Before the
PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks	)	R.93-04-002
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COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION ON PACIFIC BELL'S SECTION 271 COMPLIANCE FILING

Terry Monroe
Vice President, State Affairs
The Competitive Telecommunications Association
1900 M Street, N.W., Suite 800
Washington, D.C. 20036
Phone: (202) 296-6650
Fax: (202) 296-7585
E-Mail tmonroe@comptel.org

Linda L. Oliver
Jennifer A. Purvis
Hogan & Hartson L.L.P.
555 13th Street, N.W.
Washington, D.C. 20004
Phone: (202) 637-5600
Fax: (202) 637-5910
E-Mail: LLOliver@HHLaw.com
JPurvis@HHLaw.com

Counsel for CompTel

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COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION ON PACIFIC BELL'S SECTION 271 COMPLIANCE FILING

The Competitive Telecommunications Association ("CompTel") hereby submits its comments on the "Brief in Support of D.98-12-069 Compliance Filing and in Support of Motion for an Order that Pacific Bell has Met the Requirements of § 271 of the Telecommunications Act and § 709.2 of the Public Utilities Code" and affidavits filed by Pacific Bell ("Pacific") on July 15, 1999 ("Compliance Filing"). This Compliance Filing concerns Pacific Bell's application for interLATA authority in California.

INTRODUCTION AND SUMMARY

CompTel is a national industry association representing 350 competitive telecommunications service providers and suppliers. CompTel's members include nationwide companies and smaller, regional carriers, providing local, long distance, and Internet services using a diverse mix of entry strategies. Many of CompTel's members provide service in California. Since its inception in 1981, CompTel has advocated policies to promote the development of full and fair competition in the provision of communications services. CompTel's role on both the federal and state levels is to ensure that companies of different sizes and with different entry strategies have a full and equal opportunity to compete in all communications service markets.

Although Pacific appears to have made some improvements since its last Section 271 filing, its Compliance Filing continues to fall short of demonstrating compliance with Section 271 in a number of important respects. The shortcomings in Pacific's filing include:

- Pacific's failure to guarantee that its offering of network element combinations will remain available regardless of the conditions adopted by the Federal Communications Commission ("FCC") in connection with the merger of Pacific's parent company, SBC Communications Inc. ("SBC"), and Ameritech Corporation ("Ameritech"); 1/

1/ In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corporation, Transferor, to SBC Communications Inc., Transferee, Federal Communications Commission CC Docket No. 98-141, Letter from Richard Hetke, Senior Counsel Ameritech Corporation, and Paul K. Mancini, General Attorney and Assistant General Counsel, SBC Communications Inc., to Magalie Roman Salas, Secretary, Federal Communications Commission (dated July 1, 1999), Attachment "Proposed

- Pacific's unlawful attempt to restrict the availability of extended link/enhanced extended link (collectively referred to as "EEL");

- Pacific's inadequate unbundled loop offerings;

- Pacific's inadequate provisioning of collocation arrangements;

- the inadequacy of Pacific's commitment regarding the provision of data from actual commercial usage of Pacific's operations support systems ("OSS") following completion of the OSS tests; 2/ and

- the lack of performance remedies adequate to deter noncompliance by Pacific with performance standards established by this Commission and the FCC.

Pacific must correct the deficiencies in its Compliance Filing and address the inconsistencies between its Compliance Filing and the proposed SBC/Ameritech merger conditions before the Commission can evaluate Pacific's compliance with the competitive checklist in Section 271, much less issue a positive recommendation on Pacific's compliance with the competitive checklist. 3/

Conditions for FCC Order Approving SBC/Ameritech Merger" ("SBC/Ameritech Proposed Merger Conditions"), at 26-27.

2/ CompTel relies on other parties to identify additional deficiencies in Pacific's Compliance Filing.

3/ CompTel does not address in these comments Pacific's compliance with the public interest test of Section 271.

I. CHECKLIST ITEM (ii): PACIFIC SHOULD GUARANTEE THAT THE PROPOSED SBC/AMERITECH MERGER CONDITIONS WILL NOT AFFECT PACIFIC'S UNE COMBINATION OFFERING.

To satisfy Checklist Item (ii) in the Section 271 competitive checklist, 4/ a Regional Bell Operating Company ("RBOC"), such as Pacific, must comply with the Supreme Court's decision in AT&T Corp. v. Iowa Utilities Board. 5/ In that decision, the Supreme Court affirmed the FCC's Rule 51.315(b), which requires incumbent local exchange carriers ("ILECs") to provide network elements in their combined form. 6/

Pacific states -- as it must -- that it will comply with its obligation under the Supreme Court's decision to provide competitors with access to unbundled network element ("UNE") combinations on an unrestricted basis. Specifically, Pacific states that "[i]n compliance with the Supreme Court order, Pacific will not 'disassemble' already combined UNEs when a CLEC orders such already combined UNEs." 7/

The conditions proposed to the FCC by SBC and Ameritech on the contemplated SBC/Ameritech merger, however, contain several restrictions on the ability of competitors to obtain access to UNE combinations from SBC and

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4/ 47 U.S.C. § 271(c)(2)(B)(ii).

5/ AT&T Corp. v. Iowa Utilities Board, ___ U.S. ____, 119 S.Ct. 721, 736-38 (1999) ("AT&T Corp."), upholding 47 C.F.R. § 315(b).

6/ Id.

7/ Affidavit of Curtis L. Hopfinger on Behalf of Pacific Bell (filed July 15, 1999) ("Hopfinger Affidavit"), at para. 137, citing AT&T Corp., 119 S.Ct. 721.

Ameritech. 8/ The existence of these restrictions call into question whether Pacific intends to provide network elements in their combined form in California on an unrestricted basis -- both before and after Pacific obtains Section 271 approval.

CompTel has made clear in comments filed with the FCC that SBC and Ameritech cannot impose restrictions on the availability of UNE combinations without violating the Supreme Court's decision, the FCC's rules, and the Telecommunications Act of 1996 ("1996 Act" or "Act"). 9/ Pacific appears to acknowledge in its Compliance Filing that such restrictions are unlawful. Pacific should guarantee in this proceeding that the conditions proposed by SBC and Ameritech on their contemplated merger will not -- and cannot lawfully -- affect Pacific's compliance with its obligation to make UNE combinations, including the UNE platform, available to competitors on an unrestricted basis. Without such a guarantee, Pacific cannot satisfy the requirements of Checklist Item (ii). 10/

8/ SBC/Ameritech Proposed Merger Conditions at 26-27.

9/ In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corporation, Transferor, to SBC Communications Inc., Transferee, Federal Communications Commission CC Docket No. 98-141, Comments of the Competitive Telecommunications Association on the Proposed Conditions (filed July 19, 1999), at 11-15.

10/ 47 U.S.C. § 271(c)(2)(B)(ii).

II. CHECKLIST ITEM (ii): PACIFIC CANNOT LIMIT THE AVAILABILITY OF EEL AS EITHER A UNE OR A UNE COMBINATION.

By ordering Pacific to make EEL available to competitors without restriction in Decision No. 98-12-069, 11/ the Commission recognized the importance of EEL and the need to make EEL available for all services, all customers, and with facilities of all capacity levels. Pacific, however, states that it will provide competitors with access to EEL only for voice grade loops and only when the requesting CLEC is the provider of the particular end user's switched local exchange service. 12/

Restrictions on EEL like those imposed by Pacific would impair the ability of competitors to both expand the reach of their service offerings and provide a full complement of services to California consumers. Restrictions on EEL also would violate the Commission's orders in Decision No. 98-12-069, the 1996 Act, and the FCC's rules.

Impairing the Ability to Compete: Access to extended loops for the provision of services over all types of loops -- voice grade loops as well as high capacity loops -- is critical to the ability of CLECs to expand the geographic reach of their service offerings. The purchase of EELs allows competitors to serve geographically distant customers without having to collocate in every central office necessary to serve those customers. If CLECs are limited in the services they can

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11/ Decision No. 98-12-069 at 149 and Appendix B, page 17.

12/ Hopfinger Affidavit at paras. 139, 140.

provide over EELs, however, they will not be able to provide all the services that many customers demand.

High capacity loops (DS1, DS3, OC12, and higher) are pipelines over which advanced services are being transmitted today and increasingly will be transmitted in the future. CLECs, therefore, need EEL with high capacity loops just as much as they need EEL with voice grade loops. By restricting the availability of EEL to only voice grade loops, Pacific's EEL offering would require CLECs with customers needing high capacity loops to install the CLECs' own facilities in order to serve those customers. Yet, the costs, delays, limitations, and risks associated with collocation are such that it would not be cost-justifiable to collocate loop and switching facilities in every Pacific central office necessary to serve such customers. Access to EEL for both voice grade and high capacity loops, therefore, is essential to the ability of CLECs to expand the reach of their offerings, compete on a broad basis in California, and bring competitive advanced services to the greatest possible number of California consumers.

