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Decision 97-12-085 December 16, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Complaint of MFS Intelenet of California, Inc. against Pacific Bell and Request for Temporary Restraining Order and Preliminary Injunction.

Case 97-09-032
(Filed September 19, 1997)

INTERIM OPINION

Summary

In this decision we deny the request of the complainant, MFS Intelenet of California, Inc. (MFS) that it be granted a preliminary injunction restraining the defendant, Pacific Bell (Pacific), from withholding funds under the parties' co-carrier interconnection agreement (agreement) pending resolution of the complaint proceeding. We assess costs of the expedited hearing on the injunctive request against MFS.

Discussion

Procedural History

On September 19, 1997, MFS filed the instant complaint against Pacific and requested a temporary restraining order (TRO) pending a hearing on its request for a preliminary injunction. In the complaint MFS alleges that Pacific violated the agreement by failing to pay reciprocal compensation on calls terminated by MFS to internet service providers (ISPs). MFS also contends that Pacific's conduct is anticompetitive and that Pacific is in violation of section 251(b)(5) of the Telecommunications Act of 1996 (Teleco Act) which requires reciprocal compensation arrangements between local carriers.

In a ruling on October 1, 1997, Administrative Law Judge (ALJ) Watson issued a ruling shortening Pacific's time to answer and file a response to the request for the preliminary injunction. She set a hearing for October 15, 1997 to consider the merits on the preliminary injunction and thereafter to conduct a prehearing conference (PHC)

to set an expedited schedule for the case. The ALJ also denied the request for a TRO, noting the Commission only issues TROs when the urgency of the situation demands such relief, and none had been shown. (*MCI Telecommunications Corporation v. Pacific Bell*, 59 CPUC2d 665, 674 (1995).) The ALJ declared that, due to lack of detailed information about MFS' financial situation, MFS had not shown sufficient urgency for the issuance of a TRO.

However, the ALJ informed MFS that as part of carrying its burden on the merits of its injunctive request, it must provide testimony on its financial condition and its ability to utilize cash loans from affiliates in order to assess its claim that irreparable injury will occur absent the injunction. MFS asserts that its ISP business will be discontinued if the payment stream under the agreement is altered and customers will not return once aligned with other carriers. The ALJ cautioned that the burden is on MFS to show that a refund of monies placed in the escrow account established by Pacific is an inadequate remedy should MFS prevail on the merits of its complaint.

The hearing was held on October 15, 1997. At the beginning of the hearing, MFS was placed on notice that, should it not prevail on its injunctive request, it may be assessed the costs of the outside court reporter hired by the Commission to provide an expedited hearing.

At the PHC which followed the hearing, the parties agreed that only legal issues were involved in the dispute. Therefore, they submitted cross-summary judgment motions on December 1, 1997. Replies were filed on December 15, 1997.

In Pacific's answer and response to the injunctive request, it disclosed that it had sued MFS in San Francisco Superior Court over the same issue. Pacific's complaint is for declaratory relief regarding interpretation of the agreement, an accounting and escrow, and restitution. Pacific asked the Commission to relinquish jurisdiction to the Superior Court. The ALJ refused. MFS disclosed that it had filed a demurrer which would be heard on October 23, 1997, and asked the trial judge to defer to the Commission's jurisdiction and expertise. The ALJ required the parties to report the results of the demurrer hearing. On October 27, 1997, the parties reported to the ALJ

pending this Commission's resolution of the complaint. We appreciate the court's deference to this Commission.

MFS' Evidentiary Showing

In mid-November 1995, MFS, a competitive local exchange company, and Pacific negotiated the agreement. It was signed on November 17, 1995, and submitted to the Commission for approval as Advice Letter 17879. The Commission approved the agreement, conditioned upon the making of certain modifications, in Resolution T-15824 on January 17, 1996. On January 26, 1996, the modified agreement was filed as Advice Letter 17879A. Commencing in July, 1996, MFS and Pacific began exchanging reciprocal compensation under the terms of the agreement.

Section VI.B.1.b of the agreement sets forth a compensation rate of \$.0075 per minute for "local rate" calls. However, the agreement does not define local traffic but instead assigns this rate of reciprocal compensation based on the NPA-NXX.¹ The agreement's Section VI.B. 4.d. declares that if the calling party number, when matched to the called party number in the call record, bears an NPA-NXX assigned to the other party, and the NPA-NXX is associated with a rate center point within 0 to 12 miles of the rate center point of the called party number, the number of conversation seconds shall be billed at the local rate (minus an estimated amount of inbound number portability scheme traffic which is inbound access traffic.) The rate center point is the actual geographic point, that is, the exchange or geographic location, associated with a particular NPA-NXX, in other words, where a call is initiated and where a call is terminated.² The agreement permits the routing point, that is, where the traffic is sent

¹ NPA stands for numbering plan area, which is commonly referred to as an area code. NXX stands for the first three numbers of the actual telephone number which identify the switch entity and central office where it is located.

² Initiation and termination of a call is part of the call completion process. When a person picks up a telephone and dials, a call is originated. The call will ring down the called party's line and terminates when the called party answers the call, not when the called party hangs up after ending the conversation. Therefore, when a calling party reaches the called party's NPA-NXX,

Footnote continued on next page

after call termination, and the rate point to be different. MFS' sole witness, Eric Artman, who participated in the negotiations of the agreement, stated that there was no reference in the agreement to local traffic, because:

"We very carefully wanted to define the traffic that passed in each direction and to make sure that it was just from phone numbers. At the time of negotiations, Pacific Bell was very precise about the language it wanted to use and we agreed to their [sic] language."
(Tr. At 18.)

Referencing the traffic to the NPA-NXXs was something that Pacific wanted to do.

During the course of the negotiations culminating in the agreement, Artman did not recall whether there was any discussion specifically about calls to ISPs.³ Artman stated that inbound traffic was discussed, but he was not certain whether or not it would have included ISP traffic. MFS had advocated a bill and keep policy, which did not track local traffic and provided no reciprocal compensation for it. Pacific demanded that MFS sign an agreement with express compensation. MFS felt Pacific so insisted because Pacific thought the traffic flow would be in one direction in its favor.

Artman did not believe that specifically targeting ISPs for the termination of traffic was part of MFS' business plan at the time the agreement was negotiated. Instead, it was something MFS decided was an option when it was looking at what it could do when having to pay the relatively high rate of compensation Pacific

the call is terminated. However, the transport and termination charges under the agreement accrue for the length of the call, until a party breaks the connection.

³ ISPs provide access to the internet for their customers, and some provide additional proprietary offerings. Customers dial up a telecommunications connection provided them by the ISP. These are usually short mileage calls to incur the least cost and to provide the most direct and highest bandwidth connection for transmission of the data services traffic from the ISP back to the customer's computer. The calls are configured as direct inward dial-type services or as an FX or FX-like service. ISPs are treated like business line customers by local carriers.

demanded. After the agreement was signed, in early 1996, MFS acquired UUNET, Incorporated, an ISP.

Shortly after SBC Communications, Inc.(SBC) took control of Pacific, MFS became aware that paying reciprocal compensation under the local rate provision for calls routed by MFS to ISPs was a source of discomfort to SBC. MFS and Pacific engaged in a continuing series of discussions and negotiations about replacing the agreement and used a new negotiating team from Pacific. Internet traffic was discussed in these negotiations. On June 26, 1997, Pacific notified MFS that it was terminating the agreement in 60 days as permitted by Section XI. Pacific then extended the termination date to September 22, 1997. MFS and Pacific were arguing over whether the agreement could be terminated and superceded by Pacific's Statement of Generally Available Terms (SGAT)⁴ on file with this Commission. Because Pacific withdrew its SGAT, Pacific notified MFS on August 19, 1997 that Pacific was withdrawing its letter of termination.

In June, 1997 MFS also received a letter from Pacific stating that the July invoice would be paid under protest, and the money would be received by a certain date. After the date passed, MFS received a letter from a different Pacific employee which stated Pacific would withhold local traffic reciprocal compensation for calls routed to ISPs by MFS. The July 20, 1997, local traffic invoices totaled \$1,309,664.25. Pacific withheld \$793,499, claiming it is associated with ISP traffic, and placed it in an escrow account. The remainder, \$516,165.25, was paid to MFS. Pacific asserted that "ISP traffic is interstate or (at a minimum) interexchange traffic." Pacific also declared it would audit all local traffic reciprocal compensation since the inception of its payments to MFS and would demand a refund from MFS of all amounts previously paid to MFS for calls routed to ISPs by MFS. Pacific stated it would also audit its records and if it had passed on charges for calls it terminated to ISPs, would issue MFS a refund check. MFS was not informed of the calculations behind the dollars in local traffic compensation

⁴ Under the Teleco Act, the SGAT acts as a generic interconnection agreement.

determined to be associated with ISPs. MFS refused to let Pacific audit its call records, asserting the audit would invade the privacy of its customers.

Artman was not aware whether Pacific had paid or withheld monies from later MFS invoices. Artman's review of Pacific's tariffs revealed no change in the characterization of calls to ISPs by Pacific's end-users. Therefore, he claims that Pacific is still collecting incoming revenue from such calls as if they were standard local business calls, but it is no longer paying MFS reciprocal compensation on them under the agreement. Pacific has indicated to MFS that it would consider a bill and keep scenario which would include ISP traffic, meaning there would be no reciprocal compensation. Under the Teleco Act and the particular traffic balance between MFS and Pacific, MFS believes bill and keep is not appropriate. MFS also asserts that there is no other provision of the agreement that would provide for compensation for the calls to ISPs.

MFS has not yet stopped marketing its services to ISPs. However, it considers them substantial customers. They often buy high volumes of lines. Artman testified that were MFS to discontinue selling to ISPs, gaining them back as customers would be difficult. He notes that most ISPs load the telephone number into their computers and software so the computers using the software automatically dial the ISP. A change in phone number would require a change in the software in all of the ISPs' users computers, as well as the usual changes in business cards, letterhead, and promotional items. Artman also testified that interim number portability (INP) would not work due to its 99 line simultaneous call path limitation³ since ISPs often have more than 99 lines behind a single number. Also, in most cases, under the INP process, the call is routed through remote call forwarding which can degrade the quality of the call, particularly when it is a data transmission which needs a wide bandwidth. Therefore, MFS asserts irreparable harm because it believes its ISP customers would be lost once their phone numbers were changed by a new carrier. MFS also asserts that Pacific's

³This means that no more than 99 calls can pass on an interim portability basis from a specific phone number at once.

actions are anti-competitive and meant to drive MFS and other competitors for ISP business out of that market. Therefore MFS asserts a chilling effect on competition. At the hearing, MFS failed to produce any documentation or adduce any testimony on the issue of MFS' financial condition or its ability to obtain financing from its parent or affiliates even though directed to provide it by the ALJ in her ruling setting the hearing.

Pacific did not call any witnesses at the hearing. In its response to the request for the TRO and preliminary injunction and as an affirmative defense in its answer, Pacific alleges the complaint was not properly verified and therefore cannot form the basis of such relief.⁴ Pacific claims granting of the relief based on the complaint and absent declarations or affidavits of witnesses is a denial of due process. Pacific also asserts curing of the defect at hearing violates Pacific's due process rights. At the hearing counsel for Pacific argued that Pacific's due process rights were being violated because a live witness was being produced instead of pre-filed testimony. The ALJ refuted all such claims and proceeded with the hearing.

In its brief on the hearing and in its answer, Pacific asserts that the Federal Communications Commission (FCC), by ruling that ISPs need not pay interstate access charges (*Access Charge Reform, First Report and Order*, CC Docket No. 96-262, FCC 97-158 ¶ 341 (May 16, 1997)), has determined that internet traffic is interstate in nature. Because the agreement covers only intrastate traffic, Pacific contends it does not cover calls to ISPs because the FCC has determined that reciprocal compensation does not apply to the transport or termination of interstate traffic. (*Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 95-185, First Report and Order FCC 96-325 ¶¶ 1034-1035 (August 8, 1996), *vacated in part, Iowa Utilities Board v. FCC No. 96-3321*, (8th Cir. July 18, 1997).) Pacific also argues the Commission should dismiss the entire complaint and allow the Superior Court to

⁴ At the hearing, the complaint was verified on the stand by MFS' witness.

determine the matter based on Pacific's complaint against MFS in that forum. Finally Pacific offers as an affirmative defense that the complaint is improper as it does not allege a violation of a provision of law or order of the Commission under Public Utilities (PU) Code section 1702.

The Commission's Jurisdiction

Before reaching the merits of the preliminary injunction request, we first clarify our jurisdiction in this matter. Among the modifications to the agreement the Commission required was the addition of a new Section XXI to the agreement which states:

"XXI COMMISSION JURISDICTION

"This Agreement shall at all times be subject to such changes or modifications by the Public Utilities Commission of the State of California as said Commission may, from time to time, direct in the exercise of its jurisdiction. In addition, rates in the Agreement are subject to adjustment by the Commission to conform to rates established by the Commission in future decisions."

By requiring this addition to the agreement, we were asserting our continuing jurisdiction over its terms and their interpretation.⁷ We view this dispute as one over the interpretation of a rate in the agreement whose resolution requires our technical expertise in this area of telecommunications policy and law. We appreciate the trial judge's recognition of this fact and chastise Pacific for its blatant attempt to evade our jurisdiction. We find the ALJ acted properly in refusing Pacific's request that the hearing on the injunction not be conducted due to lack of jurisdiction over the underlying complaint. We also regard as fatuous Pacific's claim that it is denied due process by the holding of a hearing with live testimony and the right to produce its own

⁷ Although not necessary to the resolution of the jurisdiction issue, we also have discretionary jurisdiction under PU Code section 701's broad jurisdictional grant. The complaint is proper under PU Code section 1702 because the agreement was adopted by the Commission in a resolution and therefore allegations of its breach are tantamount to violation of a Commission order.

witnesses. Pacific cannot argue that the trial courts, which do not employ pre-filed testimony, have proper jurisdiction over this action and then argue in this forum due process is denied by the holding of a hearing without pre-filed testimony. The ALJ properly rejected all of Pacific's due process arguments.

The Injunctive Request

We now turn to the merits of the injunctive request. In *MCI Telecommunications Corporation v. Pacific Bell*, 59 CPUC2d 665 (1995), we set forth the standards for our grant of injunctive relief pending final issuance of a decision.

"[F]our conditions must be satisfied to establish the right to a preliminary injunction: (1) likelihood of prevailing on the merits, (2) irreparable injury, (3) no substantial harm to other interested persons, and (4) not contrary to the public interest. (*Westcom Long Distance Inc. v. Pacific Bell* (1994) 54 CPUC2d 244...)" (59 CPUC2d at 674.)

All four conditions must be met before the preliminary injunction will issue. (See, *Westcom Long Distance, Inc. v. Pacific Bell*, 54 CPUC2d 244, 259 (1994).) In this case, we need not analyze all four conditions since MFS failed to prove the requisite irreparable injury.

We find that MFS has failed to show irreparable injury sufficient to sustain the grant of a preliminary injunction. As noted by our Supreme Court, "If the damage or injury threatened is of a character which may be easily remedied if the injunction is refused, as where it is chiefly monetary damages and the defendant is solvent, the court, in its discretion, may refuse to issue any injunction...." (*Williams v. Los Angeles Railway Co.*, 150 C. 592, 596, 89 P. 330 (1907). See also, *Parker v. Pacific Gas & Electric Co.*, 50 C.A. 264, 266, 195 P. 60 (1920) (When monetary damages are ascertainable and defendant is able to respond in damages, denial of temporary injunction is proper); *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (Economic loss, however substantial, that ultimately can be recovered does not constitute irreparable injury).)

We also believe that MFS failed to show that the injury was more than speculative. Speculative injury does not constitute irreparable injury sufficient to

warrant granting a preliminary injunction. (*Caribbean Marine Services Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) See also, *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 472 (9th Cir., 1984) and *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935,938 (9th Cir. 1987).) In order to qualify for a grant of a preliminary injunction, a plaintiff must demonstrate immediate, threatened injury. (*Caribbean*, 844 F.2d at 674.) "Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur." (*Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (emphasis in orig.)) Injunctive relief will not be granted against something which is merely feared as liable to occur. (*Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931). See also *Mead Johnson Pharmaceutical Group v. Bowen*, 655 F.Supp. 53, 56 D.D.C. (1986) (mere statement of probable annual economic loss of 20 to 30 percent market share was not adequate to show irreparable harm); *Arrow Air, Inc. v. U.S.*, 649 F.Supp. 993, 1000 (D.D.C. 1986) (even economic loss of 25% of projected gross revenues of a company already in bankruptcy is not enough to show irreparable harm).)

