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Decision 98-10-008 October 8, 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

INFONXX, Inc.,

Complainant,

v.

Pacific Bell (U-1001-C),

Defendant.

ORIGINAL

Case 97-07-007
(Filed July 10, 1997)

O P I N I O N

Summary

By this decision, we affirm Decision (D.) 98-01-022, as upheld by D.98-04-071, and hold that INFONXX, Inc. (INFONXX or complainant) should not obtain access to Pacific Bell's (Pacific) directory assistance (DA) database at the same prices as such access is being offered under MCI Metro Access Transmission Services, Inc.'s (MCI), interconnection agreement or identical interconnection agreements. The complaint is dismissed.

Procedural Background

On July 10, 1997, INFONXX filed this matter concurrent with a motion for a temporary restraining order and preliminary and permanent injunctive relief. In addition to its August 14, 1997 answer, Pacific filed an opposition to complainant's motion for injunctive relief, and a motion to dismiss the complaint. With leave on September 3, 1997, INFONXX responded to Pacific's motion to dismiss. The assigned Administrative Law Judge heard arguments on INFONXX's motion at a September 2, 1997 prehearing conference, and set the

briefing schedule for the legal question at issue. INFONXX and Pacific concurrently filed opening and reply briefs on September 16 and September 23, 1997, respectively.

Pacific further moved to dismiss INFONXX's complaint on January 13, 1998, following the issuance in the Local Competition Proceeding¹ of D.98-01-022 in which the Commission refused to revise, at that time, Pacific's Directory Assistance Listings Information Service (DALIS) tariff rates to make them equal to the interconnection agreement rates between Pacific, MCI, and AT&T Telecommunications (AT&T). Pacific filed another motion to dismiss on June 30, 1998, following the issuance of D.98-04-071 which denied INFONXX's application for rehearing of D.98-01-022. INFONXX responded on January 16, 1998 and July 6, 1998, respectively.

This is a complaint case, not challenging the reasonableness of rates or charges, but rather their alleged discriminatory application, and so this decision is issued in an adjudicatory proceeding as defined in Public Utilities (PU) Code Code § 1757.1.

INFONXX's Complaint

INFONXX alleges that Pacific has discriminated against it in violation of PU Code § 453 and has refused to comply with Commission D.97-01-042 by declining to provide INFONXX access to Pacific's DA database at the same rates at which it is furnishing such access, pursuant to interconnection agreements, to MCI, AT&T, and possibly others. In D.97-01-042, the Commission ordered Pacific and GTE California Incorporated to

¹ Rulemaking 95-04-043/Investigation 95-04-044.

"provide nondiscriminatory access to their DA database listings to all competitors including third-party database vendors and [to] provide access by readily accessible tape or electronic format to be provided in a timely manner upon request with the determination of appropriate cost recovery for the preparation and delivery of the information to be addressed in the OANAD proceeding." (Ordering Paragraph 8.)

Currently, Pacific is offering DA database access to INFONXX pursuant to its DALIS prices, tariffed under Advice Letter No. 18443.²

In its brief, INFONXX argues that Pacific is providing DA database access under its DALIS tariff at market-based prices rather than in accordance with the Commission's D.97-01-042 directive that such access be furnished to all competitors at nondiscriminatory, cost-based prices. INFONXX maintains that there is no justification for the disparate pricing of the DA database access offered to it in contrast with that offered to AT&T, MCI, and parties to interconnection agreements identical to theirs. INFONXX urges the Commission to look beyond the AT&T and MCI interconnection agreements at the circumstances surrounding the determinations on pricing for access to Pacific's DA database. From that perspective, INFONXX insists, "forcing Pacific Bell to extend the very same pricing to INFONXX" would not jeopardize any "delicate balance of interests reached during negotiations or arbitration." (Opening Brief of INFONXX at 5.)

Pacific responds that INFONXX cannot prove a claim for discrimination based on the MCI and AT&T interconnection agreements because it is not similarly situated to either company. Pacific points out that INFONXX is not a telecommunications carrier, and it is not a party to an interconnection agreement.

² On June 24, 1997, the Commission allowed the advice letter to go into effect retroactive to December 1, 1996.

