

Decision 07-07-022

July 12, 2007

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks.

Rulemaking 93-04-003
(Filed April 7, 1993)

Investigation on the Commission's Own Motion into Open Access and Network Architecture Development of Dominant Carrier Networks.

Investigation 93-04-002
(Filed April 7, 1993)

(Permanent Line Sharing Phase)

ORDER DISMISSING AS MOOT THE APPLICATION FOR REHEARING OF DECISION (D.) 03-01-077 FILED BY THE UTILITY REFORM NETWORK AND GRANTING THE REQUEST FOR WITHDRAWAL OF APPLICATION FOR REHEARING FILED BY VERIZON CALIFORNIA INC.

I. SUMMARY

In this order we dispose of applications for rehearing of Decision (“D.”) 03-01-077 filed by Verizon California, Inc. (“Verizon”) and The Utility Reform Network (“TURN”). On January 30, 2003, we adopted D.03-01-077, Interim Opinion Establishing a Permanent Rate for the High-Frequency Portion of the Loop. In that decision, we ordered Pacific Bell Telephone Company (now AT&T) and Verizon to offer the line sharing unbundled network element (“UNE”). We also adopted a permanent UNE rate of \$0 for the High Frequency Portion of the Loop (“HFPL”) for both Pacific Bell and Verizon.

As explained below, TURN’s application for rehearing is dismissed because it has been made moot by the U.S. District Court’s determination in Pacific Bell

Telephone Co. v. California Public Utilities Commission, Case No. C03-1850SI, and related case Verizon California, Inc. v. California Public Utilities Commission, Case No. C04-3092. In addition, we note that on April 24, 2007, Verizon filed a letter with the Executive Director's office seeking to withdraw its application for rehearing on the grounds that it is moot. We accordingly grant Verizon's request to withdraw its application for rehearing of D.03-01-077.

II. PROCEDURAL BACKGROUND AND DISCUSSION

On December 9, 1999, the Federal Communications Commission ("FCC") released a decision requiring incumbent local exchange carriers ("ILECs") to allow competing local exchange carriers ("CLECs") access to the high frequency portion of the local loop.¹ The FCC found that the HFPL met the statutory definition of a network element, and unbundled it pursuant to §§ 251(d)(2) and 251(c)(3) of the 1996 Telecommunications Act ("Act"). The FCC encouraged states to issue interim arbitration awards setting out the necessary rates, terms, and conditions for access to this UNE. This Commission opened a new phase of the Open Access and Network Architecture Development ("OANAD") proceeding to establish terms and conditions for access to the HFPL, and concluded the interim arbitration phase in September 2000 with D.00-09-074. On May 24, 2002, with our permanent phase well underway, the D.C. Circuit Court vacated and remanded the FCC's Line Sharing Order.² We continued with our proceeding, and on January 30, 2003, we adopted D.03-01-077, Interim Opinion Establishing a Permanent Rate for the High-Frequency Portion of the Loop.

In response to USTA I, the FCC again revised its unbundling rules and issued its Report and Order and Order on Remand and Further Notice of Proposed Rulemaking on August 21, 2003 ("Triennial Review Order" or "TRO"). In this order, the FCC decided to reverse its earlier position on line sharing and eliminated this unbundling

¹ Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 98-147 and 96-98, FCC 99-355, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, Released Dec. 9, 1999 ("Line Sharing Order").

² United States Telecom Association v. FCC (D.C. Cir. 2002) 290 F.3d 415 ("USTA I").

mandate. (*Id.* at ¶ 259.) The FCC rejected its prior finding that lack of separate access to the HFPL would cause impairment. The FCC also observed that many states had priced the HFPL at approximately zero, which, according to the FCC, distorted competitive incentives, discouraged innovative arrangements between voice and data CLECs, and discouraged product differentiation between ILEC and CLEC offerings. Thus, the FCC found that mandatory line sharing was contrary to the Act's pro-competitive goals. In addition, the FCC found substantial competition from cable companies lessened any competitive benefits associated with line sharing. (*Id.* at ¶¶ 262, 263.) The FCC established a three year transition period, whereby CLECs must transition their existing customer base served via the HFPL to new arrangements, with the price for the HFPL increasing incrementally towards the cost of the loop in the relevant market.

The FCC's Triennial Review Order was quickly challenged in the D.C. Circuit Court. On March 2, 2004, the D.C. Circuit issued its opinion and once again struck down much of the FCC's Order. (See United States Telecom Association v. Federal Communications Commission, et al. (D.C. Cir. 2004) 359 F.3d 554 ("USTA II").) However, with regard to line sharing, the D.C. Circuit determined that the FCC's rules were reasonable and supported by evidence in the record, and therefore upheld those rules. At the time, it was uncertain whether the D.C. Circuit decision would be appealed to and heard by the U.S. Supreme Court.

In the meantime, on March 6, 2003, both Verizon and TURN filed timely applications for rehearing of D.03-01-077, albeit for different reasons. Verizon alleges that the Commission lacks authority under state and federal law to order line sharing as a UNE. Verizon also claims that the zero price for the HFPL is contrary to FCC rules. TURN supports the Decision's conclusion that the HFPL be offered as a UNE, but argues that the zero price violates the FCC's UNE pricing rules, specifically 47 C.F.R. § 51.505(c), as well as § 254(k) of the Act. SBC (previously Pacific Bell, now part of AT&T) filed a motion for a stay of the Decision on February 13, 2003, although it did not

file an application for rehearing of the Decision.³ SBC also filed an action against this Commission in federal district court on April 24, 2003. (See Pacific Bell v. California Public Utilities Commission, Case No. C03-1850 SI.) On July 29, 2004, Verizon also filed a complaint against the Commission in federal district court, seeking declaratory and injunctive relief because D.03-01-077 was inconsistent with the FCC's TRO and substantially prevented the FCC's implementation of the provisions of the 1996 Act. The court issued an order relating the Verizon case (C 04-3092 SI) to the Pacific Bell/SBC case. The court granted the Commission's motion to hold the proceedings in abeyance until the U.S. Supreme Court decided whether it would grant certiorari to review the D.C. Circuit's decision in USTA II.

On October 12, 2004, the U.S. Supreme Court denied certiorari in USTA II. (See AT&T Corp. v. USTA (2004) 125 S.Ct. 316, 2004 U.S. LEXIS 6711.) As a result, on January 14, 2005 Verizon and SBC each filed motions for summary judgment in the related district court actions, renewing their argument that the Commission's requirement to unbundle the HFPL is preempted by the FCC's holding in the TRO.

On April 6, 2005, the district court issued its Order Re: Plaintiffs' Motions for Summary Judgment. The court found that since the Commission's decision was issued nearly one month before the FCC's TRO was released, the Commission's decision did not take into consideration the analysis provided by the FCC, and accordingly its decision conflicted with the TRO in several respects. (See Pacific Bell v. California Public Utilities Commission (04/06/2005) Case No. C 03-1850 SI, slip op. at pp. 7-8.) The court vacated D.03-01-077 and remanded the case back to the Commission in order to make a determination whether HFPL is a UNE that corresponds to the policies of the TRO and the provisions of the 1996 Act, and to adopt pricing requirements that comply with the TRO. (Id. at pp. 8-9.)

³ We granted a stay of D.03-01-077 on March 16, 2004 in D.04-03-044. We subsequently vacated the stay in D.04-05-022.

As D.03-01-077 has been vacated and remanded to the Commission for further proceedings consistent with the District Court's order, we find that the TURN's application for rehearing of D.03-01-077 is moot.⁴

THEREFORE IT IS ORDERED that:

1. TURN's application for rehearing of Decision (D.) 03-01-077 is dismissed as moot.
2. Verizon's request of April 24, 2007, to withdraw its application for rehearing of Decision 03-01-077 is granted.

This order is effective today.

Dated July 12, 2007 at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
TIMOTHY ALAN SIMON
Commissioners

⁴ Verizon's application for rehearing would also be moot; however, Verizon filed a letter request, withdrawing its rehearing application, which we grant today in this order.