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Decision 97-04-048 April 9, 1997

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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Petition of MCI)
Telecommunications Corporation for)
Arbitration Pursuant to Section 252(b)) A.96-08-068
of the Telecommunications Act of 1996) (Filed August 30, 1996)
to Establish an Interconnection)
Agreement with Pacific Bell.)
_____)

ORDER DENYING REHEARING OF DECISION 97-01-039

An application for rehearing of Decision (D.) 97-01-039 was filed by Pacific Bell. D.97-01-039 followed an arbitration conducted pursuant to the provisions of the Telecommunications Act of 1996 (the Act). At issue were terms of the proposed interconnection agreement between Pacific Bell (Pacific) and MCI Metro Access Transmission Services (MCI). The parties presented nine issues for the Commission to determine. In D.97-01-039 the Commission issued determinations on the nine issues, and found that the resulting agreement was consistent with applicable legal standards. The application for rehearing of D.97-01-039 requests rehearing of that portion of the Decision that approves Paragraph 10.4 of the interconnection agreement. Paragraph 10.4 provides that either party may recover damages for reasonably foreseeable material harm caused by the other Party's material breach of the interconnection agreement. The Decision refers to such damages as consequential damages.

Applicant raises three arguments in support of its claim that the Decision's adoption of the consequential damages provision is unlawful, erroneous, and in excess of the Commission's authority. Applicant's arguments are made as general allegations of fact with no citation to supporting legal authority, nor citation to the record. In contrast, the

Opposition filed by MCI provides a thorough and researched articulation of its positions.

The application filed by Pacific could properly be rejected on the basis that Pacific has not met its burden of demonstrating legal error. Public Utilities Code Section 1732 provides that an application for rehearing must set forth with specificity the grounds on which the applicant considers the decision to be unlawful. The Commission's Rules of Practice and Procedure provide further notice to applicants regarding this requirement. Rule 86.1 provides as follows:

"Applicants are cautioned that vague assertions as to the record or the law, without citation, may be accorded little attention. The purpose of an application for rehearing is to alert the Commission to an error, so that error may be corrected expeditiously by the Commission."

In the pleading before us, Applicant provides only unsubstantiated and unexplained allegations of error which are of little assistance in enabling the Commission to determine if in fact an error has been committed. We have considered the appropriateness of denying the application for rehearing on this basis. We conclude that it would be appropriate to do so, but that the parties and the Commission are better served in this case if the Commission attempts to develop Applicant's arguments more fully in order to decide the issues raised upon the merits. We reach this conclusion because of the relative newness of the Telecommunications Act of 1996 (the Act) and the need for guidance from the Commission regarding local interconnection agreements and the procedures to be followed before the Commission in the arbitration of such agreements under the Act.

As a threshold issue we note that the filing of the application for rehearing by Pacific was procedurally correct. Filing an application for rehearing on a Commission decision on an arbitration under the Act is the necessary and proper procedure to be followed prior to seeking Federal Court review.

We interpret Section 252(e)(6) of the Act as permitting a party to bring an action in Federal district court after the Commission has had an opportunity to correct any errors in its decision, and has reached a final determination. The decisions of the Commission following arbitrations under the Act are no less significant than any others rendered by the Commission, and should be subject to equal scrutiny. Following the established Commission rehearing procedure does not conflict with the language of the Act, nor does it broaden the Commission's authority under Section 252, et. seq., of the Act. A final decision of the Commission on a rehearing of an arbitration decision under the Act is appealable to Federal district court pursuant to Section 252(e)(6). Rehearing provides the Commission with an opportunity to correct errors in a decision, without restricting the authority of the Federal courts to review the Commission's final decision.

We next address the three allegations of error raised by Pacific in its application. Pacific first argues that for reasons of public policy, limitations on Pacific's liability have been the "norm" and that for this reason consequential damages should not be allowed. Pacific cites one case in support of this argument. (This is the only authority cited by Pacific in the entirety of its application.) We have reviewed the case cited, Waters v. Pacific Telephone Co. (1974) 12 Cal.3d 1. Pacific's reliance on this case is misplaced. In Waters the plaintiff was a customer to whom Pacific allegedly failed to provide adequate service. The California Supreme Court held that the plaintiff was limited to recovery under Pacific's tariff, and that the Commission had approved a general policy of limiting telephone utility's liability for ordinary negligence to the specified credit allowance and had relied on the policy in establishing rates. We agree with MCI that in the instant case, unlike Waters, MCI is a competitor who must rely on Pacific's services and network elements as it enters in the local exchange market. Waters does not support the proposition that public policy

requires limiting Pacific's liability for consequential damages for foreseeable harm to its competition in the event that Pacific defaults. We agree with MCI that limiting the recovery to "reasonably foreseeable damages" substantially limits Pacific's liability. No legal error has been demonstrated.

Pacific's second allegation of error is that the Decision's adoption of the consequential damages provision violates the Act's nondiscrimination and cost-based pricing requirements. This argument is not developed. It appears to be Pacific's contention that its prices do not include the potential of consequential damages in its costs, and therefore the prices in the agreement with MCI are not cost based. We agree with MCI that any damages flowing from Pacific's breach of its obligations under the agreement are not legitimately part of the cost standard for setting interim rates under the agreement. We further find that Pacific's unsubstantiated claim of discrimination must fail. The fact that the Pacific Bell/AT&T agreement does not contain a consequential damages provision is not evidence of discrimination under the Act. The agreements between Pacific and MCI and Pacific and AT&T are separate contracts that were the subject of separate arbitrations. The Act does not require that all interconnection agreements be identical. No legal error has been shown.

The final argument raised by Pacific is that the Decision results in "unlawful confiscation of Pacific's property." The confiscation is alleged to result from providing access to Pacific's network without enabling Pacific to recover its costs, and in imposing a significant new risk for shareholders without providing Pacific with any reasonable opportunity to guard against or mitigate the risk. We agree with the argument raised by MCI in its opposition. Pacific can avoid the claimed risk by performing its obligations under the agreement and by not interfering with MCI's ability to provide service to its customers. We have considered Applicant's

argument, which consists of one sentence. We have not identified any case for unlawful confiscation of property.

No further discussion is required of Applicant's allegations of error. Accordingly, upon reviewing each and every allegation of error raised by Applicant we conclude that sufficient grounds for rehearing of Decision 97-01-039 have not been shown.

Therefore, **IT IS ORDERED:**

That the application for rehearing of Decision 97-01-039 filed by Pacific Bell is denied.

This order is effective today.

Dated April 9, 1997, at San Francisco, California.

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners