

Decision 10-02-005 February 4, 2010

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

O1 Communications, Inc. (U6065C),

Complainant,

vs.

Verizon California, Inc. (U1002C),

Defendant.

Case 08-02-013
(Filed February 15, 2008)

ORDER EXTENDING STATUTORY DEADLINE

Pub. Util. Code § 1701.2(d) provides that adjudicatory matters such as this complaint case shall be resolved within 12 months after they are initiated, unless the Commission makes findings why that deadline cannot be met and issues an order extending the 12-month deadline. In this proceeding, the original deadline for resolving the case was February 15, 2009. Through Decision (D.) 09-01-024, that deadline was extended to February 15, 2010.

As we explained in D.09-01-024, the instant matter was the subject of a complex motion to dismiss the complaint, which the former assigned Commissioner and the assigned Administrative Law Judge (ALJ) set out to resolve in a joint ruling issued on March 17, 2009, not long after the issuance of D.09-01-024. However, this ruling led not only to a motion for reconsideration (which was resolved by another joint ruling issued on May 15, 2009), but also to a contentious discovery dispute and a motion to dismiss the amended complaint that complainant eventually filed. The discovery dispute was not resolved until

August 2009, and the dismissal motion (to which it was related) was resolved in a lengthy ruling issued by the ALJ on October 29, 2009.

Now that these preliminary matters have been disposed of, the parties are preparing their written testimony, and hearings are scheduled to be held on February 16-19, 2010.

In view of the unusually contentious and protracted nature of this complex case, we have decided that the deadline for resolving this proceeding should be extended for another 12 months, until February 15, 2011. However, we also hope that since key preliminary issues have now been addressed in the rulings described above, a Presiding Officer's Decision (POD) can be issued in this matter during the Summer of 2010.

1. Background

The original complaint in this case was filed in mid-February 2008. It alleged that under the interconnection agreement (ICA) in effect between complainant O1 Communications, Inc. (O1) and defendant Verizon California, Inc. (Verizon), Verizon owed O1 approximately \$182,500 for terminating calls that were originated by Verizon customers and bound for internet service providers (ISPs) served by O1. More specifically, O1 alleged that it had properly billed Verizon for such calls for the periods August 13-September 30, 2003 and January 1-February 29, 2004, but that Verizon had refused to pay the bills.

On March 26, 2008, Verizon filed both an answer and a motion to dismiss the complaint. In its motion, Verizon argued that it owed nothing to O1 for the periods indicated, because its obligation to pay termination charges for calls originated by Verizon customers bound for ISPs that are O1 customers was

governed by the so-called “ISP Remand Order” issued by the Federal Communications Commission (FCC) in 2001.¹ Under this order, Verizon

¹ The technical citation for the ISP Remand Order is *Order on Remand and Report and Order*, CC Docket Nos. 96-98 and 99-68 (FCC 01-131), released April 27, 2001, 16 FCC Rcd 9151. After its issuance, the United States Court of Appeals for the District of Columbia Circuit found that the statutory provision relied on by the FCC did not support the ISP Remand Order. However, the D.C. Circuit remanded the order to the FCC without vacating it. *Worldcom, Inc. v. FCC*, 288 F.3d 429, 434 (D.C. Cir 2002), *cert. denied sub nom. Core Communications, Inc. v. FCC*, 538 U.S. 1012 (2003). As a result of this unusual procedural posture, the federal courts recognized that the provisions of the ISP Remand Order remained in effect despite the D.C. Circuit’s conclusions about the inadequate statutory analysis. See, e.g., *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1122-23 (9th Cir. 2003).

Two key aspects of the ISP Remand Order – which is sometimes referred to herein as the “FCC Internet Order,” the term Verizon’s pleadings use for it -- were its “rate cap” and its “growth cap.” The FCC explained the rate cap in paragraph 8 of the ISP Remand Order, in which the FCC ruled (among other things) that beginning 25 months after issuance of the order, the rate for terminating ISP-bound traffic (as the FCC defined it) would be \$.0007/MOU. This \$.0007 rate was to continue in effect until 36 months after issuance of the ISP Remand Order or further action by the FCC, whichever occurred later. (16 FCC Rcd at 9156.)

