L/nas

MAIL DATE
9/30/97

ORIGINAL

Decision 97-09-123 September 24, 1997

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 REHEARING OF DECISION 97-05-095

I. SUMMARY

On June 20, 1997, Cook Telecom, Inc. ('Cook") filed an application for rehearing of our Decision (D.) 97-05-095 in the above-captioned arbitration proceeding. Pacific Bell filed a response on July 7, 1997. Upon review of the application, and all matters stated therein, and the response of Pacific Bell, we hereby deny rehearing for failure to establish 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 , a one-way paging provider, and Pacific Bell, a local exchange carrier ("LEC"). [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.

---

[1] The arbitrated agreement conformed to the Arbitrator's Report of April 21, 1997.

The agreement, therefore, did not comply with Sections 251(b)(5) and 252(d)(2)(A)(i) of the Telecommunications Act of 1996 (or, "the1996 Act"). [2]

The Commission, however, denied Cook's request to adopt the same call termination rate that is provided to Pac-West Telecom, Inc. ("Pac-West") in an interconnection agreement with Pacific Bell, hereinafter referred to as the "Pac-West agreement." (D.97-05-095, mimeo, pp.6-7.) The Commission determined that Cook is only entitled to compensation for the costs of its paging terminal, which the Commission found to be a facility equivalent to an end-office switch pursuant to the regulations of the Federal Communications Commission ("FCC") at 47 C.F.R. §51.701(d). We also found that facilities beyond the paging terminal and facilities that are not usage-sensitive are not to be considered in calculating the compensation for termination, just as facilities beyond an end- office switch of an LEC are not compensated. (D.97-05-095, mimeo, pp. 5-6, 8, and Conclusion of Law No. 7.) The Commission, therefore, ordered that an interim rate for Cook's termination services be developed in a second phase of the proceeding consistent with the consensus costing principles established in D.95-12-016. (See D.97-05-095, mimeo, pp. 8-9, Finding of Fact No. 4, and Ordering Paragraph No. 6.)

In its application for rehearing, Cook contests the Commission's conclusions regarding the parameters to be used in establishing a termination compensation rate for Cook, but fails to substantiate legal error.

II. DISCUSSION

Cook first claims that it has the absolute right to the same termination compensation rate Pacific Bell agreed to pay to Pac-West because Cook must be treated without discrimination pursuant to Section 252(i) of the 1996 Act and other

---

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

"pre-Act precedents established both by this Commission and by the FCC." [3]

Section 252(i) provides:

> " A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."
> Emphasis added.

Cook argues that pursuant to this statutory provision, it has the absolute right to select for its agreement with Pacific Bell any of the individual elements of the Pac-West agreement, but it is not obligated to adopt all of the terms and conditions of that agreement. Cook's contention is without merit and fails to substantiate legal error in our decision. By the terms of the statute, the only agreements available for replication are those which have been approved under Section 252. The Commission, however, permissibly did not approve the Pac-West agreement under the terms of Section 252. Furthermore, the U.S. Court of Appeals has determined that a carrier does not have the right to pick and choose from the various terms and conditions of another agreement, even if it were available under Section 252(i). (Iowa Utilities Board, et al v. Federal Communications Commission, et al, (8th Cir. July 18, 1997) ___F.3d __ ("Iowa Utilities Board") [Docket Nos. 96-3321 et al.] Part II(B).)

A. The Pac-West Agreement Was Not Approved And Cannot Be Deemed Approved Under Section 252.

Section 252(i) expressly refers to the availability only of the same terms and conditions of other agreements that have been "approved under this section." The Pac-West agreement, however, was filed with this Commission on March 19,

---

[3] Cook merely references "Section 201-02" of the pre-1996Act, without providing a substantive argument to which to respond.

1996 by Advice Letter 18115 seeking approval pursuant to our rules and procedures set forth in D.95-12-056. The terms of the agreement, furthermore, were independently negotiated by the parties, and their completed agreement was submitted without a request for mediation or arbitration of unresolved issues under Section 252. The agreement, therefore, went into effect pursuant to the rules and procedures of D.95-12-056 without a formal decision of approval by the Commission, and without a statement of approval pursuant to Section 252. Cook has not refuted any of these facts. According to the express terms of Section 252(i), therefore, the Pac-West agreement is not available by right to Cook, or to any other telecommunications provider, seeking an interconnection agreement under the 1996 Act.

