

Decision 99-12-025

December 2, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the petition of Pacific Bell (U 1001 C) for arbitration of an interconnection agreement with Pac-West Telecomm, Inc. (U 5266 C) pursuant to Section 252(b) of the Telecommunications Act of 1996.

Application 98-11-024
(Filed November 16, 1998)

**ORDER DENYING APPLICATION FOR REHEARING OF
DECISION 99-06-088**

I. SUMMARY

Pacific Bell (Pacific) filed an application for rehearing challenging Decision (D.) 99-06-088, which adopted the results of the Final Arbitrator's Report and approved the resulting Interconnection Agreement between Pacific and Pac-West Telecomm, Inc. (Pac-West). Specifically, Pacific challenges the provision of the Agreement which requires the payment of reciprocal compensation for Internet Service Provider (ISP) bound traffic delivered to Pac-West. We have reviewed each and every allegation of legal error in Pacific's application and conclude that grounds for rehearing have not been demonstrated. We accordingly deny Pacific's application for rehearing.

II. BACKGROUND

Pursuant to section 252(b) of the Federal Telecommunications Act of 1996 (Act), Pacific filed an application for arbitration of an interconnection agreement with Pac-West. Arbitration conferences were held in late February and early March 1999. A Draft Arbitrator's Report (DAR) was filed and served on

March 30, 1999. Comments on the DAR were filed by Pacific, Pac-West, and GTE California Inc. (GTEC). A Final Arbitrator's Report (FAR) was issued on April 23, 1999. On April 30, 1999, the parties filed a complete Interconnection Agreement incorporating the arbitrated results. Each party also filed a statement which stated whether the negotiated and arbitrated portions of the Agreement should be approved or rejected by the Commission.

According to section 252(e) of the Act and Rule 4.2.3 of the Commission's Rules of Practice and Procedure, the Commission may only reject an agreement adopted by arbitration if it finds that the agreement does not meet the requirements of section 251 of the Act, or the standards set forth in section 252(d) of the Act. Of the 15 items presented for arbitration, the parties contended that four items adopted in the FAR should have been rejected by the Commission. Pacific argued the following issues should have been rejected: (1) the definition of local calls, (2) the definition of toll free service, and (3) whether local traffic which Pac-West delivers to its ISP customers is subject to the Interconnection Agreement.¹ Pac-West argued that one item should have been rejected: the proper compensation to be paid to Pac-West for its termination of local traffic subject to the Agreement.

The Commission affirmed the results adopted in the FAR and approved the resulting Interconnection Agreement between Pacific and Pac-West in Decision (D.) 99-06-088. The Commission relied in part on the Federal Communications Commission's (FCC) Declaratory Ruling,² released on February 26, 1999. Although the FCC concluded that ISP-bound traffic is "jurisdictionally

¹ Specifically, the traffic at issue here is Pac-West's "Type 6" service, which is tariffed exclusively for ISP-bound traffic. Sched. Cal. CLC 1-T, XIII.A, Sheet No. 36-1.

² Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98; Intercarrier Compensation for ISP-bound Traffic, CC Docket No. 99-68, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 98-96 (Feb. 26, 1999) (Declaratory Ruling).

mixed” and “appears to be largely interstate,” it ultimately declared that given the absence of a federal rule regarding the appropriate inter-carrier compensation mechanism for that traffic, state commissions may continue to determine whether reciprocal compensation is due for this traffic. (Declaratory Ruling, ¶¶ 1, 28.) In affirming the results of the arbitration, the Commission also relied on its conclusion in D.98-10-057 that ISP-bound traffic may be treated as local traffic subject to reciprocal compensation provisions of applicable interconnection agreements.³

Pacific subsequently filed the instant application for rehearing challenging the determinations made in the D.99-06-088. Two parties, ICG Telecom Group, Inc. (ICG) and Pac-West, filed oppositions to Pacific’s application for rehearing.

III. DISCUSSION

Pacific essentially raises two arguments in its application for rehearing. Pacific first argues that the Commission was legally barred from treating calls to ISPs as local for reciprocal compensation purposes because such calls are jurisdictionally interstate calls under the FCC’s February 26, 1999 Declaratory Ruling. Second, Pacific argues that the Commission was “inundated with false and irrelevant claims in emails, letters, etc., that without reciprocal compensation payments, Pac-West and ISP costs would increase, prices to ISP customers would rise, and Internet access would be threatened.” (Pacific Application, p. 2.) Pacific alleges that reliance on these assertions is improper.

³ D.98-10-057 was issued in the Commission’s Local Competition proceeding (R.95-04-043/I.95-04-044). Upon reviewing allegations of legal error in applications for rehearing of D.98-10-057, the Commission affirmed its conclusions that ISP-bound traffic may be treated as local D.99-07-047. Both of these ISP Decisions have been challenged in Federal District Court by GTEC and Pacific. See Pacific Bell v. CPUC, et al., Case No. C99-4479CW (filed October 6, 1999), and GTEC v. CPUC, et al., Case No. C99-3973CW (filed August 25, 1999).

Pacific first argues that there is no evidence in the record to support a finding that any "Type 6" calls terminate in the local calling area, and that Pac-West admits that it cannot determine where these calls are finally routed. Pacific argues that the FCC has ruled that ISP-bound calls do not terminate at the ISP's node, but rather at various websites located in other states and around the world. According to Pacific, the FCC has ruled that this type of traffic is non-local, interstate traffic. The FCC has also ruled that the reciprocal compensation obligations of the Act only apply to traffic that originates and terminates within a local area. Since ISP-bound "Type 6" calls are interstate and do not terminate on either Pac-West's network or at the ISP's node, Pacific claims that requiring the payment of reciprocal compensation for this traffic violates the Act. According to Pacific, a finding of fact or evidence which suggests that an ISP-bound call actually terminates in the same local calling area where the ISP-bound call originated is essential for the Commission to mandate reciprocal compensation.

Pacific's arguments do not reflect a complete and accurate reading of the FCC's Declaratory Ruling. Pacific correctly notes that, under the FCC's Declaratory Ruling, the Commission may not impose terminating compensation obligations on Pacific Bell for delivering Internet calls to Pac-West under section 251(b)(5) of the Act. However, the Declaratory Ruling reflects the FCC's position that some type of compensation should be due for the costs associated with the termination of this type of traffic. The FCC notes that in construing the statutory obligations under section 251(b)(5), it did not preclude parties from agreeing to include interstate traffic within the scope of their interconnection agreements, so long as no FCC rules were otherwise violated. (Declaratory Ruling, footnote 77.) Accordingly, while section 251(b)(5) of the Act does not require it, parties may agree to treat ISP-bound traffic as local traffic in their interconnection agreements for the purpose of reciprocal compensation. In addition, "even where parties to

interconnection agreements do not voluntarily agree on an inter-carrier compensation mechanism for ISP-bound traffic, state commissions nonetheless may determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic.” (Declaratory Ruling, ¶25.)

The FCC has determined that state commissions may choose reciprocal compensation as the appropriate compensation mechanism for ISP-bound traffic. Under the FCC’s Declaratory Ruling, state commissions are also free to impose other compensation rate structures. This Commission has determined in its ISP Decisions (D.98-10-057 and D.99-07-047) that, for the time being, reciprocal compensation is the appropriate mechanism by which carriers should compensate each other for the costs associated with the transport and termination of ISP-bound traffic. This determination does not violate the Act or the FCC’s orders and regulations.

Pacific erroneously declares that “as a matter of law...it is presumed that the traffic is interstate” and that it is Pac-West’s burden to establish any ISP traffic that is “local” before Pacific can be ordered to pay termination compensation. (Pacific Application, p. 16.) Pacific cites no authority in support of this proposition. In fact, the FCC specifically declared in its Declaratory Ruling that “in the current absence of a federal rule governing inter-carrier compensation... we do not find it necessary to reach the question of whether such traffic is separable into intrastate and interstate traffic.” (Declaratory Ruling, ¶19.) Accordingly, Pacific’s allegations are unfounded.