The growth cap was designed to ensure that growth in internet dial-up traffic did not undermine the FCC’s policy of discouraging arbitrage by transitioning from reciprocal compensation rates for ISP-bound traffic to a bill-and-keep regime. Under the growth cap, a local exchange carrier (LEC) could receive the compensation specified in the rate cap only up to a ceiling equal to, on an annualized basis, the ISP-bound minutes for which the LEC would be entitled to compensation under the applicable ICA for the first quarter of 2001. For 2002, the rate cap was the ceiling for 2001 plus a 10% growth factor. For 2003, the growth cap was equal to its 2002 level.

In 2004, in response to a petition from Core Communications, Inc. (Core), the FCC issued an order lifting the growth cap (as well as the so-called “new markets” rule). The formal citation for this order is *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, Order, WC Docket No. 03-171, FCC 04-241, 19 FCC Rcd 20179 (*Core Order*). The lifting of the growth cap and the new markets rule took effect on the release date of the *Core Order*, which was October 18, 2004.

Footnote continued on next page

continued, the complainant had effectively agreed (by opting into the 2003 ICA between Verizon and Pac-West Telecomm, Inc.) that O1 would be bound by the “growth caps” in the ISP Remand Order. Verizon described the growth caps and related “rate caps” as follows:

“The *FCC Internet Order* established a transitional regime to phase out the compensation that previously may have applied to ISP-bound traffic. The *FCC Internet Order* imposed caps on the per-minute rates payable on such traffic, declining toward zero over a 36-month period. The limitations on the per-minute rate that carriers are allowed to charge for ISP-bound traffic are referred to as ‘Rate Caps.’ The FCC also capped the volume of ISP-bound minutes subject to intercarrier compensation in order to ensure that growth in ISP-bound traffic did not undermine the FCC’s intent to transition away from such compensation. These limitations on allowable ISP-bound minutes are known as ‘Growth Caps.’” (Verizon Motion to Dismiss, p. 5.)

In 2004, Core also filed the first of two petitions for mandamus seeking to compel the FCC to issue a new statutory justification for the ISP Remand Order. Although the D.C. Circuit dismissed the first of these petitions without prejudice, it granted the second, and in May 2008 ordered the FCC to explain within six months what its new justification for the ISP Remand Order was. *In re Core Communications, Inc.*, 531 F.3d 849 (D.C. Cir. 2008). On November 5, 2008, the last day on which it could lawfully do so, the FCC responded to the order of mandamus. *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic* (CC Docket Nos. 96-45, 96-98, 99-68, 99-200, 01-92), FCC 08-262, __ FCC Rcd __ (Nov. 5, 2008). In this new justification for the ISP Remand Order, the FCC relied principally on an “end-to-end” analysis under § 201 of the Telecommunications Act, and ruled that the \$.0007/MOU rate cap (as well as the so-called “mirroring rule”) would remain in effect until the agency could adopt more comprehensive intercarrier compensation reform.

Several parties including Core immediately filed petitions for review of the FCC’s updated justification for the ISP Remand Order. Last month, the D.C. Circuit issued its opinion upholding the FCC’s new analysis. *See, Core Communications, Inc. v. FCC*, No. 08-1365 et al., issued January 12, 2010.

After quoting the FCC formula for computing the growth caps, Verizon's motion continued that the growth caps under a given ICA are keyed to the number of minutes exchanged under that ICA during the first quarter of 2001 – a number Verizon referred to as the “Compensable Base.” Verizon continued that it was “axiomatic” that O1 had no Compensable Base under the parties' 2003 ICA, because that ICA did not become effective until two years after the time period used to compute the Compensable Base. Verizon concluded:

“Consequently, because O1 was not and is not entitled to compensation for any minutes of ISP-bound traffic from the first quarter of 2001 under the 2003 ICA . . ., the *FCC Internet Order's* Growth Caps, which are incorporated into the agreement, dictate that O1 was not and is not entitled to any compensation for ISP-bound traffic until the Growth Caps were lifted on October 8, 2004.” (*Id.* at 6.)²

Accordingly, Verizon concluded, the complaint should be dismissed because O1 was not entitled to any compensation for any of the time periods covered by the complaint.

On April 17, 2008, O1 filed its response to the dismissal motion. In the response, O1 did not dispute Verizon's analysis of the ISP Remand Order, but argued that dismissal would be improper because the calls at issue are not governed by the ISP Remand Order. Instead, O1 argued, the traffic at issue in this case consists “almost entirely” of VNXX³ traffic, which several federal courts

² As stated in footnote 1, the FCC lifted the growth caps in the *Core Order*, which became effective on October 18, 2004.

