to Pacific's. The fact that MFSW disagrees with the Commission's findings does not establish legal error in the Decision. The Decision's factual findings concerning whether MFSW's network functions as a tandem are reviewed under the arbitrary and capricious standard, if challenged in federal court. See U.S. West v. MFS Intelenet, Inc., et al., 193 F.3d 1112, fn. 15 (9th Cir. 1999). The FAR and the Decision cite to testimony and evidence in the record which support the Decision's conclusion that MFSW's switch does not function similarly to Pacific's switch, and does not serve a geographically comparable area. Because there is substantial evidence supporting the Commission's factual findings, the Decision is not arbitrary or capricious.

2. Collocation Prices Subject to True-up

MFSW next alleges that the Decision errs by setting many of the prices for collocation based on Pacific's tariff charges and failing to make those prices subject to true up and adjustment retroactive to the effective date of the interconnection agreement. As such, MFSW claims many of the prices for collocation are not based on Total Element Long Run Incremental Cost (TELRIC), in violation of the pricing standard of § 252(d) of the Act, 47 CFR §§ 51.501, 51.503, and 51.505, and the Commission's own pricing standard adopted in D.98-02-106.

MFSW argues that the Decision should be modified to make all prices for collocation subject to true-up, retroactive to the effective date of the agreement. The DAR noted that the final prices applicable to collocation were still being litigated in the OANAD proceeding. The DAR stated that,

> [r]ather than attempt to second-guess the outcome of the OANAD proceeding, the interim collocation prices charged to MFSW shall be based on the prices being offered to all other CLCs pursuant to Pacific's Accessible Letter. For purposes of this arbitration, these interim prices shall be subject to true-up based on the outcome of the collocation pricing phase of OANAD. **Any subsequent interim prices charged to MFSW as set in Pacific's collocation tariffs shall also be subject to true up. Pacific has failed to justify exempting tariffed collocation prices from the true up process.**

DAR at 36. The FAR deleted these last two sentences without explanation. The Decision itself repeats MFSW's argument that without a true-up, the collocation prices violate the pricing standards set forth in the Act. However, the Decision does not address this argument at all.

In its response, Pacific contends that MFSW ignores 47 CFR § 51.513, which allows the Commission to adopt collocation prices without a true-up if the prices meet the proxies set by that rule. According to that rule, the collocation proxies "shall be no greater than the effective rates for equivalent services in the interstate expanded interconnection tariff." 47 CFR § 51.513(c)(6). Under this rule, the Commission can adopt collocation prices without any need for a true-up, if such prices are the same or lower than Pacific's FCC-approved interstate collocation prices. Pacific points out that the Interconnection Agreement approved by the Decision allows MFSW to order out of either Pacific's FCC-approved or Commission-approved tariffs. (Interconnection Agreement filed August 11, 1999, Appendix Collocation, Sections 7.1(a), 7.1(b).) According to Pacific, since MFSW can order collocation from either the FCC-approved or Commission-approved tariffs, MFSW can choose prices that meet the FCC's rules. Alternatively, Pacific argues, the Decision could be modified, not to provide for a true up, but to provide that the FCC-approved prices apply when MFSW orders collocation for intrastate purposes.

MFSW is correct that collocation prices in Pacific's effective Commission-approved tariffs are not based on TELRIC. The tariffs that are being set currently in the OANAD proceeding will be based on TELRIC, but unless there is a true-up, the interim collocation prices will not be based on TELRIC as required by the Act.

Although Pacific is correct that 47 CFR § 51.513 allows collocation prices without true-up if the prices meet the proxies set by that rule, there is no indication in either the DAR, FAR or the Decision that the Commission was relying on the proxies set in § 51.513 to set collocation prices. That section also requires the state commission to set forth in writing a reasonable basis for its selection of a particular rate for the element. 47 CFR § 51.513(a)(2). There does not appear to be any explanation provided pursuant to that section.

However, we find that this situation can be resolved by directing the parties to limit collocation pricing to Pacific's federal tariffs. As Pacific points out, the agreement provides MFSW the option of ordering out of either Pacific's Commission-approved or FCC-approved tariffs. Ordering out of the Commission-approved tariff would require a true-up. However, we are concerned that allowing one party a refund off tariffed charges while potentially denying the same treatment to other parties might raise serious discriminatory problems. Therefore, the Decision shall be modified to provide that the FCC-approved prices apply when MFSW orders collocation for intrastate purposes.

III. CONCLUSION

As discussed above, we have found that Pacific Bell's application for rehearing fails to state sufficient grounds for rehearing. MFSW's application for rehearing shall be granted, in part, in order to modify the Decision to provide a true-up for collocation prices in the interconnection agreement. As modified, MFSW's application for rehearing shall be denied. Therefore,

IT IS ORDERED that:

1. Decision 99-09-069 is modified as follows:

A. The first full paragraph on page 17 is modified to read:

"MFSW is correct that collocation prices in Pacific's effective Commission-approved tariffs are not based on TELRIC. However, we find that this situation can be resolved by directing the parties to limit collocation pricing to Pacific's federally-approved tariffs. Pacific offers MFSW to order out of either Pacific's FCC-approved or Commission-approved tariffs. Ordering out of the Commission-approved tariff would require a true-up. However, we are concerned that allowing one party a refund off tariffed charges while potentially denying the same treatment to other parties might raise serious discriminatory problems. On the other hand, the FCC-approved tariffs meet the FCC's pricing rules and would not require a true-up. We shall accordingly require that Pacific's FCC-approved tariff prices apply when MFSW orders collocation for intrastate purposes."

B. Conclusion of Law No. 19 is modified to read:

"The referencing of Pacific's currently effective Commission-approved tariffs would not meet the FCC's pricing rules and would require a true-up. Providing MFSW a refund off Commission-approved tariffed charges may raise serious discrimination problems. However, the referencing of Pacific's FCC-approved collocation tariffs in the Agreement is appropriate since they meet the FCC's pricing rules and do not require a true-up."

2. The parties are directed to jointly file an amended interconnection agreement which conforms to the Decision, as modified. The parties shall make appropriate changes in the Collocation Appendix, and any other applicable references in the agreement, to provide that Pacific's FCC-approved tariff prices apply when MFSW orders collocation for intrastate purposes.

3. Rehearing of Decision 99-09-069, as modified, is hereby denied.

This order is effective today.

Dated May 18, 2000, at San Francisco, California.

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

I dissent.
/s/ JOSIAH L. NEEPER
Commissioner