The Commission's Orders, 1996 Act, and the FCC's Rules: Pacific's attempt to make EEL available only for voice grade loops and only when the requesting CLEC is the provider of the particular end user's switched local exchange service 13/ also violates not only the Commission's orders in Decision No. 98-12-069, 14/ but also Sections 251(c)(3) of the 1996 Act, 15/ Section 271(c)(2)(B)(ii)

13/ Hopfinger Affidavit at paras. 139, 140.

14/ Decision No. 98-12-069 at 149 and Appendix B, page 17.

of the 1996 Act (Checklist Item (ii), 16/ and Section 51.309(a) of the FCC's Rules. 17/

> With respect to EEL, Decision No. 98-12-069:
>
> clarif[ied] and augment[ed] the [Final Staff Report] recommendation to require: Pacific shall demonstrate that it has made the extended link UNE -- which consists of the loop functionality delivered to a distant office -- available to CLECs. 18/

Pacific's restricted EEL offering violates this order in two respects. First, the order expressly requires Pacific to make EEL available as an individual UNE. Pacific indicates in its Compliance Filing, however, that it will make EEL available only as a combination of UNEs. 19/ Second, the order does not permit Pacific to impose restrictions on the availability of EEL. Yet, this is precisely what Pacific attempts to do by making EEL available only for voice grade loops and only when the requesting CLEC is the provider of the particular end user's switched local exchange service. 20/

In addition, whether EEL is considered a UNE or a combination of UNEs, the restrictions Pacific has attempted to impose on its availability violate both the 1996 Act and the FCC's rules. First, making EEL available only for use

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15/ 47 U.S.C. § 251(c)(3).

16/ Id. § 271(c)(2)(B)(ii).

17/ 47 C.F.R. § 51.309(a).

18/ Decision No. 98-12-069 at 149 and Appendix B, page 17.

19/ Hopfinger Affidavit at para. 139.

with voice-grade loops could impede a CLEC's ability to use EELs to provide services other than voice grade services. This restriction thus violates a requesting carrier's right under Section 251(c)(3) of the 1996 Act and Section 51.309(a) of the FCC's Rules 21/ to use network elements to provide *any* telecommunications service. 22/

A network element is intended as a generic capability that can be used by a CLEC to offer any service of its choosing. Section 3 of the Act defines "network element" broadly to include all "features, functions, and capabilities" of a "facility or equipment used in the provision of a telecommunications service." 23/ Section 251(c)(3) of the Act states that an ILEC must provide requesting carriers nondiscriminatory access to network elements "for the provision of a telecommunications service" and that requesting carriers must be allowed to use those network elements "to provide such telecommunications service." 24/ *Nothing* in this provision allows an ILEC (or any other entity) to limit the services that a requesting carrier may provide over the network elements that it purchases.

The FCC's rules implementing these provisions of the 1996 Act expressly provide that:

20/ Id. at paras. 139, 140.

21/ 47 C.F.R. § 51.309(a).

22/ 47 U.S.C. § 251(c)(3).

23/ Id. § 153(29).

24/ Id. § 251(c)(3).

> [a]n incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends. 25/

Pacific has itself acknowledged in its Compliance Filing that "Pacific is not allowed to impose limitations, restrictions, or requirements on the request, or the use of UNEs that would impair the ability of a CLEC to offer a telecommunications service in the manner it intends." 26/ Yet its Compliance Filing contains precisely such restrictions on EELs.

Restricting the types of EELs that can be purchased by CLECs and thus the services that can be offered over EELs denies competitors the right to obtain and use the undifferentiated functionalities of network elements. Indeed, the imposition of such restrictions effectively dictates the services a CLEC will be "allowed" to offer over the network elements it purchases. As made clear by the Act and the FCC's rules, however, the types of services offered by an entrant over the network elements it purchases are *solely* the decision of the entrant.

