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Decision 98-01-022 January 7, 1998

ORIGINAL
BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service.

Rulemaking 95-04-043
(Filed April 26, 1995)

Order Instituting Investigation on the Commission's Own Motion Into Competition for Local Exchange Service.

Investigation 95-04-044
(Filed April 26, 1995)

OPINION

Summary

By this decision, we direct the state's two largest incumbent local exchange carriers (ILECs), Pacific Bell (Pacific) and GTE California Incorporated (GTEC), to establish memorandum accounts to track billings for directory assistance (DA) services and the provision of subscriber listings for directory publishing by third-party competitors. In Decision (D.) 97-01-042, we addressed various outstanding issues relating to competitive access to ILEC subscriber-directory listings. We also noted then that questions had been raised concerning the reasonableness and competitive fairness of Pacific's tariffed rates for directory access by third-party directory vendors. We directed the assigned Administrative Law Judge (ALJ) to take comments concerning whether the existing tariffed rates for ILEC directory access should be made provisional and subject to a true-up through use of a memorandum account once appropriate rates are determined in the Open Access and Network Architecture Development (OANAD) proceeding.

By ruling dated July 21, 1997, parties were directed to comment on whether the ILECs' rates for access to directory listings should be provisional and whether the Commission should instruct the ILECs to establish a memorandum account of their billings for directory listings to competitors for the purpose of trueing-up such charges

once final rates are set in this Commission's OANAD proceeding. Opening comments were filed on August 15, 1997, with reply comments on September 15, 1997. Comments were filed by the ILECs; various parties representing independent directory vendors (e.g., the Association of Directory Publishers (ADP), INFONXX, Metro One, and Metromail); parties representing competitive local carriers (CLCs); MCI Telecommunications (MCI) and AT&T Telecommunications (AT&T), and the Commission's Office of Ratepayer Advocates (ORA).

Positions of Parties

Pacific notes that the Commission has already approved its tariffs for access to directory listings and believes there is no reason to presuppose the Commission will reject its access rates. Nonetheless, Pacific agrees to maintain a memorandum account to keep track of billings for access to its DA databases in the event that the Commission orders a true-up. Pacific believes, however, that the Commission should adopt a general rule of either allowing or disallowing true-ups. Pacific claims that it is arbitrary and unfair to allow true-ups in only certain situations, without any well-reasoned basis for deviating from recent similar instances where true-ups were not allowed. Pacific notes that its request for authority to true-up the adopted 17% wholesale discount was denied by the Commission in D.97-04-090.

GTEC argues that the memorandum account should be established to track costs as well as revenues for directory-access service so that both the ILECs' costs and revenues may be trued up against the costs and rates established in OANAD. GTEC states that it is incurring costs without yet receiving offsetting revenues for directory-access services, and thus believes tracking revenues only will be inadequate. GTEC also agrees that it would be beneficial to track access to the directory database thereby permitting the ILECs to convert the usage to the appropriate rates when set.

ORA agrees that the existing tariffed rates for access to directory databases should be deemed provisional interim rates pending adoption in the OANAD proceeding of "permanent" cost-based rates. ORA believes that the Commission should authorize each ILEC to set up a memorandum account for the purpose of truing up only

revenues after permanent rates are established in the OANAD proceeding; ORA opposes the true-up of asserted costs.

MCI agrees a memorandum account is appropriate, but believes only ILEC revenues from tariffed services related to subscriber listings should be tracked. MCI notes that, while many third-party directory publishers currently purchase Pacific's directory database through its Reproduction Rights Tariff, CLCs may purchase the same or similar data via an ILEC's offering of an unbundled network element pursuant to the rates set in OANAD. Other CLCs that have entered into interconnection agreements with the ILECs under the Telecommunications Act of 1996 (the Act) may have the ability to purchase the ILEC database on magnetic tape for the cost of the transfer medium, plus the ILEC's reasonable costs for preparation and shipping of the magnetic tape. Since there are no Commission-approved costs that an ILEC could track for the provision of access to subscriber listings via the DA unbundled network element or the purchase of the ILEC's directory database on magnetic tape, MCI argues that revenues for such services should not be subject to the memorandum account.

If a true-up for nontariffed access to ILEC databases is allowed, then MCI believes the ILECs should be allowed at most to track quantities of use by CLCs and third-party vendors. For example, an ILEC could track how many times an entity remotely accessed an ILEC database, or how many complete databases on magnetic tape the ILEC sold. The ILEC could also track how many "units" of DA service it provided to CLCs on an unbundled basis. This would allow an ILEC to keep track of usage that could be translated into a total allowable ILEC cost once the Commission determined the relevant costs and set permanent rates.

Those parties representing independent directory publishers generally support making existing directory access rates provisional and subject to a true-up.

INFONXX argues that establishing interim rates, even on a provisional basis, based on Pacific Bell's Directory Assistance Listing Information Service (DALIS) tariff schedule would violate Ordering Paragraph 8 of Decision No. 97-01-042, requiring that Pacific Bell furnish access to its DA database on a nondiscriminatory basis, as well as the prohibitions against discriminatory treatment in Public Utilities Code § 453 and similar

provisions set forth in § 252(b)(3) of the Telecommunications Act of 1996 or the Act (47 U.S.C. § 252(b)(3)) and § 202(a) of the Communications Act of 1934 (47 U.S.C. § 202(a)). Essentially, INFONXX claims it would be unlawful and anti-competitive for Pacific to be permitted to charge INFONXX and other competing providers of DA services rates based on its DALIS tariff schedules.

Pacific has refused to grant INFONXX access to its DA database at the same rates it has negotiated with MCI and AT&T. Instead, Pacific has informed INFONXX that it would only make such access available to INFONXX, whether INFONXX is operating as an independent contractor or as an agent of a telecommunications carrier, at the significantly higher rates set forth in Pacific's DALIS tariff schedule.

INFONXX believes the Commission should order Pacific to immediately furnish such access to INFONXX at the same rates as are afforded to MCI and AT&T pending a final rate order in the OANAD proceeding. Even with the availability of a subsequent true-up following a final order in the OANAD proceeding, INFONXX argues, the extent of this discrimination would place INFONXX at such a huge disadvantage that it could not reasonably compete during the interim.

Metro One also states that Pacific's current rates for directory access are excessive. Metro One expects the Commission's OANAD proceeding to order substantially lower DA access rates and, therefore, believes the Commission should order the current DA listing access rates to be provisional and subject to refund. Otherwise, Metro One claims Pacific and GTEC will realize a windfall at the expense of competitive providers and create a significant barrier to entry for competitors. Metro One asks the Commission to establish tracking accounts for each ILEC and order interest on the balances in those accounts at each ILEC's currently authorized rate of return. If the OANAD proceeding determines that current rates are excessive, purchasers of DA access listings would then receive a refund with interest which will compensate them for the use of their money and ensure the shareholders of the utility are not unjustly enriched.

Discussion

We conclude that parties have raised valid questions over the reasonableness of the ILECs' directory-access rates, and whether they properly conform to the cost-based provisions of the Act. The Act defines directory listings and databases as "network elements." (47 U.S.C. § 153 (45).) The Act also requires that the rates for network elements be "based on cost..." 47 U.S.C. § 252(d)(1)(a)(i). The Federal Communications Commission (FCC) determined in its First Report and Order that ILECs' DA databases are network elements subject to the unbundling and nondiscriminatory-access provisions of § 251(c)(3) of the Act. (First Report and Order, ¶ 538.) Yet various parties note that Pacific's directory access rates are not based on its costs, and are substantially higher than those of other Regional Bell Operating Companies (RBOCs).

We shall therefore direct each of the ILECs to establish a memorandum account to track the revenues billed for existing tariffed directory-access services, including both directory publishing and DA. We shall designate the existing directory-access rates as provisional subject to a later true-up once appropriate rates have been determined in the OANAD proceeding.

We decline to revise the DALIS tariff rates at this time to make them equal to the contract rates negotiated with MCI and AT&T. The contract rates for DA access are part of an integral package of terms and conditions specifically negotiated by the parties. It would not be appropriate to arbitrarily single out one term of such interconnection agreements and apply that term to other competitors that were not bound by the comprehensive terms of any one interconnection contract. Therefore, we shall not grant INFONXX's request. The provision for a subsequent true-up of rates provides an interim remedy for INFONXX until we establish appropriate permanent rates in OANAD.

Contrary to Pacific's claim, we find nothing inconsistent in our authorization of a true-up in this order even though we previously denied Pacific's request for a true-up of wholesale rates billed under the 17% discount rate adopted in D.96-03-020. The 17% discount rate was adopted based upon evidentiary hearings and a supporting record concerning the avoided costs related to selling Pacific's telecommunications services to

wholesale instead of retail customers. We therefore concluded that it was appropriate to apply the 17% discount for an interim period without a retroactive true-up. Once permanent wholesale rates could be established in the OANAD proceeding, the new rates would then be applied on a prospective basis only. By contrast, the tariffed rates currently being charged for directory access have not been tested through evidentiary hearings as to their reasonableness or their adherence to the requirements of the Act. Therefore, without the support of an evidentiary record, it is necessary to provide for a retroactive true-up of the directory-access rates to avoid the risk that competitors are being charged unreasonable or unfairly discriminatory rates.

We shall limit the memorandum accounts to the tracking of revenues only. Once appropriate rates are determined in OANAD, we shall direct the ILECs to determine the appropriate true-up of the accrued revenues in the memorandum account. In the event that OANAD rates turn out to be below the current provisional rates, we would direct the ILECs to compute an appropriate credit to be refunded to those competitors that were previously billed using the provisional rates. If the OANAD rates turn out to be higher than the provisional rates, we would permit the ILECs to recover the difference in revenues.

