

Decision 01-02-058 February 22, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application and Request of
Roseville Telephone Company (U-1015-C) for
Arbitration of an Interconnection Agreement
With Electric Lightwave, Inc. (U-5377-C)

Application 00-10-040
(Filed October 23, 2000)

O P I N I O N

1. Summary

Roseville Telephone Company (Roseville) on October 23, 2000, requested arbitration of an interconnection agreement with Electric Lightwave, Inc. (ELI). ELI has moved to dismiss the request for arbitration on grounds that it fails to meet requirements of this Commission and of the Federal Communications Commission (FCC). After careful consideration of the pleadings of the parties, and following an Initial Arbitration Meeting conducted on December 1, 2000, we grant the motion to dismiss.

2. Background

On September 7, 2000, the Commission approved an arbitrated agreement between Roseville and Pac-West Telecomm, Inc. (Pac-West). Pursuant to Commission policy, the agreement required payment of reciprocal compensation by Roseville for Internet service provider (ISP) calls originating on Roseville's network and delivered to Pac-West for termination. Pac-West submitted its

executed agreement to the Telecommunications Division on September 20, 2000, by advice letter.¹

On October 6, 2000, ELI filed an advice letter pursuant to Rule 7.1 of the Commission's interconnection rules (Resolution ALJ-181), exercising its right to adopt the Pac-West agreement with Roseville in its entirety.² On October 10, 2000, Roseville filed an application for rehearing of the Commission's decision approving the Pac-West agreement. On October 23, 2000, Roseville filed its request for arbitration of the interconnection agreement with ELI.

In its request for arbitration, Roseville does not dispute ELI's right to interconnect with Roseville for exchange of traffic. In fact, Roseville has been interconnected with ELI for exchange of traffic since October 1996 on a bill-and-keep basis. In a bill-and-keep arrangement, there is no reciprocal compensation, and each party bears its own costs of terminating calls that originated with the other.

Roseville, however, seeks to have the Commission prohibit ELI from adopting that portion of the Pac-West agreement providing for reciprocal compensation for ISP traffic. Instead, Roseville would have the Commission compel ELI to accept a bill-and-keep arrangement for this traffic.

¹ Pac-West Advice Letter No. 79 (September 20, 2000).

² Section 252(i) of the Telecommunications Act of 1996 provides that an incumbent local exchange carrier must "make available any interconnection, service, or network element provided under an agreement approved under this section...to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." (47 U.S.C. § 252(i).) Rule 7.1 of Resolution ALJ-181 implements this provision, authorizing a competitive local exchange carrier to adopt by advice letter either individual provisions of an approved interconnection agreement or the agreement in its entirety.

ELI moved to dismiss Roseville's request for arbitration on November 9, 2000.³ Roseville filed its opposition to the motion on November 27, 2000, and ELI, with the permission of the arbitrator/administrative law judge, filed a reply on November 30, 2000. At an Initial Arbitration Meeting conducted on December 1, 2000, the parties agreed that they would waive the nine-month deadline for a decision in the arbitration⁴ so that the Commission first could consider the motion to dismiss.

3. Requirements for "Opt-In" Arbitration

When an incumbent local exchange carrier like Roseville seeks arbitration with another carrier that seeks to "opt in" to an existing interconnection agreement, special rules apply.

Rule 7.2 of the Commission's Resolution ALJ-181, reflecting federal requirements, sets forth the applicable rules as follows:

³ ELI filed a motion to dismiss or, in the alternative, ELI's response to the request for arbitration. Under Rule 2.1(f) of the Rules of Practice and Procedure, a motion to dismiss and a response to a pleading arguably should have been filed as two separate pleadings. In the interest of efficiency, and pursuant to Rule 87, we will waive that requirement as to ELI's combined pleading and accept the pleading as a motion to dismiss.

