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Decision 99-04-031 April 1, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Petition of PDO Communications, Inc. for Arbitration Pursuant to Section 252 of the Federal Telecommunications Act of 1996 to Establish an Interconnection Agreement With Pacific Bell.

ORIGINAL

A. 98-06-052
(Filed June 15, 1998)

ORDER CLARIFYING DECISION NO. 99-01-009 AND DENYING REHEARING

I. SUMMARY

PDO Communications, Inc. (PDO) has filed an application for the rehearing of D.99-01-009 in which the Commission approved an interconnection agreement between PDO and Pacific Bell after an arbitration of issues as prescribed by the federal Telecommunications Act of 1996 (Telcom Act.) The principal subject of PDO's application is the Commission's denial of PDO's request to have the agreement include shared access to the capacity of Pacific Bell's local loop which connects the end-user (e.g., residential customer) to Pacific Bell's central office.

PDO claims: 1) the Commission did not meet the requirements of Section 252(b)(4)(c) of the Telcom Act because, according to PDO, D.99-01-009 did not resolve PDO's request for shared access to Pacific Bell's local loop; 2) the Commission erred in concluding the Federal Communications Commission (FCC) has preempted the authority to compel line-sharing and to create unbundled network elements when such elements have been shown to be technically feasible; 3) D.99-01-009 violates the nondiscrimination requirements of Section 251(c)(3) of the Telcom Act which, according to PDO, requires Pacific Bell to provide

access to all network elements on the same basis it provides such elements to itself; and 4) the Commission mischaracterized PDO's loop, or line sharing proposal as "sub-loop unbundling."

As we discuss below, we find that PDO has not substantiated legal error in D.99-01-009 under any of these claims and, therefore, the Commission denies rehearing.

II. DISCUSSION

First, PDO asserts that the Commission did not resolve the issue of its right to shared access to Pacific Bell's local loop. PDO is mistaken. Ordering Paragraph 2 of D.99-01-009 approves the interconnection agreement between PDO and Pacific Bell filed on December 9, 1998. As PDO acknowledges by the filing of the present application for rehearing, the approved agreement does not provide PDO with shared access to Pacific Bell's local loop. The Commission, therefore, resolved the issue of shared access with respect to the interconnection agreement filed on December 9, 1998, even though we also stated that the PDO's request for shared access implicated several telecommunications service issues that deserved consideration in a generic proceeding. (D.99-01-009, mimeo, pp.18-20.) Therefore, although we found it reasonable to deny PDO's request at this time, it is also in the public interest to determine whether and on what basis such shared access may be made available on a nondiscriminatory basis to all telecommunications carriers, not just to PDO. A generic review is appropriate since many carriers may be affected by any one decision on shared access to an ILEC's local loop.

Second, PDO complains that D.99-01-009 relied too extensively on the Final Report of the Administrative Law Judge (ALJ) which discusses and makes recommendations on the issues submitted to arbitration. PDO contends the Final Report contained legal errors concerning this Commission's jurisdiction

relative to the jurisdiction of the FCC in authorizing access to unbundled network elements.

The question of primary and dual regulatory jurisdiction is a question often addressed in connection with the implementation of the Telcom Act. But in this case, there is no jurisdictional dispute. Approval of an interconnection agreement pursuant to Sections 251 and 252 of the Telcom Act requires application of the expertise and independent judgment of the Commission, and adherence to state as well as federal mandates. Our actions, therefore, are taken in concert with the authority of the FCC. For example, in D.99-01-009 (mimeo, pp.12-17), we addressed certain issues raised by PDO in the proceeding with an acknowledgement that our views were consistent with those expressed in the FCC's First Report and Order. (Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, Memorandum Decision and Order, CC Docket No. 96-98, FCC 96-325, 11 FCC Rcd 1 (August 8,1996).) Our rationale appropriately recognizes the regulatory coordination between this Commission and the FCC that is necessary to achieve the intent and purpose of the Telcom Act.

The issue of granting access to unbundled network elements epitomizes the need for coordinated regulation. In AT&T Corp., et al. v. Iowa Utilities Board, et al. ("Iowa Utilities") 119 S.Ct. 721 (1999), Lexis 903, at *40, the U.S. Supreme Court vacated the FCC's Rule 319 [47 CFR §51.319] as an improper implementation of Sections 251(c)(3) and 251(d)(2) of the Telcom Act which provide the statutory foundations for ordering access to an incumbent local exchange carrier's (ILEC's) unbundled network elements. Thus eliminated was the FCC's identification of seven categories of unbundled network elements of an ILEC to which new telecommunications carriers may acquire access. Furthermore, among the unbundled network elements that had been identified in

vacated Rule 319 was the local loop, which was defined as a "transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and an end user customer premises;..." (Rule 319(a).)

