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ORIGINAL

Decision 91-09-077 September 25, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the Establishment of a Forum to Consider Rates, Rules, Practices, and Policies of Pacific and GTE California Incorporated.	)	I.90-02-047 No. 0001 (Filed February 23, 1990)

O P I N I O N

Summary

This decision grants the "Joint Motion of Teleport Communications Group and Pacific Bell for the Adoption of Settlement Agreement" (Joint Motion) filed on August 19, 1991. The decision also adopts the "Settlement Agreement and Revised Stipulation" (Settlement Agreement) entered into by Pacific Bell (Pacific) and Teleport Communications Group (TCG) on August 19, 1991. Under the adopted Settlement Agreement, Pacific will provide interconnection to Teleport Communications San Francisco, Inc., (Teleport)[1] at the terms and conditions set forth in the "Application for Exchange Access Service and/or Facilities Hubbing" (Specialized Service Arrangements, or SSA) attached to the Settlement Agreement. Pursuant to the SSA, Pacific will offer Teleport exchange access services and facilities to provide High-capacity (90 millibits per second (Mbps)) Access Service from Teleport's points of connection to the Pacific central offices (COs). Teleport will pay Pacific a nonrecurring charge of $63,105, a monthly rate of $512 per month, and a termination charge equal to the actual cost of removal.

1 Teleport is an affiliate of TCG. The Joint Motion and Settlement Agreement were executed by TCG to enable Teleport to receive the desired service from Pacific.

Procedural Background

This matter is the first to be addressed in an investigatory docket that was initiated by the Commission as mandated by Decision (D.) 89-10-031 in Investigation (I.) 87-11-033 (Investigation into Alternative Regulatory Frameworks for Local Exchange Carriers). The Commission intended this investigation to replace the general rate case as a forum for parties who claim that current tariff offerings do not meet their needs. (33 CPUC 2d 43, 208.)

The "Petition of the Teleport Communications Group to Require Pacific Bell to Modify Special Access Tariffs and Practices" (Petition) was filed on April 16, 1990. TCG asked the Commission to require Pacific to:

1. Terminate fiber optic interconnection cables dedicated to Teleport at Pacific's COs;

2. Locate interconnection electronics specified by Teleport at the COs' end of the interconnection cables;

3. Charge Teleport a "capital-like amount and only reasonable, cost-based rates to recover Pacific's costs" of termination; and

4. Directly interconnect Teleport's CO-to-POP[2] Links with End User-to-CO Links provided by Pacific. Teleport intends to offer CO-to-POP links in competition with Pacific.

In support of its Petition, TCG argued that the Commission intended competitive provision of CO-to-POP links to

2 POP is the acronym for "point of presence," a term which describes the location of a nonlocal exchange carrier's facilities that enable it to interconnect with end users through the facilities of a local exchange carrier.

exist because the Commission had granted Pacific the right to price its CO-to-POP link on a flexible basis. Teleport claimed it was foreclosed from competing with Pacific because Pacific had refused to allow the extension of Teleport's network to a Pacific CO.

Teleport claimed that its objectives would be realized if Pacific either permitted Teleport to co-locate Teleport's interconnection cable and interconnection facilities at the Pacific CO or provided Teleport with a "virtual co-location" that is technically and economically equivalent to actual co-location.

On May 21, 1990, Pacific filed its protest to and comments on the Petition. Pacific claims the Commission neither adopted pricing flexibility nor intended to foster competition for CO-to-POP facilities; equivalent interconnection for the facilities described by Teleport exists today; and the gravamen of the Petition is a request for access charge reductions.

Metropolitan Fiber Systems of California, Inc. (Metropolitan) commented in favor of the Petition. GTE California Incorporated, Citizens Utilities Company of California, and the Commission's Division of Ratepayer Advocates (DRA) protested the Petition. The Federal Executive Agencies (FEA) were granted leave to intervene.

