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JUN 27 1997

Decision 97-06-113 June 25, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Petition of Sprint Communications Company L.P. (U-5112-C) for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with GTE California, Inc.	)	Application 96-09-039 (Filed September 25, 1996)

ORIGINAL

ORDER DENYING REHEARING, GRANTING PETITION TO MODIFY, AND MODIFYING DECISION

On March 19, 1997, the Commission issued Decision (D.)97-03-048 in this proceeding, in which we found (Finding of Fact 10) that GTE California (GTEC) had represented in a filed document that Sprint was seeking something at variance from the GTEC/AT&T interconnection agreement (resulting from the GTEC/AT&T arbitration) which Sprint sought to elect in this proceeding, and held (Conclusion of Law 6) that GTEC knowingly or negligently misrepresented to the Commission the nature of the Sprint tendered agreement. The Commission then remanded the proceeding to the Division of Administrative Law Judges for further proceedings to determine whether the misrepresentation referred to in Finding of Fact 10 and Conclusion of Law 6 was negligent or deliberate, and whether any sanctions should be imposed on GTEC (Ordering Paragraph 5). By Notice dated March 25, 1997, a Prehearing Conference (PHC) was scheduled to be held on April 30, 1997 to address the issues raised by the Commission in its decision.

On March 31, 1997, GTEC sent a letter addressed jointly to the Chief Administrative Law Judge (CALJ) and the assigned Administrative Law Judge (ALJ) setting forth GTEC's view of the situation, and requested that the Commission vacate, on its own motion, those portions of the "draft decision" alleging

misrepresentation by GTEC, and to vacate the Notice of Prehearing Conference.

By ruling dated and filed April 9, 1997, the assigned ALJ denied GTEC's request to vacate and advised all parties that the Commission considered GTEC's March 31, 1997, letter to the CALJ and the ALJ to be a Prehearing Conference Statement, and further directed that GTEC serve a copy of the statement on all parties of record in order that they be afforded an opportunity to respond.

At the PHC held on April 30, 1997, GTEC orally moved to convert its March 31, 1997, letter to the CALJ and the ALJ to an application for rehearing pursuant to the Commission's Rules of Practice and Procedure. The motion was taken under advisement by the ALJ and GTEC was directed to file a brief in support of the motion not later than May 12, 1997, and Sprint to file a response, should it so desire, not later than May 27, 1997. Both parties have timely filed.

In its filing, Sprint advises that it opposes GTEC's motion unless the scope of the issues is limited to Finding of Fact 10, Conclusion of Law 6, and Ordering Paragraph 5. It cautions, however, that its position should not be interpreted as agreement with, or acquiescence in GTEC's statements regarding what Sprint's intentions concerning interconnection were.

Methods of Obtaining Review of Commission Decisions

Under the Commission's rules, following closure of the record but prior to the issuance of a decision, any party may petition for submission be set aside, and the record reopened for the receipt of additional evidence (Rule 84). Here that was not done.

Once a decision has been issued, however, there are only three methods for obtaining review of a Commission decision: (1) application for rehearing; (2) judicial review by the Supreme Court following a decision on rehearing; and (3) petition for modification. Of these three, only the application for rehearing

and the petition for modification are within the jurisdiction of the Commission. By statute, rehearing is a necessary prerequisite to a judicial appeal, and under the doctrine of exhaustion of administrative remedies, the courts will reject an appeal if the appellant has not pursued all of its administrative remedies. In the case of a Commission decision, that means a timely application for rehearing. Here, no timely application for rehearing was filed.

Conversion of Letter to Application for Rehearing

D.97-03-048, the decision sought to be reviewed, was issued on March 18, 1997, and by its terms, became effective that day. It was mailed to all parties the following day, March 19, 1997. Pursuant to Rule 85, an application for rehearing must be filed within 30 days after the date of issuance. For the purposes of that rule, "date of issuance" means the date when the Commission mails the order or decision to the parties to the action or proceeding. Thus, to be timely, an application for rehearing must have been filed in this case not later than April 18, 1997. It is undisputed that no formal application for rehearing was ever filed in this proceeding, and the time for filing such an application has now expired.

GTEC argues that its letter of March 31, 1997, is the functional equivalent of an application for rehearing, and should be considered a timely application for rehearing in that the letter was mailed within 30 days after D.97-03-048 was mailed to the parties, thus meeting the time deadline imposed by Rule 85, and contains all of the information required by Rule 86.1, with the specificity required by that rule. GTEC has cited cases wherein it claims that the Commission, in the exercise of its discretion, granted to others the relief it now seeks.

While the statute and rules relating to rehearing can be read as setting a 30-day jurisdictional deadline, we need not reach the question of whether there might be extraordinary circumstances

in which we could give unsophisticated parties relief from that deadline. GTEC is not an unsophisticated party.

Here it can hardly be said that GTEC is unfamiliar with Commission procedure and the requirements set forth in its various rules. GTEC is a regular participant in proceedings before the Commission and has on past occasions filed or been served with applications for rehearing. It knows or at least should know that where a time limit is set by the rules for some action to be taken to review or reconsider a Commission decision, or where other conditions are set forth, strict compliance with every provision of the rule is required. In this instance that was not done. Rather, GTEC simply mailed a letter jointly to the CALJ and the assigned ALJ asking that the Commission, on its own motion, vacate certain of its findings, conclusions, and orders set forth in the decision. While mailed within 30 days after the issuance of the decision sought to be reviewed, the letter was not filed as required in the case of an application for rehearing; the requisite number of copies required of an application for rehearing were neither included nor forwarded to the Commission's docket office; and a copy of the letter and its attached exhibits were not served on any other party to the proceeding. This, by no means, met or even approached the requirements for an application for rehearing. At best, the letter could be considered an ex parte contact. We see no excuse for GTEC failing to comply with the formal requirements for an application for rehearing, and in furtherance of our principle that Rule 85 is jurisdictional, we deny GTEC's motion to consider the March 31, 1997, letter an application for rehearing.