In the case of the nontariffed provision of access to ILEC databases, we shall allow the ILEC to track quantities of usage by CLCs or third-party vendors which can later be translated into a cost-recovery allowance once final rates are determined in OANAD.

The ILECs shall not be permitted, however, to use the memorandum accounts to track or true-up actual costs incurred in the ongoing provision of directory access services. The purpose of the memorandum accounts is merely to correct for the potential that current rates are not set at an appropriate level. It would be improper to expand the use of the memorandum account to insulate the ILECs against the normal operating risks associated with controllable costs. Therefore, we shall not permit the ILECs to use the memorandum accounts for a true-up of operating expenses associated with the provision of directory access services. In the case of GTEC which does not have tariffs in effect and is incurring costs without receiving offsetting revenue, we shall

permit it to track quantities of usage by CLCs and third-party vendors which can be used to determine the revenues subject to recovery based upon the rates ultimately determined in the OANAD proceeding.

We shall authorize the ILECs to apply interest to the memorandum account equal to the most current 3-month commercial paper rate consistent with past practice for similar accounts. We deny the proposal by Metro One to apply an interest factor equal to each company's currently authorized rate of return. Under the New Regulatory Framework, the ILECs are not authorized a single rate of return, but are permitted to earn within a range of return parameters. In any event, the use of a total rate of return, which includes equity capital, would overstate the cost of short-term interest normally assumed for the financing of memorandum-account balances. The accrual of interest will account for the time value of money related to the interim period while the memorandum accounts are in effect. Once we have concluded the true-up of rates and determined the net balance in the memorandum account to be either refunded to customers or to be collected, we shall include the applicable accrued interest on the net balance in computing the amount to be refunded (or charged) to customers.

Findings of Fact

1. In D.97-01-042, the Commission directed the assigned ALJ to take comments on whether the ILECs' rates charged to third-party vendors for subscriber-directory access should be made provisional and subject to a memorandum account true-up once final rates are established in the OANAD proceeding.

2. The tariffs currently in effect for ILEC directory access were not the subject of evidentiary hearings and were not scrutinized for compliance with the cost-based provisions of the Act.

3. Certain CLCs have entered into interconnection agreements pursuant to the Act under which those CLCs may purchase the ILEC database on magnetic tape for the cost of the transfer medium, plus the ILEC's reasonable cost for preparation and shipping of the magnetic tape.

4. No party has objected to the establishment by the ILECs of a memorandum account to track revenues billed under the tariffed rates for these services.

5. Because GTEC does not yet have an applicable tariff in place, it is incurring costs without yet receiving offsetting revenues for directory-access services.

6. The interest rate determined from the three-month commercial paper rate reasonably reflects the short-term interest costs incurred to finance the balance in the memorandum account established in this order.

Conclusions of Law

1. The ILECs should establish memorandum accounts to keep track of revenues billed for directory-access services rendered to third-party competitors in order to permit a later true-up once final rates are established for these services in the OANAD proceeding.

2. Making the ILECs' directory access rates provisional and subject to subsequent true-up will address the concern that third-party competitors might be subject to unfair discrimination or anticompetitive treatment with respect to directory access.

3. Rates charged under interconnection agreements which may be based upon the ILEC's actual costs should not be subject to true-up since there would be no Commission-authorized contract costs against which to perform a true-up.

4. It would be improper to expand the use of the memorandum account to permit the true-up of expenses in addition to revenues billed since to do so would insulate the ILECs against the normal operating risks associated with managing controllable costs.

5. There is nothing inconsistent in the authorization of a true-up in this order even though the Commission previously denied Pacific's request for a true-up of wholesale rates adopted in D.96-03-020.

6. There was no basis to grant a true-up of wholesale rates based on the adopted 17% wholesale discount since the discount was adjudicated in evidentiary hearings whereas the ILEC directory access tariff rates were not based upon any evidentiary record.

O R D E R

IT IS ORDERED that:

1. Pacific Bell (Pacific) and GTE California Incorporated (GTEC) are each directed to establish a memorandum account to record billings to third-party vendors under tariffs for directory-assistance and directory-publishing services.
2. To the extent that GTEC does not currently have tariffed rates in effect for directory access, it shall track quantities of usage from which subsequent revenue obligations can be computed once applicable Open Access and Network Architecture Development (OANAD) rates are finalized.
3. The tariffed rates billed for directory access pursuant to Ordering Paragraph 1 shall be deemed provisional and the billings thereunder shall be subject to a true-up once final rates are determined in the OANAD proceeding.
4. The memorandum accounts shall retroactively reflect revenues which were previously billed since the effective date of the directory-access tariffs, and shall prospectively reflect revenues yet to be billed until a further order addressing the disposition of the balance in the memorandum accounts.
5. The memorandum accounts shall include a monthly provision for accrued interest on the balance in the account based upon the 3-month commercial paper interest rate as published by the Federal Reserve Board.

This order is effective today.

Dated January 7, 1998, at San Francisco, California.

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