The Court found that in identifying accessible unbundled network elements, the FCC had failed to follow the statutory directives of Section 251(d)(2), which requires that access be granted only if "necessary" and if failure to provide access would "impair" the ability of the carrier seeking access to provide the services it wanted to offer (the "necessary and impair standard").[1] The Court held that the FCC had failed to employ limiting criteria in applying the necessary and impair standard and instead improperly gave virtually blanket access to ILEC networks on an unrestricted basis. (Iowa Utilities, Lexis 903, at *35-37.)

The Court also found that the FCC had misinterpreted Section 251(c)(3), which generally requires ILECs to allow requesting carriers access to their network elements "at any technically feasible point." Instead of construing this directive with respect to where unbundled access must occur, the Court explained that the FCC incorrectly used technical feasibility as a factor in determining which network elements must be unbundled and made available for access. (Iowa Utilities, Lexis 903, at *38-39.)[2]

Although these findings led the Court to vacate only Rule 319, the Court's rationale regarding the "necessary and impair" standard and the technical feasibility factor also implicates the FCC's Rule 317 [47 CFR§51.317]. Rule 317 states that when a State commission determines what network elements, in

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1 Section 251(d)(2) of the Telcom Act of 1996 provides: "In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether—(A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."

2 Just as the FCC erred in interpreting Section 251(c)(3), PDO also is mistaken where it argues that it should be allowed access to Pacific Bell's local loop capacity on an unbundled basis because it is technically feasible to do so. (Application, at 17.)

addition to those identified by the FCC, should be made available for purposes of Section 251(c)(3) of the Telcom Act, the State commission shall first decide whether it is technically feasible for the ILEC to provide access. Rule 317 also provides guidelines for withholding access even after a finding of technical feasibility. The guidelines for withholding access include, among other things, a determination of whether the network elements are proprietary or confidential, and the ability of the new carrier to provide the service over other unbundled network elements of the ILEC without decreasing the quality of the service and the costs to the new carrier. Because the Court found that the FCC had not properly interpreted or applied Section 251(d)(2), it follows that the FCC guidelines set forth in Rule 317 may also need revision.

Iowa Utilities, therefore, has led the FCC to ask the Eighth Circuit of the United States Court of Appeals not only to immediately execute the U.S. Supreme Court's judgment regarding Rule 319, but also to recall prior approval of Rule 317 so that it can be remanded to the FCC for reconsideration. [3]

At this point, therefore, Rule 319, in which the FCC had identified the local loop as an unbundled network element, is vacated, and Rule 317, which describes the application of the necessary and impair and technical feasibility standards, is likely to be revised. We find that under these circumstances, and recognizing the need for coordinated regulation with the FCC, it is reasonable to affirm our denial of PDO's request for immediate shared access to Pacific Bell's local loop. PDO has not demonstrated any legal imperative to require our granting their request at this time.

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[3] The FCC made its request in a filing dated March 2, 1999, "Response of Federal Respondents to Local Exchange Carriers' Motion Regarding Further Proceedings On Remand and Motion for Voluntary Partial Remand," at pp.17-18, in Iowa Utilities Board, et al. v. FCC, Case No. 96-3321, (8th Cir.).

In support of its claim, PDO cited the FCC's First Report and Order at paragraphs 248 and 310. (Application, at 17.) Paragraph 248, however, only expresses the FCC's view that the State commissions administer the FCC's unbundled network element requirements and inform the FCC of their evaluation of the success or difficulties in implement the FCC requirements. Paragraph 310, also cited by PDO, addresses the FCC's general rules regarding access to unbundled elements on an nondiscriminatory basis. It provides that "the states will implement the general nondiscrimination rules set forth herein by adopting, inter alia, specific rules determining the timing in which incumbent LECs must provision certain elements, and any other specific conditions they deem necessary to provide new entrants, including small competitors, with a meaningful opportunity to compete in local exchange markets." (Emphasis added.)

