Mailed 4/7/2000

Decision 00-04-034 April 6, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Complaint of MFS Intelnet of California, Inc. (U 5172 C) against Pacific Bell (U 1001 C) and Request for Temporary Restraining Order and Preliminary Injunction.	Case 97-09-032 (Filed September 19, 1997)

OPINION RESOLVING DISPUTE OVER COMPENSATION FOR TERMINATION OF CALLS TO INTERNET SERVICE PROVIDERS UNDER CO-CARRIER AGREEMENT FILED AS ADVICE LETTER 17879A

1. Summary

We conclude that complainant MFS Intelnet of California, Inc. (MFS) has established, as a matter of law, that under the terms of the applicable co-carrier agreement, defendant Pacific Bell (Pacific) must pay MFS reciprocal compensation for calls routed to MFS' ISP customers. We grant MFS summary adjudication on this issue but dismiss the second and third counts of the complaint after denying both parties' motions for summary adjudication on those counts.

2. Procedural Background

In Decision (D.) 97-12-085, our interim opinion in this proceeding, we denied MFS' request that we enjoin Pacific from withholding funds under the parties' co-carrier telecommunications interconnection agreement (agreement) [1] pending resolution of the complaint on the merits.

---

[1] The parties filed the November 17, 1995 agreement for our approval as Advice Letter (AL) 17879. On January 17, 1996 in Resolution T-15824, we approved the agreement,

Footnote continued on next page

We described the initial pleadings (MFS' complaint and Pacific's answer) in detail in D.97-12-085. Briefly, the three-count complaint alleges: (1) Pacific has violated Section VI.B.4.d of the modified agreement by refusing to pay reciprocal compensation on calls routed to ISPs by MFS; (2) Pacific's conduct is anticompetitive; and (3) Pacific's conduct violates federal law, specifically Section 251(b)(5) of the Communications Act of 1934. Pacific's answer denies any wrongdoing and asserts three affirmative defenses.

This proceeding was submitted for decision initially on December 15, 1997 after the parties filed cross-motions for summary judgment. The parties suggested this procedure at the prehearing conference on October 15, 1997, representing that the contract dispute between them turns on issues of law and that the material facts are not at issue. In late 1997 and early 1998, the parties filed several supplemental pleadings requesting official notice of our filings at the Federal Communications Commission (FCC) and the determinations of other state commissions. Most recently, on September 16, 1999, MCI WorldCom Technologies, Inc. (MCI), the successor to complainant MFS, filed a motion to supplement the MFS motion for summary judgment. The assigned administrative law judge (ALJ) set aside submission to accept MCI's motion, Pacific's opposition and MCI's reply and resubmitted the proceeding.

---

conditioned upon the making of certain modifications. Among the modifications we required was the addition of Section XXI, which provides, in relevant part:

> "This Agreement shall at all times be subject to such changes or modifications by the Public Utilities Commission of the State of California as said Commission may, from time to time, direct in the exercise of its jurisdiction."

In conformance with Resolution T-15824, the parties revised the agreement (modified agreement) and filed it on January 26, 1996 as AL 17879A.

As we noted in D.97-12-085, the parties' dispute is also the subject of a complaint Pacific filed against MFS in the San Francisco Superior Court. The court has stayed that matter pending our resolution of this proceeding. Consequently, Pacific's first affirmative defense, that multiple proceedings in multiple jurisdictions may lead to inconsistent results, is moot.

3. Factual Background

As D.97-12-085 relates, MFS and Pacific began exchanging reciprocal compensation under the terms of the modified agreement in July 1996. On June 26, 1997, Pacific notified MFS it would terminate the agreement in 60 days. Thereafter, Pacific informed MFS it would not pay local traffic reciprocal compensation for calls MFS routed to ISPs since, according to Pacific, "ISP traffic is interstate or (at a minimum) interexchange traffic." (D.97-12-085, *slip* op. at 5.) Pacific paid only $516,165.25 of MFS' July 20, 1997 invoice for reciprocal compensation of $1,309,644.25 and placed the $793,499 remainder in an escrow account. This sum represents Pacific's estimate of the portion of the invoice attributable to traffic from Pacific's customers to MFS' ISP customers. Pacific also stated it would seek a refund of any compensation previously paid for termination of calls to ISP.

Subsequently, Pacific first deferred the date for termination of the agreement to September 22, 1997 and then, on August 19, 1997, withdrew the termination letter. Pacific took the latter action after withdrawing its Statement of Generally Available Terms (SGAT) on file with the Commission. Under federal law, the SGAT acts as a generic interconnection agreement when a more specific one is not in place. Therefore, with Pacific's SGAT withdrawn, the modified agreement, pursuant to the terms in its Section XI, continued to govern

the MFS/Pacific interconnection until it was replaced by the new agreement that we approved in D.99-09-069.

4. Commission Practice Concerning Motions For Summary Judgment

Summary judgment is an appropriate procedure for resolving a contract dispute where the only issue is a question of law. (See *Lipson v. Superior Ct.* (1982) 31 Cal. 3d 362.)

The Commission has not established a rule that explicitly governs summary judgment or summary adjudication of issues, and we have looked to the requirements of Code Civ. Proc. § 437(c), which governs civil practice, for guidance in resolving such motions. (See *Westcom Long Distance, Inc. v. Pacific Bell et al.*, D.94-04-082 [54 CPUC2d 244, 249].)

The statute provides, in relevant part: "The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. (Code Civ. Proc. § 437(c).)

As the courts have explained, the summary judgment procedure provides a vehicle for the moving party to "pierce" the pleadings and attack the merits of the opposing party's case using declarations and other documentary support. The moving party must show that the opposing party's claims or defenses raise no triable issue of material fact (that is, they are a sham or lack evidentiary support) or that the sole dispute is an issue of law. (See *Stationers Corp. v. Dunn & Bradstreet, Inc.* (1965) 62 C.2d 412.)

5. Discussion

5.1 Count 1: Reciprocal Compensation

We begin our analysis by examining the language of the modified agreement in order to establish the context for the parties' competing arguments

for summary judgment. We then review their various pleadings, comprised of the 1997 summary judgment motions and oppositions to one another's motions, and the 1999 supplemental filings. References to MFS in this discussion do not distinguish between the named complaint and its successor MCI, since their interests are interchangeable.

As both parties acknowledge, the fundamental goal of contract interpretation is to give effect to the objective intent of the parties, taken from the four corners of the contract. (See *Kerr v. Brede* (1960) 180 Cal.App.2d 149.) The compensation provisions at issue in this complaint are found in Section VI.B.4.d of the modified agreement. That section provides:

> "For the total conversation seconds *where the CPN* [calling party number] *bears an NPA-NXX assigned to the other Party, where such NPA-NXX is associated with a rate center point within 0-12 miles of the rate center point of the called party number,* that number of total conversation seconds charged at the Blended rate per paragraph 3, above, shall be subtracted and *the remainder shall be billed at the Local rate* specified above."[2] (Emphasis added.)

The local rate and blended rate are two of five specified reciprocal compensation rates, the others being toll rate, LISA transit rate, and JANE transit rate.[3] (Section VI.B.1.) All of these reciprocal compensation rates apply to

---

[2] The parties explain that the blended rate was negotiated to cover the unique situation of interstate (or intrastate toll) calls which appear to be "local" because they involve a ported telephone number.

[3] The LISA (Local Interconnection Service Arrangement) trunk provides for the termination of local exchange and intraLATA telephone traffic from MFS' network to Pacific's network. The JANE trunk provides for termination of traffic moving in the other direction, from Pacific's network to MFS'. (Section II. "Definitions" II and JJ.)

"traffic carried between Pacific and MFS via LISA or JANE trunks." (*Id.*) According to Section VI.B.4, the test for determining the "traffic type" for each call a party receives from the other over a LISA/JANE trunk is "comparing the Calling Party Number (CPN) in the call record to the called party number in the record."

ISPs are never mentioned in the modified agreement, nor are local calls. Rather, as described in the paragraph above, the different rates apply to different traffic types. The ISP traffic at issue in this proceeding is initiated when a Pacific customer dials an ISP which is a MFS customer and which has a telephone number with a NPA-NXX associated with a rate center point within twelve miles of the rate center point associated with the NPA-NXX of the Pacific customer's own telephone number.[4]

Thus, the ISP traffic fits the traffic pattern which Section VI.B.4.d clearly states shall be billed at the local rate. It does not fit any of the others. Nor does ISP traffic fit the conditions for application of meet-point billing, as the modified agreement expressly extends such arrangements to third parties for whom MFS provides switched access services via a Pacific access tandem switch. (Section V.A.1.)

MFS argues, in both its 1997 and 1999 filings, that this conclusion should end our examination and that we must hold that the modified agreement is clear, unambiguous and not reasonably susceptible to any interpretation except that the parties intended reciprocal compensation for termination of calls to ISPs.

---

[4] It is not clear from the pleadings whether there is any traffic going in the other direction, i.e., from MFS' customers to Pacific's ISPs, but the compensation terms of the modified agreement apply equally to both utilities and to traffic in both directions.

Pacific challenges such a result and claims the modified agreement is ambiguous because it contains no express mention of ISP traffic. Therefore, Pacific argues (in its 1997 filings), we must look beyond the language itself and consider extrinsic evidence, specifically "the existing legal definition of Internet traffic," to ascertain the parties' objective intent. (Pacific opposition, p. 3.) While ISP calls may "appear local" to a Pacific customer, they are not, Pacific contends. (Pacific motion, p. 2.) Pacific develops this theory at length, arguing that more than a decade of FCC decisions, as well as our own, clearly establish that Internet traffic is interstate or interexchange in nature and that therefore, as a matter of law, such traffic cannot be subject to reciprocal compensation. MFS, in its 1997 filings, argues that if we consider extrinsic evidence at all, we must reach just the opposite conclusion.

MFS and Pacific rely on many of the same Commission and FCC precedents, but construe them differently. Their arguments serve to underscore the reality, that as of 1995, the legal character of ISP traffic had not been definitively stated. In fact, this issue came to a head in California in 1998 when a coalition of telecommunications providers filed a motion in the Commission's local competition proceeding (R.95-04-043/I.95-04-044) and sought generic resolution of the jurisdictional nature of ISP-bound calls. The coalition pointed to Pacific's assertion, in this complaint and elsewhere, that calls to an ISP constituted interstate calls and that reciprocal compensation arrangements applied only to local calls.

In D.98-10-057, as modified by D.99-07-047,[5] we addressed the coalition's motion, affirming our jurisdiction over telephone traffic between end users and ISPs for the purpose of determining intercarrier compensation and holding that such traffic is subject to the bill-and-keep or reciprocal compensation provisions of applicable interconnection agreements.

Specifically, we ordered:

> "The compensation provisions of interconnection agreements shall apply to the terminating traffic sent by competitive local carriers (CLCs) to Internet Service Providers (ISPs)." (D.98-10-057, Ordering Paragraph 1, emphasis added.)

and:

> "All carriers subject to interconnection agreements containing reciprocal compensation provisions are directed to make the appropriate reciprocal payment called for in such agreements for the termination of ISP traffic which would otherwise qualify as a local call until such agreements are ended, or until or unless the Commission reaches a different determination in its deliberations concerning the use of disparate rating and routing points being conducted in R.95-04-043/I.95-04-044. *Whether an ISP-bound call should be treated as local is based on the rating of the call measured by the distance from the rate center associated with the originating caller's telephone number to the rate center associated with the telephone number used to access the ISP modem.*" (D.98-10-057, Ordering Paragraph 2, as modified by D.99-07-047, emphasis added.)

Moreover, in D.99-07-047 we directly addressed the jurisdictional dispute which is at the core of this complaint, when we stated:

---

[5] D.99-07-047 denied rehearing but modified D.98-10-057, among other things, to conform to FCC orders in CC Dockets 96-98 and 99-68, adopted on February 25, 1999.

> *"ILEC's should be bound by their agreement to pay reciprocal compensation for local calls, which historically included ISP-bound calls prior to the recent change initiated by Pacific in questioning the validity of such treatment.* The recent FCC Declaratory Ruling certainly affirms the validity of treating ISP-bound traffic as local for purposes of inter-carrier compensation arrangements." (D.99-07-047, slip op. at 17, emphasis added.)
>
> On the issue of the definition of "local call" we stated:
>
> "If the rate center associated with the telephone number of the end user originating the call is within 12 miles or EAS of the rate center associated with the telephone number used to access the ISP, then such call should be rated as a local call." (D.98-10-057, Finding of Fact 11, as modified by D.99-07-047.)

Our determinations in D.98-10-057, as modified by D.99-07-047, eliminate Pacific's second affirmative defense that when the parties contracted in 1995, established law prohibited payment of reciprocal compensation for terminations of ISP traffic. Such payments were not barred in 1995 and they are not barred now. Accordingly, Pacific's associated argument, that the parties could not have intended the modified agreement to cover ISP traffic, fails.