Similarly, Cook fails to substantiate legal authority for its proposition that the Commission is compelled to deem the Pac-West agreement was approved under the 1996 Act and therefore available under Section 252(i).
Cook fails to overcome the salient and unrefuted threshold fact that the Pac-West agreement was not submitted to the Commission under Section 252.

The language of the 1996 Act does not automatically subject all interconnection agreements to Sections 251 and 252, and therefore does not prohibit the Pac-West agreement from going into effect pursuant to our rules and procedures set forth in D.95-12-056. Section 252(a)(1) states:

> "Voluntary Negotiations. - Upon receiving <u>a request</u> for interconnection, services, or network elements <u>pursuant to section 251</u> [of the Act], an incumbent local exchange carrier <u>may</u> negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251." Emphasis added.

Section 252(a)(2) provides that :

> "Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of negotiation." Emphasis added.

And Section 252(b)(1) provides:

> "During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues." Emphasis added.

These provisions of Section 252 clearly establish that the process of approving, mediating, or arbitrating an agreement by a State commission under Section 252 is invoked only after a carrier makes an express request under Section 251 for an interconnection agreement. Cook, however, offers no evidence of Pac-West having submitted its request for an interconnection agreement to Pacific Bell under Section 251. In addition, when Pacific Bell and Pac-West submitted their agreement to the Commission pursuant to D.95-12-056, they had completed their negotiation. Neither could be described, therefore, as meeting the condition of a party still in the process of negotiating an agreement under Section 252(a)(2). Further, Cook has not proffered any evidence that either Pacific Bell or Pac-West sought the involvement of this Commission for mediation or arbitration pursuant to Section 252(b). Instead, the parties completed their negotiation and filed their agreement by advice letter without indicating that they were seeking Commission approval under Section 252. [4]

---

[4] The advice letter was dated March 19, 1996, only a few weeks after the Telecommunications Act was enacted on February 8 ,1996, and several months before the August 8, 1996 release of the first set of regulations of the FCC which were promulgated to implement the Act. (FCC's First Report and Order, 11 FCC Rcd 15499 (August 8, 1996).)

Cook also fails to identify any legal mandate for the claim that the timing of the filing of an interconnection agreement with a State commission determines whether the agreement is to be both "deemed" approved under the Act and made available under Section 252(i).

Cook's reliance on Section 252, therefore, is misplaced. The terms of the statute do not provide a foundation for the claim that the Pac-West agreement must be deemed approved by the Commission under the 1996 Act. Thus, the Pac-West agreement is not available by right, in whole or in part, to parties to other interconnection agreements with Pacific Bell.

B. The FCC's Pick-and Choose Rule Was Vacated By the U.S. Court of Appeals

Assuming arguendo that the Pac-West agreement were available under Section 252(i), Cook nonetheless does not have the right under the 1996 Act to choose only the termination rate and not adopt all of the other terms and conditions of that agreement.

Shortly after Cook filed its application for rehearing, the U.S. Court of Appeals vacated, on jurisdictional grounds, several of the pricing regulations issued by the FCC to implement the 1996 Act. Among the regulations vacated was the FCC's so-called "pick and choose" rule which would have allowed a non-incumbent carrier, like Cook, to pick any single term or condition of another interconnection agreement that the incumbent local exchange carrier ("LEC") had entered into under Section 252. (See 47 C.F.R. §51.809, and the FCC First Report and Order, 11 FCC Rcd, at pp. 16137-16142, paragraphs 1309-1323.) However, the Eighth Circuit vacated the FCC's regulation holding that the "pick and choose" rule was "an unreasonable construction of the Act...." (Iowa Utilities Board) supra, Part II(B).

We note, furthermore, that although certain of the FCC regulations vacated by the court were preserved for application to commercial mobile radio

service providers ("CMRS"), a class which includes paging services, the court did not include the pick-and-choose rule among the regulations saved for CMRS agreements. (See Iowa Utilities Board, supra, Part II(A) and footnotes 21, and 39 which summarize the pricing regulations vacated.) [5]

Under current law, therefore, even if the Pac-West agreement could be "deemed" approved under the 1996 Act, and all other circumstances were equal, we would not be required by Section 252(i) to permit Cook the selection of only the termination rate of the Pac-West agreement. The Cook/Pacific Bell agreement would have to adopt, as the statute states, "the same terms and conditions" as those provided in the Pac-West/ Pacific Bell agreement, not just Pac-West's termination rate. (See Iowa Utilities Board, supra, fn. 22.) But, all other circumstances are not equal. Given the differences in telecommunications functions between Pac-West and Cook, it is not feasible for Cook to adopt all the terms and conditions of the Pac-West agreement.

