



**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

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Cox California Telcom, LLC (U-5684-C))
)
Complainant,)
)
v.) C.11-05-012
) (Filed May 9, 2011)
)
Verizon California, Inc. (U-1002-C),)
)
MCI Metro Access Transmission Services)
(U-5253-C), and MCI Communications)
Services, Inc. (U-5378-C),)
)
Defendants.)
_____)

MOTION TO DISMISS COMPLAINT WITHOUT PREJUDICE

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Pursuant to Article 11 of the Commission’s Rules of Practice and Procedure, Verizon California Inc. (U-1002-C), MCImetro Access Transmission Services LLC (U-5253-C), and MCI Communications Services, Inc. (U-5378-C) (collectively, “Verizon”) move to dismiss the Complaint filed by Cox California Telcom, LLC (“Cox”) on May 9, 2011, or, in the alternative to stay this proceeding pending completion of the FCC’s rulemaking on intercarrier compensation for Voice over Internet Protocol (“VoIP”) calls.

I.

INTRODUCTION

This Commission has held that dismissal of a complaint without prejudice is appropriate where “related and potentially determinative issues are pending in a federal forum.”¹ That is the case here. Cox’s complaint asks this Commission to impose legacy tariffed switched access charges on VoIP traffic. But the FCC has confirmed that *it* is the appropriate regulatory body to determine intercarrier compensation rates for such traffic, and it intends to do so in the near term. In its pending rulemaking to reform the intercarrier compensation system and universal service funding, the FCC identified intercarrier compensation for VoIP traffic as

¹ See, e.g., *Pac-West Telecomm, Inc. v. Sprint Spectrum, L.P., et al.*, D.11-03-034, 2011 Cal. PUC LEXIS 190, *30 (Mar. 24, 2011).

one of three particularly pressing issues,² and the FCC Commissioners committed to issuing an order “within a few months” of the record closing in May.³

Because the FCC is considering the same VoIP compensation issue that Cox’s complaint raises, this Commission should, consistent with past practice, dismiss this complaint without prejudice. In the alternative, the Commission should stay this proceeding pending the FCC’s VoIP compensation ruling. This is the same approach two federal courts — one here in California — recently took in cases involving VoIP compensation disputes.⁴ It is also the same approach this Commission has repeatedly taken when a matter before it raises issues already before a federal forum, in order to avoid wasting its limited resources.⁵

² See *Connect America Fund; a National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers; Developing a Unified Intercarrier Compensation Regime, etc.*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13, WC Docket No. 10-90, etc. (Feb. 9, 2011) (“NPRM”) ¶¶ 603–619 available online at http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0209/FCC-11-13A1.pdf).

³ See <http://beta.fcc.gov/blog/making-universal-service-and-intercarrier-compensation-reform-happen> (last visited June 22, 2011).

⁴ *Pac-West Telecomm, Inc. v. MCI Comm. Services, Inc. d/b/a Verizon Business Services*, No. 1:10-cv-01051-OWW-GSA, 2011 U.S. Dist. LEXIS 30044 (E.D. Cal. Mar. 22, 2011) (order granting motion for primary jurisdiction referral and stay pending FCC ruling) (“*California Stay Order*”); *CBeyond Comm., LLC v. MCI Comm. Services, Inc. d/b/a Verizon Business*, No. 1:11-cv-0693-TCB (N.D. Ga. May 19, 2011) (order granting unopposed motion to stay proceedings) (“*Georgia Stay Order*”).

⁵ See, e.g., *Pac-West Telecomm, Inc. v. Sprint Spectrum, L.P., et al.*, D.11-03-034, 2011 Cal. PUC LEXIS 190 (Mar. 24, 2011); *Pacific Bell v. MAP Mobile Communications*, D.06-04-010, 2006 Cal. PUC LEXIS 116, *1 (Apr. 13, 2006); *Pacific Bell v. AT&T Communications of California, Inc. and MCI Telecommunications Corporation*, D.97-09-105, 1997 Cal. PUC LEXIS 828, *2 (Sept. 24, 1997). Verizon discusses each of these cases below.

In addition to avoiding a risk of inconsistency with the FCC’s ruling and conserving Commission resources, a stay will allow the parties to focus on negotiating a resolution of their dispute — as they were doing when Cox filed its Complaint, and as Verizon is doing with a number of other providers. In fact, Verizon has already negotiated VoIP compensation agreements with two other providers, using the same \$0.0007 per-minute rate that Verizon is currently paying Cox for IP-originated or -terminated traffic. Although Cox may believe that filing a complaint will help it to gain leverage in the parties’ negotiations, this tack will serve only to divert to litigation resources that are necessary to resolve the parties’ dispute, making an agreement that much less likely.