⁴ Pursuant to § 252(b)(1) of the Telecommunications Act, a party to interconnection negotiations may petition a state commission for arbitration during the period from the 135th day to the 160th day after the date on which the parties commenced negotiations under § 251 of the Act. Under § 252(b)(4)(C) of the Act, a state commission is to conclude an arbitration proceeding not later than nine months after the date on which the parties commenced negotiations. The parties agree that a reasonable interpretation of these provisions would require the Commission to conclude the arbitration by February 10, 2001.

“Rule 7.2. Incumbent Local Exchange Carrier’s Response

“Within 15 days of its receipt of the Advice Letter or Letter of Intent, the ILEC [incumbent local exchange carrier] shall either send the requesting carrier a letter approving its request or file a request for arbitration based solely on the requirements in [47 C.F.R.] § 51.809:

“a. Any individual interconnection, service, or network element arrangement contained in any agreement approved by the Commission pursuant to Section 252 of the Telecommunications Act of 1996, must be made available upon the same rates, terms, and conditions as those provided in the agreement.

“b. The obligations of section (a) above shall not apply where the ILEC proves to the state commission that:

“(1) The costs of providing a particular interconnection, service, or element to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement.

“(2) The provision of a particular interconnection, service, or element to the requesting carrier is not technically feasible.”

The requirements of Rule 7.2(b)(1) and (2) are identical to those of the FCC, as set forth in 47 C.F.R. § 51.809. Rule 7.3.1 of Resolution ALJ-181 establishes the burden of proof as follows:

“In any application for arbitration filed pursuant to Rule 7, the ILEC has the burden of proof that the carrier’s request does not meet the requirements of § 51.809. The ILEC’s request for arbitration must include facts and evidence that its request for arbitration is consistent with the requirements of § 51.809 and Rule 7.2.”

4. Discussion

Roseville has the burden of showing that its request for arbitration complies with FCC and Commission requirements. The threshold requirement for a request for arbitration under Rule 7.2 and 47 C.F.R. § 51.809 is that the applicant must prove either (1) that the costs of providing interconnection to the requesting carrier are greater than the costs of providing interconnection to the carrier that originally negotiated the agreement, or (2) that the particular interconnection requested by a carrier is not technically feasible.

Roseville concedes that technical feasibility is not an issue and therefore it does not seek arbitration under that provision. Rather, Roseville seeks arbitration solely on the grounds that the costs of providing interconnection to ELI will be greater than those of providing interconnection only to Pac-West. (47 C.F.R. § 51.809(b)(1).)

By its terms, § 51.809(b)(1) applies only in a situation where due to the differing circumstances of the carrier requesting adoption, the costs of providing service to that carrier would be higher than for the original carrier.⁵ In this case, Roseville does not argue that there are special circumstances related to the provision of service to ELI such that Roseville will incur greater costs in providing interconnection services to ELI pursuant to the Pac-West agreement than it will in providing Pac-West those same services. Roseville simply argues that its general costs of providing reciprocal compensation for ISP-bound traffic

⁵ In promulgating § 51.809(b)(1), the FCC concluded that § 252(i) of the Telecommunications Act was intended to “require that publicly filed agreements be made available only to carriers who cause the incumbent LEC to incur no greater costs than the carrier who originally negotiated the agreement....” (*First Report and Order*, CC Dkt. 96-98 at ¶ 1317 (FCC August 8, 1996).)

will increase if competitive local exchange carriers like ELI are allowed to adopt the agreement and its ISP compensation requirements.

Roseville's position that its costs, cumulatively, will increase as other carriers adopt the Pac-West agreement does not conform to the plain language of § 51.809(b)(1) and Rule 7.2(b)(1). Even granting that Roseville will experience a general increase in costs of this nature, such a claim regarding its costs of compliance is not grounds for application of § 51.809(b)(1) and Rule 7.2(b)(1) and does not present any issue for arbitration between these individual carriers.

Roseville also asserts that the Commission should stay the reciprocal compensation provisions of the Pac-West agreement with regard to ELI until the FCC rules further, or until the Commission issues a decision on Roseville's application for rehearing of the Pac-West agreement and in the Commission's reciprocal compensation proceeding (Rulemaking 00-02-005). Roseville argues that Commission action in any of these proceedings could "substantially revise the Commission's policy on reciprocal compensation" and that the Commission should prevent ELI from fully adopting the Pac-West agreement until these proceedings are completed.

The narrowly tailored provisions of our Rule 7.2(b) and of 47 C.F.R. § 51.809 do not provide an exception to Roseville's interconnection obligations on the grounds of regulatory developments which may or may not take place in the future. Regardless of the merits of Roseville's contentions, an arbitration under Rule 7 is not the forum in which to raise them. As we stated in the Pac-West decision (D.00-09-032):

"[U]nless and until we adopt a new policy in our rulemaking proceeding, or until the matter is otherwise decided at the federal level, the Commission's current policy requiring the payment of reciprocal compensation for ISP traffic remains in

effect and will be followed here. The Commission's OIR and the FCC proceeding are the more appropriate forums in which to consider a change in policy on ISP compensation....”
(D.00-09-032, slip op. at 10.)

Because Roseville has failed to make the showing required by Rule 7.2(b) and by 47 C.F.R. §51.809 for arbitration of ELI's request to adopt the interconnection agreement between Roseville and Pac-West, the motion to dismiss Roseville's application for arbitration is granted. Pursuant to Rule 7.3.2, Roseville shall honor ELI's adoption of the terms of the Pac-West agreement with Roseville in its entirety as of the date of the filing of ELI's request.

This proceeding is closed.

5. Comments on Draft Decision

The draft decision of the arbitrator/administrative law judge in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. ELI urges adoption of the draft decision. Roseville comments that if the Commission adopts the draft decision, it should change the effective date of ELI's adoption of the arbitration agreement to October 23, 2000, in conformance with Rules 7.2 and 7.3 of Resolution ALJ -181. That change has been made in Ordering Paragraph 2.

Findings of Fact

1. On September 7, 2000, the Commission approved an arbitrated agreement between Roseville and Pac-West.
2. The agreement between Roseville and Pac-West requires payment of reciprocal compensation by Roseville for ISP calls originating on Roseville's network and delivered to Pac-West for termination.

3. On October 6, 2000, ELI filed an advice letter pursuant to Rule 7.1 of the Commission's interconnection rules seeking to adopt the Pac-West agreement with Roseville in its entirety.

4. On October 23, 2000, Roseville filed a request for arbitration of an interconnection agreement with ELI.

5. Under Rule 7.2(b) and 47 C.F.R. § 51.809, Roseville in its request for arbitration must show either (1) that the costs of providing interconnection to ELI are greater than the costs of providing interconnection to Pac-West, or (2) that the ELI connection is not technically feasible.

6. The ELI connection is technically feasible.

7. Roseville has not shown that costs of providing interconnection to ELI are greater than the costs of providing interconnection to Pac-West.

8. ELI has moved to dismiss Roseville's request for arbitration on grounds that it does not meet the requirements of Rule 7.2(b) and 47 C.F.R. § 51.809.

Conclusions of Law

1. The motion to dismiss Roseville's request for arbitration should be granted.

2. Pursuant to Rule 7.3.2, Roseville should be directed to honor ELI's adoption of the terms of the Pac-West agreement with Roseville in its entirety.

O R D E R

IT IS ORDERED that:

1. The motion of Electric Lightwave, Inc. (ELI) to dismiss the request for arbitration of Roseville Telephone Company (Roseville) is granted.

2. Roseville is directed to honor ELI's adoption of the terms of Roseville's arbitration agreement with Pac-West Telecomm, Inc. as of October 23, 2000, in conformance with Rules 7.2 and 7.3 of Resolution ALJ-181.

3. Application 00-10-040 is closed.

This order is effective today.

Dated February 22, 2001, at San Francisco, California.

LORETTA M. LYNCH

President

HENRY M. DUQUE

RICHARD A. BILAS

CARL W. WOOD

GEOFFREY F. BROWN

Commissioners