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Decision 97-09-122 September 24, 1997

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Petition of Cook Telecom, Inc. For Arbitration Pursuant to § 252(b) of the Telecommunications Act of the Rates, Terms and conditions of Interconnection With Pacific Bell.	A. 97-02-003 (Filed February 3, 1997)

ORDER DENYING APPLICATION BY PACIFIC BELL FOR REHEARING OF DECISION 97-05-095

I. SUMMARY

On June 23, 1997, Pacific Bell filed an application for rehearing of our Decision (D.) 97-05-095 in the above-captioned arbitration proceeding. Cook Telecom, Inc. ("Cook") filed a response in opposition on July 8, 1997. Airtouch Paging of California ("Airtouch") and Paging Network, Inc. ("Paging Network") also timely filed oppositions to the rehearing application. Upon review of the application, and the responses of Cook and the other parties, we hereby deny rehearing. Pacific Bell has not established legal error in our decision as is required by Cal. Pub. Util. Code § 1732.

In D.97-05-095, which we issued as an interim opinion, we rejected the Arbitrated Interconnection Agreement between Cook and Pacific Bell that was submitted for our review.[1] We determined that the arbitrated agreement, dated April 28, 1997, failed to provide compensation to Cook for the termination of paging calls originating on Pacific Bell's facilities as is required by the Telecommunications Act of 1996 ("the1996 Act") at 47 U.S.C. §§251(b)(5)and 252(d)(2)(A)(i).[2]

In its application for rehearing, Pacific Bell contends that Sections 251(b)(5) and252(d)(2)(A)(i) do not create a duty with respect to a one-way paging provider, such as Cook , where it requires that a local exchange carrier "... establish reciprocal compensation arrangements for the transport and termination of telecommunications."[3] Both this Commission and Pacific Bell agree that Cook does not provide "transport," so the only compensation in question pertains to Cook's termination of paging calls.

Pacific Bell argues two propositions: 1) Call termination requires a "switching" function, and Cook's paging terminal technically does not "switch" calls as does an end-office switch of an exchange carrier. Therefore, Cook should not be compensated because it technically does not engage in the termination of paging calls originating on Pacific Bell's network. 2) Because Cook is a one-way paging provider, Pacific Bell cannot terminate calls originating on Cook's network. Therefore, given the statutes requirement that the compensation arrangement for call termination be mutual and reciprocal, and given Cook's operations do not allow Pacific Bell to receive compensation for terminating calls,

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[1] The arbitrated agreement conformed to the Arbitrator's Report in this case which was filed and served on April 21, 1997.

[2] We also found that the arbitrated agreement was not consistent with the Commission's Rules Governing Filings Made Pursuant to the Telecommunications Act of 1996, Resolution ALJ-168, and D.95-12-016 regarding the costing principles to be applied in determining the termination costs for Cook. However, this matter was not included in Pacific Bell's application for rehearing.

[3] The 1996 ACT amended and repealed various sections of the Communications Act of 1934 beginning at 47 U.S.C. §151. Hereinafter, all statutory references shall be to Title 47 of the U.S. Code unless otherwise indicated.

Cook cannot, Pacific Bell argues, receive compensation under Sections 251(b)(5) and 252(d)(2)(A)(i).

We find that neither proposition has merit and neither establishes legal error in D.97-05-095.

II. DISCUSSION

A. Paging Terminal As Equivalent Facility

Pacific Bell contends that the FCC's definition of "termination" excludes Cook from the application of Section 251(b)(5). At 47 C.F.R. § 5.701(d), the FCC provides with respect to establishing reciprocal compensation arrangements:

> ". . .termination is the switching of local telecommunications traffic at the terminating carrier's end-office switch, or <u>equivalent facility</u>, and delivery of such traffic to the called party's premises." Emphasis added.

Pacific argues that because the definition uses the term "switching," and Cook's paging terminal does not employ a switching device, as does an end-office switch used by an exchange carrier, it is incorrect to conclude that a paging terminal is equivalent to an end-office switch. Based on the FCC's regulation, therefore, according to Pacific Bell it is legal error to conclude that the costs of the paging terminal are subject to compensation under Section 251(b)(5). (Application for Rehearing, pp. 3-4, and fn. 9, and pp. 9-10.)

Pacific Bell relies on a narrow definition of "switching" drawn from a technical glossary of AT&T Bell Laboratories, and Newton's Telecom Dictionary, and an unreasonably restrictive meaning for "equivalent." This semantic argument fails in light of the express reference in Section 251(b)(5) to the broad category of "telecommunications" for which call termination compensation is to be paid. Although Cook's paging service operates differently from the technology of an exchange carrier, such as Pacific Bell, there is no denying that Cook provides a telecommunications service and performs a termination function.[4] If Cook were not providing termination for telecommunications, the paging calls of Pacific Bell's customers would not succeed in reaching the paged customer. Cook's terminal receives, or terminates, calls that originate on Pacific Bell's network, and then transmits the calls from its paging terminal to the pager of the party called, just as an end-office switch terminates and then transmits a call to the telephone of the called party. If, as Pacific Bell argues, Cook does no more than "disconnect" the call,[5] then indeed extraordinary telepathic communications occur each time a paging customer receives a message on the pager which had been "disconnected" by Cook.

Moreover, the FCC's First Report and Order, by which the FCC promulgated regulations to implement the 1996 ACT, explicitly includes paging providers within the class of commercial mobile radio service ("CMRS") providers that are subject to Section 251(b)(5).[6] The FCC states:

> "The Commission concludes that LECs are obligated, pursuant to § 251(b)(5) and the corresponding pricing standards of § 252(d)(2) to enter into reciprocal compensation arrangements with CMRS providers, including paging providers, for the transport and termination of traffic on each other's networks." (First

[4] The 1996 ACT amends 47 U.S.C. §153 to add several definitions. At 47 U.S.C. §153 (2)(48), "Telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, §153 (2)(50), "Telecommunications equipment" is defined as "equipment, other than customer premises equipment, used by a carrier to provide telecommunications services, and includes software integral to such equipment (including upgrades)". At 47 U.S.C. §153 (2)(51), "Telecommunications Service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." Emphasis added.

[5] Pacific Bell's Application for Rehearing, at p.6.

[6] 47 U.S.C. §153 (27) defines "mobile service" a "a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes (A) both one-way and two-way radio communication services,.... This definition is reflected in the FCC's regulations at 47 C.F.R. §20.3 which defines "commercial mobile radio service" as including "both one-way and two-way radio communications services."

Report and Order, 11 FCC Rcd 15499, 15517, paragraph 34.)[7]

Pacific Bell fails to acknowledge this clear statement of the FCC, and does not offer us any countervailing, specific language in the 1996 Act itself which would compel finding Cook's termination of calls at its paging terminal is not equivalent to the termination function of an end-office switch. We find no legal error, therefore, in our decision to have Cook's call termination compensation based on Cook's paging terminal costs.

Furthermore, to exclude paging providers would contravene the public policy purposes of the 1996 ACT. Section 257(a), for example, provides for the elimination of "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunication services and information services…." Section 257(b) provides that the FCC "shall seek to promote the policies and purposes of this ACT favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity."

Paging providers fit squarely within this policy as one of many diverse technical means of enhancing and providing telecommunications that serve the public interest, particularly with respect to the security and emergency uses of paging services.

B. Reciprocal Call Termination Compensation

Pacific Bell also contends that we committed legal error in our decision where we apply Sections 251(b)(5) and 252(d)(2)(A)(i) to an interconnection agreement between Pacific Bell and a one-way paging provider. Because, Pacific

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[7] In D.97-05-095, at pages 4-5, we also cited paragraphs 1008, 1092, and 1093 of the First Report and Order where the FCC explains the application of its regulations to paging providers in implementing Section 251(b)(5).

Bell argues, it is not possible for Pacific Bell to receive compensation for terminating calls originating on Cook's network, mutual and reciprocal, bi-directional compensation cannot be arranged with Cook to comply with Sections 251(b)(5) and 252(d)(2)(A)(i). (Application for Rehearing, pp. 15-19.)

