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MAIL DATE  
9/30/97

Decision 97-09-126

September 24, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

**ORIGINAL**

In the Matter of the Application by )  
 ACN Communications (U-2528-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). )  
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A.97-03-001  
(Filed March 3, 1997)

**ORDER DENYING REHEARING OF DECISION 97-06-011**

ACN Communications ("ACN") has filed an application for rehearing of our Decision (D.) 97-06-011 in the above-captioned arbitration proceeding. Upon review of the application, and all matters raised therein, we hereby deny rehearing. ACN has not established legal error in our decision as is required by Cal. Pub. Util. Code Section 1732.

This proceeding was initiated by ACN which filed a petition for arbitration on March 3, 1997 under Section 252 of the Telecommunications Act of 1996 seeking an interconnection agreement with Pacific Bell. <sup>1</sup> After a hearing on the matter, the arbitrator issued a report on May 23, 1997. Pacific Bell and ACN then submitted for Commission approval a Conformed Interconnection Agreement pursuant to the arbitrator's report. In D.97-06-111, we approved the agreement. In doing so, we also expressly rejected ACN's contention that it had a right to the terms and conditions of an interconnection agreement entered into by Pacific Bell

with Pac-West Telecomm, Inc. (the "Pac-West agreement"), the latter, like ACN, a "competitive local exchange carrier" (CLC)).<sup>2</sup> We determined in D.97-06-011 that the Pac-West agreement was not available for replication by ACN under Section 252(i), as ACN claimed, because that agreement was not submitted to the Commission under the 1996 Act and was not approved by the Commission pursuant to the 1996 Act.

ACN now reiterates its argument, stating in the negative, that there is no provision in the 1996 Act allowing an interconnection agreement to become effective outside of the provisions of the Act. ACN states its position as follows:

"There is no authority in the Act or anywhere else for an incumbent local exchange carrier to refuse to file an agreement under Section 252, nor is there any provision that allows a State commission to follow any procedures for approving or rejecting filed interconnection agreements other than those set forth in Section 252. (ACN's Application for Rehearing, at p. 3.)<sup>3</sup>

We observe initially that ACN relies here on its own paraphrasing of Section 252. When we look at the terms of the two most pertinent provisions, both Section 251 and 252, we find, quite to the contrary of ACN's claim, that the circumstances by which the Pac-West agreement was independently negotiated and by which it went into effect pursuant to our own rules and procedures set forth

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<sup>1</sup> The 1996 ACT amended and repealed various sections of the Communications Act of 1934 at 47 U.S.C. §151 et seq. Unless otherwise indicated, all statutory references shall be to Title 47 of the U.S. Code.

<sup>2</sup> We refer hereinafter to this agreement as the "Pac-West agreement."

<sup>3</sup> Although ACN does not explicitly state the underlying objective of its application, we understand it is to establish a basis for invoking Section 252(i) of the 1996 which it believes allows ACN's agreement with Pacific Bell to replicate the Pac-West agreement.

in D.95-12-056, preclude it from being adopted as a matter of right under Section 252(i).

Specifically, Section 252(a)(1) states:

**“Voluntary Negotiations. - Upon receiving a request for interconnection, services, or network elements pursuant to section 251 [of the Act], an incumbent local exchange carrier may 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.

ACN presents no evidence that Pac-West chose to submit its request to Pacific Bell under Section 251. Instead, the parties filed the Pac-West agreement by Advice Letter No. 18115 in compliance with D.95-12-056.<sup>4</sup>

We also read at Section 252(a)(2):

**“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 the negotiation.”**

When Pacific Bell and Pac-West submitted their agreement to the Commission pursuant to D.95-12-056, they had completed their negotiation.

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<sup>4</sup> The advice letter, we note, was dated March 19, 1996, only a few weeks after the Telecommunications Act was enacted on February 8, 1996 and several months before even the regulations of the Federal Communications Commission (“FCC”) implementing the ACT were promulgated in the FCC’s First Report and Order, 11 FCC Red 15499, which was released August 8, 1996.

Neither could be described, therefore, as meeting the condition of a party still in process of negotiating an agreement under Section 252.

In addition, Section 252(b) provides that after a prescribed number of days following a local exchange carrier's receipt of a request for negotiation, "the carrier or any party to the negotiation may petition a State commission to arbitrate any open issues." Neither Pacific Bell nor Pac-West sought the involvement of this Commission for mediation or arbitration under Section 252 during the course of their negotiation.

Therefore, when we examine the terms of Section 252, on which ACN relies, we find no foundation for ACN's argument that the Pac-West agreement was approved or must be deemed approved under the 1996 Act. The Pac-West agreement permissibly went into effect under the pre-existing procedures established by D.95-12-056.

Finally, ACN's added version of the factual circumstances surrounding the Pac-West agreement does not establish legal error in our decision. ACN relies on irrelevant and unfounded assertions. ACN claims, for example, that:

"[T]he agreement was not permitted to go into effect and under the procedures set forth in Decision No. 95-12-056 the agreement thereby became a matter for approval or rejection by the Commission not the staff." (ACN's Application for Rehearing, at p. 2.)

We do not see how this description of events, offered without record evidence, would lead us to conclude that the Pac-West agreement was approved, or could be deemed approved by the Commission under Section 252 of the 1996 Act. As ACN states, the matter was subject to D.95-12-056. Indeed, there is no

Commission decision that ACN can cite which approved the Pac-West agreement pursuant to the terms and procedures of the 1996 Act.

With similar reliance on a conclusory assertion, ACN also contends that Pacific Bell and Pac-West "knew the 1996 Act applied" to their agreement when the Advice letter was submitted, and that the Commission and the staff as well "knew the Act applied." (ACN's Application for Rehearing, at p. 3.) ACN again cites no record evidence to support this claim. Furthermore, ACN fails to explain the probative value or relevance of the claim with respect to the fact that the Pac-West agreement was not filed by the parties nor approved by the Commission pursuant to the provisions of the 1996 Act.

Accordingly, we find that ACN has not met its burden of demonstrating legal error in D.97-06-111. ACN has failed to substantiate that we overlooked any material facts and has not proffered any rationale or legal authority that would require granting rehearing. The Commission did not approve the Pac-West agreement pursuant to the 1996 Act, and ACN has not demonstrated that Section 252 requires that all interconnection agreements be approved under the 1996 Act. Consequently, as we concluded in D.97-06-111, ACN does not have a right to the terms and conditions of the Pac-West agreement under Section 252(i).

**IT IS THEREFORE ORDERED** that the application for rehearing filed by ACN be denied.

This decision 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.