In its 1999 filing, Pacific refocuses its argument for the use of extrinsic evidence. Pacific's new argument, in essence, is that at the time of the parties' 1995 negotiations, the telecommunications industry's definition (and Pacific's understanding) of the term "the NPA-NXX of the called party" was "based upon a party's physical location." (Pacific opposition, p. 3.) Because it could not anticipate that MFS would engage in "disparate rating and routing practices", Pacific contends, there was no reason to separately negotiate the compensation terms applicable to ISP traffic. (*Id.*)

This argument fares no better than the first. With respect to the industry standard argument, as MFS points out, Pacific's own tariffs from at least as early

as 1994 rate calls as local or toll based on the following language: "It is the applicable rate center as identified by telephone number prefix, *not the physical location of the calling or called party* that is used to rate calls." (CAL. P.U.C. No. A6, emphasis added.) Pacific's subjective understanding is irrelevant to our examination. The objective intent of the parties, rather than the subjective intent of one of them, controls contract interpretation. (*Titan Group, Inc. v. Sonoma Valley County Sanitation Dist.* (1985) 164 Cal.App.3d 1122.)

Finally, as the Commission noted in D.97-12-085, testimony at the preliminary injunction hearing in this proceeding established that the language relating traffic type to the NPA-NXX codes in Section VI.B.4 is language Pacific, itself, proposed. D.97-12-085 quoted MFS' witness Artman as follows:

> "We very carefully wanted to define the traffic that passed in each direction and to make sure that it was just from phone numbers. At the time of negotiations, Pacific Bell was very precise about the language it wanted to use and we agreed to their [sic] language." (D.97-09-032, slip. op. at 4., quoting Tr. at 18.)

Continuing its discussion in D.97-12-085, the Commission stated:

> "MFS had advocated a bill and keep policy, which did not track local traffic and provided no reciprocal compensation for it. Pacific demanded that MFS sign an agreement with express compensation. MFS felt Pacific so assisted because Pacific thought the traffic flow would be in one direction in its favor." (*Id.*)

5.2 Counts II and III

The summary judgment pleadings devote little attention to MFS' allegations that Pacific's conduct, in withholding reciprocal compensation, is anticompetitive (Count II) and violates federal law, specifically Section 251(b)(5) of the Communications Act of 1934 (Count III). Having resolved the primary

dispute between the parties, above, we need not reach these subsidiary allegations and decline to do so. We dismiss both counts.

6. Conclusion

For the reasons discussed above, we grant summary adjudication for MFS on the issue of reciprocal compensation, but dismiss the second and third counts after denying summary adjudication on those issues for either party.

7. Comments on Section 311(g)(1)

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g) and Rule 77.1 of the Rules of Practice and Procedure. Comments were filed on March 27 by MCI and Pacific, and reply comments were filed on April 3 by MCI. Apart from noting a clerical error, which we have corrected, the comments repeat arguments made in the parties' briefs and already addressed in the draft decision.

Findings of Fact

1. The modified agreement continued to govern the MFS/Pacific interconnection until it was replaced by the new agreement we approved in D.99-09-069.

2. ISP traffic fits the traffic pattern which Section VI.B.4.d of the modified agreement clearly states shall be billed at the local rate.

3. Extrinsic evidence in the form of Commission and FCC decisional precedents establishes that there was no prohibition on reciprocal compensation payments for termination of ISP traffic in 1995.

4. Extrinsic evidence in the form of Pacific's own tariff's establishes that the objective definition, in 1995, of the term "the NPA-NXX of the called party" was not based upon a party's physical location but upon the applicable rate center as identified by telephone number prefix.

5. The language relating traffic type to the NPA-NXX codes in Section VI.B.4 of the modified agreement was proposed by Pacific.

6. The summary judgment pleadings devote little attention to Counts II and III of the complaint.

7. The parties suggested this summary judgment procedure at the prehearing conference.

Conclusions of Law

1. Consideration of the extrinsic evidence on which Pacific relies fails to establish that the modified agreement is ambiguous.

2. MFS has established that Pacific owes MFS reciprocal compensation under Section VI.B.4.d of the modified agreement for calls routed to MFS' ISP customers. We should grant summary adjudication for MFS on this issue.

3. Having resolved the primary dispute between the parties in Count I, we need not reach the subsidiary allegations in Counts II and III and should dismiss both of them.

4. In order to ensure expeditious compliance with the ordering paragraphs, this decision should be effective immediately.

O R D E R

IT IS ORDERED that:

1. We grant summary adjudication forMCI WorldCom Technologies, Inc. (MCI), the successor of MFS Intelnet of California, Inc. (MFS), on Count I of the complaint.

2. Counts II and III of the complaint are dismissed.

3. Pacific Bell shall pay MCI all reciprocal compensation, and accrued interest, withheld under Section VI.B.4.d of the co-carrier agreement, filed as Advice Letter 17879A, for termination of traffic routed to MFS/MCI customers who are internet service providers.

4. This proceeding is closed.

This order is effective today.

Dated April 6, 2000, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
CARL W. WOOD
Commissioners