Complainant is a third-party DA vendor which has expressed no interest in entering into an interconnection agreement similar to MCI's or AT&T's. In addition, Pacific notes, the Commission expressly stated in D.97-08-059 that the pricing structures contained within an arbitrated interconnection agreement apply only to the parties to the agreement, and do not form the basis for establishing tariff pricing. (Pacific Concurrent Opening Brief at 2.) Finally, the Eighth Circuit Court of Appeals ruled in Iowa Utilities Board v. FCC, 120 F3d 753 (1997) (Cert. granted 118 S. Ct. 879) that customers may not simply "pick and choose" the most favorable terms from an interconnection agreement without assuming the entire set of obligations contained in that agreement.

Discussion

In the Local Competition Proceeding's D.98-01-022, we expressly declined to grant INFONXX's request that the Commission "revise the DALIS tariff rates at this time to make them equal to the contract rates negotiated with MCI and AT&T."³ We held that the contract rates for DA access that MCI and AT&T are charged, pursuant to their respective interconnection agreements, are part of an integral package of terms and conditions. Further, we declared that 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. Moreover, in D.98-04-071, we affirmed our earlier decision and denied INFONXX's Application for Rehearing on the grounds that INFONXX had failed to show that requiring competitive DA service providers to pay Pacific's tariffed rates is discriminatory.

³ D.98-01-022 at 5 (January 8, 1998).

While we directed the incumbent local exchange carriers to provide nondiscriminatory access to their DA database listings to all competitors in Ordering Paragraph 8 of D.97-01-042, at the same time, we set forth that the "determination of appropriate cost recovery for the preparation and delivery of the information" was to be addressed in the Open Access and Network Architecture Development (OANAD) proceeding. Notwithstanding complainant's subsequent and continuous insistence that the appropriate cost recovery work has already been done in the MCI and AT&T arbitrations, in fact, the DA database access rates derived through the arbitrations can be best described as cost-based subject to the agreement reached through private/commercial negotiations.

Thus, the interconnection agreement rates to which INFONXX repeatedly refers are not distinctly cost-based. INFONXX is aware⁴ that the Commission is looking at the DA database access cost studies that were filed in the OANAD docket. As we reiterated in the above cited recent decisions rejecting INFONXX's contentions about the discriminatory pricing of DA database access, the provision of a subsequent true-up of rates is an appropriate interim remedy for INFONXX and others that are similarly situated until we establish the permanent cost-based rates. Accordingly, we shall dismiss the complaint and close this proceeding.

⁴ In fact, INFONXX has submitted comments on the studies.

Findings of Fact

1. INFONXX is not a telecommunications carrier, and it is not a party to an interconnection agreement.
2. MCI, AT&T, and parties to interconnection agreements identical to theirs are paying DA database access prices pursuant to their agreements.
3. Pacific has offered INFONXX DA database access at the prices contained in Pacific's DALIS tariff.
4. The prices contained in the interconnection agreements differ from the DA database access prices contained in the DALIS tariff.
5. The Commission determined in D.98-01-022 and upheld in D.98-04-071 that requiring competitive DA providers to pay Pacific's tariffed rates is not discriminatory.
6. As an interim remedy for competitive DA providers, D.98-01-022 made Pacific's DALIS tariff provisional and subject to a memorandum account true-up once permanent rates are established in the OANAD proceeding.

Conclusions of Law

1. INFONXX should not obtain access to Pacific's DA database at the same prices as such access is being offered under MCI's interconnection agreement or those agreements identical to it.
2. This is a complaint case, not challenging the reasonableness of rates or charges, but rather their alleged discriminatory application, and so this decision is issued in an adjudicatory proceeding as defined in PU Code § 1757.1.
3. This complaint should be dismissed.
4. In the interest of finalizing this case, the order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. Case (C.) 97-07-007 is dismissed.
2. C.97-07-007 is closed.

This order is effective today.

Dated October 8, 1998, at Laguna Hills, California.

RICHARD A. BILAS

President

P. GREGORY CONLON

JESSIE J. KNIGHT, JR.

HENRY M. DUQUE

JOSIAH L. NEEPER

Commissioners