We do not see how either Paragraph 284 or Paragraph 310 compels this Commission to grant PDO immediate shared access to Pacific Bell's local loop as part of the current interconnection agreement between the two carriers. Nor are we convinced of any legal imperative to grant access before this Commission considers in a generic proceeding the implications of shared access to the local loop for all telecommunications carriers, as we have ordered. To the contrary, in Paragraphs 248 and 310, the FCC expressed a reasonable expectation that its jurisdiction under the Telcom Act of 1996 and the mandate of the State commissions would be discharged in a collaborative process to enhance the development of competition in the local telecommunications markets. In citing Paragraphs 248 and 310 of the First Report and Order, therefore, PDO actually points out the FCC's recognition of the discretionary judgment this Commission must exercise, just as we did in D.99-01-009.

Furthermore, our decision reflects adherence to State law as well of the Telcom Act. Cal. Pub. Util. Code Section 709(e) provides that one of the

policies informing this Commission's actions shall be: "To remove the barriers to open and competitive markets and promote fair product and price competition in a way that encourages greater efficiency, lower prices, and more consumer choice." Our reasons for denying PDO shared access to the local loop as part of its current interconnection agreement with Pacific Bell are consistent with this policy. Before one telecommunications carrier can be granted shared access, we must determine if permitting an initial sharing by one carrier creates a barrier for other communications carriers. We must also consider whether access by another means is more efficient, and whether shared access will result in fair price competition among several carriers, not just between Pacific Bell and PDO. Accordingly, we have decided, pursuant to Cal. Pub. Util. Code Section 701, to review on a generic basis the many issues attendant to shared access to the local loop. Our action is not an abandonment of our jurisdiction, as PDO mistakenly claims. It is instead an affirmation of our authority to make reasoned judgments in coordination with the FCC in implementing the Telcom Act.

Third, PDO describes the Commission's denial of PDO's immediate shared access to Pacific Bell's local loop as discriminatory. PDO's argument is based on Pacific Bell's present ability to provide high-speed data service (DSL service) to its customers. As we have described above, the foundation is lacking for a charge of discrimination in determining access. Iowa Utilities requires the FCC to derive limiting criteria to replace its blanket access approach. (Iowa Utilities, Lexis 903, at *35-37.) The Court thereby has demanded a higher level of scrutiny and a more deliberative process on the part of the FCC in implementing Sections 251(c)(3) and 251(d)2). This Commission also plays a significant role in implementing the same statutory provisions. It is, accordingly, reasonable for us to withhold granting PDO access at this time, and to further consider the complex issues to be resolved in connection with ordering shared

access to an ILEC's local loop. Our deliberative approach parallels the review the FCC must now make at the order of the U.S. Supreme Court. Presently, therefore, the issue of nondiscriminatory shared access to the local loop is at best premature.

Fourth, PDO objects to our reference to "sub-loop unbundling" in D.99-01-009. PDO explains that sub-loop unbundling is different from the sharing of capacity on Pacific Bell's local loop. PDO further explains that unlike sub-loop unbundling, which "peels" voice or data traffic from a portion of the local loop before it reaches the serving central office, its proposal involves "picking up the data traffic at the serving central office through collocation." (Application, p.13.)

PDO appears to be correct in identifying a semantic error. The use of "sub-loop unbundling" in our decision was a mislabeling of our understanding that PDO wants shared access to Pacific Bell's local loop. However, although we acknowledge an error in the term used, we do not find it is material to our rationale or decision denying PDO's request. See D.99-01-009, mimeo, at page 10 where we describe the issue raised by PDO as whether an ILEC "can be compelled to make available as a separate unbundled network element a portion of the capacity of a local loop which Pacific Bell is currently using....." and where we refer to the question of Pacific Bell having to "share capacity on existing local loops...." The mislabeling does not, therefore, constitute legal error since it was not a dispositive element in our analysis of the case. Nonetheless, to clarify our decision, we will order the reference to "sub-loop unbundling" be replaced with "shared access to the local loop."

III. CONCLUSION

PDO has not demonstrated any legal error in D.99-01-009 for which rehearing is warranted.

IT IS THEREFORE ORDERED that:

1. D.99-01-009 be modified to replace "sub-loop unbundling," wherever it appears in the decision, with "shared access to the local loop." (See mimeo, pages 12,19, 20, Finding of Fact 21, and Conclusions of Law Nos. 12 and 13.

2. Rehearing of D.99-01-009, as modified herein, is denied.

This decision is effective today.

Dated April 1, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners