

Decision 01-09-053 September 20, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Complaint of MFS Intelnet of California, Inc.
(U 5172 C) against Pacific Bell (U 1001 C) and
Request for Temporary Restraining Order and
Preliminary Injunction.

Case 97-09-032
(Filed September 19, 1997)

**OPINION RESOLVING PETITION FOR
MODIFICATION OF D.00-04-034**

1. Summary

We grant the petition to modify Decision (D.) 00-04-034 filed by MCI WorldCom Communications, Inc. (MCI), the successor in interest to MFS Intelnet of California, Inc. (MFS), and direct Pacific Bell (Pacific) to pay MCI interest on the underlying contractual obligation at the rate of 10 percent per annum, as required by Civ. Code § 3289.

2. Procedural Background

Ordering Paragraph 3 of D.00-04-034 provides:

3. Pacific Bell shall pay MCI all reciprocal compensation, and accrued interest, withheld under Section VI.B.4.d of the co-carrier agreement, filed as Advice Letter 17879A, for termination of traffic routed to MFS/MCI customers who are internet service providers.

MCI filed a petition for modification of D.00-04-034 on April 4, 2001, which seeks clarification that the appropriate rate of interest is 10 percent per annum. Pacific filed an opposition on May 7 and MCI filed a reply on May 17.

3. Factual Background

The pleadings relate that on March 29, 2000, just prior to issuance of D.00-04-034, Pacific paid MCI the principal it had withheld pending resolution of the parties' contractual dispute over payment of reciprocal compensation for termination of calls to internet service providers, known as ISPs. Pacific also paid MFS interest in the amount of \$3,910,845.00. According to MCI, as of March 29, 2000, Pacific owed \$10,899,484.63 in interest on the principal (at 10 percent per annum), and thus, Pacific's payment was short by \$6,988,639.63. Pacific had held the principal in an escrow account where it earned interest at a rate of less than 10 percent per annum. According to Pacific, by dispersing to MCI the principal and all interest which had been earned in the escrow account as of March 29, 2000, Pacific fully discharged its obligation.

Pacific had previously filed an action in the San Francisco Superior Court against MFS over the parties' co-carrier agreement dispute, and that proceeding was stayed pending final determination of MFS' complaint at the Commission. When Pacific refused to pay additional interest in the spring of 2000, MCI sought enforcement of the Commission's order by filing a cross-claim to Pacific's original Superior Court claim. Pacific filed a demurrer to the cross-claim and MCI filed a motion for summary judgment. The Superior Court heard both motions on November 20, 2000. While the Superior Court agreed with MCI that 10 percent per annum is the statutory rate for calculating prejudgment interest on breach of contract under Civ. Code §3289, it recommended that MCI seek clarification of D.00-04-034 from the Commission. The Superior Court advised:

. . . The problem is they [the Commission] didn't specify what the accrued interest is, and what the rate is.

And you know, if it comes from me, its going to be 10 percent, I agree. Because that's, well, I think that's the legal rate of

interest. Though, indeed, the Commission might have different perspective on it. And they made the order, they must have in mind what the interest is. And it seems to me that doesn't require very much in the way of effort for you to go to the PUC and say, "Judge Garcia is somewhat reluctant on his own to award 10 percent. He would like you to tell him if that's what you meant." (MCI petition, Ex. 6. [*Pacific Bell v. MFS Intelenet*, No. 988749, Transcript of Hearing at 4 (Cal. Sup. Ct. Nov. 20, 2000)].)

4. Discussion

We agree that Ordering Paragraph 3 of D.00-04-034 should have clearly specified the interest rate owed for termination of ISP traffic. It is immaterial that the parties' underlying pleadings, which did not argue the issue, led us to conclude that they agreed that the statutorily prescribed rate would apply. Under Civ. Code § 3289, unless the terms of a contract provide otherwise, the legal rate of prejudgment interest for breach of contract is 10 percent per annum.¹

The recent pleadings indicate that the parties strongly disagree over the amount of interest MCI is entitled to receive. Unequivocally, the record on which they rely shows that Pacific paid only part of each MFS reciprocal compensation invoice dated June 20, 1996 through March 10, 2000 and placed the remainder in the escrow account on a monthly basis. Pacific opened the escrow account and made the escrow deposits, voluntarily and unilaterally. The terms of the disputed co-carrier agreement do not require such an escrow deposit. The Commission did not order Pacific to open an escrow. Moreover, at a hearing held before Pacific's San Francisco Superior Court action was stayed, the

¹ See Civ. Code § 3289(b) which provides: "If a contract entered into after January 1, 1986, does not stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10 percent per annum after a breach."

Superior Court denied Pacific's motion for express approval of the escrow. The Superior Court, recognizing that a court-ordered escrow might be perceived as a limitation on the statutory interest rate, stated:

What do we gain by having to put the money in escrow? If it's a breach of contract, you are still going to be – they are still going to be entitled to contract damages and appropriate interest. And I suppose that really is the issue, is what will the measure of interest be if this Court orders that you could put, that you put it into escrow, then I suppose you can make a very good argument at some subsequent point in time that ultimately if the Defendants prevail, that the limit of the measure of interest damages is doing to be the interest that you obtain by having complied with the court order to put it into escrow. (MCI petition, Ex. 2. [*Pacific Bell v. MFS Intelenet*, No. 988749, Transcript of Hearing at 8 (Cal. Sup. Ct. Sept. 22, 1997)].)

Pacific now argues that MCI is barred from demanding interest at 10 percent per annum because in the underlying proceeding at the Commission it asked for "the interest accrued on any amounts Pacific Bell has paid into escrow". (Pacific opposition at 6, citing C.97-09-032, MCI's Sept. 16, 1999 Motion to Supplement Motion for Summary Judgment, p. 19.) According to Pacific, *clearly* MCI sought only – and the Commission directed Pacific to pay only -- "the 'accrued interest' from the escrow account". (See Pacific opposition at 6.) According to MCI, *clearly* it was asking for "interest on that portion of its reciprocal compensation invoices which Pacific Bell had not paid". (See MCI reply at 6.)

Nothing in the record suggests that MFS or MCI determined to forego payment of interest at the statutory rate and accept, instead, interest at the lower rate earned by Pacific's escrow account. While we agree that MCI could have formulated its request more precisely, Pacific's argument remains unpersuasive.

We cannot reasonably interpret MCI's request to mean what Pacific argues it must mean. Thus, as set forth in the ordering paragraphs below, we grant MCI's petition and modify Ordering Paragraph 3 of D.00-04-034.

5. Comments on Draft Decision

The draft decision of the ALJ 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. Pacific filed comments on July 16, 2001, and MCI filed reply comments on July 23, 2001.

Pacific argues that the draft decision commits legal error by failing to address two other arguments Pacific raised in opposition to MCI's petition, namely that MCI should have filed an application for rehearing, which is now legally barred, and that Civ. Code § 3289 is inapplicable to an interconnection agreement created under the Telecommunications Act of 1996. Both arguments continue to be unpersuasive. MCI's petition does not allege legal error in D.00-04-034 but rather, requests clarification of that decision. As such, it comports with Rule 47 of the Commission's Rules of Practice and Procedure. Pacific provides no citation to support its second argument, and we are unaware of any provision in federal law which either prescribes the interest rate which must apply to an interconnection agreement or prohibits the application of state law when the underlying agreement is silent.

Findings of Fact

1. Pacific paid only part of each MFS reciprocal compensation invoice dated June 20, 1996 through March 10, 2000 and placed the remainder in the escrow account on a monthly basis.
2. Pacific opened the escrow account and made the escrow deposits, voluntarily and unilaterally. The terms of the disputed co-carrier agreement do

not require such an escrow deposit; the Commission did not order Pacific to open an escrow; and the San Francisco Superior Court denied Pacific's motion for express approval of the escrow.

3. Nothing in the record suggests that MFS or MCI determined to forego payment of interest at the statutory rate and accept, instead, interest at the lower rate earned by Pacific's escrow account.

Conclusions of Law

1. We should grant MCI's petition and modify Ordering Paragraph 3 of D.00-04-034 to clarify that the legal rate of interest on any reciprocal compensation withheld is 10 percent per annum until the date of payment.

2. In order to ensure expeditious compliance with the ordering paragraphs, this decision should be effective immediately.

O R D E R

IT IS ORDERED that:

1. We grant the petition to modify Decision (D.) 00-04-034 filed on May 17, 2001, by MCI WorldCom Technologies, Inc. (MCI), the successor of MFS Intelnet of California, Inc. (MFS).

2. Ordering Paragraph 3 of D.00-04-034 is modified as follows:

3. Pacific Bell shall pay MCI all reciprocal compensation, withheld under Section VI.B.4.d of the co-carrier agreement, filed as Advice Letter 17879A, for termination of traffic routed to MFS/MCI customers who are internet service providers. Pacific shall also pay MCI interest on any

reciprocal compensation withheld at a rate of 10 percent per annum until the date of payment.

3. This proceeding is closed.

This order is effective today.

Dated September 20, 2001, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners