

Decision 97-06-111 June 25, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application by ACN Communications (U-2588-C) for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Pacific Bell (U-1001-C).

ORIGINAL
Application 97-03-001
(Filed March 3, 1997)

OPINION APPROVING ARBITRATED AGREEMENT**Summary**

In this decision, we approve an arbitrated agreement between Pacific Bell (Pacific) and ACN Communications (ACN) for the interconnection of their telecommunications service networks pursuant to Section 252 of the Telecommunications Act of 1996.

Procedural Background

ACN filed a petition for arbitration on March 3, 1997, seeking an interconnection agreement under Section 252 of the Telecommunications Act of 1996 (47 U.S.C. 252, Pub. L. 104-104, 110 Stat. 56) (the Act) pursuant to, but modifying, Pacific's Statement of Generally Available Terms (SGAT). Pacific filed a response to ACN's petition on March 28, 1997. The Commission held an arbitration hearing on April 15, 1997, and the parties filed briefs on April 28, 1997. By the end of hearing and briefing, only two issues remained in dispute.

The arbitrator issued her report on May 23, 1997. The parties submitted their Conformed Interconnection Agreement pursuant to that report on May 30. ACN and Pacific submitted comments on June 9, 1997. ACN's comments reiterated its position in the arbitration proceeding that it is entitled to the terms and conditions of Pacific's interconnection agreement with Pac-West (Pac-West agreement). Pacific's comments request that the Commission adopt its customer-migration cost proposal.

Discussion

Pacific describes the arbitrated agreement in the following terms. "The . . . Agreement is based on Pacific's [SGAT]. . . incorporates the results of the Arbitrator's Report, as well as language proposed by ACN for Section 16.1 regarding procedures for dispute resolution . . . agreed to by Pacific. . . [and] reflects the correction of typographical errors in the SGAT and mutually agreed upon changes . . . concerning the

billing format for local services." (Pacific's Comments at 6.) Despite this seeming collaboration, the parties raise two issues with the arbitrator's report.

1. ACN's Comments

The arbitrator found that because the Pac-West agreement was not "an agreement approved under" the Act, the availability provisions of subsection *i* of Section 252 should not apply. Once again, ACN takes issue with this determination. The agreement reached between Pacific and Pac-West, ACN states, was submitted under the Act merely because it is an interconnection agreement submitted to the Commission. Subsections (a)(1) and (e) of Section 252 require that *all* interconnection agreements be submitted to state commissions for approval and provide for deemed approval where the commission fails to act within in a prescribed amount of time (30 days for arbitrated agreements, 90 for negotiated). Since the Pac-West agreement was submitted to the Commission and the ninety-day period passed, ACN argues, it was deemed approved under the Act.

ACN's argument is without merit. It incorrectly assumes that any submittal of an agreement to a state commission is a Section 252 approval request. Pacific submitted the Pac-West agreement for approval under Decision 95-12-056, which delegated to Commission staff the power to approve such agreements. The parties to that agreement did not put the Commission on notice that they were seeking approval under the Act; instead, they sought approval under the Commission's procedures and rules. The Act requires that the Commission, not its staff, either act or fail to act on the approval. (Resolution ALJ-168 at 9.) The Commission had no such opportunity in the Pac-West approval process, and, for that reason alone, the Pac-West submittal was not "under" the Act.

2. Pacific's Comments

Pacific invites the Commission to reconsider the finding in the Arbitrator's report that Public Utilities(PU) Code § 532 requires that it be held to its tariff rates for customer migration. Pacific proposes that ACN be charged nothing initially for customer migration while Pacific tracks migration costs for subsequent recovery in the appropriate Commission proceeding. The arbitrator agreed with ACN that Section 532 requires Pacific to charge only its tariffed rates. Pacific responds that Section 532 gives the Commission the power to exempt utilities from its provisions where it finds the alternative rates are "just and reasonable." (PU Code § 532.)

We decline Pacific's invitation. To do so would be inconsistent with Resolution ALJ-168 in which the Commission stated that "all unbundled elements arbitrated before the OANAD pricing decision will include interim rates for unbundled elements which will subsequently be revised on a forward basis once the Open Access and Network Architecture Development (OANAD) pricing order is issued." (Resolution ALJ-168 at 4 [Emphasis added].) Furthermore, Pacific has not made the requisite showing under Section 532 that the tariffed rates are unreasonable. They merely argue that they will not be able to recover the costs of switching customers under the current pricing scheme. This argument, beyond its lack of evidentiary support, assumes the OANAD proceeding will not address Pacific's concerns. Finally, if competitive local carriers (CLCs), such as AT&T Communications of California, Inc., Sprint Communications Company, and MCI Telecommunications Corporation, feel it is appropriate to accept Pacific's proposal in spite of lower tariff rates, that is their prerogative. However, where, as here, there is a dispute, it is inappropriate to hold a CLC to the incumbent's proposed terms when tariffed rates are in effect.

The parties having filed a Conformed Interconnection Agreement consistent with the arbitrator's report and appearing consistent with the Act, the agreement is approved under subdivision (e) of Section 252 of the Act.

Finding of Fact

Pacific did not present evidence to show that its tariffed rates are unreasonable under PU Code § 532.

Conclusions of Law

1. The Conformed Interconnection Agreement between Pacific and ACN complies with Section 251 and subdivision (d) of Section 252 of the Telecommunications Act of 1996.
2. The interconnection agreement between Pac-West and Pacific was not approved under section 252 of the Telecommunications Act of 1996.

O R D E R

IT IS ORDERED that:

1. The Conformed Interconnection Agreement filed on May 30, 1997, by Pacific Bell and ACN Communications is approved pursuant to the requirements of Section 252 of the Telecommunications Act of 1996.

2. The parties shall file an executed copy of such agreement within 10 days of the date of this order and shall supplementally provide two copies to the Telecommunications Division, together with a version thereof in electronic form in hyper text markup language format.

3. Application 97-03-001 is closed.

Dated June 25, 1997, at San Francisco, California.

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