ALJ/GAA/tcg

Decision 89 07 044 JUL 19 1989 ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of US Sprint Communications Company (U-5112-C) for a Certificate of Public Convenince and Necessity for Authority to Provide an IntraLATA High Speed Digital Private Line Service in California.	)	Application 88-11-009 (Filed November 4, 1988)

OPINION MODIFYING DECISION 89-02-027

On March 10, 1989 US Sprint Communications Limited Partnership (Sprint) (U-5112-C) filed a petition for modification (petition) of Decision (D.) 89-02-027 dated February 8, 1989. Sprint in its petition seeks modification of D.89-02-027 in the following two respects:

1. Deletion of Ordering Paragraph 1.e., which requires that Sprint must establish its rates and charges above costs; and

2. Deletion of Ordering Paragraphs 7 and 8 which directed Sprint to file certain semiannual reports for a two-year period, on the development of this new service.

Sprint's Position Regarding Cost Based Rates

In its petition, Sprint asserts that the imposition of a cost requirement in setting rates is inconsistent with the modified settlement agreement adopted in Phase I of Order Instituting Investigation (I.) 87-11-033 by D.88-09-059, Ordering Paragraph 7 which permits non-dominant carriers to change their tariff rates and conditions on five days' notice without cost support.

Sprint also notes that, as a non-dominant carrier, it maintains its books of account in accordance with generally accepted accounting principles (GAAP) rather than in compliance

with the Uniform System of Accounts (USOA). Therefore, since it does not have its records under the USOA, it contends that it may not be capable of providing jurisdictionally separated cost studies to cover this service offering under its GAAP form of accounts.

Sprint also argues that it is not necessary to impose the cost requirement on it, because it is non-dominant in the intraLATA market and by definition non-dominant carriers "have no market power to establish rates in a predatory or exploitive manner." (Sprint Pet. for Mod. p. 4.)

Sprint further argues that the Commission needs to clarify that it did not intend to impose new costing standards upon non-dominant interexchange carriers without an adequate record.

Protests and Comments Received Relative to Sprint's Position on Cost Based Rates

DRA and Pacific Bell (Pacific) filed timely protests to Sprint's petition. DRA contends that Sprint's petition flies in the face of established Commission precedent, and that the Commission must consider the antitrust implications of its activities.[1]

DRA also challenges as inappropriate Sprint's reference to D.84-06-113, relative to its position as a non-dominant interLATA carrier. DRA asserts that D.84-06-113 clearly deals with dominance in the well-established interLATA and interstate long-distance market. D.89-02-027 dealt with the new, changing market for intraLATA high speed digital private line service, and until D.89-02-027 and its companion decisions were issued on February 8, 1989, no competition was permitted for such service in the

1 DRA cites Northern California Power Agency v. Public Util. Comm., 5 Cal. 3d 370 at 379, 380, 96 Cal. Rptr. 18, 486 P 2d 1218 (1971).

intraLATA market. DRA opines that it is too early to consider dominance, or lack of it, for this high speed digital service in the intraLATA market.

DRA also maintains from its review of D.84-06-113 and the settlement agreement of D.88-09-059 that neither order "limits the Commission's power to impose terms and conditions on applicants for Certificates of Public Convenience and Necessity (CPCNs) beyond the express language of the settlement agreement and D.88-09-059." DRA bolsters its position by pointing out that Sprint's gross revenues for 1987 were $2.405 billion and is a profitable corporation with sufficient resources to enable it to engage in below cost pricing, particularly for a small segment of its market.

Lastly, DRA comments that it is ironic for Sprint to petition for a change to eliminate a restriction on its ability to price below cost, when it was among those vociferous opponents of below cost pricing by Pacific, AT&T Communication of California, Inc. (AT&T-C) and GTE California Incorporated (GTEC).

In its protest, Pacific agreed that D.88-09-059 approving the modified settlement does not require Sprint to price its intraLATA high speed digital services above cost. However, Pacific notes that nothing in D.88-09-059 suggests that requiring Sprint's intraLATA high speed digital private line service to be priced above cost is inequitable. Pacific asserts that such requirement in D.89-02-027 is reasonable and in the public interest, and the imposition of that requirement in addition to those set out in D.88-09-059 is not improper.

Pacific states that the compelling reason for requiring Sprint to price its intraLATA private line services above cost is to ensure that competition takes place on a level playing field. Pacific and other local exchange companies (LEC) are required to set their rates and charges for intraLATA high speed digital private line services above the cost of providing these services. Therefore, Pacific argues that without requiring Sprint to price

above its cost, there is no way for the Commission to ensure that Sprint is not engaging in below cost pricing to the detriment of other providers of these services.

Pacific urges that whatever costing convention and requirements are applied to one carrier also be applied to that carrier's competitors. Pacific then referred to a similar decision for MCI which included the requirement that MCI's price be set above the cost of furnishing the service. Pacific refers specifically to page 6 of D.89-02-025 where the Commission determined that the monitoring and reporting information requested by the DRA in its protest is needed by the Commission to protect competitors against anticompetitive behavior e.g., below cost pricing.

On March 15, 1989 AT&T-C replied to Sprint's petition and concurred with Sprint's arguments, except that AT&T-C disagreed to the extent that Sprint would consider AT&T-C as a dominant carrier in this new intraLATA market.

In supporting Sprint's proposed modifications of D.89-02-027, AT&T-C further requested that such modifications apply to all interexchange carriers authorized to provide intraLATA high speed digital private line service.

Discussion Regarding Cost Based Rates

Recently, by D.89-05-066, dated May 26, 1989, we dealt with a similar petition by MCI Telecommunications Corporation (MCI) regarding D.89-02-025, dated February 8, 1989. The following rationale was set forth in D.89-05-066 for granting MCI's request.

> "When we added this requirement to MCI's CPCN in D.89-02-025 we did not anticipate any controversy. We were mistaken in that expectation.
>
> "The settlement agreement in Phase I of I.87-11-033 contained a requirement that Pacific Bell and GTEC offer cost justifications to establish the lower bound of their pricing

flexibility in this market. No such requirement was prescribed for new entrants. Given that Pacific Bell and GTEC were starting in this newly-competitive market from a near-monopoly position with monopoly local service as a potential source of cross-subsidy, the cost-justified price floors were an appropriate measure to help assure that the market would develop fairly. We believe that the parties had precisely these concerns in mind in drafting the specific terms of the settlement on this issue.

"As a new entrant in this market, MCI has neither market share nor potential recourse to any source of monopoly revenues to cross-subsidize prices for anticompetitive reasons. Further, it is difficult to anticipate how MCI could make such anticompetitive conduct pay, as it would need to become dominant in the market and determine a means to exclude others (in particular, Pacific Bell or GTEC) before becoming able to sustain prices high enough above cost for long enough to recoup its losses from initial predatory pricing. Such a scenario may be theoretically possible, but from this vantage it is certainly far-fetched and there is no evidence in its favor. As described later in this order and elsewhere, we will continue to monitor the development of this market closely to assure that it develops fully and fairly. Also, we retain our full investigative authority to respond to evidence of anticompetitive conduct on the part of MCI or others, whether brought to our attention through our own formal monitoring or by aggrieved parties.

"We are therefore left with no good policy rationale to support this requirement, and a good argument that its imposition would disturb the integrity of the settlement's implementation. We will grant MCI's motion to delete Ordering Paragraph 1.e. from D.89-02-025, and will entertain similar motions from other new entrants similarly situated." (D.89-05-066, mimeo. pp. 5 & 6.)

There is also good cause to grant Sprint's similar request to delete Ordering Paragraph 1.e. from D.89-02-027, and we will do so in this order.

Sprint's Position on Reporting Requirements

Sprint asserts that the imposition of reporting requirements on Sprint was not discussed or agreed to by the parties to the settlement agreement in Phase I of I.87-11-033 or D.88-09-059. Sprint opines that if such requirements are deemed necessary, they should first be addressed in later phases of I.87-11-033, and the Commission should explore reasons for such reporting requirements at hearings before ordering the reports to be filed by Sprint.

Protests and Comments of Interested Parties Relative to Reporting Requirements of D.89-02-027

Pacific opines that the need for these reports is apparent, because the reports will allow the Commission to assess the impact of allowing competition for intraLATA high speed digital private line services. These monitoring and reporting requirements will also provide the Commission with information it needs to oversee the effects of competition. Therefore, Pacific contends that the monitoring and reporting requirements of D.89-02-027 are reasonable and should not be modified.

DRA first asked for more stringent reporting requirements in its December 2, 1988 protest of Sprint's A.88-10-053. Now, DRA takes strong exception to Sprint's request to be exempted from the less onerous reporting requirements of Ordering Paragraphs 7 and 8 of D.89-02-027, stating that these requirements are entirely consistent with recent Commission actions to monitor the development of competition in markets where competition was formerly prohibited.

DRA also notes that Sprint is not the sole applicant that is subject to the reporting requirements. Identical reporting requirements were imposed on MCI, AT&T-C, Cable and Wireless, Wang Communications and Bay Area Teleport by decisions issued contemporaneously with D.89-02-025 on February 8, 1989.