C. The Pac-West Compensation Rates For Termination Were Not Shown To Be Cost-Based.

Independent of the Pac-West agreement being unavailable under Section 252(i), the Pac-West termination rate cannot be adopted as a proxy rate for Cook since we have no cost study by which to evaluate the Pac-West rate. Because Cook, unlike Pac-West, requested an interconnection agreement with Pacific Bell under Section 251, and requested arbitration under Section 252, we are obligated to set the termination rate in accordance with Section 252(d)(2)(A)(ii) which provides:

> "[A] State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless. . . such terms and conditions

---

[5] The court recognized that certain of the more general pricing regulations affecting CMRS providers were within the FCC's jurisdiction pursuant to 47 U.S.C.§§152(b) and 332 which preempt most state regulation of CMRS providers.

> determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls." Emphasis added.

In compliance with that mandate, we have decided to require the application of the costing principles set forth in D.95-12-056. We have no record, however, that the Pac-West termination rate was developed for paging calls consistent with these principles.

The Pac-West agreement went into effect without an evidentiary hearing. There is no record, therefore, of a specific cost analysis for Pac-West's termination rate which we can evaluate and approve. There is also no data in our records that would show that Pac-West's cost for terminating paging calls were broken out from the costs of terminating other types of calls. The Pac-West termination rate is applied without distinguishing the type of call that is terminated. See the declaration in the present docket of John K. La Rue, President of Pac-West where he attests:

> "Pacific Bell pays terminating compensation to Pac-West for the Relevant Calls [i.e. calls routed by Pac-West's switch(es) to trunks connecting with paging facilities of third parties] at the same rates as Pacific pays for all other traffic terminated under the Interconnection Agreement. " (Exhibit 4, p.2, paragraph 5.)

Cook, moreover, has not shown how we could, after the fact, extract a cost-based, one-way paging termination rate from the Pac-West agreement.

According to the declaration of Mr. La Rue:

> "However, the substantial majority of calls terminated by Pac-West under the Interconnection Agreement are not Relevant Calls [i.e. calls routed by Pac-West's switch(es) to trunks connecting with paging facilities of third parties], but instead are voice or non-one-way paging data calls...." (Exhibit 4, p.1, paragraph 2.)

The Pac-West rate, therefore, which compensates predominately for the termination of calls other than paging calls, is not a reasonable approximation of Cook's termination costs for paging calls. In addition, as an exchange carrier, Pac-West's technical operations and telecommunications equipment are different from Cook's. Pac-West is compensated by Pacific Bell for termination of calls which may go to a wireline customer, a voice mail box, or a third-party paging service. Pac-West's termination function is much the same as Pacific Bell's, but very different from the kind of termination provided by Cook as a one-way paging provider. As a result, Pac-West's termination costs cannot be presumed to be the same as Cook's paging terminal costs. This conclusion also reflects the finding of the FCC in its First Report and Order that an LEC's forward-looking costs for determining call termination compensation is not a reasonable proxy for the costs of a paging provider. (FCC's First Report and Order, supra, at p. 16043, paragraph 1092.) The Pac-West rate, therefore, cannot be applied to Cook because it is not possible to determine that it was developed as a cost-based termination rate for a paging service.

Cook, therefore, has not demonstrated that we arbitrarily overlooked any material facts in this proceeding, nor misapplied the law with respect to the denying the availability of the termination rate of the Pac-West agreement to its agreement with Pacific Bell.

III. PARAMETERS FOR SETTING COOK'S TERMINATION RATE

In D.97-05-095, in addition to denying Cook's adoption of the Pac-West termination rate, we also rejected a cost-study offered by Cook for setting its compensation rate for terminating paging calls. We found Cook's study was not consistent with our consensus costing principles set forth in D.95-12-016. We also found that Cook improperly included costs for facilities beyond the paging terminal, as well as costs for features and equipment not restricted to paging

services. (D.97-05-095, mimeo, p. 8-9, Findings of Fact Nos. 10-13.) We concluded that an appropriate termination rate should be developed for Cook in a second phase of this proceeding, and stated:

> "Cook should only be entitled to compensation for its paging terminal costs which, for the purposes of this arbitration, should be considered an equivalent facility to an end-office switch." (D.97-05-095, mimeo, Conclusion of Law No. 7.)

In the application for rehearing, Cook reiterates that the costs of facilities beyond the paging terminal, in particular its transmitters and the facilities linking the paging terminals to transmitters, and those linking the transmitters, should also be included in determining the compensation it is to receive from Pacific Bell. (Cook's Application for Rehearing, p. 9-10.) Cook does not specifically discuss, however, any terms of the 1996 Act which would render unlawful the costing parameters we have thus far ordered for Cook's termination rate. Consequently, Cook fails to substantiate legal error on this subject.

Cook argues that our position is inconsistent with the FCC's regulation which defines termination at 47 C.F.R. §51.701(d) as follows:

> "For purposes of this sub-part, termination is the switching of local telecommunications traffic at the terminating carrier's end-office switch, or equivalent facility, and delivery of such traffic to the called party's premises."[6]

Cook looks particularly to the last clause in the regulation regarding the "delivery of such traffic." We acknowledge that there is some ambiguity in the language of the FCC's regulation. However, the FCC's explanation of its definition comports with our ruling. The FCC states in its First Report and Order the following:

---

6 Although the Eight Circuit vacated the FCC's pricing regulations in Iowa Utilities Board, the regulation at 47 C.F.R.§51.701(d) was preserved for application to CMRS providers such as Cook.

"[T]he 'additional cost' to the LEC of terminating a call that originates on a competing carrier's network primarily consists of the traffic-sensitive component of local switching. The network elements involved with the termination of traffic include the end-office switch and local loop. The costs of local loops and line ports associated with local switches do not vary in proportion to the number of calls terminated over these facilities. We conclude that such non-traffic sensitive cost should not be considered 'additional costs' when a LEC terminates a call ....For the purposes of setting rates under section 252(d)(2), only that portion of the forward-looking, economic costs of end-office switching that is recovered on a usage-sensitive basis constitutes an "additional cost" to be recovered through termination charges." (First Report and Order, supra, at pp. 16024-16025, paragraph 1057. Emphasis added.)

It is clear from this statement that the FCC did not intend, when referring to the "delivery" of calls in its definition, to have the costs of facilities beyond the end-office switch included in a termination rate. Therefore, since we have found a paging terminal to be a facility equivalent to an end-office switch in providing a call termination function, thus permitting Cook to seek compensation under Section 251(b)(5), it is just and reasonable to limit the costs considered for termination compensation to the paging terminal. (See. D.97-05-095, mimeo, p. 6 and Conclusion of Law 7.) [7]

Cook nonetheless argues that the FCC's explanation for eliminating local loop costs is based on finding the local loop is not usage-sensitive. A paging

---

[7] Consistent with the FCC's ruling, in three of Pacific Bell's agreements approved under Section 252, the termination rates exclude costs beyond the end-office switch, whether calls terminated are thereafter routed to an end-user telephone, a voice mail box, or a paging terminal. (See Attachments 8, p.2 and 18, pp.15-18 of the AT&T/Pacific Bell agreement filed in A.96-08-040, approved in D.96-12-034; Attachment 18, pp.12-13 of the MCI/Pacific Bell agreement filed in A.96-08-068, approved in D.97-01-039; and Attachment 18, pp. 11-12 of the Sprint/Pacific Bell agreement Pacific Bell filed in A. 96-09-

(continued on next page)

provider's transmitter costs should be included because unlike an exchange carrier's local loop, transmitters are, according to Cook, usage-sensitive. Cook states that when usage increases on a paging network, Cook must either increase transmission speeds or add frequencies. (Cook's Application for Rehearing, p. 10.)

Cook fails to demonstrate, however, that it is applying the same technical definition of "usage-sensitive" used by the FCC in excluding local loop costs. Cook is actually claiming costs for increasing the capacity of its transmitters. The FCC does not regard capacity increases as evidence of usage-sensitivity.[8] Cook also does not show how the forward-looking costs of the transmitter operations which it claims are usage-sensitive can be calculated consistent with our costing principles.

Cook contends, alternatively, that usage sensitivity is not a relevant factor in calculating termination costs for a paging provider. (Cook's Application for Rehearing, p. 10.)[9] This argument simply contradicts the FCC's determination that usage-sensitivity is the critical determinant in calculating the costs. Cook references for support paragraphs 682, 692, and 694 of the FCC's First Report and Order, but fails to provide us with any discussion or identification of the particular FCC statements in the three cited paragraphs which could support including transmitter costs in setting the termination rate. We cannot assess, therefore, whatever legal import Cook may have in mind with respect to paragraphs 682, 692, and 694.

Cook further argues that we have made prior statements which would allow using non-usage-sensitive facilities in setting termination rates. Cook

---

(continued from previous page)
043, approved in D.97-01-046. See also, the Arbitrator's Report, April 21, 1997, pp.20-21.)

[8] See the FCC's First Report and Order, 11 FCC Rcd, at p. 16024, paragraph 1057, n. 2533.

[9] Presumably, Cook is arguing in the alternative that if its transmitters are not considered usage-sensitive, then they should nonetheless be included in the cost study for a termination rate since usage-
(continued on next page)

quotes, out of context, a clause from one of our decisions, issued in our rulemaking proceeding on Open Access Network Architecture Development ("ONAD")10 regarding avoidable costs : "...avoidable costs can include both volume sensitive and volume insensitive costs." (Cook's Application for Rehearing, pp.10-11, citing D.95-12-016, mimeo, p. 49.) Cook also refers to parts of a statement regarding a cost study applicable to local exchange carriers. Citing D.95-12-016, at p. 50, Cook writes:

> '"The TSLRIC study for each LEC 'service' shall include the volume sensitive costs of shared disaggregated pieces and the total costs of (both volume sensitive and volume insensitive) for all disaggregated pieces or functions that are dedicated uniquely to the LEC 'service" being studied.'" (Cook's Application for Rehearing, p.10.)

We observe initially that Cook's citations are not correct. We have, after a search, located the words quoted by Cook in our Costing Principles 1 and 3 set forth in Appendix C of D.95-12-016. Nonetheless, having found the source of Cook's partial quotations, we still cannot see the legal basis for Cook's position.

The language Cook has extracted from Principles 1 and 3 regarding avoidable costs and disaggregated pieces pertain specifically to factors for calculating costs of individual, unbundled network elements and combinations of elements. These factors were identified for the purpose of pricing unbundled network elements which could be offered, for example, by an LEC to competing carriers, and for the purpose of setting price floors to preclude cross-subsidization of various network elements by an LEC. In the second phase of the present proceeding, these principles, and the other costing principles set forth in D.95-12-

---

(continued from previous page)
sensitivity is not an appropriate costing principle.

036, shall be further considered with respect to developing the appropriate compensation rate for Cook's termination of paging calls. The fundamental parameters, however, in addition to our costing principles, which are to guide the parties in the second phase are those we stated in D.97-05-095: 1) costs of the paging terminal only shall be considered; 2) non-paging service features are to be excluded; 3) the termination rate to be compensated by Pacific Bell is only for Pacific-originated traffic, and 4) no transport costs are to be included. (D.97-05-095, mimeo, pp.8-9, Findings of Fact 10-14, and Conclusion of Law 7 and 8.)

We note, however, that it may be necessary to revisit Cook's termination rate that is being developed in the second phase of this proceeding once the FCC has completed its own proceeding on developing compensation rules for paging providers under the 1996 Act. [11] The termination rate we approve may be subject to revision should the FCC develop costing principles and guidelines in setting a paging provider termination rate which are different from and legally supersede those we have established.

Nonetheless, despite the fact that the rate to be set may be provisional, we are convinced that there is no legal error in limiting the costs to be included in the rate to costs of the paging terminal.

IV. CONCLUSION

Cook has not met its burden of demonstrating legal error either in our denial of the Pac-West termination rate or in our costing requirements. Accordingly, the Commission shall go forward in the second phase of the

---

(continued from previous page)

10 Docket No. R.93-04-003/I.93-04-002.

11 The FCC has decided to initiate a further proceeding to determine an appropriate proxy for paging costs, and, if necessary, set a specific paging default proxy. In the meantime, the FCC directs that in arbitrating interconnection agreements, the State commission's should establish termination rates "based on forward-looking economic costs." (See the FCC's First Report and Order, 11 FCC Rcd, at pp. 16043-44, paragraph 1093.)

arbitration proceeding to determine the compensation Cook is to receive for terminating calls originating on Pacific Bell's network consistent with the directions set forth in D.97-05-095.

IT IS THEREFORE ORDERED that the application for rehearing of D.97-05-095 filed by Cook Telecom, Inc. is denied.

This order is effective today.

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

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

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