³ “VNXX” stands for “virtual” NXX traffic. In *Verizon California, Inc. v. Peevey*, 462 F.3d 1142, 1148 (9th Cir. 2006), which affirmed a decision of this Commission, the court defined vNXX traffic as follows:

Footnote continued on next page

have held is not governed by the ISP Remand Order. O1 argued that it should be allowed to file an amended complaint making clear that the vast majority of the traffic at issue in this case is VNXX traffic.

On April 28, 2008, with the permission of the ALJ, Verizon filed a reply to O1's response. In its reply, Verizon argued that none of the invoices O1 had submitted to Verizon at the time mentioned VNXX traffic, and that before being allowed to file any amended complaint, O1 should be required to exhaust its remedies under the parties' ICA:

"To the extent O1 is really seeking compensation for vNXX traffic, then it must identify the traffic as such, and submit invoices for that traffic to Verizon; and if a dispute ensues, it must follow the dispute resolution procedures in the 2003 interconnection agreement between Verizon and O1. Under those procedures, O1 has an obligation to negotiate with Verizon prior to filing a complaint. It has not done so with regard to its claimed vNXX traffic, so the Complaint should be dismissed." (Verizon Reply to O1 Response, pp. 2-3.)

On March 17, 2009, Commissioner Chong and ALJ McKenzie issued a 14-page joint ruling addressing the motion to dismiss.⁴ The March 17 Ruling denied the motion, but stated that "we also share Verizon's skepticism about

"VNXX, or 'Virtual Local' codes are NPA-NXX codes that correspond to a particular rate center, but which are actually assigned to a customer located in a different rate center. Thus a call to a VNXX number that appears to the calling party to be a local call is in fact routed to a different calling area. The CPUC has determined that VNXX traffic should be rated to consumers as a local call, meaning that the originating LEC cannot charge the calling customer a toll despite the long-distance nature of the call's physical routing."

⁴ *Joint Assigned Commissioner's and Administrative Law Judge's Ruling Denying Motion to Dismiss*, issued March 17, 2009. Hereinafter, this ruling will be referred to as the "March 17, 2009 Ruling" or the "March 17 Ruling."

O1's claim that virtually all of the traffic in dispute is VNXX traffic, because O1 did not assert this claim until *after* Verizon had filed its motion to dismiss." (March 17 Ruling, p. 3; emphasis in original.) In view of this skepticism, the Ruling continued, O1 would be required to rebill the traffic in question as VNXX traffic, and then meet-and-confer with Verizon pursuant to the dispute resolution provisions of the parties' ICA to determine whether the dispute could be worked out. If it could not, the March 17 Ruling required O1 to file an amended complaint within 60 days, and the litigation would go forward. However, the March 17 Ruling noted that in any such litigation, O1 would have the burden of proving that any traffic for which it was seeking compensation was, in fact, VNXX traffic.

On April 9, 2009, Verizon moved for reconsideration of the March 17 Ruling. First, Verizon argued that the March 17 Ruling should be reconsidered, because that ruling misconstrued California law in holding that claims for VNXX compensation for the 2003 and 2004 traffic at issue would be timely because such claims would "relate back" to the original filing date for this case, *i.e.*, to February 15, 2008. In the alternative, Verizon requested a clarification of certain aspects of the March 17 Ruling, especially the statement in the Ruling that "in its April 28, 2008 reply to O1's response, Verizon . . . seems to concede implicitly that it would be obliged to pay [O1] if the traffic in question were properly-billed VNXX traffic." (March 17, 2009 Ruling, p. 9.) On this question, Verizon stated that it strongly contested O1's claims, and that it intended to move for dismissal or summary judgment at an appropriate time.

On May 15, 2009, Commissioner Chong and ALJ McKenzie issued a 16-page joint ruling denying the motion for reconsideration, but granting Verizon's alternative request for clarification of the March 17 Ruling.⁵ First, the May 15 Ruling rejected Verizon's argument that the March 17 Ruling had misapplied the "relation back" doctrine under California law, concluding that the earlier ruling had properly held that if the parties could not resolve their dispute, O1 should be permitted to file an amended complaint alleging that the traffic at issue was, in fact, VNXX traffic. (May 15 Ruling, pp. 5-10.)