Pacific's second restriction on the availability of EEL -- that CLECs may obtain access to EEL only if the CLEC is the provider of the particular end user's switched local exchange service 27/ -- also violates both the 1996 Act and the

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25/ 47 C.F.R. § 51.309(a).

26/ Affidavit of William C. Deere on Behalf of Pacific Bell (filed July 15, 1999) ("Deere Affidavit"), at para. 49, citing 47 C.F.R. § 51.309.

27/ Hopfinger Affidavit at paras. 139, 140.

FCC's Rules. Pacific's apparent justification for this restriction is that EEL "is not intended to displace existing Pacific access services." 28/

The FCC, however, has rejected such arguments and made clear that CLECs may purchase UNEs to provide *any* telecommunications service they choose, including exchange access services. 29/ According to the FCC,

> [S]ection 251(c)(3) provides that requesting telecommunications carriers may seek access to unbundled elements to provide a 'telecommunications service,' and exchange access and interexchange services are telecommunications services. Moreover, section 251(c)(3) does not impose restrictions on the ability of requesting carriers 'to combine such elements in order to provide such telecommunications service.' Thus, we find that there is no statutory basis upon which we could reach a different conclusion. . . . 30/

The FCC also rejected ILEC arguments like that of Pacific regarding EEL because:

28/ Id. at para. 140.

29/ See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, 15679, 15680, paras. 356, 359 ("Local Competition Order"), vacated in part sub nom. Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997), rev'd in part and remanded in part sub nom. AT&T Corp, 119 S.Ct. 721. The FCC has issued a Further Notice of Proposed Rulemaking on the question of whether it is possible to restrict the use of the transport network element (whether dedicated or shared) to requesting carriers that are providing local exchange service to the customers served over that transport. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Third Order on Reconsideration and Further Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 97-295 (rel. Aug. 18, 1997), at paras. 60, 61. In its comments before the FCC, CompTel made clear that such restrictions are not permissible under the Act. Unless and until the FCC determines that restrictions on the use of UNEs may be imposed, this Commission is bound to follow the FCC's prior rulings that CLECs cannot be restricted in their ability to employ UNEs to provide any service, including exchange access service.

30/ Local Competition Order, 11 FCC Rcd at 15679, para. 356.

> [t]he incumbent LECs are arguing in effect, that we should read into the current statute a limitation on the ability of carriers to use unbundled network elements, despite the fact that no such limitation survived the conference committee's amendments to the 1996 Act. 31/

Pacific, therefore, is not permitted to make EELs available only on the condition that a requesting CLEC is also the provider of the particular end user's switched local exchange service. 32/

Third, restricting the types of EELs that can be purchased and permitting CLECs to purchase EELs only when a CLEC is the provider of a particular end user's switched local exchange service, also violate the nondiscrimination requirements of Section 251(c)(3) and Checklist Item (ii). 33/ This is so because while Pacific permits CLECs to purchase only certain types of EELs under certain conditions, Pacific itself is subject to no restrictions on its use of EELs or any other UNEs.

In sum, until Pacific removes the restrictions it has placed on the availability of EELs, Pacific cannot be deemed to have satisfied the requirements of Checklist Item (ii) in Section 271. 34/

31/ Id. at 15680, para. 359.

32/ Id.. The Supreme Court's recent decision upholding the FCC's jurisdiction to adopt binding rules regarding any aspect of the 1996 Act makes clear that ILECs are bound to follow these FCC rules. AT&T Corp., 119 S.Ct. at 730.

33/ 47 U.S.C. §§ 251(c)(3); 271(c)(2)(B)(ii).

34/ Id. § 271(c)(2)(B)(ii).

III. CHECKLIST ITEMS (ii) AND (iv): PACIFIC FAILS TO OFFER CLECS ACCESS TO xDSL-EQUIPPED LOOPS.

Pacific's unbundled loop offerings are deficient and fail to satisfy the requirements of either Checklist Item (ii) or Checklist Item (iv) of Section 271. 35/ Specifically, Pacific does not appear to offer competitors access to xDSL-*equipped* loops. Rather, Pacific's offerings in this regard appear to be limited to xDSL-*capable* loops. 36/

To satisfy Checklist Items (ii) and (iv), Pacific must provide competitors with access to xDSL-equipped loops as well as xDSL-capable loops. "xDSL-equipped" loops are simply another type of loop -- one that already has been equipped by the ILEC with the capability to provide xDSL services to end user customers (because the ILEC has already connected the loop to the necessary central office equipment, such as ILEC digital subscriber line access multiplexers ("DSLAMs")). Although some CLECs may wish to install their own DSLAMs and connect them to ILEC loops through collocation in the ILEC central office (and should be able to do so), it is critical that CLECs also have the ability to purchase xDSL-equipped loops as UNEs from Pacific. Competitors need access to xDSL-equipped loops for the same reasons that they need access to conventional loops. 37/

35/ Id. §§ 271(c)(2)(B)(ii) and (iv).

36/ See Hopfinger Affidavit at Attachment O, pages O-16 through O-24.

37/ CompTel has argued in the FCC's UNE Remand Proceeding that xDSL-equipped loops would satisfy the test for mandatory network elements for all ILECs under any reasonable reading of the "necessary" and "impair" standards of Section 251(d)(2). Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Second Further Notice of Proposed Rulemaking,

The loop UNE includes, as part of its features, functions, and capabilities, the electronics that an ILEC has installed on the loop to increase the loop's capacity. CLECs thus have a right to purchase xDSL-equipped loops. This is so, first, because UNEs, by definition, include all the features, functions, and capabilities of the ILECs' network facilities or equipment, as the Supreme Court has held and as the FCC's currently effective rules provide. 38/ Second, Pacific must provide competitors with access to its local loops under Section 271, which specifically requires RBOCs to provide such access as a condition to satisfying the competitive checklist. The checklist does not draw distinctions among loops based on their bandwidth or other capabilities. 39/ Finally, as the FCC has concluded, Section 251 of the Act applies equally to UNEs used in the provision of advanced services, and draws no distinctions based on speed (capacity); technology (circuit-switched vs. packet switched); or service type (conventional or advanced), nor does it draw distinctions based on the timing of ILEC investment in network capabilities. 40/

CC Docket No. 9698, FCC 99-70 (rel. April 16, 1999) ("FCC UNE Remand FNPRM"), Comments of CompTel at 31-35.

38/ AT&T Corp., 119 S.Ct. at 734, affirming 47 C.F.R. § 51.5 (*Network element.*).

39/ 47 U.S.C. § 271(c)(2)(B)(iv).

40/ See Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, et al., Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 98-188 (rel. Aug. 7, 1998) ("FCC Advanced Services Order") at paras. 11, 35, 40, 49, appeal docketed, Docket No. 98-1410 (D.C. Cir. 1998). The FCC has sought a voluntary remand of this order "to allow the Commission to consider further, on its own motion, the issues raised in the [petitioner's] brief." Motion of Federal Communications Commission for Remand to

In sum, therefore, although CLECs should be able to install DSLAMs of their own if they choose, CLECs also must have the ability to purchase xDSL-equipped loops as network elements from Pacific. Accordingly, the Commission should make clear that to satisfy Section 271, Pacific must provide competitors with access, on an unrestricted basis, not only to xDSL-capable loops, but also to xDSL-equipped loops.

IV. CHECKLIST ITEMS (i) AND (ii): PACIFIC HAS NOT DEMONSTRATED FULL COMPLIANCE WITH THE FCC's COLLOCATION ORDER.

As the Commission is aware, the FCC recently adopted an order imposing new obligations on ILECs in their provision of collocation to competitors ("Collocation Order"). 41/ This order created important new requirements that will make it easier, faster, and cheaper for CLECs to collocate, and that will reduce the amount of space required for collocation. In particular, as Pacific acknowledges, 42/

Consider Issues," filed June 22, 1999, at 1. The Commission also has opposed US West's request that the Advanced Services Order be vacated while the FCC considers any voluntary remand. To our knowledge, the Court has not yet acted on the FCC's motion.

41/ In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, First Report and Order, FCC 99-48 (rel. Mar. 31, 1999) ("FCC Collocation Order"), appeal docketed, Docket Nos. 99-1176, 99-1201 (D.C. Cir. 1999).