The assigned administrative law judge (ALJ) solicited prehearing conference (PHC) statements from the parties and convened a PHC on September 25, 1990. A service list was established at the PHC. At that time, Pacific and TCG announced that they were actively pursuing settlement of the case. In order to facilitate resolution of the matter, the ALJ ruled that a subsequent PHC would be held on October 26, 1990, that the subsequent PHC would serve as the publicly noticed settlement conference required by Rule 51.1 (b) of the Commission's Rules of Practice and Procedure (Rules), and that Pacific and TCG would mail their written agreement to the parties on the service list seven days before the PHC.

The "Joint Notice of Stipulation by and Between Teleport Communications Group and Pacific Bell" (Notice) dated October 18, 1990 was mailed to the parties. The Notice included a joint motion for the adoption of a stipulation and an "Application for Exchange Access Service" that set forth all the terms of a co-location agreement between TCG and Pacific, except for the price. The Notice and its attachments were discussed at the October 26, 1990 PHC. The parties to the stipulation (Proponents) urged that the stipulation be approved by the Commission prior to the submission of any testimony and that further proceedings be limited to the unresolved question of the appropriate price for the service. Minor amendments to the stipulation were made and the revised document was circulated November 1, 1990. Parties served comments and replies to comments regarding the revised stipulation.

The Proponents subsequently reached agreement on the price Teleport should pay Pacific for the desired services. A joint motion filed May 8, 1991, seeks approval of a settlement agreement dated May 7, 1991, which the Proponents intended to supercede the earlier stipulation. However, no notice of settlement conference had been circulated prior to execution of the new agreement as required by Rule 51.1.

Pursuant to direction from the ALJ, on August 2, 1991 the Proponents withdrew the May 8 joint motion and circulated a Notice of Settlement Conference to all parties. The settlement conference was held on August 9, 1991. The Proponents then executed their Settlement Agreement and filed their Joint Motion on August 19, 1991. The terms of the Settlement Agreement are identical to those contained in the May 7 settlement agreement. All of the parties that participated in the settlement conference agreed to file their comments on the Settlement Agreement, if any, no later than

September 3, 1991. On that basis, the ALJ granted TCG's motion to shorten time for filing comments from 30 days to 15 days.[3]

Comments on the May 7 settlement agreement were received from Metropolitan and DRA when it was circulated in May; replies to those comments were filed by Proponents within the comment period established by Rule 51.4. When the Settlement Agreement was circulated in August, comments were received from Metropolitan, FEA, Associated Communications of Los Angeles, Inc. (Associated), and DRA. Metropolitan incorporated its earlier comments; the FEA adopted Metropolitan's previously filed comments; the DRA reiterated its earlier position. Pacific responded to the comments of Metropolitan and FEA. Because the May 7 settlement agreement was identified in all significant respects to the August 19 Settlement Agreement submitted for our approval, we will consider all comments to be addressed to the August 19 Settlement Agreement.

Terms of the Settlement Agreement

Under the Settlement Agreement, Pacific agrees to provide Teleport with exchange access service and facilities. Teleport will purchase specified equipment and then transfer ownership to Pacific at Teleport's cost. Teleport will construct fiber optic cable from its two designated points of connection to a specified Pacific CO. Pacific will pay its pro rata share of the cable's costs and will connect exchange access service to Teleport's points of connection via this cable.

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3 The California Cable Television Association (CCTA) opposed the motion to shorten time for filing comments. Although a party to the proceeding, CCTA did not file comments on either the stipulation of November 1990 or the settlement agreement circulated in May 1991. It did not participate in the August settlement conference. CCTA has not asserted any interest in the merits of this proceeding. Its objection to the shortening of time should be denied.

The service to be provided will be High-capacity Access Service described in Sec. 7.2.2(c)(4) of Pacific's access tariff, CPUC 175-T. This service will be provided for 10 years for a nonrecurring charge of $63,105 and a monthly rate of $512, subject to a termination charge equal to the actual cost of removal.

The Proponents agree that the stated rates and charges apply only to the exchange access services and facilities described in the SSA to be effected between Teleport's points of connection and Pacific's CO. They acknowledge that any additional access services or facilities ordered from Pacific and provided in conjunction with these facilities will be charged at tariff rates developed for those services or facilities on a case-by-case basis.

