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MAIL DATE
10/13/98

Decision 98-10-032 October 8, 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.	Application 96-09-012 (Filed September 19, 1996)

ORIGINAL

ORDER DENYING REHEARING OF DECISION 98-05-060

I. INTRODUCTION

On January 23, 1998, GTE California, Incorporated (GTEC) filed a Petition to Modify Decision (D.) 97-01-045. In that decision, we approved an interconnection agreement between GTEC and MCI Telecommunications (MCI), following a period of arbitration conducted according to §252(b)(4) of the federal Telecommunications Act of 1996 (Act). In its petition, GTEC requested that the Commission change the decision in order to relieve GTEC of its obligation to provide network elements to MCI in a pre-combined format. GTEC stated in its petition that a recent decision by the U.S. Court of Appeal for the Eighth Circuit[1] struck down Federal Communications Commission (FCC) rules which had previously required incumbent local exchange carriers (ILECs) to recombine or rebundle network elements purchased by competing local exchange carriers (CLECs). GTEC argued that in light of the Eighth Circuit's decision, the interconnection agreement should be modified to remove GTEC's obligation to recombine network elements at MCI's request. We denied GTEC's petition by

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1 See, Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997), cert. granted, 118 S.Ct. 879 (January 26, 1998).

D.98-05-060, concluding that the issue of GTEC's obligation to recombine network elements was not raised during the arbitration proceeding, and therefore was not appropriately before us for consideration.

GTEC subsequently filed the instant application for rehearing, in which it alleges that the Commission erred in its conclusion that GTEC voluntarily agreed to rebundle network elements. GTEC further claims that it is legal error for the Commission to treat as a waiver an agreement by an ILEC to rebundle network elements if the agreement was made during the period when the FCC's rules requiring rebundling were still binding.

GTEC also states that it filed the instant application for rehearing in part to "preserve its statutory right to federal court review of its current rebunding claims. At the time GTEC Filed, its application for rehearing, the decision approving the GTEC/MCI interconnection agreement D.97-01-045 was the subect of litigation pending before the United States District Court for the 3 Northern District of California. See, GTE California Inc. v. Conlon, MCI Telecommunications Corp., et al., Case No. C-97-1757 SI (GTEC v. Conlon). On September 29, 1998, that Court issued a decision it which it addressed numerous issues, including GTEC's current rebundling claims.[2]

II. DISCUSSION

As GTEC acknowledges in its application, applications for rehearing are generally not made in connection with a Commission decision denying a petition to modify. The Commission has broad discretion when considering a petition to modify a previous decision. There is no statutory right to reopen a Commission proceeding once it has been submitted and decided. The only

[2] Two other Commission decisions approving interconnection agreements between GTEC and AT&T, and Pacific Bell and MCI were also the subject of this litigation. See, GTEC v. Conlon, AT&T Communications of Calif., et al, Case No. C-97-1756 SI and MCI Telecommunications Corp. v Pacific Bell, et al., Case No. C-97-0670 SI. The Court's September 29, 1998, decision addressed all three cases.

provision for reopening a proceeding once submitted, including reopening due to material changes of law, is contained in Rule 84 of our Rules of Practice and Procedure which requires that a petition to reopen be filed *before* issuance of the decision. GTEC is in no position to complain of legal error in denying its petition simply because we did not exercise our discretion in its favor.

In reading GTEC's application, it is clear that the Commission action of which GTEC complains is embodied in D.97-01-045. GTEC did not file an application for rehearing of D.97-01-045, which became final and effective on January 23, 1997. We ordinarily do not permit a petition to modify to be used as a vehicle to circumvent the proper appeal procedure and undermine the concept of finality of Commission decisions. This is consistent with prior Commission and Supreme Court decisions disposing of similar efforts to pursue appellate review after the right to do so has lapsed. (See, Young v. Industrial Accident Comm'n, 63 Cal.App.2d 286, 288 (1944); Northern California Ass'n to Preserve Bodega Head and Harbor, Inc. v. Public Utilities Comm'n, 61 Cal.2d 126, 134 (1964); Rulemaking to Change Structure of Gas Utilities' Procurement Practices, [D.92-09-054] (1992) 45 Cal.P.U.C.2d 465; In re Biennial Resource Plan Update, [D.95-10-020] (1995) 61 Cal.P.U.C.2d 698.)

Nonetheless, we have reviewed the substantive arguments that GTEC presents in its application and find them without merit. We denied GTEC's petition to modify on the basis that GTEC's obligation to recombine UNEs was not designated as an unresolved issue for arbitration before the Commission. GTEC's arguments that this issue was in fact before us in arbitration merely repeat those stated in its petition to modify and fail to set forth specifically the grounds on which GTEC considers our decision to be unlawful. Therefore GTEC's application for rehearing does not meet the requirements of California Public Utilities Code §1732 or Rule 86.1 of the California Public Utilities Commission Rules of Practice and Procedure.

GTEC further alleges that the Commission's conclusion that GTEC waived the rebundling issue is incorrect as a matter of law. GTEC claims that the Commission erred in failing to apply the "futility doctrine," arguing that a state commission may not refuse to address the UNE pre-combination issue on the ground that the obligation arose from a voluntary agreement, if that agreement was reached during the period when the FCC's rules requiring pre-combination were still binding. In support of its argument, GTEC cites a recent decision of the U.S. District Court for the Eastern District of North Carolina, AT&T Communications for the Southern States, Inc. v. Bellsouth Telecommunications Inc., et al., Case No. 5:97-CV-405-BR (E.D.N.C. May 22, 1998). In that case, the Court rejected AT&T's argument that Bellsouth voluntarily consented to a similar provision requiring Bellsouth to combine network elements at AT&T's request. The Court remanded the issue to the North Carolina Utilities Commission for renegotiation between the parties.

Our decision denying the petition, however, does not rest on the basis that GTEC voluntarily consented to the rebundling provision, but on the basis that the issue was not addressed by the Commission during the arbitration. No party designated GTEC's obligation to recombine UNEs as an unresolved issue for arbitration, and this obligation was not one imposed by the Commission as a result of the arbitration process. AT&T v. Bellsouth does not support GTEC's argument that this Commission is obligated to unilaterally modify the interconnection agreement to eliminate the rebundling requirement. Moreover, the Court in GTEC v. Conlon found that, in fact, GTEC had waived its rebundling claims by not raising them during the arbitrations. GTEC v. Conlon, No. C97-1757 SI. Slip op. At 28-29 (N.D.Cal September 29, 1998.)

Finally, GTEC's argument that the Commission erred by failing to apply the "futility doctrine" in considering its petition to modify is necessarily without merit. The "doctrine" on which GTEC relies is a judicially developed

exception to the doctrine of exhaustion of administrative remedies, which is a prerequisite to judicial review. GTEC cites no authority which extends the futility exception to an administrative agency exercising its discretion in considering a petition to modify a prior decision. We note that GTEC did raise the futility argument before the Court in GTEC v. Conlon. The Court rejected GTEC's arguments noting that GTE was one of the parties that successfully challenged the FCC's rule in the state "[i]f GTEC wished to challenge the CPUC's order on this issue in this Court, it should have objected during the proceeding below." Id., at 29

As no legal error has been demonstrated, GTEC's application for rehearing should be denied.

IT IS THEREFORE ORDERED that:

1. The Application for Rehearing of Decision 98-05-060 is denied.
2. This proceeding 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
JOSHIA L. NEEPER
Commissioners