42/ See Brief in Support of D.98-12-069 Compliance Filing and in Support of Motion for an Order that Pacific Bell has Met the Requirements of § 271 of the Telecommunications Act and § 709.2 of the Public Utilities Code (filed July 15, 1999) ("Pacific Compliance Filing") at 31-59; Hopfinger Affidavit at paras. 69, 93.

the FCC's Collocation Order requires ILECs, such as Pacific, to make available to competitors a cageless collocation option that:

- allows CLECs to collocate in any unused space in the ILEC's premises, to the extent technically feasible, without requiring the construction of a room, cage, or similar structure; without requiring a separate entrance to a competitor's space; and without requiring CLECs to collocate in a room or space separate from the ILEC's own equipment; 43/
- gives CLECs direct access to their equipment without any intermediate interconnection arrangement if technically feasible; 44/ and
- permits CLECs to purchase collocation space in single-bay increments. 45/

Pacific indicates in its Compliance Filing that it has taken steps to comply with this order by filing a new proposed collocation tariff. 46/ It is not enough, however, to claim that collocation will be made available in compliance with the FCC's rules based solely on paper promises in a proposed tariff. Rather, Pacific must show, through real world provisioning of cageless and other collocation arrangements to competitors, that it is actually providing collocation in conformance with the FCC's requirements. Until then, Pacific cannot be deemed to have satisfied Section 271.

43/ FCC Collocation Order at para. 42.

44/ Id.

45/ Id. at para. 43.

46/ Hopfinger Affidavit at para. 69.

Furthermore, Pacific offers only a 110-day provisioning time frame for cageless collocation arrangements. 47/ This provisioning interval is only 10 days shorter than the 120-day provisioning interval that Pacific was required to offer for cage-based collocation arrangements. 48/ Cageless collocation arrangements involve no cage construction and require far less conditioning than cage-based collocation arrangements. Thus, Pacific's provisioning intervals for cageless arrangements should be significantly shorter than the 120-day interval for cage-based arrangements, not a mere 10 days shorter. Indeed, Pacific must provide shorter provisioning intervals for cageless collocation arrangements if Pacific is to comply with the requirements of Checklist Items (i) and (ii) that it provide competitors with nondiscriminatory access to interconnection arrangements and network elements. 49/

In addition, CLECs in this proceeding have demonstrated that Pacific's proposed collocation tariff, submitted with Advice Letter No. 20412, conflicts in many other ways with the FCC's Collocation Order. For example, Pacific's Advice Letter No. 20412 contains charges based on pricing methodologies that conflict with both the Commission's Consensus Costing Principles and the FCC's required

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47/ Pacific Advice Letter No. 20412 (filed July 9, 1999), proposed collocation tariff § 16.10.1(E)(3). Pacific indicates in its Section 271 filing, however, that the provisioning intervals for cageless collocation arrangements are 120 days. Hopfinger Affidavit at para. 111.

48/ Decision No. 98-12-069 at 125.

49/ 47 U.S.C. §§ 271(c)(2)(B)(i) (Checklist Item (i)), 271(c)(2)(B)(ii) (Checklist Item (ii)).

TELRIC costing methodology. 50/ Pacific's Advice Letter No. 20412 also imposes unreasonable conditioning charges for cageless collocation arrangements. 51/ Moreover, Pacific imposes unreasonable, unsubstantiated, and in some cases duplicative charges for what appear to be excessive security measures in connection with Pacific's provisioning of cageless arrangements. 52/ Pacific's Advice Letter No. 20412 also contains language that would effectively allow Pacific to limit the portions of a central office that would be made available for cageless collocation even though nothing in the FCC's Collocation Order permits such limitations. 53/ In short, the CLECs make clear that

> Pacific's proposed tariff in Advice Letter No. 20412 would strip the FCC's order of meaning by claiming to implement new FCC mandated options such as Cageless and Adjacent Collocation, but by doing so under terms and at prices that maintain nearly as high a barrier to competitive entry as to Pacific's current collocation offerings. 54/

50/ Letter from AT&T Communications of California, Inc., Accelerated Connections, Inc., Covad Communications Company, ICG Telecom Group, Inc., MCI WorldCom, MGC Communications, Inc., NEXTLINK, California, NorthPoint Communications, Inc., and Sprint Communications Company L.P., to Jack Leutza, Director, Telecommunications Division, California Public Utilities Commission, regarding Protest to Pacific Bell Advice Letter 20412 -- (Revised) (dated July 29, 1999) ("CLEC Collocation Filing Protest Letter"), at 3-4.

51/ Id. at 11.

52/ Id. at 11-13.

53/ Id. at 14-15.

54/ Id. at 3.

Until Pacific corrects the conflicts between its collocation offerings and the FCC's Collocation Order and demonstrates actual compliance with the FCC's collocation requirements, Pacific cannot be considered in compliance with Section 271.

