

ALJ/SAW/jva *

Mailed 6/19/98

Decision 98-06-074 June 18, 1998

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Petition of AT&T
Communications of California, Inc. for
Arbitration Pursuant to Section 252 of the Federal
Telecommunications Act of 1996 to Establish an
Interconnection Agreement with GTE California,
Incorporated.

Application 96-08-041
(Filed August 19, 1996)
(Petition to Modify filed
January 13, 1998)

**OPINION DENYING GTE CALIFORNIA INCORPORATED's (GTEC)
PETITION TO MODIFY DECISION 97-01-022**

Summary

In Decision (D.) 97-01-022, we approved an agreement between AT&T Communications of California, Inc. (AT&T) and GTEC for the interconnection of their telecommunications services networks pursuant to the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the Act). In a Petition to Modify, GTEC asks us to change that decision to state that GTEC cannot be required to provide unbundled network elements to AT&T in an already-bundled or pre-combined format. GTEC states that this request is prompted by the language in a recent decision of the Eighth Circuit United States Court of Appeals. We reject this request for two reasons. First, this issue was not raised or was abandoned during the arbitration process and is therefore not appropriately before us in this docket for consideration. Second, the issue will be considered in the current phase of Rulemaking (R.) 93-04-003 (see Administrative Law Judge's Ruling in that docket dated March 4, 1998). GTEC is a party to that proceeding and can seek relief in that forum.

Background

GTEC filed its Petition to Modify on January 13, 1998. AT&T filed its opposition on February 13, 1998. Sprint Communications, Pacific Bell, and the Telecommunications Resellers Association (TRA) filed responses. TRA filed its comments late. Its motion to accept a late-filed response is hereby granted. GTEC moved for leave to file a reply to AT&T's opposition and AT&T filed an opposition to that motion. GTEC's motion is granted. We will consider not only the substance of GTEC's reply, but also the substantive response that was included in AT&T's opposition to the motion.

Discussion

Under Subsection 252(b)(4)(A) of the Act, an arbitration must be limited to the resolution of issues raised by the negotiating parties at the time. Thus, we must first determine whether or not the issue of GTEC's obligation to furnish AT&T with already-bundled or pre-combined network elements was before the Commission during the arbitration. In supporting its contention that it had raised this issue, GTEC does not cite to the evidentiary record or its brief. It does refer to an issue matrix that it offered at the beginning of the arbitration process. However, the matrix does not appear to raise this issue.

From an abbreviated version of the matrix, GTEC cites its assertion that it would "unbundle the network and provide AT&T" with five specific unbundled elements. Here, as it became clear during the hearings and subsequent briefs, the question was not whether GTEC could be required to pre-combine or pre-bundle the elements, but whether GTEC could limit its offering to five specific network elements. AT&T argued that GTEC should be required to provide any technically feasible element requested by AT&T. GTEC also argued that AT&T should not be allowed to order the provision of network elements that could be

combined to replicate GTEC's bundled services. None of these references raise the issue of pre-combination or re-bundling that GTEC now raises.

In its full matrix, GTEC stated that "AT&T must have the ability to purchase individual or combinations of unbundled network elements (UNEs) from GTEC in order to provide local telephone service to AT&T customers by which to serve its customers." GTEC suggests that this language shows that it had raised the rebundling issue. However, this statement does not specifically identify the rebundling issue. Even if it did, it merely characterizes AT&T's request and does not state an issue that GTEC was asking the arbitrator to resolve.

GTEC also argues that the Arbitrator's Report contains a finding on the issue of requiring GTEC to provide pre-combined or already-bundled elements. However, the report makes no such finding. The portion of the report cited by GTEC states:

"Consistent with other portions of this report, AT&T may order, and GTEC will provide any combination of network elements AT&T desires, so long as the combination is technically feasible. This includes the right of AT&T to replicate GTEC's retail service by purchasing the appropriate combination of unbundled network elements."

This portion of the report addresses the issue of whether AT&T has the right to purchase any particular set or combination of unbundled elements, even if the particular combination of elements are offered by GTEC to its retailed customers as bundled service. It does not address the issue of whether GTEC must provide a platform with pre-combined or already-bundled elements. The latter issue was not raised in the arbitration and was not resolved by the arbitrator.

Both GTEC and AT&T are of the opinion that the agreement approved by the Commission in D. 97-01-022 does require GTEC to provide pre-combined or already-bundled elements. In approving the agreement, the Commission approved terms that were reached voluntarily between the parties as well as those that were derived from the results of the arbitration process. To the extent to which the parties have resolved this issue in their agreement, they have done so on their own.

GTEC argues that even if it failed to raise the issue in arbitration, it cannot be found to have waived its right to raise it later. GTEC relies on a doctrine which states that a party cannot be found to have waived its right to raise an issue over which the agency lacked the power to produce the desired result. The implication is that at the time of the arbitration, the Commission was powerless to reject a request from AT&T to require GTEC to provide pre-combined elements but that the Commission is now required to do so. We will not explore the direct applicability of the waiver doctrine, or respond, here, to GTEC's suggestion that we must reject a pre-combination requirement. Even if GTEC might prevail on each of these points, we cannot adopt a position on an issue that was not addressed in the arbitration. To do so would be unfair to AT&T, which would have been denied an opportunity to state its case to the arbitrator.

However, the agreement between GTEC and AT&T remains "at all times subject to changes, modifications, orders and rulings" by the Federal Communications Commission or by this Commission (see Paragraphs 22.8 of the agreement). 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.

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In light of all of these circumstances, it is appropriate to deny this petition for modification.

Findings of Fact

1. The issue raised by GTEC in this petition was not before the Commission during the arbitration process.
2. The issue raised by GTEC in this petition will be before the Commission in R.93-04-003.

Conclusion of Law

The petition for modification filed by GTEC on January 13, 1998, in this application, should be denied.

O R D E R

IT IS ORDERED that:

1. The petition for modification filed by GTE California Incorporated on January 13, 1998, in this application, is denied.

2. Application 96-08-041 is closed

This order is effective today.

Dated June 18, 1998, at San Francisco, California.

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