Both parties recognize that the subject exchange access services and facilities may be used to transport authorized interstate and intrastate traffic. The Proponents intend to preclude Teleport from supplying local exchange dial tone to its customers. They agree that Teleport may not interconnect the 90 Mbps service at Pacific's CO with any dial tone service or other services excluded by the SSA.

A good portion of a settlement agreement addressed the potential interconnections that Pacific may construct at the request of TCG in the future. Pacific agrees to provide similar interconnections pursuant to the terms of the Settlement Agreement but potentially using other equipment. The prices and other terms and conditions for any similar interconnections are to be negotiated in good faith by the parties. However, if the purpose of the interconnection is to facilitate the provision of services which compete with those offered by Pacific, Pacific need not accept a price if the contribution derived from that price (the amount of price in excess of cost) is less than the contribution Pacific realizes for like connections when it offers its competing services directly to customers.

Comments on the Settlement Agreement

DRA had no objection to adoption of the Settlement Agreement. It suggests that the concerns of Metropolitan and the FEA be addressed not in this proceeding, but in the rate design phase of I.87-11-033. DRA's position is well taken.

Metropolitan recommended rejection of the Settlement Agreement for the following reasons:

1. The Settlement Agreement places the Proponents' competitors at a competitive disadvantage by seeking to deny comparable interconnection arrangements to those competitors;
2. It provides no cost support for the rates;
3. It is vague and anticompetitive;
4. It attempts to resolve important legal and policy issues outside the limits of this proceeding; and
5. Proponents did not follow Rule 51.1, which requires a settlement conference be held.

The FEA concurs in these comments and likewise recommends rejection.

Burden of Parties Contesting a Proposed Stipulation or Settlement

Rule 51.5 states in part:

"...Parties should indicate the extent of their planned participation at any hearing. If the contesting party asserts that hearing is required by law, appropriate citation shall be provided...."

Rule 51.6 (a) states in part:

"If the stipulation or settlement is contested, pursuant to Rule 51.4, in whole or in part on any material issue of fact by any party,... (d)iscovery will be permitted and should be well underway prior to the close of the comment period...."

Although Metropolitan, FEA, and Associated recommend rejection of the Settlement Agreement, no party indicated what it would show or the extent of its planned participation at any evidentiary hearing on TCG's petition for an order requiring Pacific to interconnect Teleport's CO-to-POP links at cost-based rates. None of the parties asserted that hearing is required by law. Despite its avowed interest in the price of Pacific's service to Teleport, Metropolitan has not pursued discovery of that issue as required under Rule 51.6 (a). Pacific reported in its response to Metropolitan's comments on the May 8 joint motion that "Metropolitan has not inquired of Pacific whether the rates satisfy the requirement (that CO-to-POP services be provided at fully allocated or direct embedded costs)."

Metropolitan, FEA, and Associated have not given the Commission constructive guidance on the benefits of proceeding to evidentiary hearing. Metropolitan failed to diligently pursue discovery and did not follow through on its comments objecting to the Settlement Agreement. Thus, we find that Metropolitan, FEA, and Associated have not properly contested the Settlement Agreement. On that basis, we need not consider the merits of their comments. Nonetheless, we will analyze those comments, below, to provide guidance to Pacific and other parties who may wish to negotiate similar SSAs.

Procedure for Contested Stipulations and Settlements

Rule 51.6 (a) states:

> "If the stipulation or settlement is contested, pursuant to Rule 51.4, in whole or in part on any material issue of fact by any party, the Commission will schedule a hearing on the contested issue(s) as soon after the close of the comment period as reasonably possible...."

Rule 51.6 (b) states:

> "The Commission may decline to set hearing in any case where the contested issue of fact is

> not material or where the contested issue is one of law. In the latter case, opportunity for briefs will be provided."

Metropolitan and FEA state five grounds for their recommended rejection of the Settlement Agreement. Associated cited two of those five grounds. We shall determine whether these parties have contested a material issue of fact that requires hearing or a contested issue of law, that requires an opportunity for briefs.

