

Decision 10-02-025 February 25, 2010

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Pacific Bell Telephone Company, d/b/a AT&T
California (U1001C),

Complainant,

vs.

O1 Communications, Inc. (U6065C),

Defendant.

Case 08-03-001
(Filed March 4, 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 March 4, 2009. Through Decision (D.) 09-02-018, that deadline was extended to March 4, 2010.

As we explained in D.09-02-018, the instant case presents complex legal and factual issues based on the claim of Pacific Bell Telephone Company d/b/a AT&T California (AT&T) that defendant O1 Communications, Inc. (O1) has wrongly billed AT&T at reciprocal compensation rates for traffic delivered to O1 that is bound for Internet service providers (ISPs), even though such “ISP-bound” traffic is subject to the \$.0007 per minute-of-use (MOU) rate set forth in the “ISP Remand Order” issued by the Federal Communications

Commission (FCC) in 2001.¹ In its complaint, AT&T alleged that under a proper application of the 3:1 ratio set forth in the ISP Remand Order,² the volumes of

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 were its "rate cap" and its "growth cap." The FCC explained the rate cap in paragraph 8 of the order, in which it 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 interconnection agreement (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

traffic AT&T had delivered to O1 that were subject to reciprocal compensation rates were much lower than the volumes O1 had claimed.

As set forth below, there has been a great deal of activity in this case since the issuance of D.09-02-018. Although it initially appeared that the dispute might be amenable to mediation, and then that another case with nearly identical

In 2004, Core also filed the first of two petitions for mandamus seeking to compel the FCC to issue its 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.

² On page 14 of D.06-06-055, *Pac-West Telecomm, Inc. v. AT&T Communications of California, Inc.*, we quoted the following language from paragraph 8 of the ISP Remand Order to describe the purpose and intent behind the 3:1 ratio:

In order to limit disputes and costly measures to identify ISP-bound traffic, we adopt a rebuttable presumption that traffic exchanged between LECs that exceeds a 3:1 ratio of terminating to originating traffic is ISP-bound traffic subject to the compensation mechanism set forth in this Order. This ratio is consistent with those adopted by state commissions to identify ISP or other convergent traffic that is subject to lower intercarrier compensation rates.

facts might be dispositive of many of the issues here, it ultimately became necessary to hold hearings in this proceeding. The hearings took place on November 12, 13, and 16, 2009. The parties have also extensively briefed the issues, submitting briefs on December 18, 2009 and January 15 and 29, 2010.

In view of the contentious and protracted nature of this case, we have decided that the deadline for resolving the proceeding should be extended for another 12 months, until March 4, 2011. However, we also hope that since briefing has now been completed, a Presiding Officer's Decision (POD) can be issued in this matter during the summer of 2010.

1. Factual Background

As noted above, the complaint in this case was filed in March 2008 and alleged that O1 had wrongly billed AT&T at reciprocal compensation rates for ISP-bound traffic delivered by AT&T to O1. AT&T alleged that most of this traffic should not have been billed at reciprocal compensation rates, but at the much lower \$.0007 per MOU rate set forth in the ISP Remand Order. AT&T alleged that it had identified the erroneous billing through "analysis of traffic studies and data supplied by O1," and that these materials indicated that 98% of the total local traffic AT&T delivers to O1 in California is ISP-bound. As relief, AT&T sought "an order requiring [O1] to bill [AT&T], including true-up to the date of this complaint, for the transport and termination of traffic in a manner that is consistent with the results reached by [AT&T's] traffic analysis."

(Complaint at 8-9.) AT&T also requested that the Commission issue an order "requiring the parties to amend the current Interconnection Agreement to implement and effectuate accurate billing on a going-forward basis." (*Id.* at 9.)

O1 filed its answer on April 16, 2008. In the answer, O1 admitted that in July 2003, AT&T had invoked the ISP terminating compensation plan set forth in

the ISP Remand Order, but denied that this plan was applicable to all of the traffic covered by this case. Rather than the ISP Remand Order, O1 contended that the traffic at issue was subject to the terms of the "Appendix Reciprocal Compensation" (RC Appendix) that is part of the ICA in effect between AT&T and O1. Defendant further asserted that all of its billings to AT&T were consistent with the RC Appendix.

O1 also alleged that before addressing the factual disputes in this case, AT&T should be required to comply with the dispute resolution provisions of the ICA, and the Commission should conduct a rulemaking, since this complaint represented the first time AT&T had sought to establish "a methodology for rebuttal of the 3:1 presumption set forth in the ISP Remand Order and determination of the data requirements sufficient to support such a rebuttal of that presumption." (Answer at 7.)

O1 also contended that even after the recommended rulemaking was held and the dispute resolution procedures of the ICA had been exhausted, the Commission would still need to hold hearings to determine such issues as:

- What data should be required to rebut the 3:1 presumption, including the time periods to use, the validity of sampling techniques, and what verification should be required of the records used;
- What methodology and technology should be used to determine if a particular call is actually terminated to an ISP, and how ISPs are to be distinguished from "other Internet-related entities";
- How to distinguish between "ordinary business calls" to ISP customer service and accounting representatives and calls that are actually connected to the Internet; and
- What criteria should be used to distinguish calls to ISPs that

are subject to the ISP Remand Order from those that are not, such as VNXX calls. (*Id.* at 6.)³

2. Procedural History

On March 27, 2009, not long after the issuance D.09-02-018, a prehearing conference (PHC) was held in this proceeding. At the PHC, the parties agreed that it made sense to submit their dispute to mediation. Owing to scheduling difficulties, the first mediation session was not held until June 8, 2009, and it quickly proved unsuccessful.