This argument, however, does not establish legal error. First, the language of the statute requires that the compensation be reciprocal, not the services. Second, Pacific Bell presumes the necessity of a temporal element in the arrangement required by Section 251(b)(5). It is our understanding that the statute requires no more than an arrangement be made to compensate termination by whichever party incurs termination costs. The fact that at the moment Pacific Bell does not terminate calls received from Cook does not mean that an "arrangement," the term used in the statute, cannot be achieved to provide for the compensation rate each would receive for terminating calls originating on the other's network. The purpose of the arrangement is to assure that there is compensation for termination services between interconnecting LECs and telecommunications providers. The statute does not compel the sending of messages for termination by one party, just as it does not require the use of termination services with a certain regularity.

In D.97-05-095, we also referred to historical inequities concerning LECs which required CMRS providers to compensate the LEC for terminating calls originated by the CMRS.[8] In some cases, CMRS providers reported that "incumbent LECs even charge CMRS providers for terminating incumbent LEC-originated calls." (FCC's First Report and Order, at paragraph 1081.) At

[8] In its Application for Rehearing, at p. 21, Pacific Bell challenges our reference to these historical inequities as irrelevant since Pacific Bell is not named as one of the LECs with inequitable agreements. Unfortunately, this argument lacks a logical foundation. For example, while the terms of the 1996 Act are not specifically directed at Pacific Bell individually, Pacific Bell is nonetheless effected by them.

paragraph 1084 of the First Report and Order, moreover, the FCC summarized the record as follows regarding CMRS providers, the class in which Cook is included:

> "According to most paging companies, incumbent LEC abuses are especially acute for narrowband CMRS providers. Because virtually 100 percent of paging calls are originated on incumbent LEC networks, and terminated on CMRS networks, incumbent LEC abuses, it is argued, present a formidable barrier to entry in the CMRS marketplace. Most paging carriers allege that incumbent LECs charge narrowband CMRS providers for terminating LEC-originated calls on the paging network but do not compensate narrowband CMRS providers for terminating incumbent LEC originated traffic. Many narrowband CMRS providers also allege discrimination because the charges assessed to paging companies for connection to the landline network are different from the charges assessed on other CMRS providers, and that many of these interconnection charges are not substantiated with adequate cost data."

Upon reviewing such comments regarding unequal and discriminatory terms imposed by LECs, the FCC stated, in paragraph 1093 of the First Order:

> "Based on the extensive record in the LEC-CMRS Interconnection proceeding, as well as that in this proceeding, we conclude that, in many cases, incumbent LECs appear to have imposed arrangements that provide little or no compensation for calls terminated on wireless networks, and in some cases imposed charges for traffic originated on CMRS providers' networks, both in violation of Section 20.11 of our rules."

Whether or not Pacific Bell has been one of the offenders alluded to in these comments, we are confident that the compensation requirements of Section 251(b)(5) were legislated to correct and preclude inequitable arrangements imposed by LECs on CMRS providers. Congress wanted to assure that if either party to the agreement incurs costs in terminating calls originated on the other party's network, the costs would be reasonably compensated. Unless a paging service such as Cook is compensated for terminating calls originated by Pacific Bell's network, the inequities referenced by the FCC could continue.

Furthermore, while we acknowledge, as pointed out by Pacific Bell, that in D.97-05-095 we referred most often to the FCC's explanations of its regulations as set forth in the First Report and Order, rather than to specific regulations, we find no legal error here. The First Report and Order authoritatively explains the rationale of the regulations and how the FCC, which has primary jurisdiction of CMRS providers, would implement the 1996 Act.[2]

We note, for instance, that the FCC's regulation at 47 C.F.R. §51.701(a) states that the provisions of the entire subpart H, Sections 51.701 to 51.717, apply to the termination of local telecommunications traffic between LECs and other telecommunications carriers. At 47 C.F.R. §51.701(b)(2) local telecommunications traffic is defined as traffic "between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates with the same Major Trading Area . . ." In addition, at 47 C.F.R. §51.717, the FCC authorizes CMRS providers to renegotiate agreements established before August 8, 1996, the date the regulations were promulgated, if the agreement does not provide for reciprocal compensation of termination costs. (See also Paragraphs 1409, and especially paragraphs 34, 1084, 1092, 1093, 1414 of the FCC's First Report and Order which specifically explain how the termination compensation regulations are to apply to paging companies.)

In paragraph 1093, for example, the FCC directs the State commissions to establish rates when arbitrating disputes for "the termination of traffic by paging

[2] Congress amended § 2(b) of the Communications Act of 1934 to preclude state regulation of entry of and rates charged by CMRS providers. See 47 U.S.C. §§ 152(b) and 332(c)(1)(B) which give the FCC the authority to order LECs to interconnect with CMRS carriers.

providers based on forward-looking economic costs of such termination to the paging provider." The FCC noted as well in paragraph 1092 that "...paging providers, as telecommunications carriers, are entitled to mutual compensation for the transport and termination of local traffic..."

The FCC further explained in paragraph 1092 that the call termination compensation for LECs and paging providers did not have to be in the same amount for each party, recognizing that because of the difference in technologies between an exchange carrier and a paging service, reasonable compensation for termination services would also be different. The FCC, therefore, excepted agreements between LEC's and paging providers from its regulation at 47 C.F.R.51.711(a)(1) which generally requires symmetrical termination rates. [10]

C. Public Policy Objectives

Pacific Bell also claims that we committed legal error where we stated what we believed to be Congress's intention in the 1996 Act. (Application for Rehearing, p. 20-21.) Pacific Bell appears to overlook the pivotal role delegated to the State Commissions in Section 252 to mediate, arbitrate, and approve interconnection agreements pursuant to the 1996 Act. This mandate necessarily requires and permits us to implement such provisions as Sections 251(b)(5) and 252(d)(2)(A)(i) consistent with both our most reasonable interpretation of the statutory provisions and with the FCC's directions and regulations applicable to

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[10] The U.S. Court of Appeals recently vacated, on jurisdictional grounds, the FCC's pricing rules where they effect intrastate telecommunications, but it preserved certain regulations including 47 C.F.R. §51.711(a)(1) for application to CMRS providers which are within the FCC's primary jurisdiction. However, without explanation, while preserving the regulation at § 51.711(a)(1) which by reference to subsection (c) exempts paging services from the requirement of symmetrical compensation rates, the court did not preserve subsection (c) and kept it in the list of regulations vacated on jurisdictional grounds. Iowa Utilities Board et al. v. FCC, et al. (8th Cir. July 18, 1997) __F.3d__, at n. 21 and n. 39. [Docket Nos. 96-3321 et al.].

paging providers. As noted above, the FCC has explicitly explained that the reciprocal compensation requirements are to be applied to paging providers. (See paragraph 34 of the First Report and Order, for example.) Further, this mandate of the 1996 Act to the State commissions requires that we apply Section 251(b)(5) in the context of the overall intent of the Congress as expressed in Section 257(b), quoted above, with respect to the national policy of eliminating barriers to new telecommunication services and technologies, and promoting vigorous economic competition, technological advancement, and the public interest, convenience, and necessity. Support for our interpretation and application of Sections 251(b)(5) and 252(d)(2)(A)(i) is also provided in Sections 253(a) and (b):

> "(a) IN GENERAL. - No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
>
> "(b) STATE REGULATORY AUTHORITY. - Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with §254 [universal service provisions], <u>requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.</u>"[11] Emphasis added.

As we stated in D.97-05-095, we are requiring that Pacific Bell enter into a reciprocal compensation arrangement with Cook for the termination of telecommunications because it is required by the 1996 Act and the policy objectives expressed by Congress therein. Providing compensation to Cook for

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[11] See also, Section 252(e)(2)(B) which states that a State commission may only reject an agreement adopted by arbitration if "the agreement does not meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251, or the [pricing] standards set forth in (d) of this section."

terminating calls originating on Pacific Bell's network, and thereby financially benefiting Pacific Bell, will serve to achieve the policy objectives of protecting the public safety and welfare, ensuring the continued quality of telecommunications services, and safeguarding the rights of consumers who should not be denied access to paging services at reasonable prices.

We are not persuaded, therefore, by Pacific Bell's argument that it should not compensate Cook for call termination since it does not now pay other paging providers and does not pay any providers of two-way services for their paging terminal costs. According to Pacific Bell, in the interconnection agreements it has entered into thus far, it pays only for end-office switching costs. (Pacific Bell's Application for Rehearing, pp. 23-24.) We observe, however, that the record does not appear to be clear on this point, and in any event, Pacific Bell's assertions are not relevant. The fact that Pacific Bell may at this time be compensating a carrier for call termination with one rate, whether the call terminated is transmitted to a telephone, a voice mail box, or to a paging provider which then transmits it to a pager, does not establish, legally or logically, that Pacific Bell is not obligated to compensate a paging provider for termination of paging calls only. Further, we acknowledge that it is possible for a paging provider to agree to waive the receipt of call termination compensation, and for the Commission to recognize the waiver was not unlawful if knowingly made as one factor among the other terms and conditions of a negotiated agreement.

Where, however, a paging provider invokes Section 251(b)(5), we must apply the compensation requirement consistent with the statute. Section 252 (c)(1) provides:

> "In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall- (1) ensure that such resolution and conditions meet he requirements of section 251, including the regulations

prescribed by the Commission (i.e. FCC) pursuant to section 251. "

Finally, Pacific Bell also challenges our statement in D.97-05-095 that we did not believe Congress intended to provide for termination compensation for two-way wireless service, but not for one-way wireless services. Pacific Bell claims that we ignored the fact that Congress provided separately for two-way and not for one-way telecommunications providers in Section 251(c)(2). As we understand Pacific Bell's reference to Section 251(c)(2), it is arguing that compensation for call termination only applies to " telephone exchange service and exchange access." (Pacific Bell's Application for Rehearing, p.23.) We do not see, and Pacific Bell does not identify, any terms of Section 251(c)(2) which restricts call termination compensation to exchange carriers only. Section 251 (c)(2) states that in arbitrating disputed issues, a State commission shall "establish any rates for interconnection, services, or network elements according to subsection (d)." When we look then at subsection (d), in particular Section 251(d)(2)(A), we find general pricing standards for determining compensation for transport and termination services, but again, we do not find a distinction between exchange carriers and paging services. Pacific Bell's reliance on Section 252(c)(2) is misplaced.

Finally, we want to clarify that in the second phase of this proceeding, termination and transport compensation for Pacific Bell shall also be determined and stated in the agreement in order to provide for a reciprocal compensation arrangement as required by Section 251(b)(5). Termination and transport rates can be developed by applying as a proxy relevant components of other Pacific Bell interconnection agreements.

III. CONCLUSION

We find, therefore, that because we know of no exclusion of CMRS providers from the 1996 Act, and no exclusion of paging providers from the ranks of CMRS providers, requiring Pacific Bell to enter into a reciprocal compensation arrangement with Cook for the termination of paging calls originating on Pacific Bell's network complies with Sections 251(b)(5) and 252(d)(2)(A)(i), the FCC's orders and regulations, and with the public policy objectives set forth in the 1996 Act. The application for rehearing, therefore, is denied for failing to establish legal error in D.97-05-095.

IT IS THEREFORE ORDERED that:

1) The application of Pacific Bell for rehearing of D.97-05-095 be denied.

2) D.97-05-095 is modified to require termination and transport rates for Pacific Bell are to be developed in the second phase of the arbitration proceeding.

Dated September 24, 1997, at San Francisco, California.

JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
RICHARD A. BILAS
Commissioners

President P. Gregory Conlon being necessarily absent, did not participate.

I dissent.

/s/ JOSIAH L. NEEPER
Commissioner