The Settlement Agreement is neutral with respect to competitors. Pacific has offered to execute a SSA to interconnect any other party employing the same format under substantially the same terms it has negotiated with TCG. However, because the location and type of equipment required to serve an alternate service provider will be unique to each service, the issue of cost must be resolved on an individual basis. The Settlement Agreement governs the terms of service that Pacific proposes to provide Teleport under extremely specific circumstances. In fact, if Teleport wishes additional interconnection or other services from Pacific, the terms of those services will have to be negotiated independent of the Settlement Agreement. Teleport's bargaining position will be identical to that of its competitors. Pacific has not discriminated against other alternate service providers in its settlement with Teleport.

Metropolitan and FEA believe that arrangements such as Teleport's should be offered on a general tariffed basis as soon as possible. Associated claims that as a unique arrangement between Teleport and Pacific, the Settlement Agreement discriminates against similarly situated alternative service providers. We disagree. The scope of this proceeding involves the petition of TCG for a narrowly defined service. The relief sought by Metropolitan, FEA, and Associated could not be undertaken here without creating a conflict with the Commission's inquiry into

costing and pricing methodology that is still pending in Phase III of I.87-11-033. In the Settlement Agreement itself, the parties have affirmed their continuing right to advocate their positions with respect to the terms of service provided under the Settlement Agreement in regulatory proceedings.[4] Thus, the Settlement Agreement cannot be said to resolve any legal or policy issues outside the scope of this proceeding.

Metropolitan argues that Pacific should be required to identify specifically the amount of contribution that it asserts is generated by its various services, and should identify the services that are subsidized by these amounts. Associated would require a cost analysis of the rates proposed by the Settlement Agreement to demonstrate their reasonableness. Such a showing would needlessly duplicate the evidentiary hearings contemplated for I.87-11-033 and is not required in this proceeding.

On the issue of rates and charges, Pacific points out that its rates are consistent with the Commission's requirement that CO-to-POP connections be priced at fully allocated or direct embedded costs. TCG is satisfied that the rates comply with the Commission's requirement. DRA's concurrence in the agreement provides some assurance of the reasonableness of the rates.

We do not agree with Metropolitan and FEA that any of the terms of the Settlement Agreement it has identified as vague are in fact vague. Neither Metropolitan nor FEA identified any anticompetitive terms in the agreement.

In its comments on the May 7 settlement agreement, Metropolitan asserted that because fundamental elements of the stipulation, such as the equipment to be interconnected, the

4 While TCG has agreed not to oppose price floors based on incremental costs, TCG retains the right to question the appropriateness of Pacific's claimed incremental costs.

location for interconnection, and the price of service, have been amended since the settlement conference, the settlement conference required by Rule 51.1 (b) was not held. Proper notice and opportunity to comment on the proposed Settlement Agreement was provided in August and September 1991, after Metropolitan filed its comments. We find there has been no violation of Rule 51.1 (b).

While Metropolitan challenges the nonrecurring and recurring rates that Teleport would pay Pacific under the Settlement Agreement, it has not alleged that the rates violate any Commission order or rule. Instead, it attacks the Settlement Agreement by comparing the agreed-upon rates with rates charged by other local exchange carriers for other alternative service providers in or outside California. This assertion of out of state rates is not relevant to show whether Pacific has complied with the CPUC's rules on the pricing of these services.

We conclude that Metropolitan and Associated have not successfully contested a material fact or issue of law. The opposition of FEA is substantially the same as Metropolitan's and likewise fails to present a material issue of fact or of law. Thus, no evidentiary hearing or opportunity for briefs is required by Rule 51.6.

Conclusion

The Settlement Agreement was reached by TCG and Pacific over one year after TCG filed its petition. During that interval, the parties have had ample opportunity to discover the strengths and weaknesses of each other's positions. The terms of the settlement do not conflict with any Commission precedent. Indeed, by pricing the cost of the exchange access service to Teleport at fully allocated or direct embedded cost, Pacific will comply with D.88-09-059, the Phase I decision in I.87-11-033. The Settlement Agreement forestalls the expenditure of time and money to litigate the terms and conditions of service to one alternative service provider. In light of the foregoing, we find the Settlement

Agreement to be in the public interest and accordingly grant the August 19 Joint Motion.