DRA also notes that these reporting requirements will "sunset," since the Commission only requires that the reports be filed for a two-year period through year end 1990.

Discussion of Reporting Requirements for Sprint's IntraLATA High Speed Digital Service

By its Petition for Modification of D.89-02-025, MCI also requested deletion of these same reporting requirements. In D.89-05-066 we included the following discussion of this matter.

> "The issue of reporting requirements, while not advanced by the parties to the Phase I settlement agreement in I.87-11-033 or in D.88-09-059, was properly addressed in D.89-02-025 and in other contemporaneous orders issued on February 8, 1989. We also substantially reduced the burden and sensitivity of these reports for this emerging competitive industry, as compared to the content and timing initially recommended for these reports by DRA.
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> "First we asked that the reports be filed semiannually rather than quarterly; more significantly, we deleted the requirement that these utilities compute their costs on a monthly basis for each rate offering.
>
> "The remaining reporting requirement is not an onerous one since we are only asking for monthly service volumes, monthly inward movement volumes, and monthly recurring and non-recurring billings by tariff rate elements.
>
> "This information does not reveal who the customers are, how they were solicited, or their specific level of business activity with

> MCI. Thus, the question of propriety of the reported information is largely moot.
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> "The calendar year 1990 sunset provision for these reports was inserted in the hope that competition will truly emerge for this high speed digital private line service, and this industry can be left to compete without need for reporting thereafter. We agree with DRA and Pacific that the reporting requirements of D.89-02-025 are reasonable and necessary. Therefore, we see no reason to make any change in the modest reporting requirements adopted for MCI in D.89-02-025 at this time." (D.89-05-066, mimeo. pp. 7 & 8.)

Sprint's request is identical to MCI's request relative to D.89-02-025, which we denied by D.89-05-066. Accordingly, we see no reason to make any change in the reporting requirements adopted for Sprint in D.89-02-027.

Findings of Fact

1. The Phase I settlement in I.87-11-033 included cost-justification requirements only for the intraLATA high-capacity private line prices of Pacific Bell and GTEC.

2. The integrity of the Commission's implementation of the Phase I settlement would be better preserved if the requirement to price above cost were deleted from Sprint's CPCN granted in D.89-02-027.

3. Sprint has no monopoly markets from which cross-subsidies could be extracted to support predatory pricing in the high-capacity intraLATA private line market.

4. Sprint has no apparent means to exclude other competitors from any segment of the intraLATA high-capacity private line market.

5. It is extremely unlikely that Sprint is now or will foreseeably be in a position to profitably pursue anticompetitive conduct in the competitive intraLATA high-capacity private line market.

6. The better preservation of the integrity of the Commission's implementation of the Phase I settlement and the inability of Sprint to profitably pursue anticompetitive conduct are good cause to delete the requirement to price above cost from Sprint's intraLATA high-capacity private line CPCN.

7. The semi-annual reports required by Ordering Paragraphs 7 and 8 of D.89-02-027 are reasonable and necessary to inform the Commission of the development of emerging competition for these intraLATA high speed digital private line services.

8. The reporting requirements discussed in D.89-02-027 and in 6. above do not contain references to specific customers or the marketing practices of Sprint; and, therefore, any question of propriety of such information is largely moot.

9. A calendar year 1990 sunset provision has been incorporated in the reporting requirements of D.89-02-027 so that these reports may be terminated as and when competition fully develops.

10. There is no compelling reason to make any changes in the modest reporting requirements adopted for Sprint in D.89-02-027.

Conclusions of Law

1. Good cause having been shown, Ordering Paragraph 1.e. should be deleted from D.89-02-027.

2. Except to the extent set forth in Conclusion of Law 1 above, Sprint's petition for modification of D.89-02-027 should be denied.

O R D E R

IT IS ORDERED that:

1. Ordering Paragraph 1.e of D.89-02-027 issued February 8, 1989 is deleted.

2. The ordering paragraphs and other provisions and requirements of D.89-02-027 dated February 8, 1989, except as

expressly modified here, continue to apply to Sprint after the effective date of this order.

3. All other relief requested by Sprint in its petition for modification of D.89-02-027 is denied.

This order is effective today.

Dated JUL 19 1989, at San Francisco, California.

G. MITCHELL WILK
President
FREDERICK R. DUDA
STANLEY W. HULETT
JOHN B. OHANIAN
Commissioners

Commissioner Patrick M. Eckert, being necessarily absent, did not participate.

I CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY.

Victor Weisser, Executive Director