



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

FILED

07-12-11
04:59 PM

Cox California Telcom, LLC (U-5684-C),
Complainant,

v.

Verizon California, Inc. (U-1002-C), MCI Metro Access
Transmission Services (U-5253-C), MCI
Communications Services, Inc. (U-5378-C),
Defendants.

C.11-05-012
(Filed May 9, 2011)

**RESPONSE OF COX CALIFORNIA TELCOM, LLC, DBA COX COMMUNICATIONS,
OPPOSING THE MOTION TO DISMISS WITHOUT PREJUDICE**

Douglas Garrett
Cox California Telcom, LLC
2200 Powell St., Suite 1035
Emeryville, CA 94608
T: 510.923.6222
E: douglas.garrett@cox.com

Margaret L. Tobias
Tobias Law Office
460 Pennsylvania Ave
San Francisco, CA 94107
T: 415.641.7833
E: marg@tobiaslo.com

Douglas C. Nelson
Senior Counsel
Cox Communications, Inc.
1400 Lake Hearn Drive
Atlanta, GA 30339
T: 404.269.5750
E: douglas.nelson@cox.com

J.G. Harrington
Dow Lohnes PLLC
1200 New Hampshire Ave, NW, Suite 800
Washington, DC 20036
T: 202.776.2818
E: jharrington@dowlohn.com

Dated: July 12, 2011

Pursuant to the Commission's Rules of Practice and Procedure ("Rules") 11.1(e), Cox California Telcom, LLC (U-5684-C) ("Cox") hereby submits this response in which it opposes the Motion to Dismiss Without Prejudice (the "Motion") filed by Verizon California, Inc. (U-1002-C), MCI Metro Access Transmission Services LLC (U-5253-C) and MCI Communications Services, Inc. (U-5378-C) (collectively, "Verizon") in the above-referenced proceeding.

I. Introduction.

In the Motion, Verizon asks the Commission to dismiss this proceeding without prejudice or, in the alternative, stay the proceeding pending a decision in the Federal Communications Commission ("FCC") proceeding on reform of the high-cost universal service fund and intercarrier compensation.¹ While Verizon frames the Motion as intended to ensure judicial economy, in fact, it is a delaying tactic intended to put off the time when Verizon must pay the access charges that it has been withholding from Cox since January 2010.

Verizon claims that the FCC is poised to resolve the central issues in this proceeding, but that simply is not the case. As shown below, the FCC has provided no indication that it has any interest in using its rulemaking proceeding to resolve disputes as to traffic exchanged before any new rules go into effect, and there is no guarantee that the FCC will act on its hoped-for schedule. Indeed, because the traffic at issue here is exchanged in TDM format, it is not apparent that any decision the FCC makes about IP-based interconnection will have any effect at all on this proceeding. Moreover, any FCC decision is entirely irrelevant to Verizon's manipulation of the percentage of interstate use ("PIU") factor used to calculate its intrastate access charges, to circuit-switched traffic or to access charges that are subject to California interconnection agreements. Additionally, Verizon's claims that delay in this proceeding will facilitate negotiation or will allow Cox to obtain more complete relief are unsupported. Finally,

¹ Motion, at 1.

Verizon ignores the fact that the Commission already has decided disputes substantially similar to those described in the Complaint. There is no basis for the Commission to retreat from continuing to resolve those types of disputes now.

II. There Is No Basis to Defer to the FCC on Any Issue.

Verizon’s basic argument is that the Commission should wait until the FCC acts in the intercarrier compensation proceeding before taking any action on the Complaint.² A close examination of the FCC’s *Inter-carrier Compensation Notice* reveals that it provides no reason to delay.³

First, there is nothing in the *Inter-carrier Compensation Notice* that indicates that any decision the FCC might make would be applied retroactively to this dispute or to any traffic that is exchanged before the effective date of a FCC order. In fact, the *Inter-carrier Compensation Notice* is quite clear on the point that its focus is on forward-looking changes to the intercarrier compensation regime, not on looking backwards.⁴ The FCC emphasizes that it is not proposing any “flash cuts,” and it proposed “transitions and glide paths that [it] believe[s] will facilitate adaptation to reforms.”⁵ More specifically, the discussion of compensation for voice over IP traffic (which is relevant to this proceeding only to the extent that Verizon can demonstrate that traffic exchanged in TDM format is, in fact, voice over IP traffic) is framed in terms of what the compensation obligations will be going forward.⁶ In addition, while Verizon suggests that the

² *Id.* at 4-8.

³ 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) (the “*Inter-carrier Compensation Notice*”).

⁴ *See, e.g., id.*, ¶ 17 (describing “glide path”),

⁵ *Id.*

⁶ *See id.*, ¶¶ 615 (discussing possibility of going-forward adoption of bill-and-keep), 616 (discussing possibility of going-forward adopting of voice over IP-specific intercarrier compensation rates), 617 (discussing possibility of including voice over IP in future glide path), 618 (discussing possibility of applying current intercarrier compensation rates to voice over IP in the future). While the *Inter-carrier Compensation Notice* asks for

FCC will resolve questions about the jurisdictional authority over voice over IP services in the intercarrier compensation proceeding, the *Inter-carrier Compensation Notice* itself makes no indication that the FCC intends to address those issues. All the *Inter-carrier Compensation Notice* says is that the FCC “has declined to explicitly address the intercarrier compensation obligations associated with VoIP traffic” in previous decisions.⁷ Even without considering the FCC’s stated disinterest in addressing traffic exchanged in the past, it would be very unusual for the FCC to adopt rules that have retroactive effect, and federal law strictly limits the retroactive application of new rules.⁸

At the same time, the FCC has indicated that it does not wish to interfere with existing arrangements for IP-based traffic, including “commercial arrangements regarding compensation for interconnected VoIP traffic” during the pendency of the intercarrier compensation proceeding.⁹ This statement is consistent with the conclusion that the FCC does not intend to adopt an order that resolves pending disputes as to traffic that already has been exchanged and that its chief concern is with reforming intercarrier compensation on a going-forward basis.

For this reason, this proceeding is entirely distinguishable from the cases that Verizon cites. For instance, in *Pac-West Telecomm v. Sprint Spectrum*, the Commission concluded that the U.S. Court of Appeals was considering an appeal of the FCC order that was the underlying basis for the four complaints filed by Pac-West Telecomm and that had determined that wireless

comment on “whether particular forms would have retroactive effect,” none of the FCC’s own proposals would be retroactive. *Id.*, ¶ 614. Also, as discussed below, retroactive rules are strongly disfavored as a matter of administrative law. *See infra* text accompanying n.8.

⁷ *Inter-carrier Compensation Notice*, ¶ 610. In practice, the FCC has been careful to avoid making decisions about the regulatory classification of voice over IP services whenever possible. *See, e.g.*, IP-Enabled Services, *Report and Order*, 24 FCC Rcd 6039 (2009) (adopting requirement that voice over IP providers obtain authorization to discontinue service, but declining to determine whether such providers are subject to Section 214 of the Communications Act). For that reason, the likelihood that the FCC will choose to do so in the intercarrier compensation proceeding is low.

⁸ *See, e.g.*, *Georgetown University Hospital v. Bowen*, 821 F.2d 750 (D.C. Cir. 1987) (invalidating application of Medicare reimbursement rules to services provided before the rules were adopted).

⁹ *Inter-carrier Compensation Notice*, ¶ 614.

termination rates should be determined by state commissions.¹⁰ In other words, in that case a pending appeal was certain to decide whether the Commission had jurisdiction; here, the FCC has made no commitment at all to decide any of the issues raised by the Complaint.¹¹

Similarly, in *Pacific Bell v. MAP Mobile Communications*, the Commission dismissed a complaint because “many, if not all, of the issues” raised in the complaint were being litigated at the FCC by the same parties, and the complaint in *Pacific Bell v. AT&T Communications of California* was dismissed for essentially the same reason.¹² In both cases, the nature of the FCC proceedings was such that it was nearly certain that the issues that had been raised both at the Commission and at the FCC would be resolved at the FCC. Here, there is no parallel complaint proceeding at the FCC and, critically, the FCC has provided no reason to believe that it will resolve the issues that Verizon believes are central to this proceeding.

The two federal court cases that Verizon cites also do not provide a basis for dismissal or deferral. First, in *CBeyond v. MCI*, the motion to stay the proceedings was unopposed, so that case was effectively a matter of the parties agreeing to a stay.¹³ Moreover, the court’s prediction in *CBeyond* that a decision could occur “by the end of the summer” already appears to be incorrect, as FCC staff and commissioners have acknowledged that their original schedule will not be met.¹⁴ Second, in *Pac-West Telecomm, Inc. v. MCI*, the court, at the request of the

¹⁰ *Pac-West Telecomm, Inc. v. Sprint Spectrum, L.P., et al.*, D.11-03-034. Subsequent to that decision, the Court of Appeals denied the appeal, and Pac-West now has asked the Commission to reopen that proceeding. See Pac-West Telecomm, Inc.’s (U5266C) Petition for Modification of D.11-03-034 and to Reopen the Complaints, Case 09-12-014, *et al.*, filed July 6, 2011.

¹¹ As shown below, there are several significant issues in this proceeding that are entirely outside the scope of the *Intercarrier Compensation Notice*. See *infra* Part III.

¹² *Pacific Bell v. MAP Mobile Communications*, D.06-04-010; *Pacific Bell v. AT&T Communications of California, Inc. and MCI Telecommunications Corporation*, D.97.09-105.

¹³ *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).

¹⁴ See, e.g., *USF/ICC Order May Be Done in Fall, Not Later, Genachowski Aide Says*, TELECOM A.M., June 16, 2011 (quoting FCC aides as acknowledging that order will not be completed on original schedule); *USF Reform Order Likely to Be Pushed Back to Fall, FCC Officials Say*, TR DAILY, June 16, 2011 (quoting aide to

complainant Pac-West, directed it to seek a ruling from the FCC, rather than dismissing the case.¹⁵ In neither case did the decision prevent a party from pursuing remedies that it wanted to pursue. Additionally, when AT&T sought relief for its dispute with Global NAPs with respect to IP-enabled/voice over IP traffic those parties exchanged, the federal court dismissed the case on the grounds that this Commission has exclusive jurisdiction over disputes concerning breaches of interconnection agreements.¹⁶ Further, courts generally do not exercise jurisdiction over disputes involving tariffs or disputes that require technical issues “within the special competence of an administrative agency.”¹⁷

In addition, the Commission should look to how states have responded to stay requests. Twice state commissions have been asked to stay complaints concerning intercarrier compensation for IP-based traffic, and in both cases the state commissions have rejected those requests. As the Iowa Utilities Board explained:

Ultimately, the FCC may decide in the IP-Enabled Services rule making that the type of VoIP calling involved in this case is an information service subject to exclusive regulation, but it could classify such VoIP calling as a telecommunications service. Either way, the FCC has not yet made this classification and Sprint’s decision to stop paying the intrastate access charges under Iowa Telecom’s tariff was premature. It would be premature for the Board to try to anticipate any conclusions the FCC might make in the IP-Enabled Services NPRM.¹⁸

Commissioner Copps as stating that “the exact time table may be in flux”). The FCC has failed repeatedly to adopt intercarrier compensation reform, even when, as FCC Commissioner McDowell noted in his separate statement on the *Intercarrier Compensation Notice*, “four commissioners, two Democrats and two Republicans (myself included) agreed in principle” on how to proceed. *Intercarrier Compensation Notice*, Statement of Commissioner Robert M. McDowell, at 1. Given this tortuous history, it is perilous to predict the timing of FCC action on intercarrier compensation reform.

¹⁵ *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).

¹⁶ *See Global NAPs California, Inc. v. Public Util. Comm’n of Cal.*, 2010 U.S. Dist LEXIS 16096 *5-6.

¹⁷ *North County Communs. Corp. v. Cal. Catalog & Tech.*, 594 F.3d 1149, 1155-1156 (9th Cir. 2010) (quoting *W. Radio Servs. Co. v. Qwest Corp.*, 530 F.3d 1186, 1200 (9th Cir. 2008)).

¹⁸ *Sprint Communications Company, L.P. v. Iowa Telecommunications Services, Inc.*, Order, Docket No. FCU-2010-0001 (Ia. Util. Bd., Feb. 4, 2011) at 35.

Similarly, the South Dakota Public Service Commission rejected a request for stay made by Verizon – using arguments very similar to those Verizon has made here – in a complaint proceeding initiated by Midcontinent Communications and Knology after Verizon refused to pay tariffed access charges.¹⁹

Finally, the Motion presumes that this matter is, in fact, within the FCC’s jurisdiction and not the Commission’s. However, the Commission already has decided that it has jurisdiction over disputes between carriers that involve intrastate voice over IP traffic, and that conclusion has been affirmed by the Ninth Circuit.²⁰ Granting the Motion would effectively repudiate that decision, which is neither legally sound nor permissible. Rather, absent an affirmative demonstration of the FCC’s authority, the presumption should be that the Commission has jurisdiction to decide the issues presented in this proceeding. Indeed, this is what the Ninth Circuit decided in a case involving ISP-bound traffic, when it held that in the absence of a FCC decision that invalidated or prohibited the Commission’s actions, the Commission was empowered to arbitrate issues involving ISP-bound traffic, even though the FCC later held that traffic to be interstate in nature.²¹

III. There Are Significant Issues in This Proceeding That Are Unaffected by the FCC’s Intercarrier Compensation Proceeding.

The central premise of the Motion is that any FCC decision in the intercarrier compensation proceeding will, in effect, decide all of the issues in this case as well. As shown

¹⁹ Complaint filed by Midcontinent Communications, Knology of the Plains, Inc. and Knology of the Black Hills, LLC, against MCI Communications Services, d/b/a Verizon Business Services for Unpaid Access Charges, *Order Denying Request to Stay Proceedings*, TC10-096 (S.D. Pub. Svc. Comm’n, Mar. 14, 2011).

²⁰ See *Global NAPS California, Inc. v. Public Utilities Commission of the State of California*, 624 F.3d 1225 (9th Cir. 2010). The Commission has followed its precedent in that case in a subsequent decision. *Pacific Bell Tel. Company v. Global NAPS California, Inc.*, D.08-09-027 (Nov. 19, 2007), *rehearing denied* D.09-01-038. As noted in the Complaint, every other state commission to consider this question has reached the same conclusion. See Complaint, ¶ 54 & n. 9 (citing cases in five states).

²¹ *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1130-31 & n. 14 (9th Cir. 2003).

above, that is incorrect because it is extremely likely that the FCC will adopt rules that address only future traffic exchanges, and the Complaint addresses traffic exchanged *before* any FCC rules become effective. Verizon also fails to acknowledge that there are issues in this proceeding that would be unaffected by any FCC decision in the intercarrier compensation proceeding.

First, the intercarrier compensation proceeding has nothing to do with the dispute concerning Verizon's improper revision in the PIU factor, which substantially changed the mix of interstate and intrastate traffic and significantly reduced Verizon's access charges.²² Indeed, the Motion does not even mention this part of the Complaint. Thus, the Motion provides no basis to dismiss or defer consideration of the Complaint as to the PIU issue.

Second, a substantial fraction of the access traffic exchanged between Cox and Verizon is, as Verizon knows, neither IP-originated nor IP-terminated.²³ This traffic will be unaffected by any FCC decision concerning IP-based traffic. Moreover, because any changes that the FCC makes in the overall access regime will be forward-looking, there is no chance at all that an intercarrier compensation reform order will affect Cox's rights to be paid for the access services it provides as to wholly circuit-switched traffic.²⁴ As a result, there is no basis to defer consideration of the Complaint as to circuit-switched traffic.

Third, as Verizon concedes in the Motion, some of the traffic that is the subject of this complaint is covered by interconnection agreements.²⁵ The Commission already has concluded

²² See Complaint, ¶¶ 45-46.

²³ See *id.*, ¶ 28. In fact, and as described in the Complaint, *all* of the traffic that is exchanged between Cox and Verizon is exchanged in TDM format, and all of that traffic is routed by Cox via a standard circuit switch. *Id.*, ¶¶ 24-26.

²⁴ See, e.g., *Inter-carrier Compensation Notice*, ¶ 17 (describing FCC intent to avoid "flash cuts" and to employ transitions and glide paths from current regime).

²⁵ See Complaint, ¶¶ 30-36; Motion at 3, n. 6.

that disputes concerning interconnection agreements and, specifically, disputes concerning whether an interconnection agreement covers IP-based traffic, fall within its jurisdiction.²⁶

Moreover, the FCC has made it clear that it does not intend to overturn existing agreements concerning intercarrier compensation. For instance, the *Intercarrier Compensation Notice* states that “nothing in the instant Notice should be read to encourage, during the pendency of this proceeding, unilateral action to disrupt existing commercial arrangements regarding compensation for interconnected VoIP traffic.”²⁷ In other words, the FCC expects that existing agreements will be honored until such time as any rules it may adopt mandate a different regime.

Thus, a substantial number of the issues in this proceeding are entirely independent of any FCC decision in the intercarrier compensation rulemaking. Deferring action on those issues would serve only to delay Verizon’s obligation to pay, and would not result in any countervailing benefits for Cox or the Commission.

IV. Verizon’s Other Reasons to Defer this Proceeding Are Insubstantial.

Verizon offers two other reasons to defer this proceeding: that deferral would facilitate negotiations between the parties and that Cox would be better off in a federal forum because a substantial part of the traffic that is disputed is subject to Cox’s interstate tariff.²⁸ Neither of these claims has any basis.

First, there is no reason to think that negotiation would be advanced by dismissal or deferral of this proceeding. Verizon’s position as to what it should pay has not changed in any meaningful way since the disputes began, and it provides no reason to think its position ever

²⁶ *Cox California Telcom, LLC (U-5684-C), Complainant vs. Global NAPs California, Inc. (U-6449-C), Defendant*; Case 06-04-026; Decision (D.) 07-01-004 (Opinion Granting Complainant’s Motion For Summary Judgment) and Decision 07-08-031 (denying rehearing of Decision 07-01-004), as Modified.

²⁷ *Intercarrier Compensation Notice*, ¶ 614.

²⁸ Motion at 3.

will change. For instance, as detailed in the Complaint, Verizon has refused to provide data to support its alteration of the PIU factor, and in the 16 months between the time it changed the PIU and the time Cox filed the complaint, the dispute was not resolved.²⁹

As for the dispute concerning IP-originated and -terminated traffic, the Motion itself demonstrates that negotiation almost certainly would be futile. Verizon’s “successful” negotiations were with providers that were willing to accept a rate of \$0.0007 per minute for IP-based traffic, which is the rate that Verizon unilaterally decided to impose on Cox last summer (and has been paying since that time).³⁰ The Motion makes Verizon’s position clear, which is that it is willing to negotiate Cox’s surrender to Verizon’s terms, not a real settlement. Indeed, if Verizon wished to resolve or at least narrow the pending disputes, it would have already paid Cox for all circuit-switched traffic, which is not subject to Verizon’s claims concerning IP-based traffic.

In short, and contrary to Verizon’s claim, the purpose of the Complaint was not “to gain leverage” over Verizon, but to resolve disputes that the parties had attempted to resolve but could not resolve over a period of months. The Complaint changes nothing, and Verizon’s suggestion that negotiation would be facilitated by dismissal or deferral is, therefore, false.

Verizon also argues that “judicial efficiency considerations” are implicated because Cox can receive “complete relief” only from a federal forum.³¹ This is nonsense. Cox could receive complete relief from the FCC only if two premises are true: (1) that the traffic at issue here will be deemed to be IP-based, even though it is exchanged in TDM format and through circuit switches; and (2) that the FCC has exclusive jurisdiction over all IP-based traffic. However,

²⁹ Complaint, ¶¶ 47, 52.

³⁰ Motion at 3.

³¹ *Id.*

neither of these premises is established; rather, they simply are Verizon's own arguments for its conclusion that it does not need to pay access charges on the traffic in dispute. Moreover, if either of them is incorrect (as they are), Cox could not obtain complete relief from the FCC, since the FCC is barred by Section 2(b) of the Communications Act from delving into matters concerning intrastate services.³²

It may be that Verizon believes that Cox would be better off filing suit in federal court, but it is not clear whether Cox could obtain complete relief in federal court.³³ In any event, the question of what is the best way for Cox to recoup the charges that Verizon refuses to pay is not a matter for Verizon to decide. More significantly, sending California regulatory issues to federal courts would run the risk of inconsistent decisions on state law matters, a risk that is eliminated if the Commission, as the expert agency on state telecommunications law, makes the decisions. Considerations of judicial efficiency plainly favor having an expert agency decide matters within its expertise, rather than having those issues decided by entities with less knowledge of the subject matter.

³² 47 U.S.C. § 152(b); see *Louisiana Pub. Svc. Comm'n*.

³³ For instance, in the absence of complete diversity of the parties, a federal court would have to determine whether state law claims were sufficiently related to the federal claim to justify considering them together. The standard for such determinations is whether the state law claims are "so related to claims in the action within [the district court's] original jurisdiction that they form part of the same case or controversy under Article III." 28 U.S.C. § 1367(a); see *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). See also, *Global NAPs California, Inc. v. Public Util. Comm'n of Cal.*, 2010 U.S. Dist LEXIS 16096.

V. Conclusion.

There is no reason to think that the FCC will decide any of the issues in this proceeding and many of the issues raised by the Complaint are beyond the scope of the *Intercarrier Compensation Notice*. Moreover, stay or dismissal will not facilitate fair negotiations between Cox and Verizon or make it easier for Cox to obtain complete relief.

For all these reasons, the Motion should be denied.

Dated: July 12, 2011

Douglas Garrett
Cox California Telcom, LLC
2200 Powell St., Suite 1035
Emeryville, CA 94608
T: 510.923.6222
E: douglas.garrett@cox.com

Douglas C. Nelson
Senior Counsel
Cox Communications, Inc.
1400 Lake Hearn Drive
Atlanta, GA 30339
T: 404.269.5750
E: douglas.nelson@cox.com

Respectfully submitted,
/s

Margaret L. Tobias
Tobias Law Office
460 Pennsylvania Ave
San Francisco, CA 94107
T: 415.641.7833
E: marg@tobiaslo.com

J.G. Harrington
Dow Lohnes PLLC
1200 New Hampshire Ave, NW, Suite 800
Washington, DC 20036
T: 202.776.2818
E: jharrington@dowlohn.com