

Decision 98-05-060 May 21, 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Petition of MCI
Telecommunications for Arbitration Pursuant
to Section 252(b) of the Telecommunications
Act of 1996 to Establish an Interconnection
Agreement with GTE California, Incorporated.

ORIGINAL
Application 96-09-012
(Filed September 19, 1996;
Petition filed January 23, 1998)

OPINION DENYING GTEC's PETITION TO MODIFY DECISION 97-01-045

Summary

This decision denies the Petition to Modify Decision (D.) 97-01-045 (Petition) filed by GTE California Incorporated (GTEC). In its Petition, GTEC requested relief from its obligation to recombine network elements purchased from GTEC by MCI Telecommunications Corporation (MCI). We deny GTEC's request since the issue of GTEC's obligation to recombine network elements was not raised during the arbitration that resulted in D.97-01-045, and hence is not appropriately before us in this docket. However, the matter of recombining network elements will be considered in due course by the Commission in Rulemaking (R.) 93-04-003. GTEC is a party to that proceeding and may seek relief in that forum.

Procedural Background

On September 19, 1996, MCI filed a petition for compulsory arbitration regarding a proposed interconnection agreement with GTEC.¹ MCI filed its

¹ MCI's petition was docketed as Application 96-09-012.

petition pursuant to § 252(b)(1) of the Telecommunications Act of 1996 (the Telecom Act) which states as follows:

"During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues."

The Commission conducted the arbitration in accordance with § 252(b)(4) of the Telecom Act and the rules set forth in Resolution ALJ-168. On January 24, 1997, the Commission concluded the arbitration by issuing D.97-01-045 which adopted an interconnection agreement (the Agreement) between GTEC and MCI. The Agreement was based largely on (1) the proposed agreement submitted by MCI in its petition for compulsory arbitration and (2) the findings and conclusions contained in the Arbitrator's Report issued on December 11, 1996.

On January 23, 1998, GTEC filed a Petition so as to remove the requirement in the Agreement for GTEC to recombine unbundled network elements (UNEs) purchased by MCI. GTEC states that a recent decision by the U.S. Court of Appeals for the Eighth Circuit determined that GTEC has no obligation under the Telecom Act to recombine UNEs purchased by MCI.² In light of the Court's decision, GTEC requests that the Agreement be modified to remove GTEC's obligation to recombine UNEs.

Responses to GTEC's Petition were filed by MCI, Pacific Bell (Pacific), and the Telecommunications Resellers Association (TRA). Pacific supported GTEC's Petition, while MCI and TRA opposed it. On March 9, 1998, GTEC filed a motion

² *Iowa Utilities Board v FCC*, 120 F.3d 753, 813.

for leave to submit a reply to MCI's opposition. GTEC's motion was granted in a ruling issued by Administrative Law Judge (ALJ) Kenney on March 20, 1998.

Discussion

Under § 252(b)(4)(A) of the Telecom Act, the Commission's authority to arbitrate issues is limited to those issues raised by the parties during the arbitration.³ Thus, to resolve GTEC's Petition, we must first determine whether or not the issue of GTEC's obligation to recombine UNEs on behalf of MCI was before the Commission during the arbitration.

We have reviewed the arbitration record and can find no trace of any party having asked the Commission to arbitrate the issue of GTEC's obligation to recombine UNEs purchased by MCI. GTEC's Petition provided several citations to the arbitration record, but none of the citations demonstrates that the issue of GTEC's obligation to recombine UNEs was before the Commission during the arbitration. Rather, each citation concerned the separate and distinct issue of whether GTEC should be required to provide MCI with a set of UNEs that, when used together, replicate one or more of GTEC's retail services.

GTEC next argues that the following portion of the Arbitrator's Report required GTEC to recombine UNEs:

"GTEC must provide any combination of network elements that MCI desires, so long as the combination is technically feasible. This includes the right of MCI to replicate GTEC's retail service by purchasing the appropriate combination of unbundled network elements." (Arbitrator's Report, mimeo., p. 26)

³ Subsection 252(b)(4)(A) states: "The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3)."

GTEC misconstrues the Arbitrator's Report. The portion of the report cited by GTEC addresses MCI's right to purchase UNEs from GTEC, including sets of UNEs that replicate GTEC's retail services. It does not address the issue of which party - GTEC or MCI - has the responsibility for recombining UNEs. The latter issue was not raised in the arbitration and was not resolved by the arbitrator.

GTEC next states that the Agreement adopted by the Commission in D.97-01-045 requires GTEC to be responsible for recombining UNEs. GTEC argues this is proof that the issue was arbitrated by the Commission. We disagree. The portion of the Agreement cited by GTEC comes from MCI's proposed agreement that was submitted at the outset of the arbitration as part of MCI's petition. Under § 252(b) of the Telecom Act and Resolution ALJ-168, GTEC and MCI had a responsibility to designate unresolved issues related to MCI's proposed agreement.⁴ However, no party designated GTEC's obligation to recombine UNEs as an unresolved issue to be arbitrated by the Commission.⁵ We therefore included this provision in the Agreement adopted by us in D.97-01-045, along with dozens, if not hundreds, of other uncontested provisions from MCI's proposed agreement.

For the forgoing reasons, we conclude that the issue of GTEC's obligation to recombine UNEs purchased by MCI was never brought to us for arbitration. Under § 252(b)(4) of the Act, we are limited to arbitrating issues that were raised

⁴ ALJ-168, Rules 3.3.a., 3.6, and 3.9. ALJ-168 has been superceded by ALJ-174 which maintains the requirement for parties to identify unresolved issues.

⁵ Exhibit 6 to GTEC's Petition reveals that the only issues GTEC had at the close of the arbitration hearings concerning recombination was whether GTEC would be fairly compensated to connect UNEs to one another, and whether MCI could use UNEs obtained from GTEC to replicate GTEC's retail services. Both of these issues were resolved in D.97-01-045.

by the parties. Since GTEC's Petition asks us to resolve an issue that the parties never asked us to arbitrate, we must deny the Petition.

Although we deny GTEC's Petition, GTEC may have another opportunity to seek relief from its obligation to recombine UNEs. More specifically, we plan to consider, in due course, the matter of recombining UNEs in R.93-04-003.⁶ If we ultimately determine in R.93-04-003 that incumbent local exchange carriers (ILECs) such as GTEC cannot be required to recombine UNEs, then GTEC may wish to invoke Article III, Section 37 of the Agreement adopted in D.97-01-045 which allows for renegotiation in the event the Commission promulgates new rules or regulations that make unlawful any provision in the Agreement.

Findings of Fact

1. The issue raised by GTEC in its Petition was not before the Commission during the arbitration process.
2. The issue of ILECs' obligation to recombine UNEs will be addressed in due course by the Commission in R.93-04-003.

Conclusions of Law

1. Subsection 252(b)(4) of the Telecom Act limits the Commission's authority to arbitrate issues brought to the Commission pursuant to § 252(b) of the Telecom Act to only those issues that were raised by the parties during the arbitration.
2. GTEC's Petition should be denied.
3. The following order should be effective immediately.

⁶ D.98-02-106, mimeo., pp. 16-17; rulings by the assigned ALJ in R.98-04-003 dated March 4 and March 27, 1998.

O R D E R

IT IS ORDERED that:

1. The petition for modification of Decision 97-01-045 filed by GTE California Incorporated is denied.

2. Application 96-09-012 is closed.

This order is effective today.

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

RICHARD A. BILAS

President

P. GREGORY CONLON

JESSIE J. KNIGHT, JR.

HENRY M. DUQUE

JOSIAH L. NEEPER

Commissioners