

**PUBLIC UTILITIES COMMISSION**505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298**FILED**06-18-10
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June 18, 2010

TO PARTIES OF RECORD IN APPLICATION 10-04-029

Attached is the Draft Arbitrator's Report (DAR) of Administrative Law Judge (ALJ) Yacknin, the ALJ assigned as the arbitrator for these matters. It has been prepared and is being distributed for comment as set forth in Resolution ALJ-181.

Rule 3.19 of ALJ-181 states:

"Each party and any member of the public may file comments on the Draft Arbitrator's Report (DAR) within 10 days of its release. Such comments shall not exceed 20 pages, unless otherwise authorized by the Arbitrator for the respective parties in arbitration, and shall focus on factual, legal or technical errors in the DAR. In citing such errors, parties shall make specific references to the record. Comments which merely reargue positions taken in briefs will be accorded no weight and are not to be filed. Reply Comments, if ordered by the arbitrator, shall be limited to identifying misrepresentations of law, fact or condition of the record contained in comments."

Therefore, comments on DAR shall be filed and served on or before June 28, 2010.

/s/ KAREN V. CLOPTON

Karen V. Clopton
Chief Administrative Law Judge

Attachments

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Request for Arbitration of Verizon California Inc. Pursuant to Section 252(i) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, to Affirm Verizon's Denial of Blue Rooster Telecom, Inc.'s Request to Adopt the Interconnection Agreement between Blue Casa Communications, Inc. and Verizon California Inc. Because a Reasonable Period of Time Has Elapsed.

Application 10-04-029
(Filed April 23, 2010)

DRAFT ARBITRATOR'S REPORT

This report determines that Blue Rooster Telecom, Inc. is not entitled to adopt the existing interconnection agreement between Blue Casa Communications, Inc. and Verizon California Inc., or to commence operations under that agreement pending resolution of the parties' interconnection dispute.

I. Background

Blue Rooster Telecom, Inc. (Blue Rooster) is a newly-certified competitive local exchange carrier (CLEC). On March 30, 2010, Blue Rooster submitted an advice letter seeking to adopt the existing interconnection agreement between Blue Casa Communications, Inc. (Blue Casa) and Verizon California Inc. (Verizon). Verizon denied Blue Rooster's request on the basis that the Blue Casa agreement is almost seven years old (dated August 15, 2004), the Blue Casa agreement itself is an adoption of an earlier agreement between Pac-West

Telecomm Inc. (Pac-West) and Verizon (dated May 29, 2003) that has since been amended, the original term of the agreement has expired and the agreement is terminable upon 90 days' written notice so CLECs currently operating under it do so under this "evergreen" term, the agreement does not reflect existing law including two Federal Communications Commission (FCC) orders (dated 2004 and 2008) clarifying how carriers should be compensated for internet service provider traffic, and it does not reflect the seven years of business developments that are reflected in Verizon's more recent interconnection agreements.

Blue Rooster maintains that the Blue Casa agreement should be available to it because other CLECs are currently operating under it, so that Blue Rooster would be placed at a significant competitive disadvantage if it is not allowed to adopt it. Blue Rooster asserts that Verizon has not met the requirements of Resolution ALJ-181 because it has not specified the provisions in the Blue Casa agreement to which it objects. Blue Rooster asserts that, if this matter nevertheless proceeds to arbitration, the Commission should order Verizon to honor the adoption of the terms of the Blue Casa agreement to which it does not object, and implement the terms of the Blue Casa agreement to which it does object subject to retroactive true-up, pursuant to Rule 7.3.2 of Resolution ALJ-181.

At the initial arbitration meeting conducted on May 28, 2010, the arbitrator determined that this dispute does not raise any disputed issues of material fact that require hearing, and set the time for filing concurrent briefs on the legal issues of (1) whether Blue Rooster is entitled to adopt the previously-approved interconnection agreement between Verizon and Blue Casa, and, if not, (2) whether Blue Rooster is entitled to commence operations pursuant to an order requiring Verizon to honor all of the provisions of that Verizon/Blue Casa interconnection agreement to which Verizon does not have an actual, good

faith objection, pursuant to Rule 7.3.2 of Resolution ALJ-181. The parties filed concurrent opening briefs on June 9 and concurrent reply briefs on June 16, 2010, when the arbitration proceeding was submitted.

II. Blue Rooster is not Entitled to Adopt the Blue Casa Agreement

Pursuant to Section 51.809 of the FCC's rules and Rule 7.2 of this Commission's Resolution ALJ-181 implementing Section 252 of the Telecommunications Act of 1995, an incumbent local exchange carrier (ILEC) shall make existing interconnection agreements available for adoption by other CLECs "for a reasonable period of time after the approved agreement is available for public inspection under 252(f) of the Act." Blue Rooster is not entitled to adopt the Blue Casa agreement because a reasonable period of time has elapsed since Blue Casa and Verizon entered into it: the original agreement is nearly seven years old, the original term of the agreement expired almost four years ago and the agreement is terminable upon 90 days' written notice. Given this passage of time and the likelihood that law and technology may have evolved in the interim, it would be unreasonable to continue to make the agreement available for adoption. This is not to say that any or all of the terms of the Blue Casa agreement are unreasonable or illegal. It may be that the parties will independently reach an agreement that incorporates some or all of those terms or that, if the matter proceeds to arbitration of the interconnection terms, the Commission will ultimately approve them. However, pursuant to Section 51.809 and Rule 7.2, the Blue Casa agreement is no longer deemed to be available for adoption per se.

Blue Rooster argues that the "reasonable period of time" rule requires consideration of the particular circumstances of each case, and that the reasons given by the FCC for the "reasonable period of time" rule -- potential technical

incompatibility and changes to pricing and network configuration choices over time – are inapplicable here. Blue Rooster argues that Verizon has not shown that the Blue Casa agreement is inconsistent with current law and that, in any event, the agreement provides for amendment to reflect change of law so Verizon’s objection that the agreement is out of date is without merit.

To the contrary, the applicability of the “reasonable period of time” rule does not turn on a showing that the terms of a vintage agreement have become unreasonable under current circumstances; that is the purpose of Rule 7.2(b), which provides that an ILEC is not obliged to enter into an approved agreement if it proves that the costs of providing the interconnection, service or element under the agreement are greater than the costs of providing it to the CLEC that originally negotiated the agreement. Rather, the “reasonable period of time” rule removes the presumption that the terms of a previously approved agreement are reasonable. This is not to say that the terms of an “old” agreement are per se unreasonable; parties may negotiate and, if necessary, seek arbitration to adopt such terms. However, whether or not particular terms of an unavailable agreement are reasonable is not at issue in this arbitration. At issue is whether Blue Rooster is entitled to adopt the Blue Casa agreement pursuant to Rule 7.2(a) rather than enter into negotiations to attempt to obtain those same terms. It is not.

Blue Rooster argues that Verizon’s refusal to accept its adoption of the Blue Casa agreement is discriminatory in violation of the fundamental purpose of Section 252(i), because it continues to interconnect with several other CLECs under evergreen terms of the Blue Casa and similar agreements. Blue Rooster argues that singling out Blue Rooster for negotiation and arbitration of the agreement is, in itself, discriminatory and anti-competitive. By this logic, the

Blue Casa agreement must be made available for adoption so long as it is in effect between Verizon and any other CLEC. Such requirement would be unreasonable, as it would require the ILEC to synchronize the terms of all of its interconnection agreements or be subject to their adoption by other CLECs in perpetuity. Instead, the “reasonable period of time” rule strikes an appropriate balance between making interconnection agreements equally available to competing CLECs and allowing ILECs the right to negotiate current agreements under current circumstances.

III. Blue Rooster is not Entitled to Operate under the Blue Casa Agreement Pending Resolution of its Interconnection Dispute

Blue Rooster asserts that the Commission should order Verizon to immediately honor the Blue Casa agreement pursuant to Rule 7.3.2, which provides that, “[s]hould the ILEC file for arbitration, the ILEC shall immediately honor the adoption of those terms not subject to objection” and, “to the extent the ILEC seeks arbitration of a particular interconnection, service or element, the ILEC shall immediately honor such provisions subject to retroactive price true-up....” To the contrary, Blue Rooster is not entitled to operate under the Blue Casa agreement pending resolution of its interconnection dispute, and Verizon has reasonably complied with the intent and requirements of Resolution ALJ-181.

Allowing a CLEC to operate under disputed terms of an interconnection agreement, and requiring the ILEC to specify those disputed terms, makes sense where an ILEC objects to provisions of an interconnection agreement that is otherwise available pursuant to Rule 7.2, e.g., either because the ILEC’s costs have become greater than originally negotiated in the agreement or because it is no longer technically feasible (see Rule 7.2(b).) It does not make sense where, as

here, the dispute concerns the fundamental issue of whether the interconnection agreement is available in the first place. Verizon has made a showing, endorsed by this report, that the Blue Casa agreement is no longer available. Verizon represents that it has no objection to any provisions of the interconnection agreements that are available to Blue Rooster. To the extent that Blue Rooster seeks to commence operations pending negotiation and/or arbitration of an interconnection agreement, it should ask Verizon to honor the terms of an available interconnection agreement subject to retroactive price true-up based on the resolution of the negotiation or arbitration, consistent with the intent of Rule 7.3.2 of Resolution ALJ-181.

O R D E R

IT IS ORDERED that parties may file and serve comments on the Draft Arbitrator's Report by no later than June 28, 2010.

Dated June 18, 2010, at San Francisco, California.

/s/ MICHELLE COOKE for

Hallie Yacknin
Administrative Law Judge

INFORMATION REGARDING SERVICE

I have provided notification of filing to the electronic mail addresses on the attached service list.

Upon confirmation of this document's acceptance for filing, I will cause a Notice of Availability of the filed document to be served upon the service list to this proceeding by U.S. mail. The service list I will use to serve the Notice of Availability of the filed document is current as of today's date.

Dated June 18, 2010, at San Francisco, California.

/s/ OYIN MILON
Oyin Milon

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to ensure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

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