Moreover, judicial efficiency considerations are particularly relevant in this proceeding because even Cox must acknowledge that this Commission does not have authority to resolve the totality of the dispute between Cox and Verizon regarding IP-originated and IP-terminated traffic. The majority of the traffic for which Verizon has withheld switched access charges is traffic Cox itself rates as “interstate,” and Cox does *not* assert that this Commission has authority to determine whether Cox’s federal tariffs require Verizon to pay switched access charges on such traffic. Cox can only receive complete relief for its entire dispute with Verizon (i.e., for traffic Cox rates as “intrastate” as well as traffic it rates as “interstate”) from a *federal* forum.⁶

⁶ Cox might assert that this Commission is authorized to interpret the interconnection agreements between the parties, and that Verizon purportedly agreed in those agreements to pay Cox’s tariffed federal switched access charges for VoIP traffic. However, Cox itself admits that the great majority of traffic at issue here is not subject to any interconnection agreement. Most of the traffic at issue is exchanged between Cox and MCI Communications Services, Inc. (see Compl., ¶ 62), but that entity has not

II.

ARGUMENT

Although Cox attempts to frame its complaint as a tariff and contract interpretation matter, the real issue in this case is whether intrastate tariffed switched access charges apply to VoIP traffic — in other words, what is “the appropriate intercarrier compensation framework for voice over Internet protocol (VoIP) traffic”?⁷ This is the very issue the FCC identified for resolution (among others) in its *NPRM* issued in February.⁸ Indeed, the FCC emphasized the need for it to resolve the VoIP compensation issue on an expedited basis, precisely because of the increasing number of intercarrier disputes, like Cox’s complaint here:

We recognize the need for the [FCC] to move forward expeditiously with reform and understand that disputes regarding compensation for interconnected VoIP traffic have increased during the time these issues have been pending. We recognize that such disputes could impede the industry’s ability to make an orderly transition to a reformed intercarrier compensation system.⁹

As noted, the FCC intends to decide the VoIP compensation issue in the next few months. So even if this Commission had the authority to determine VoIP compensation (and it does not),¹⁰ it would make no sense for this

entered into any interconnection agreement with Cox, and Cox does not allege otherwise.

⁷ *NPRM* at ¶ 608.

⁸ *See id.*

⁹ *Id.* at ¶ 614.

¹⁰ In its Answer filed today, Verizon explains that VoIP traffic is inherently interstate in nature and subject to the exclusive jurisdiction of the FCC. Moreover, VoIP is an information service under federal law, and the tariffed access charge regime therefore does not apply to VoIP traffic, as two federal courts recently found. *PAETEC Comm., Inc. v. CommPartners, LLC*, No. 08-0397, slip. op., 2010 U.S. Dist. LEXIS

Commission to proceed with Cox’s complaint. Doing so would require this Commission, its staff, and the parties to spend their limited time and resources trying to resolve the same VoIP compensation issues pending for decision before the FCC. Not only would such a course be controversial, complex, and vigorously litigated — with the outcome likely challenged on appeal — it would also put the Commission at risk of contradicting the FCC and having its decision invalidated. Even if some issues were to remain after the FCC has acted, it is likely that the FCC’s decision would provide critical guidance to state commissions in evaluating any remaining disputes.

Indeed, the Commission has repeatedly recognized that dismissal of a complaint is the best course when action in a related federal proceeding is expected to affect the Commission’s resolution of the matter. For example, the Commission recently dismissed four virtually identical CLEC complaints asking the Commission to determine the proper intercarrier compensation for termination of wireless traffic, because the issue was also before the D.C. Circuit. The Commission found that proceeding with the case would pose a “significant risk that the Commission would end up wasting the resources devoted to this effort” given the pending federal court action.¹¹ The Commission also observed that even if the matter was not fully resolved by the D.C. Circuit, an FCC remand

51926 (D.D.C. Feb. 18, 2010); *Manhattan Telecomm. Corp. v. GNAPs*, No. 08-cv-3829, 2010 U.S. Dist LEXIS 32315, 49 Comm. Reg. (P&F) 1296 (S.D.N.Y. Mar. 31, 2010).

