

5/8/98

Decision 98-05-024

May 7, 1998

ORIGINAL

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)

ORDER DENYING APPLICATION FOR REHEARING
OF DECISION NO. 98-01-054

I. INTRODUCTION

In D.98-01-054, the Commission approved an arbitrated interconnection agreement between GTE California Inc. (GTE) and Cox California Telecom, Inc. (Cox) pursuant to the Telecommunications Act of 1996 (Act). D.98-01-054 adopted the same prices as those established in D.97-01-022 regarding the interconnection agreement between GTE and AT&T Communications of California, Inc. (AT&T). The rates set in the GTE/AT&T proceeding, and adopted in D.98-01-054 for Cox, are interim rates which will remain in effect only until permanent prices are established in the Commission's Open Access and Network Architecture Development (OANAD) docket (R.93-04-002/A.93-04-003). GTE maintained throughout the GTE/Cox proceeding that the prices adopted in the GTE/AT&T agreement violated the Act. The GTE/AT&T agreement is currently the subject of federal litigation with regard to a number of issues, including the rates adopted in that proceeding.

GTE filed an application for rehearing of D.98-01-054 alleging that the prices adopted in the agreement violate the Act. GTE argues that the adopted costs violate the Act because they do not cover all of the incumbent's own costs of providing interconnection or network elements, both direct and common costs; and GTE will not be compensated for any additional costs imposed upon it by reason of the Commission's past and present regulatory policies: including subsidy costs (the costs to GTE of fulfilling the Commission's commitment to universal service and the current system of intercustomer subsidies), and historical costs of constructing and maintaining its telephone network. GTE further claims that the "peculiar procedural history" of this case could lead to different rates adopted by Cox and AT&T and would therefore not comport with the requirements of federal and state law that rates be non-discriminatory.

Cox filed an untimely opposition along with a motion for leave to late-file its opposition to GTE's Application for Rehearing on the grounds of inadvertent mistake in missing the filing deadline. We find that good cause has been shown, and that the comments put forth by Cox in its opposition are helpful in considering GTE's application for rehearing. We therefore will grant Cox's motion for leave to late-file its opposition to GTE's Application for Rehearing.

II. DISCUSSION

GTE declares in its application for rehearing that it "maintains all of those objections" raised in the GTE/AT&T proceeding as well as the federal litigation arising from that proceeding. However, Public Utilities Code §1732 states that an application for rehearing "shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful. No corporation or person shall in any court urge or rely on any ground not so set forth in the application." We wish to make clear that GTE's claim of incorporating

objections does not satisfy these requirements. We will not address any arguments not clearly and specifically raised in GTE's application for rehearing.

Moreover, Rule 86.1 of the California Public Utilities Commission Rules of Practice and Procedure further provides that "applications for rehearing shall set forth specifically the grounds on which applicant considers the order or decision of the Commission to be unlawful or erroneous. Applicants are cautioned that vague assertions as to the record or the law, without citation, may be accorded little attention." Although GTE raises several claims in its application for rehearing regarding the prices adopted in the GTE/Cox Agreement, the only provision of law specifically cited by GTE is section 254(f) of the Telecommunications Act of 1996.¹ GTE did not cite any other legal authority in support of its arguments. This is obviously a fatal flaw.

Nonetheless, we have reviewed every argument raised by GTE in its application and considered the responses thereto, and are of the opinion that good cause for rehearing has not been shown. The rates adopted in the GTE/AT&T Agreement, as well as the GTE/Cox Agreement were found by the Commission to be fair, reasonable, and consistent with the requirements of the Telecommunications Act of 1996. GTE did not provide any new evidence or legal authority in the GTE/Cox proceeding or raise any new arguments in its application for rehearing to persuade us to conclude that the adopted rates do not comport with the Act. Therefore we find no inconsistencies with the Act, the U.S. Constitution or other legal error with regard to the prices adopted in the GTE/Cox Agreement.

In addition, we find unconvincing GTE's claim that the "peculiar procedural history" of this case could lead to different rates adopted by Cox and

¹ The relevant portions of section 254(f) state: "A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement on universal service in that State." 47 U.S.C. §254(f).

AT&T which would therefore violate the requirements of federal and state law that rates be non-discriminatory. GTE argues that since the GTE/AT&T rates are the subject of litigation, they are subject to change. Should this occur, GTE hypothesizes that a "possible procedural quandary" may occur whereby the GTE/AT&T rates could change, whereas the rates adopted by Cox would remain the same. Again, GTE has failed to cite any specific legal authority in support of its claim. The fact that a Commission order has the potential of resulting in "possible procedural quandary" does not constitute legal error justifying rehearing. In addition, as GTE acknowledges in its application for rehearing, the GTE/Cox agreement contains provisions which obligate the parties to renegotiate their agreement in light of any modifications made to the GTE/AT&T rates due to subsequent litigation or Commission decision. Specifically, Article XXXIII of the Agreement provides:

GTE and Cox further agree that the terms and conditions of this Agreement were composed to implement the legal requirements in effect at the time the Agreement was produced. Any modifications to those legal requirements will trigger an obligation of the Parties to renegotiate any terms and conditions of this Agreement affected by such modifications, unless so ordered as part of the modification, in which case the affected terms and conditions will be deemed to be automatically superceded.

In addition, Article II of the Agreement similarly provides:

The services and facilities to be provided to Cox by GTE in satisfaction of this Agreement may be provided by GTE pursuant to GTE tariffs and then current practices. Should such services and facilities be modified by tariff or by order of the Commission or any court having jurisdiction, including any modifications resulting from other Commission proceedings, federal court review or other judicial

action, such modifications will be deemed to trigger an obligation of the Parties to renegotiate any rates, terms and conditions of this Agreement which may be affected by such actions, unless so ordered as part of the modification, in which case the affected terms and conditions will be deemed to be automatically superseded.

The obligation of Cox and GTE to renegotiate terms in light of subsequent litigation or appeals was specifically negotiate and agreed to by the parties, and was not presented to the Arbitrator for resolution. GTE believes, and asks the Commission to acknowledge, that these provisions clearly obligate the parties to conform their agreement to any modifications to the GTE/AT&T rates caused by subsequent litigation or Commission decision. However, GTE has shown no reason for the Commission to change or interpret these provisions in the context of this application for rehearing. The claim of possible future negotiations between the parties which may potentially lead to discriminatory rates does not at this time give rise to the need to interpret these provisions in a manner consistent with GTE's interpretation. Nor does GTE's claim demonstrate legal error.

III. CONCLUSION

We find the challenges alleged in GTE's application for rehearing are without merit. We find no inconsistencies or violations of the Act, the U.S. Constitution, or other legal error and thus rehearing should be denied.

THEREFORE, GOOD CAUSE APPEARING, IT IS ORDERED that Cox California Telecom, Inc.'s Motion of March 12, 1998 requesting leave to late-file its opposition to GTE California Incorporated's Application for Rehearing is granted.

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IT IS FURTHER ORDERED that GTE's application for rehearing of D.98-01-054 is denied.

This order is effective today.

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

RICHARD A. BILAS

President

P. GREGORY CONLON

HENRY M. DUQUE

JOSIAH L. NEPPER

Commissioners

Commissioner Jessie J. Knight, Jr.
being necessarily absent, did not
participate.