A second PHC was held on July 17, 2009. At this PHC, it was agreed that many of the issues presented by this case were likely to be resolved by the decision in Case (C.) 08-09-017, a proceeding presenting nearly identical issues

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

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.

Several courts have held that when VNXX traffic is routed to ISPs, the rate caps set forth in the ISP Remand Order do not apply, because the issue before the FCC in the ISP Remand Order was “whether reciprocal compensation obligations apply to the delivery of calls from one LEC’s end-user customer to an ISP *in the same local calling area* that is served by a competing LEC.” (ISP Remand Order, ¶ 13, 16 FCC Rcd at 9159; emphasis added.) See, e.g., *Verizon California, Inc. v. Peevey*, supra, 462 F.3d at 1158-59; *Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 73-74 (1st Cir. 2006); *Global NAPs, Inc. v. Verizon New England, Inc.*, 454 F.3d 91, 99 (2d Cir. 2006); *Qwest Corporation v. Washington State Utilities and Transportation Commission*, 484 F.Supp.2d 1160, 1172-75 (W.D. Wash. 2007).

that AT&T had brought against Pac-West Telecomm, Inc. (Pac-West). Pac-West was another competitive local exchange carrier (CLEC) that had entered into an ICA with AT&T, the same ICA that O1 had chosen to opt into.

In view of the similarity between the two cases, the parties agreed that many of the threshold legal and methodological issues in this proceeding were likely to be resolved by the Commission's decision in C.08-09-017, and the parties noted that a POD in that case was expected to be issued in early August 2009. However, the parties also agreed that they would need discovery on issues unique to this case, and O1 insisted that this proceeding was likely to present some special issues not present in C.08-09-017, such as whether the traffic volumes AT&T was challenging included so many VNXX calls that hearings would be uneconomic.

In order to accommodate the common issues between this case and C.08-09-017 with the issues that were unique to this case, the Administrative Law Judge (ALJ) and the parties agreed upon a schedule that called for the service of opening testimony in early October 2009, with hearings to be held in early December 2009.

The assumptions behind this schedule changed, however, when the parties in C.08-09-017 reached a settlement, and no POD was issued in that proceeding. In response to this, the ALJ sent an e-mail to the parties on September 4, 2009, suggesting that the interval between the service of opening and reply testimony should be shortened, and that hearings should be held during the week of November 9, 2009.

After some discussion, the parties agreed that these changes were feasible, and hearings in the case were ultimately held on November 12, 13, and 16, 2009.

Both parties filed opening briefs on December 18, 2009, reply briefs on January 15, 2010, and rebuttal briefs on January 29, 2010.

3. Discussion

As is evident from the procedural history set forth above, this case has moved expeditiously since issuance of the extension order in D.09-02-018. Although PHCs could not always be scheduled immediately because of the participants' other commitments, the only delay that has occurred since the issuance of D.09-02-018 is attributable to the 10-week interval between the first PHC on March 27, 2009 and the mediation session on June 8, a session that did not result in success.

We are pleased that despite the settlement reached in C.08-09-017, the parties were able to adjust their schedules so that hearings could be held slightly sooner than the dates agreed to immediately after the July 17 PHC. We also hope that since the briefing is now completed, it will be possible to issue a POD in this case sometime during the summer of 2010.

However, in order to allow enough time for the POD to be prepared (and for any ensuing appeal or request for review to be disposed of), we have decided – pursuant to our powers under Pub. Util. Code § 1701.2(d) – to extend the time for resolving this proceeding until March 4, 2011.

4. Waiver of Comments on Proposed Decision

Under Rule 14.6(c)(4) of the Commission's Rules of Practice and Procedure, the Commission may reduce or waive the period for public review and comment of proposed decisions extending the deadline for resolving adjudicatory proceedings. Accordingly, pursuant to this rule, the otherwise applicable period for public review and comment is waived.

5. Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and A. Kirk McKenzie is the assigned ALJ in this proceeding.

Findings of Fact

1. The complaint in this case was filed on March 4, 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 March 4, 2010 by D.09-02-018.
3. On March 27, 2009, a PHC was held at which the parties agreed to submit this matter to mediation.
4. The mediation session was held on June 8, 2009, but was unsuccessful.
5. On July 17, 2009, a second PHC was held, immediately after which a hearing schedule for this proceeding was agreed to.
6. After a settlement was reached in C.08-09-017, the hearing schedule agreed to following the second PHC was modified.
7. Pursuant to the modified schedule, opening and rebuttal testimony were served during October 2009, and hearings in this proceeding were held on November 12, 13, and 16, 2009.
8. Opening briefs were submitted by the parties on December 18, 2009, reply briefs on January 15, 2010, and rebuttal briefs on January 29, 2010.
9. An extension of time until March 4, 2011 should give the assigned ALJ adequate time to draft a POD, and should give the Commission enough time to dispose of any ensuing appeal or request for review pursuant to Rule 14.4 of the Commission's Rules of Practice and Procedure.

Conclusions of Law

1. Because of the delay in holding hearings brought about by scheduling

conflicts and the unsuccessful attempt at mediation, it will not be possible to resolve this proceeding by the deadline established in D.09-02-018, which is March 4, 2010.

2. The deadline established in D.09-02-018 should be extended for 12 months to allow for resolution of this proceeding.

IT IS ORDERED that the deadline set forth in Decision 09-02-018 for resolving this proceeding, March 4, 2010, is extended to and including March 4, 2011.

This order is effective today.

Dated February 25, 2010, at San Francisco, California.

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