V. CHECKLIST ITEMS (i) AND (ii): THE COMMISSION SHOULD CLARIFY PACIFIC'S OBLIGATION REGARDING DATA FROM COMMERCIAL USAGE OF ITS OSS.

Pacific also cannot be deemed to have satisfied the requirements of Section 271 until Pacific demonstrates (1) that its OSS provides competitors with access to interconnection, network elements, and resale that is equal in quality to that provided by Pacific to itself and its affiliates 55/ and (2) that Pacific has developed a working OSS capable of supporting broad-based local competition in California. The record in this proceeding shows that Pacific has, to date, failed to comply with these requirements. Indeed, the performance data from Pacific's OSS currently show that Pacific does not provide competitors with OSS at parity with the OSS that Pacific provides to itself. 56/ In addition, Pacific has yet to demonstrate that its OSS satisfies the Commission's recently adopted performance standards.

The poor performance of Pacific's OSS to date underscores the need to obtain, and permit parties to comment on, an additional three months of data from actual commercial usage of Pacific's OSS *following* the completion of the OSS

55/ 47 U.S.C. §§ 251(c)(2), 251(c)(3), 271(c)(2)(B)(i) (Checklist Item (i)), 271(c)(2)(B)(ii) (Checklist Item (ii)).

56/ Affidavit of Gwen S. Johnson on behalf of Pacific Bell (filed July 15, 1999).

testing. Data from actual commercial usage following completion of the OSS tests is necessary in order to ensure that the OSS that Pacific provides to competitors is actually equal in quality to the OSS that Pacific provides to itself and its affiliates when service is provided to real customers, over live lines, at real-world volumes. 57/ Such data also is necessary to ensure that the OSS Pacific provides to competitors is equally operable for both large and small carriers.

The importance of obtaining data from actual commercial usage becomes particularly clear when one considers the consequences of permitting Pacific to enter the in-region, interLATA market before it makes adequate OSS available to competitors. After obtaining in-region interLATA authority, Pacific will be able to convert large volumes of customers rapidly using the software-based primary interexchange carrier ("PIC") process established in the long distance market. When added to Pacific's ownership of the local exchange network, this ability will make it possible for Pacific to offer one-stop shopping packages of local and long distance services to large numbers of customers almost immediately after obtaining interLATA authority. Competitive carriers, by contrast, will not be able to convert commercial volumes of customers quickly in the local exchange market if the OSS available from Pacific remains inadequate. Consequently, competitive carriers will not be able to match Pacific's one-stop shopping service offerings. The Commission thus cannot issue a positive recommendation on Pacific's compliance

57/ See 47 C.F.R. § 51.312(b); Local Competition Order, 11 FCC Rcd at 15658, para. 312.

with the competitive checklist in Section 271 until Pacific demonstrates that it actually provides competitors with nondiscriminatory OSS.

Pacific indicates that it will submit data from actual commercial usage of its OSS after the OSS testing has been completed. 58/ The Commission should clarify, however, both Pacific's obligation with respect to the submission of data from actual commercial usage following completion of the OSS tests, and the procedure to be followed with respect to that submission. First, the Commission should make clear that the submission of three months of data from actual commercial usage *following* the completion of the OSS testing is a mandatory element in Pacific's overall Compliance Filing, not an optional supplement to that filing. Second, the Commission should make clear that the additional data from actual commercial usage must demonstrate compliance with the Commission's recently adopted performance standards. Third, the Commission should make clear that parties will have an opportunity to comment on Pacific's submission of additional commercial data just as they will have an opportunity to comment on the results of the OSS tests. 59/ These clarifications are necessary if the Commission is to accurately determine whether Pacific's OSS satisfy the requirements of Section 271.

58/ See Pacific Compliance Filing at 31-32.

59/ See Assigned Commissioner's Ruling on California Telecommunications Coalition's Motion for Clarification (dated July 23, 1999), at 3, 4.

VI. CHECKLIST ITEMS (i) AND (ii): PACIFIC'S POOR PERFORMANCE DATA DEMONSTRATES THE NEED FOR MEANINGFUL PERFORMANCE REMEDIES.