The Declaratory Ruling explicitly allows state regulatory commissions to exercise jurisdiction over ISP-bound traffic for reciprocal compensation purposes in the absence of any federal rule to the contrary. Specifically, the FCC stated:

“Currently, the [FCC] has no rule governing inter-carrier compensation for ISP-bound traffic. In the absence of such a rule, parties may voluntarily include this traffic within the scope of their interconnection agreements under sections 251 and 252 of the Act, even if these statutory provisions do not apply as a matter of law. Where parties have agreed to include this traffic within their section 251 and 252 interconnection agreements, they are bound by those agreements, as interpreted and enforced by the state commissions.” (Declaratory Ruling, at ¶ 22.)

As mentioned above, the FCC expressly authorized state commissions to require reciprocal compensation for ISP-bound traffic even where parties have not been able to agree on a compensation mechanism. (Declaratory Ruling, ¶25.)

The FCC further stated:

“A state commission’s decision to impose reciprocal compensation obligations in an arbitration proceeding – or a subsequent state commission decision that those obligations encompass ISP-bound traffic – does not conflict with any Commission rule regarding ISP-bound traffic.” (Id., at ¶ 26.)

It is clear that this Commission did not err in its understanding or its application of the FCC’s Declaratory Ruling.⁴ The FCC’s ruling confirms that treating ISP-bound traffic as local for purposes of reciprocal compensation does not violate its previous rules or the 1996 Act.

⁴ Pacific also complains that the Decision is in error as it relies on D.98-10-057, which Pacific considers legally deficient. The Commission has already addressed Pacific’s arguments concerning legal error in D.98-10-057, as set forth in D.99-07-047. That discussion will not be repeated here. Moreover, both Pacific and GTEC have challenged the Commission’s ISP Decisions in the United States District Court; neither decision has been stayed by this Commission or by the District Court and accordingly both are effective orders.

In its application for rehearing, Pacific claims that it is arbitrary and capricious government action for the FCC to exempt ISP-bound traffic from interstate access charges and the Commission to treat such traffic as local for reciprocal compensation. However, conspicuously absent from Pacific's analysis is any mention of the recent decision of the Seventh Circuit in Illinois Bell Telephone Co., d/b/a Ameritech Illinois v. WorldCom Technologies, et al., ___ F.3d ___, 1999 U.S. App. LEXIS 20828 (7th Cir. June 18, 1999) ("Illinois Bell"), which affirmed the decision of the Illinois Commerce Commission ("ICC") requiring Ameritech to pay reciprocal compensation for ISP-bound traffic. The Court found the ICC decision fully consistent with the FCC's Declaratory Ruling: "The ICC's conclusion –that reciprocal compensation should apply to traffic Ameritech bills as local traffic –does not violate the Act or the FCC's interpretation of the Act." 1999 U.S. App. LEXIS 20828, *18-19. The Seventh Circuit accepted both the FCC's and the ICC's legal analyses, which taken together allow ISP-bound traffic to be treated as interstate for FCC jurisdictional purposes, but as local for purposes of reciprocal compensation.

The Seventh Circuit's decision answers Pacific's complaint that "it is arbitrary and capricious government action for the FCC to treat ISP-bound traffic as interstate, thereby, by means of the FCC-imposed [access charge] 'exemption,' depriving Pacific Bell of access charges for carrying this traffic and for the California Commission inconsistently to treat the same traffic as 'local,' thereby requiring Pacific Bell to pay Pac-West ... 'local' termination charges." (Pacific Application, p. 14.) The Seventh Circuit did not view such treatment by the FCC and the ICC as arbitrary or capricious: "Not that the majority rules in these matters, but the commissions in well over half the states have made the same determination that the ICC made, including some interpretations made after the [FCC's] February ruling." Illinois Bell, supra, at *22. The Seventh Circuit

ultimately held that the ICC's treatment of ISP-bound traffic as local traffic for reciprocal compensation purposes "does not violate the Act or the FCC's interpretation of the Act." *Id.*, at *18-19.

Finally, Pacific's arguments that the Commission was improperly influenced by public and political clamor over this issue are unpersuasive. Pacific argues that the Decision improperly relied on claims of potential increased costs to ISPs and was not based on evidence in the record. However, the fact that the issue considered in this proceeding was the subject of much public debate does not mean the parties were deprived of due process. Significantly, Pacific does not allege that any *ex parte* violations occurred; nor does Pacific demonstrate how these activities may have affected the Arbitrator's findings and conclusions as contained in the Final Report. All the Decision does is adopt the findings in the FAR and require the parties to file an interconnection agreement consistent with the FAR. Pacific fails to point to any Finding of Fact or Conclusion of Law in the Decision which was allegedly premised on or affected by such activities. Contrary to Pacific's claims, nothing in the Decision suggests that the Commission based its decision to require reciprocal compensation on concerns of alleged increases in ISP costs. As such, we find Pacific's arguments unpersuasive.

IV. CONCLUSION

Pacific has not shown legal error in Decision 99-06-088. Pacific has failed to demonstrate that the Commission's determination that reciprocal compensation be paid for ISP-bound traffic violates the Federal Telecommunications Act of 1996 or the FCC's rules and regulations implementing that Act.

THEREFORE, IT IS ORDERED that Pacific's application for rehearing of Decision 99-06-088 is denied.

This proceeding is closed.

This order is effective today.

Dated December 2, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOEL Z. HYATT
CARL W. WOOD
Commissioners

I will file a written dissent.

/s/ JOSIAH L. NEEPER
Commissioner

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Commissioner Josiah L. Neeper, Dissenting:

I dissent from the majority's decision.

The rehearing process gives the Commission an opportunity to correct errors that may have been committed in the deliberation of our proceedings. The majority's decision on rehearing fails to take advantage of this opportunity and propagates a legally erroneous and flawed decision that relies on unfounded concern about the viability of PacWest as a service provider and claims of harm to Internet users of PacWest's service.

The decision misapplies the Commission's decision on reciprocal compensation (Decision 98-10-057) and unfairly shifts unnecessary costs to customers of Pacific Bell. In so doing, the decision sets yet another precedent for future decisions that if extended will have adverse consequences to carriers and their customers who will unwittingly subsidize a revenue stream to certain carriers in return for no clear and tangible benefit to consumers.

Decision 99-06-088 which is the subject of the rehearing application erred in its analysis that treating Internet Service Provider (ISP) bound calls as interstate calls (and consequently imposing reciprocal compensation payment obligations on carriers that originate them) will have harmful effects on rural customers. The record of this case is devoid of such claims or evidence that can support them. No evidence exists in this proceeding that PacWest will be unable to recover the costs of transporting or terminating ISP bound calls if the Commission declines to order reciprocal compensation. Moreover, nothing in the record of this case supports the conclusion that PacWest's financial viability will be hampered and that such an event will bode a threat to discontinuity or degradation of access by rural or urban customers who use ISP services.

The Commission received numerous electronic mails through write-in campaigns expressing an unfounded concern about the impact of our proposed decisions on not just PacWest's customers but also all Internet users. In reality, the proceeding in which the PacWest-Pacific Bell interconnection agreement was considered did not even address the issues of financial impact on customers of PacWest let alone rural customers of Internet users. However the PacWest-Pacific Bell arbitration decision stated and relied on this unsubstantiated and unfounded threat that a "change [in] current

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relationships and cash flows" would be harmful to PacWest, ISPs, and rural customers and goes on to impose reciprocal compensation on PacBell. Current financial relationships between PacWest and PacBell related to ISP - bound calls, as they existed then, did not indicate that access to the Internet would be affected by the majority's decision. PacWest's viability as a business was never claimed to have depended on cash flow from reciprocal compensations. The majority's decision (D.99-06-088) erred in relying on this unfounded fear when, in fact, neither the record or PacWest itself could support that reciprocal compensation was necessary for PacWest's profitability or rural customers' access to the Internet. The decision the majority adopts today repeats the same errors.

For all the above reasons I dissent from the majority decision.

/s/ Josiah L. Neeper
Josiah L. Neeper
Commissioner

San Francisco, California
December 2, 1999