Petition for Modification

Once a Commission decision has become final, as D.97-03-048 became on March 19, 1997, the day it was mailed to the parties, and the time limit for filing an application for rehearing has expired, as it now has in this case, the only method by which a

Commission decision may be changed by the Commission is through a party filing a petition for modification (Rule 47).

Rule 47 governs petitions for modification of Commission decisions. Under the provisions of the rule, such petitions must, unless provided otherwise by the rule, be filed within one year and served on all parties to the proceeding. Since less than a year has expired since the effective date of the decision sought to be modified, such a petition would now be timely. Also, since the presiding ALJ caused GTEC's March 31, 1997, letter to be filed and served on all parties, the letter, if considered a petition for modification, would comply with the requirements of Rule 47.

The stated purpose of a petition for modification is to ask the Commission to make changes to the text of an issued decision. That is precisely what GTEC requests of the Commission; thus, the petition for modification is the more suitable vehicle by which to consider GTEC's request. We, therefore, deem GTEC's letter of March 31, 1997, to be a timely Petition for Modification of D.97-03-048, and will review that portion of the decision that GTEC alleges is inconsistent with its due process rights.

In the filing that we now consider to be a petition for modification, GTEC alleges that its due process rights were violated by the Commission finding (Finding of Fact 10) and concluding (Conclusion of Law 6) that a statement filed with the Commission in the course of this proceeding and orally repeated to a Commission employee were misleading, where GTEC was not afforded a hearing on the issue before the Commision reached that conclusion.

While we may harbor considerable doubt about the proposition that the Commission is required to hold a hearing before concluding that statements made by a party in papers filed of record and orally transmitted directly to a Commission employee during the course of a Commission-ordered briefing session are misleading, particularly where, as here, a hearing was to be held

on the issue of whether the misleading statement was intentional or negligent, and whether any sanctions were to be imposed, we believe that unanticipated and unintended personal consequences which could flow to individual GTEC employees and/or representatives justifies our reviewing our finding and conclusion.

Here, GTEC alleged in the disputed statements that Sprint was seeking other than what was contained in the GTEC/AT&T interconnection agreement, which Sprint was seeking to elect in the underlying arbitration proceeding. We accepted GTEC's statements at face value and interpreted them to mean that the terms of the agreement submitted by Sprint in this proceeding differed in some major respect from the GTEC/AT&T agreement. This necessitated Commission staff spending considerable time and effort conducting a side-by-side, line-by-line comparison of each of the many pages of the two documents. The mere fact that we read them in the way we did indicates that we were misled by them. When the side-by-side, line-by-line comparison failed to reveal any differences, the presiding ALJ directed GTEC to demonstrate any variation between the GTEC/AT&T agreement and the agreement proffered by Sprint. GTEC replied that there was none. We thus considered GTEC's on-the-record statements to have been misleading.

Subsequent to the issuance of D.97-03-048, we have had repeated ex parte contacts by various GTEC representatives, each of whom offered some rationale of the statements intended meaning and import, and why they should not be considered misleading. While those explanations have not changed our view of the character of those statements as misleading, we are now persuaded that they were not made with that intention, but were a by-product of the zeal with which GTEC pursued its cause.

We recognize that arbitration of interconnection agreements under the Telecommunications Act of 1996 is a very important and emotional subject to the parties involved, and has grave consequences for the future financial well-being of the

5. Application 96-09-039 is closed.
This order is effective today.
Dated June 25, 1997, Francisco, California.

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

participants. As a result, litigation concerning such agreements is often contentious and rife with hyperbole. So much so that the parties on occasion cause and suffer unintended abuses. Here, all indications point to a conclusion that GTEC's "bargaining position" was part of a national strategy designed to obtain the best results in a number of states rather than a strictly local undertaking. Under such circumstances, it is not unusual that misunderstandings by one or more parties involved might occur. Specifically, we feel that part of the problem in this proceeding may be found in a continuation of extremely zealous advocacy when such a level of debate was no longer required or even appropriate.

We will, therefore, deny GTEC's motion to convert its March 31, 1997 letter to an application for rehearing, consider the letter as a petition for modification, grant the same, and modify D.97-03-048 by adding a period before the semi-colon in Finding of Fact 10 and deleting the semi-colon and all wording following in that finding, delete Conclusion of Law 6, and delete Ordering Paragraph 5.

IT IS THEREFORE ORDERED that:

1. GTE California's (GTEC) oral motion to convert its March 31, 1997, letter to an application for rehearing is denied.

2. GTEC's oral motion to convert its March 31, 1997 letter is considered a petition for modification of Decision (D.) 97-03-048.

3. GTEC's petition for modification of D.97-03-048 is granted to the extent set forth below.

4. D.97-03-048 is modified by adding a period before the semi-colon in Finding of Fact 10 and deleting the semi-colon and all wording following in that finding; deleting Conclusion of Law 6; and deleting Ordering Paragraph 5.