Even with the incentives created by the prospect of in-region, interLATA entry under Section 271, Pacific has failed, to date, to provide competitors with OSS at parity with the OSS that Pacific provides to itself and its affiliates. Once Pacific receives interLATA authority in California, there will be even less incentive for Pacific to comply with its OSS obligations. In fact, as a competitor in the telecommunications market, Pacific will have an affirmative incentive *not* to comply such obligations once it receives interLATA authority in California.

To ensure that Pacific complies with its obligation to provide competitors with nondiscriminatory OSS, it is essential that the Commission establish performance remedies that will create a meaningful deterrent to Pacific noncompliance. Furthermore, it is essential that the Commission establish such performance remedies *before* Pacific obtains interLATA authority in California. This is so because the Department of Justice's "irreversibly open to competition" standard cannot be met in California's local exchange market until such remedies are established. 60/

60/ E.g., Second Application by BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana, CC Docket No. 98-121, Evaluation of the United States Department of Justice (filed April 19, 1998), at 1.

In crafting performance remedies, CompTel urges the Commission to adhere to certain fundamental standards. Specifically, the Commission should establish performance remedies that:

- are rapid and self-executing;
- consist of financial remedies paid to CLECs, not to a government fund;
- are substantial enough to ensure compliance with the performance standards prescribed by this Commission and the FCC;
- provide financial compensation to affected CLECs that goes beyond mere restitution and addresses additional damage suffered by CLECs, such as loss of customers, loss of reputation, loss of revenues, and a loss of ability to win new customers;
- require Pacific to absorb the financial remedies paid to CLECs, not pass them on to rate payers;
- ensure compliance with performance standards both before and after Pacific receives Section 271 authority; and
- impose financial remedies that are escalated and categorized, or tiered, to take into account extreme non-compliance, extended periods of non-compliance, and noncompliance at industry-wide, as well as CLEC-specific, levels.

In addition, the Commission should consider adopting escalating market structure remedies for severe non-compliance, such as a requirement that Pacific must structurally separate its network and retail service operations. 61/

Without such performance remedies, Pacific will have little incentive to provide competitors with access to nondiscriminatory OSS, particularly after

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61/ At the federal level, in the case of non-complying RBOCs, market structure remedies also should include: (1) denial of interLATA authority under Section 271, (2) suspension of an RBOC's ability to market to or accept new interLATA

Pacific obtains interLATA authority in the state. As a result, the Commission will not be able to ensure that the local exchange market in California is irreversibly open to competition. The Commission cannot, therefore, issue a positive recommendation on Pacific's Section 271 application until it has established meaningful performance remedies that incorporate the fundamental elements described above.

CONCLUSION

For the foregoing reasons, the Commission should reject Pacific Bell's Compliance Filing because it violates the 1996 Act, the FCC's rules, the Supreme Court's decision in AT&T Corp. v Iowa Utilities Board, and the Commission's orders in Decision No. 98-12-069. The Commission also should require Pacific to explain the inconsistencies between the proposed conditions in the FCC SBC/Ameritech Merger proceeding and this Compliance Filing.

Pacific cannot satisfy Section 271 until it (1) guarantees competitors unrestricted access to UNE combinations (including the UNE platform), EEL, and xDSL equipped loops; (2) demonstrates actual fulfillment of the FCC's collocation requirements through real-world provisioning of, for example, cageless collocation arrangements; (3) shortens its cageless collocation provisioning intervals; and (4) demonstrates that it has developed adequate OSS through the submission of data from actual commercial usage at commercial volumes, following the completion of

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customers after it has received Section 271 authority, and (3) revocation of an RBOC's interLATA authority, including the loss of existing interLATA customers.

the OSS tests. In addition, the Commission cannot issue a positive recommendation on Pacific's Section 271 application until it has established meaningful performance remedies that will help ensure that California's local exchange market ultimately will be irreversibly open to competition.

Respectfully submitted,

Terry Monroe
Vice President, State Affairs
The Competitive Telecommunications Association
1900 M Street, N.W., Suite 800
Washington, D.C. 20036
Phone: (202) 296-6650
Fax: (202) 296-7585
E-Mail: tmonroe@comptel.org

Linda L. Oliver
Jennifer A. Purvis
Hogan & Hartson L.L.P.
555 13th Street, N.W.
Washington, D.C. 20004
Phone: (202) 637-5600
Fax: (202) 637-5910
E-Mail: LLOliver@HHLaw.com
JPurvis@HHLaw.com

Counsel for CompTel

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