ALJ/BWM/sid

Mailed

Decision 98-01-054 January 21, 1998

JAN 22 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Request of COX CALIFORNIA TELCOM, INC. (U-5684-C) for Arbitration under Section 252(b) of the Telecommunications Act of 1996 Regarding Interconnection with the Local Exchange Network of GTE California Incorporated.	Application 97-09-012 (Filed September 10, 1997)

ORIGINAL

Lee Burdick, Attorney at Law, and Richard Smith, for Cox California Telcom, Inc., applicant.
Elaine M. Lustig and Blane T. Yokota, Attorneys at Law, for GTE California Incorporated, respondent.

OPINION

1. Summary

We approve the arbitrated Interconnection Agreement (Agreement) between Cox California Telcom, Inc. (Cox or applicant) and GTE California Incorporated (GTE or respondent) pursuant to the Telecommunications Act of 1996 (Act), and our Revised Rules for Implementing the Provisions of Section 252 of the Act (Rules).[1] The proceeding is closed.

2. Background

On September 10, 1997, Cox filed an application for arbitration of an interconnection agreement with GTE. GTE filed its response on October 6, 1997. An arbitration hearing was held on October 23, 1997. Briefs were filed by October 31, 1997. The Draft Arbitrator's Report was filed and served on November 17, 1997. Comments on the Draft Arbitrator's Report were filed and served on December 1, 1997. The Final

[1] Resolution ALJ-174, dated June 25, 1997.

Arbitrator's Report was filed and served on December 16, 1997. Pursuant to Rule 4.2.1, applicant and respondent jointly filed an arbitrated Agreement on December 23, 1997 for Commission approval. Also on December 23, 1997, applicant and respondent separately filed statements regarding whether the arbitrated Agreement meets the requirements of federal and state law.

3. Interconnection Agreement

With the exception of four issues, the parties negotiated the entire Agreement.

3.1 Negotiated Portions of Agreement

Section 252(e) of the Act provides that we may only reject an agreement (or portions thereof) adopted by negotiation if we find that the agreement (or portions thereof) discriminates against a telecommunications carrier not a party to the agreement, or implementation of such agreement (or portion thereof) is not consistent with the public interest, convenience and necessity. No party or member of the public alleges that any negotiated portion of the Agreement should be rejected. We find nothing in any negotiated portion of the Agreement which results in discrimination against a telecommunications carrier not a party to the Agreement, nor which is inconsistent with the public interest, convenience and necessity.

3.2 Arbitrated Portions of Agreement

Section 252(e) of the Act, and our Rule 4.2.3, provide that we may only reject an agreement (or any portion thereof) adopted by arbitration if we find that the agreement does not meet the requirements of Section 251 of the Act, including the regulations prescribed by the Federal Communications Commission (FCC) pursuant to Section 251, or the standards set forth in Section 252(d) of the Act. Four issues were presented for, and resolved by, arbitration:

1. whether the agreement should contain a most favored terms and conditions clause;

2. whether access charges should be assessed on the purchase of unbundled network elements (UNEs);

3. whether the adopted prices should be those proposed by Cox or GTE; and

4. whether one party should bear the cost associated with environmental clean-up of third-party contamination resulting from work at that party's facilities at the request of the other party.

In statements filed December 23, 1997, each party argues that the Agreement should be approved with respect to the arbitrated issues on which they prevailed, but rejected with respect to the issues on which they did not prevail.

3.2.1 Most Favored Terms and Conditions Clause

Applicant sought inclusion of a most favored terms and conditions clause. The proposed clause is modeled after Section 252(i) of the Act, and generally provides that respondent make available to applicant any interconnection, service or element provided under another approved agreement upon the same terms and conditions.

The Arbitrator rejected inclusion of the proposed clause. Respondent contends this result fully satisfies the Act and Commission decisions. Applicant contends the Agreement should be rejected, and a new Agreement ordered which contains the proposed clause.

Applicant's December 23, 1997 statement repeats several points raised before, and rejected by, the Arbitrator. For example, applicant argues that a most favored terms and conditions clause is necessary to meet the standards of Section 252(d) of the Act (i.e., that the rates be just, reasonable and nondiscriminatory). In support, applicant cites the FCC regulation directing every incumbent local exchange carrier to make available to any competitive local carrier any service or element upon the same terms and conditions contained in any other approved agreement. (47 C.F.R. Section 51.809(a).) Applicant acknowledges, however, that the Eighth Circuit Court of Appeals vacated this FCC regulation.[2] Moreover, we agree with the Arbitrator that the Court

[2] Iowa Utilities Board v. FCC, (8th Cir. 1997) 120 F.3d 753, 800, 819 footnote 39.

found the FCC regulation unreasonable, and our implementation of the same, or similar, clause would be just as unreasonable.

Applicant argues that Section 252(i) of the Act is not self-implementing, making inclusion of the most favored terms and conditions clause reasonable so that applicant may seek damages should respondent violate the law. We affirm the Arbitrator's finding that the decision to include or exclude the proposed clause is not dependent upon applicant's ability to obtain damages should respondent violate the law. Rather, the clause is unreasonable for the reasons stated by the Court, and as found in the Arbitrator's Report, and must be rejected. Moreover, federal and state law provide adequate mechanisms for applicant to enforce its rights. The unreasonableness of including the proposed clause outweighs any added burden on applicant of pursuing its rights under existing law.

Applicant contends the proposed clause is consistent with the intent of Public Utilities (PU) Code Section 453(a), and its inclusion is necessary to comply with the requirements of State law.[3] To the contrary, the proposed clause is not necessary to ensure that respondent complies with the PU Code, while inclusion of the proposed clause is unreasonable for the reasons stated by the Court, and found in the Final Arbitrators' Report.

We affirm the results of the arbitration. We may reject the arbitrated Agreement if it fails to meet the requirements of Act Section 251, including FCC regulations, and Act Section 252(d). We find no such failure.

---

[3] Public Utilities Code Section 453(a) states:

> "No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage."

3.2.2 Assessment of Intrastate Charges on Unbundled Network Elements

Respondent proposed that intrastate access charges be assessed on the purchase of UNEs. Applicant opposed the proposal. Both parties agreed that the Commission decision on the petition for modification of Decision (D.) 96-12-034 filed by AT&T Communications of California, Inc. (AT&T) in Application (A.) 96-08-040 should control the outcome here.[4]

D.97-11-034 denied AT&T's petition for modification. The arbitration outcome, therefore, authorizes respondent to assess intrastate access charges in addition to UNEs. Respondent submits that this outcome satisfies the Act and Commission decisions. Applicant opposes this result. Applicant, however, raises no new arguments, but states the same arguments heard and rejected when we issued D.97-11-034.

We affirm the results of the arbitration. We may reject the arbitrated Agreement if it fails to meet the requirements of Act Section 251, including FCC regulations, and Act Section 252(d). We find no such failure.

3.2.3 Adopted Prices

Applicant sought the same rates that we approved in the AT&T/GTE arbitration (D.97-01-022; i.e., the rates proposed by AT&T). Respondent requested the same rates it proposed in the AT&T/GTE, and other, arbitrations, which it asserts are compensatory and based on actual costs. The Arbitrator adopted applicant's proposed rates, with those rates having previously been found by us to merit approval under the Act, whereas we have rejected respondent's proposed rates.

---

[4] A.96-08-040 is the application of AT&T for arbitration of an interconnection agreement with Pacific Bell. D.96-12-034 authorized the assessment of switched access charges in addition to UNEs. AT&T filed a petition for modification, seeking to reverse that authorization.

Applicant submits that this result complies with federal and state tests for an acceptable agreement. Respondent repeats its arguments that the adopted prices are unlawful. Respondent, however, raises no new arguments.

We affirm the results of the arbitration. We may reject the arbitrated Agreement if it fails to meet the requirements of Act Section 251, including FCC regulations, and Act Section 252(d). We find no such failure.

3.2.4 Environmental Clean-up Costs

Respondent proposed a sentence requiring the party whose act triggers the clean-up of third-party environmental contamination to bear the clean-up cost. Applicant opposed the sentence. The Arbitrator rejected respondent's proposal based on, among other things, the prohibition against liability shifting in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA; codified at 42 U.S.C. Sections 9601 et. seq.), the inconsistency with the Agreement's independent contractor clause, and adequate guidance under existing federal and state law to determine cost responsibility as individual, unique cases arise while avoiding the conflicts created by respondent's generic proposal.

Applicant submits that this result complies with federal and state tests for an acceptable agreement. Respondent reasserts its arguments in favor of its proposal, but makes no new arguments.

We affirm the results of the arbitration. We may reject the arbitrated Agreement if it fails to meet the requirements of Act Section 251, including FCC regulations, and Act Section 252(d). We find no such failure.

3.3 Preservation of Authority

Section 252(e), and our Rule 4.2.3, provide that nothing shall prohibit a State Commission from establishing or enforcing other requirements of State law in its review of an agreement, including compliance with intrastate telecommunications service quality standards, or other requirements of the Commission. Other than the contentions addressed and dismissed above, no party or member of the public identifies any conflict between the Agreement and any State law, including intrastate

telecommunications service quality standards, or other requirements of the Commission, and we are aware of none.

Findings of Fact

1. On December 23, 1997, parties jointly filed an arbitrated Agreement for Commission approval.

2. The parties negotiated the entire Agreement, with the exception of four issues presented for arbitration.

3. No party or member of the public alleges that any negotiated portion of the Agreement must be rejected.

4. No negotiated portion of the Agreement results in discrimination against a telecommunications carrier not a party to the Agreement, or is inconsistent with the public interest, convenience and necessity.

5. The Eighth Circuit Court of Appeals vacated the FCC's regulation implementing Section 252(i) of the Act (the most favored terms and conditions clause). (Iowa Utilities Board v. FCC, (8th Cir. 1997) 120 F.3d 753, 800, 819 footnote 39.)

6. D.97-11-034 denied AT&T's petition for modification of D.96-12-034, thereby affirming the authorization for incumbent local exchange carriers to assess switched access charges in addition to UNEs.

7. Applicant's proposed rates have previously been found to meet the terms of the Act, while respondent's proposed rates have been rejected. (For example, D.97-01-022).

8. Respondent's proposed environmental clean-up provision conflicts with the CERCLA prohibition against liability shifting, is inconsistent with the Agreement's independent contractor clause, and is unnecessary given adequate guidance under existing federal and state law to determine cost responsibility in individual, unique cases without creating the conflicts caused by respondent's generic proposal.

9. No arbitrated portion of the Agreement fails to meet the requirements of Act Section 251, including FCC regulations pursuant to Section 251, or the standards of Act Section 252(d).

10. No provision of the Agreement conflicts with State law, including compliance with intrastate telecommunications service quality standards, or other requirements of the Commission.

Conclusions of Law

1. The Agreement between Cox and GTE should be approved.

2. This order should be effective today because it is in the public interest to implement new national telecommunications policy, as accomplished through the Agreement, as soon as possible.

O R D E R

IT IS ORDERED that:

1. Pursuant to the Telecommunications Act of 1996, and Resolution ALJ-174, the Interconnection Agreement between Cox California Telcom, Inc. and GTE California Incorporated (GTE) filed December 23, 1997 is approved. The parties shall sign, file and serve the approved Interconnection Agreement within three days of the date of this order, and the Interconnection Agreement shall become effective on the date the signed copy is filed.

2. GTE shall, within 10 days of the date of this order, serve the Director of the Telecommunications Division, and the Administrative Law Judge Division Webmaster, with the approved Interconnection Agreement on electronic disk in hypertext markup language format. Further, within 10 days of the date of this order, GTE shall place the approved Interconnection Agreement on its world wide web site, and provide

information to the Administrative Law Judge Division Webmaster on linking the approved Interconnection Agreement on GTE's web site with the Commission's web site.

3. This proceeding is closed.

This order is effective today.

Dated January 21, 1998, at San Francisco, California.

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