MFS' evidence shows only that it "may" have to discontinue offering ISPs service in the future if Pacific continues to withhold payments until this dispute is resolved. MFS gave no date certain for such a discontinuance. Therefore, the alleged injury which might arise if customers were lost and could not be regained is speculative and remote. Additionally, MFS failed to obey the ALJ's directive that we be provided with essential financial information to assess whether it is in fact unable to withstand interrupted cash flow of \$750,000 per month pending dispute resolution. Therefore, we cannot predict if MFS will soon reach the position of having to discontinue service to the ISP market. Likewise, we cannot ascertain whether money damages will not be sufficient to make MFS whole at the completion of this case. For these reasons, MFS has not shown irreparable harm and the request for a preliminary injunction should be denied.

Costs of the Expedited Hearing

We also conclude that MFS should bear all costs of the hiring of an outside reporter in order to provide MFS an expedited hearing in this matter. In this time of

dwindling Commission resources, parties should be aware that requests for extraordinary action on an expedited basis may require our resort to outside resources. Should this occur, if sufficient basis is not shown for the exercise of such expedition with its attendant cost, we shall not hesitate to place the financial burden on the party so burdening our scarce resources. We find this especially justified in this case as MFS was specifically directed by the ALJ to provide us with essential information at the hearing and failed to do so. The failure to provide this information led to the denial of MFS' request for injunctive relief. Therefore, we shall direct the Chief Hearing Reporter to send MFS the bill for all outside services utilized to hold this hearing on the record. MFS shall have 30 days to reimburse the Commission for such charges.

Findings of Fact

1. In July, 1996, MFS and Pacific began exchanging reciprocal compensation under the agreement, as approved by the Commission in Resolution T-15824 and filed as Advice Letter 17879A.

2. Section VI.B.1.b. of the agreement sets forth a compensation rate for "local rate" calls.

3. Pacific did not pay in full the July, 1997 local traffic invoices under the agreement. Instead, it withheld funds associated with ISP traffic and placed them in an escrow account. Pacific asserted it would audit all past compensation under the agreement and demand a refund for any funds paid for termination of traffic to ISPs.

4. MFS requests a preliminary injunction issue to prevent Pacific from withholding funds pending the resolution of this case.

5. MFS has not yet stopped marketing its services to ISPs. MFS has not provided a date certain at which time it would be forced to stop marketing services to ISPs if funds continue to be withheld. MFS failed to produce any documentation or adduce any testimony on the issue of its financial condition or ability to obtain financing from its parents or affiliates, even though directed to provide it by the ALJ in a ruling prior to the hearing.

Conclusions of Law

1. The Commission has jurisdiction over this case pursuant to Section XXI of the agreement and PU Code section 701.
2. The complaint states a claim under PU Code section 1702 because the agreement was adopted by the Commission in a resolution and its breach is tantamount to violation of a Commission order under Section 1702.
3. If the injury threatened may be easily remedied by the grant of chiefly monetary damages and the defendant is solvent, the request for a preliminary injunction may be denied.
4. Speculative injury is not irreparable injury sufficient to support the grant of a preliminary injunction.
5. MFS has failed to show irreparable injury will occur absent the preliminary injunction.
6. The request for a preliminary injunction should be denied.
7. MFS should bear the costs of all outside services employed by the Chief Hearing Reporter in order to grant MFS' request for an expedited hearing.

INTERIM ORDER

IT IS ORDERED that:

1. The request of MFS Intelenet of California, Inc. (MFS) that it be granted a preliminary injunction restraining Pacific Bell from withholding funds under their co-carrier interconnection agreement pending resolution of this complaint is denied.
2. Within 30 days of our Order, the Commission's Chief Hearing Reporter shall invoice MFS for all costs for all outside services employed to hold the preliminary injunction hearing on the record on an expedited basis.

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3. MFS shall reimburse the Commission's Chief Hearing Reporter for the amounts invoiced within 30 days of receipt of her invoice.

This order is effective today.

Dated December 16, 1997, at San Francisco, California.

P. GREGORY CONLON

President

JESSIE J. KNIGHT, JR.

HENRY M. DUQUE

JOSIAH L. NEEPER

RICHARD A. BILAS

Commissioners