¹¹ *Pac-West Telecomm, Inc. v. Sprint Spectrum, L.P., et al.*, D.11-03-034, 2011 Cal. PUC LEXIS 190, *4–*5 (Mar. 24, 2011).

could provide critical “guidance about the parameters of reasonableness in this controversial area.”¹² The same reasoning applies with equal force here.¹³

In D.06-04-010, the Commission, likewise, dismissed a complaint between Pacific Bell and MAP Mobile involving alleged nonpayment for access services “on the grounds that the Federal Communications Commission (FCC) [was] considering many, if not all, of the issues in a case filed about four months before the instant complaint.”¹⁴ The Commission found that the outcome of the complaint “involves, in major part, matters of federal law,” and concluded that “[h]aving these two actions proceed simultaneously in two different forums is inefficient at best and poses the risk of inconsistent results.”¹⁵

In D.97-09-105, the Commission again dismissed a complaint involving issues before the FCC — this time, a claim by Pacific Bell against AT&T and MCI for certain marketing practices. MCI moved to dismiss because “the FCC was considering the very issues raised in Pacific Bell’s complaint” in a pending proceeding. The Commission granted the dismissal, holding that “efficient deployment of this Commission’s resources requires that we decline to exercise our jurisdiction where a fully competent agency is also addressing the same

¹² *Id.* at *5.

¹³ This Commission also expressed skepticism about the CLECs’ attempt to invoke the traditional legal doctrine of “unjust enrichment.” *Id.* at *36. Cox similarly alleges that Verizon is “unjustly enriched” (*see, e.g.*, Compl, ¶ 75), but that claim is untethered to Commission precedent, to Cox’s tariff, or to the Public Utilities Code.

¹⁴ *Pacific Bell v. MAP Mobile Communications*, D.06-04-010, 2006 Cal. PUC LEXIS 116, *1 (Apr. 13, 2006).

¹⁵ *Id.* at *5.

issues.”¹⁶ This is exactly the situation here, where the FCC is now addressing the very VoIP compensation issue raised in Cox’s complaint, and the same action — dismissal — is justified.

As noted, two federal courts have taken the same type of approach Verizon is urging here, staying proceedings involving similar VoIP compensations disputes pending FCC action. In March, a U.S. District Court in California granted a six-month stay of a lawsuit that Pac-West brought against MCI Communications Services, Inc., finding that the central “question of whether Plaintiff is entitled to charge tariffed rates for VoIP traffic” was being addressed in the FCC’s intercarrier compensation rulemaking.¹⁷ The court ordered the parties to refer the dispute to the FCC, holding “this case requires the resolution of an issue within the jurisdiction of an administrative body exercising statutory and comprehensive regulatory authority over a national activity that requires expertise and uniformity in administration.”¹⁸

And just last month, a U.S. District Court in Georgia stayed a VoIP compensation case until the earlier of six months or until the FCC acts on its *NPRM*.¹⁹ The court observed that “the claims and defenses in this action include the proper classification of VoIP telephone calls, the rate structure applicable to such telephone traffic, and whether such telephone traffic is subject to state

¹⁶ *Pacific Bell v. AT&T Communications of California, Inc. and MCI Telecommunications Corporation*, D.97-09-105, 1997 Cal. PUC LEXIS 828, *3 (Sept. 24, 1997).

¹⁷ *California Stay Order*, 2011 U.S. Dist. LEXIS 30044, *6–*7.

¹⁸ *Id.* at *9–*10, quoting *Syntek Semiconductor Co., Ltd. v. Microchip Tech. Inc.*, 307 F.3d 775, 782 (9th Cir. 2002).

¹⁹ *Georgia Stay Order* at 2.

regulation and tariffs or instead is subject only to federal regulation.”²⁰ It concluded that a stay “will promote the interests of justice and judicial economy” because “the FCC’s action on these issues, which is expected by the end of summer, will narrow — and could potentially eliminate — the issues in dispute in this litigation.”²¹ The same logic applies here, where the same kinds of issues are before this Commission. It makes no sense for the Commission, its staff, and the parties to waste their limited time and resources trying to resolve the same VoIP compensation issues pending before the FCC.

III.

CONCLUSION

The Commission should dismiss without prejudice or should stay Cox’s complaint pending the FCC’s decision on the appropriate intercarrier compensation framework for VoIP traffic. Following the FCC’s decision, the Commission may assess whether the FCC ruling fully resolves the parties’ dispute or whether further action by this Commission is needed and permitted. Dismissal without prejudice would also allow the parties to resume commercial negotiations without the distraction and resource drain of litigation.

²⁰ *Id.*

²¹ *Id.* at 2, 3.

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Respectfully submitted,



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