Findings of Fact

1. TCG filed a petition to require Pacific to modify its special access tariffs and practices. TCG is affiliated with Teleport.

2. TCG sought to physically terminate Teleport's CO-to-POP links at the Pacific CO, and to connect its CO-to-POP links with facilities of Pacific known as End User-to-CO Links. TCG claimed this interconnection was mandated by the Commission's decision to allow Pacific to price its provision of CO-to-POP links on a flexible basis.

3. On May 21, 1990, Pacific filed its protest to and comments on the Petition. Pacific disputed TCG's interpretation of the Commission's intent and argued that the gravamen of the Petition is a request for access charge reductions.

4. The ALJ received PHC statements from the parties and convened a PHC on September 25, 1990. At that time, Pacific and TCG announced that they were actively pursuing settlement of the case.

5. The ALJ ruled that a subsequent PHC would be held on October 26, 1991, that this PHC would serve as the publicly noticed settlement conference required by Rule 51.1 (b), and that Pacific and TCG would mail their written agreement to the parties on the service list seven days before the PHC.

6. The Notice dated October 18, 1990 was distributed to the parties. The Notice and its attachments were discussed at the October 26, 1990 PHC. The stipulation did not include the price that Teleport would pay Pacific for its interconnection services.

7. Minor amendments to the stipulation were made and the revised document was circulated November 1, 1990. Parties served comments and replies to comments regarding this stipulation.

8. Proponents subsequently reached agreement on the price Teleport should pay Pacific for the desired services. The Joint Motion for adoption of a settlement agreement dated May 7, 1991, was filed on May 8, 1991 pursuant to Rule 51.3.

9. Proponents withdrew the May 8 Joint Motion on August 2, 1991.

10. Proponents circulated a Notice of Settlement Conference to all parties on August 2, 1991. The settlement conference was held on August 9, 1991.

11. The Proponents executed their Settlement Agreement and filed it and the Joint Motion with the Commission on August 19, 1991. The terms of the Settlement Agreement are identical to those contained in the May 7 settlement agreement.

12. All of the parties that participated in the settlement conference agreed to file their comments on the Settlement Agreement, if any, no later than September 3, 1991. On that basis, TCG's motion to shorten time for filing comments from 30 days to 15 days was granted.

13. Pursuant to the SSA, Pacific will offer Teleport exchange access services and facilities to provide High-capacity (90 Mbps) Access Service from Teleport's points of connection to the Pacific COs. Teleport will pay Pacific rates and charges that are equal to Pacific's fully allocated or direct embedded cost.

14. Metropolitan, FEA, and Associated recommended rejection of the Settlement Agreement as contrary to the public interest.

15. Metropolitan, FEA, and Associated did not contest a material issue of fact or an issue of law.

16. The issue of the proper tariffed rate for high-capacity access service from an alternate service provider's points of connection to Pacific's CO may be addressed in the rate design portion of I.87-11-033.

Conclusions of Law

1. The parties to the Settlement Agreement complied with Rule 51 of the Commission's Rules.

2. The pricing terms of the Settlement Agreement are consistent with D.88-09-059.

3. The Settlement Agreement is reasonable in light of the whole record, consistent with law, and in the public interest.

4. The objection of CCTA to TCG's motion for shortening time for comments should be denied.

O R D E R

IT IS ORDERED that:

1. The "Joint Motion of Teleport Communications Group and Pacific Bell for the Adoption of Settlement Agreement" filed on August 19, 1991, is granted.

2. The California Cable Television Association's objection to shortening time for filing comments relative to the August 19, 1991 Settlement Agreement is denied.

3. The "Settlement Agreement and Revised Stipulation" entered into by Pacific Bell and Teleport Communications Group on August 19, 1991 is approved.

This order is effective today.

Dated September 25, 1991, at San Francisco, California.

PATRICIA M. ECKERT
President
JOHN B. OHANIAN
DANIEL Wm. FESSLER
NORMAN D. SHUMWAY
Commissioners

I abstain.

/s/ G. MITCHELL WILK
Commissioner

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

NEAL J. SHULMAN, Executive Director