Although it rejected Verizon's position on the relation back doctrine, the May 15 Ruling agreed that clarification of the March 17 Ruling was appropriate. First, the May 15 Ruling agreed that Verizon had not conceded that "it would be obligated to pay O1 for VNXX traffic (billed at reciprocal compensation rates) that O1 originated in late 2003 and early 2004." (*Id.* at 11.) Second, the May 15 Ruling concluded that the March 17 Ruling could not be read as foreclosing Verizon from asserting any of the affirmative defenses in Verizon's original answer against an amended complaint, including defenses that the amended complaint failed to state a cause of action, or that it was barred by the statute of limitations and/or the doctrines of waiver and laches. Third, the Ruling concluded that Verizon was free to argue that any claims in an amended complaint were barred by O1's course of conduct from 2003 to 2007 with respect to billing. (*Id.* at 11-15.)

⁵ *Joint Ruling of Assigned Commissioner and Administrative Law Judge Denying Reconsideration and Offering Clarification of March 17, 2009 Ruling*, issued May 15, 2009. Hereinafter, this ruling will be referred to either as the "May 15, 2009 Ruling" or the "May 15 Ruling."

O1 filed an amended complaint on June 11, 2009, which was quickly followed on June 30 by another motion to dismiss. In its new motion, Verizon argued that the amended complaint should be dismissed “as a sanction for O1’s extended and willful violation” of the discovery requirements set forth in the March 17 Ruling, which Verizon read as requiring O1 “to respond within seven days to any discovery request seeking additional information with respect to the traffic at issue.” (June 30 Dismissal Motion, p. 1.) Despite this directive, Verizon continued, “O1 has for more than 70 days refused to produce crucial switch data that Verizon needs to calculate transport fees owed it by O1^[6] – data that are available from no source other than O1.” (*Id.*) In the alternative, Verizon argued that the second and third counts of the amended complaint should be dismissed, because they went beyond the scope of the claims permitted under the relation back doctrine by the March 17 Ruling.

Before ruling on the new dismissal motion, the ALJ convened a prehearing conference (PHC) on July 10, 2009 that dealt in large part with finding ways to provide Verizon with the transport data it was seeking without creating undue burdens for O1. After an extensive discussion, O1 agreed it would produce new data files on July 13 that would, in O1’s view, be responsive to Verizon’s requests. The ALJ scheduled a follow-up conference call for July 23, 2009 to determine whether Verizon concurred that the data to be produced on July 13

⁶ On the question of transport fees, the March 17 Ruling had noted that under the parties’ ICA, “Verizon is entitled to collect transport fees from O1 for VNXX traffic,” and that “by pursuing its claim that ‘virtually all’ of the traffic in dispute in this case is VNXX traffic rather than ISP-bound traffic, O1 will be obligated to pay transport fees connected with such traffic, and may not rely on any statute-of-limitations defense it might otherwise have to avoid paying such transport fees.” (March 17 Ruling, p. 12, n. 7.)

was adequate. The ALJ also pointed out that until the discovery dispute was resolved, it would not be possible to set a hearing schedule for the proceeding. (July 10 PHC Transcript, pp. 29, 43-44.)

During the July 23, 2009 conference call, it became apparent that Verizon did not agree that the additional data produced on July 13 was sufficient. Verizon's representatives emphasized repeatedly that without knowing the identity of the switch that "handed off" a particular call to O1 (and the switch's associated trunking group), Verizon could not compute the transport fees due on VNXX traffic under its theory of the case. After a contentious discussion, O1 finally agreed that what its general counsel characterized as the "call pattern" for a given call could be used as a proxy for the data Verizon was seeking. At the direction of the ALJ, the parties were instructed to confer further about the proposed proxy assumptions, and on August 7, 2009, O1 provided Verizon with the last set of data Verizon needed to compute the transport fees due under its theory of the case.

On October 29, 2009, the ALJ issued a 26-page ruling that dealt with Verizon's motion to dismiss the amended complaint.⁷ First, the ALJ ruled that complete dismissal of the amended complaint was too harsh a sanction for O1's delay in responding to discovery requests, since (1) Verizon's initial data request had been too broad, (2) it took some time for Verizon to make clear to O1 the nature of the data it was really seeking, and (3) Verizon had failed to enlist the assistance of the ALJ in its dispute with O1, even though this would have been a

⁷ *Administrative Law Judge's Ruling Denying Motion to Dismiss Amended Complaint in Its Entirety, Dismissing Counts 2 and 3 of Amended Complaint, and Imposing Sanctions for Failure to Respond in a Timely Manner to Discovery Requests*, issued October 29, 2009.

less drastic alternative than a dismissal motion, and even though the March 17 Ruling clearly invited Verizon to seek such assistance. However, the ALJ also concluded that because O1 had delayed in producing data that was in its possession even after Verizon had made clear what it was seeking, O1 should be required to pay the reasonable costs of preparing the June 30 dismissal motion to Verizon as a sanction. Finally, the ALJ concluded that the second and third counts of the amended complaint should be dismissed, because (1) the second count dealt with toll traffic, which was not within the scope of the amended complaint authorized by the March 17 Ruling, and (2) the third count sought a declaratory judgment with respect to traffic generated during time periods other than those covered by the original complaint.

On December 1, 2009, the ALJ held a telephonic PHC with the parties to set a hearing schedule. Based on this discussion, the ALJ directed the parties to serve written direct testimony on January 13, 2010 and reply testimony on February 3. Hearings in the case were scheduled for February 16-19, 2010.

2. Discussion

As indicated by the foregoing procedural summary, this case has generated a great deal of motion practice -- and has consumed a large amount of ALJ and Commissioner time -- since the deadline for the proceeding was first extended in D.09-01-024. As noted above, a significant part of this time was consumed by the dispute between O1 and Verizon about the quantity and nature of the data that Verizon was seeking to compute transport fees under its theory of the case. We agree with the opinion the ALJ expressed at the July 10 PHC that until this discovery dispute was resolved, it was not possible to set a hearing schedule for the proceeding.

We are pleased that a hearing schedule has now been set, and that hearings will finally be held in mid-February. As noted in the introduction to this decision, we also hope that it will be possible to issue a POD during the Summer of 2010. However, in order to allow enough time for this unusually contentious proceeding to be adjudicated, we have decided – pursuant to our powers under Pub. Util. Code § 1701.2(d) – to extend the time for resolving this proceeding until February 15, 2011.

3. Waiver of Comments on Proposed Decision

Under Rule 14.6(c)(4) of the Rules of Practice and Procedure, the Commission may waive the otherwise applicable 30-day period for public review and comment on a decision that extends the 12-month deadline set forth in Pub. Util. Code § 1701.2(d). Under the circumstances of this case, it is appropriate to waive the 30-day period for public review and comment.

4. Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and A. Kirk McKenzie is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. The complaint in this case was filed on February 15, 2008.
2. Owing to the urgency of other matters being handled by the assigned ALJ, the 12-month deadline for resolving this proceeding was extended until February 15, 2010 by D.09-01-024.
3. On March 17, 2009, a joint ruling was issued concerning the motion to dismiss the complaint that Verizon had filed on March 26, 2008.
4. On April 9, 2009, Verizon moved for reconsideration of the March 17, 2009 joint ruling.

5. On May 15, 2009, another joint ruling was issued in response to Verizon's motion for reconsideration.

6. Pursuant to the March 17, 2009 Ruling, O1 filed an amended complaint on June 11, 2009.

7. On June 30, 2009, Verizon filed a motion to dismiss the amended complaint, based principally on O1's alleged delay in responding to discovery requests.

8. The assigned ALJ held a PHC on July 10, 2009 and a conference call on July 23, 2009 to deal with the parties' discovery dispute.

9. On October 29, 2009, the assigned ALJ issued a 26-page ruling denying in part and granting in part Verizon's motion to dismiss the amended complaint.

10. Until the parties' discovery dispute and the motion to dismiss the amended complaint were resolved, it was not feasible to set a hearing schedule for this proceeding.

11. Hearings in this case are scheduled to be held on February 16-19, 2010.

12. An extension of time until February 15, 2011 should give the ALJ adequate time to draft a POD, and should allow the losing party or any concerned Commissioner time to decide whether to file an appeal of the POD (or request review thereof) pursuant to Rule 14.4 of the Commission's Rules of Practice and Procedure.

Conclusions of Law

1. Because of the extensive motion practice in this case that followed the issuance of D.09-01-024, it will not be possible to resolve this proceeding by the deadline established in D.09-01-024, which is February 15, 2010.

2. The deadline established in D.09-01-024 should be extended for 12 months to allow for resolution of this proceeding.

IT IS ORDERED that the deadline set forth in Decision 09-01-024 for resolving this proceeding, February 15, 2010, is extended to and including February 15, 2011.

This order is effective today.

Dated February 4, 2010, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
TIMOTHY ALAN SIMON
NANCY E. RYAN
Commissioners