

Decision 11-07-032 July 14, 2011

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

XO Communications Services, Inc.
(U5553C),

Complainant,

vs.

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

Defendant.

Case 09-07-021
(Filed July 20, 2009)

**ORDER MODIFYING DECISION (D.) 10-07-005, AND
DENYING REHEARING, AS MODIFIED**

I. INTRODUCTION

In this Order, we dispose of the application for rehearing of Decision (D.) 10-07-005 filed by Pacific Bell Telephone Company d/b/a AT&T California (“AT&T”).

The goal of the Telecommunications Act of 1996 (“ACT”) (Pub. L. No. 104-104 (Feb. 8, 1996) 110 Stat. 56, codified at 47 U.S.C. §§ 151 et. seq.) is to foster rapid development of competition in local telecommunications services. To achieve that goal, the Act requires that incumbent local exchange carriers (“ILECs”) share their networks with competitors seeking entry into the traditionally monopolistic local service market. Specifically, the Act requires that ILECs provide interconnection for the facilities and equipment of the competitive local exchange carriers (“CLECs”).¹ ILECs

¹ 47 U.S.C. § 251(a)(1) & (c)(2). The term ILEC is defined in 47 U.S.C. § 251(h).

also must provide CLECs with nondiscriminatory access to an ILECs' unbundled network elements ("UNEs"),² and allow CLECs to collocate their equipment in ILEC wire centers as necessary to accomplish interconnection.³ Attendant to collocation is the ability for CLECs to cross-connect their equipment with that of other carriers also collocated within an ILEC's premises.⁴ The Federal Communications Commission ("FCC") has held that the Act imposes a general requirement that ILECs bill CLECs for cross connects based on a cost-based pricing methodology termed the Total Element Long-Run Incremental Cost ("TELRIC"), the same cost-based pricing applicable to the provision of interconnection and access to unbundled network elements.⁵

AT&T and XO are telecommunications carriers authorized to do business in California as an ILEC and a CLEC, respectively. Pursuant to the Act and the terms of an interconnection agreement ("ICA"), XO maintains physical collocation in several of AT&T's California wire centers.⁶ In addition, AT&T provides connections which allow XO to cross-connect with various other CLECs collocated in AT&T's premises.⁷ Initially, XO purchased cross connects by ordering the service out of AT&T's federal

² 47 U.S.C. § 251(c)(3).

³ 47 U.S.C. § 251(c)(6). See also *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers* ("Local Competition Order") (1996) 11 FCC Rcd 15499 ¶¶ 26, 27, 28, 594, 595, 629.

⁴ See e.g., *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability* ("Collocation Order") (2001) 16 FCC Rcd 15435 ¶¶ 1, 2, 55-84. ILEC-provided cross connects are required and considered part of the terms and conditions of collocation. (*Id.* at ¶¶ 62, 79, 80, 82.)

⁵ See e.g., *Local Competition Order, supra*, 11 FCC Rcd 15499, at ¶¶ 29, 618-629. See also 47 U.S.C. § 251(c)(2), (c)(3), (c)(6) & (d)(1); 47 C.F.R. §§ 51.501, 51.503 & 51.505.

⁶ Joint Factual Stipulation, dated January 27, 2010, para. 4, 5. The applicable ICA was originally entered into between AT&T and XO's predecessor in interest, Nextlink California, Inc. (See Complaint of XO, filed July 20, 2009, Exh. A.)

⁷ Joint Factual Stipulation, dated January 27, 2010, at para. 6, 7, 8.

special access tariff.⁸ As an example, the tariffed rate for so-called “cage-to-cage interconnection” for a DS3 transport circuit can range as high as \$723.96 per month.⁹

In 2007, XO requested that AT&T convert its pricing for cross connects to lower TELRIC rates.¹⁰ AT&T did so for cross connect service in wire centers that are deemed “impaired” for UNE transport (i.e., non-competitive). However, it continued to bill at the higher tariff rate in “unimpaired” (i.e., competitive) wire centers.¹¹

On approximately January 1, 2008, XO began to withhold any cross connect payment amounts in excess of TELRIC prices.¹² XO and AT&T attempted, unsuccessfully, to resolve the billing dispute informally for over a year. On July 20, 2009, XO filed a formal complaint with this Commission seeking a determination that AT&T must bill for all disputed cross connects at the TELRIC rate rather than the federal special access tariff rate.

In D.10-07-005, we agreed with XO, and directed AT&T to write off any portion of any bill in excess of TELRIC rates after January 1, 2008. (D.10-07-005, at pp. 6-7 [Ordering Paragraph Numbers 1 & 2].)

AT&T filed a timely application for rehearing asserting that the Decision is unlawful because: (1) it violates the Filed Rate Doctrine by requiring AT&T to charge other than the tariff rate; and (2) the Commission impermissibly altered the terms of the ICA. A response was filed by XO.

We have carefully considered the arguments raised in the application for rehearing and are of the opinion that we should modify D.10-07-005 to correct an error regarding what rate AT&T may charge XO for “cage-to-cage interconnection” (or “cross

⁸ Joint Factual Stipulation, dated January 27, 2010, at para. 9.

⁹ Joint Factual Stipulation, dated January 27, 2010, para. 9. [Showing the applicable charges as: \$61.98 (cross connect) 61.98 (cross connect); \$600 (special access transport)].

¹⁰ Joint Factual Stipulation, dated January 27, 2010, at para. 10 [Showing the applicable charges as: \$45.68 (cross connect); \$45.68 (cross connect); \$0 (UNE transport)].

¹¹ Joint Factual Stipulation, dated January 27, 2010, at para. 11.

¹² Joint Factual Stipulation, dated January 27, 2010, at para. 12.

connects”). As discussed below, the Decision is modified to require the disputed charges to be paid in accordance with Section XI of the ICA. Rehearing of D.10-07-005, as modified, is denied.

II. DISCUSSION

A. Filed Rate Doctrine

AT&T contends the Decision violated the Filed Rate Doctrine by requiring AT&T to bill for cross connects at the TELRIC rate rather than the tariff rate under which XO initially purchased service. (Rhg. App., at pp. 1-2, relying on *Evanns v. AT&T Corp. et al.* (“*Evanns*”) (2000) 229 F.3d 837 and *Cahnmann v. Sprint Corp.* (“*Cahnmann*”) (1998) 133 F.3d 484.)

The Filed Rate Doctrine generally provides that a filed tariff is the contract between carriers. Once the tariff is filed and until it is amended, modified, superseded, or disapproved, parties may not deviate from its terms.¹³ AT&T is correct in its statement of these fundamental principles. However, we disagree that the Filed Rate Doctrine is controlling in this instance.

We note that unlike the situation in either *Evanns* or *Cahnmann*, AT&T and XO have an ICA encompassing XO’s physical collocation and cross connect service.¹⁴ As discussed in greater detail below, where there is an applicable ICA, that document controls. The Filed Rate Doctrine, then, only applies to the ICA itself and to the extent the ICA may incorporate any relevant tariff.¹⁵

¹³ See e.g., *Evans, supra*, 229 F.3d, at p. 840; *Cahnmann, supra*, 133 F.3d, at p. 487.

¹⁴ See Joint Factual Stipulation, dated January 27, 2010, at para. 4. See also Complaint of XO, filed July 20, 2009, Exh. A, ICA Between Nextlink California, Inc. and Pacific Bell, Section XI.

¹⁵ See *Verizon Del., Inc. v. Covad Communications Co.* (2004), 377 F.3d 1081, 1089, cited in *McLeodUSA Telecommunications Services, Inc. v. Arizona Corporation Commission* (2009) 755 F.Supp. 2d 1003, 1018.

B. The ICA And Applicable Law

AT&T contends that the ICA does not apply because XO ordered cross connect service under its special access tariff. AT&T argues that even if the ICA applies, the Decision failed to properly apply it since Section XI of the ICA specifically provides that collocation charges are subject to AT&T Tariff 175-T, Section 16. By directing AT&T to instead charge the TELRIC rate, AT&T asserts the Commission unlawfully altered the terms of the ICA. (Rhg. App., at pp. 2-3, relying on *Pacific Bell v. Pac-West Telecomm, Inc.* (2003) 325 F.3d 1114, 1127.)

Our Decision ordered the TELRIC rate based on Section 251(c)(6) of the Act, as well as the FCC's *Local Competition Order* and *Collocation Order*. As previously indicated, these authorities require the ILEC to bill the provision of interconnection, unbundled network elements, and the provision of collocation (e.g. cross connects) at TELRIC cost-based rates.¹⁶ (D.10-07-005, at pp. 2-5.)

The Decision is correct insofar as its statement of the general requirement of the Act. However, we inadvertently overlooked other relevant law which operates to supersede the general requirement when carriers have entered into voluntary ICAs for the provision of service. In particular, Section 252(a)(1) of the Act provides in pertinent part:

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers *without regard to the standards set forth in subsections (b) and (c) of section 251 of this title.*

(47 U.S.C. § 252, subd. (a)(1) (emphasis added).)

Consistent with Section 252(a)(1), the FCC has held that parties may freely negotiate ICA terms without regard to the general pricing requirements of the Act, even where the terms may deviate from the preferred outcomes under the act. (See e.g., *Local Competition Order, supra*, 11 FCC Rcd 15499, at ¶ 66.)

¹⁶ See *ante*, fn. 5.

The Courts have affirmed this result, finding that despite the general requirements of the Act, carriers are free to enter into voluntary ICAs which allow them to opt out of the regulatory regime and depart from the otherwise applicable requirements of the Act.¹⁷

In light of this law we find that to resolve the instant dispute it is necessary to look to the terms of the ICA between AT&T and XO. A review of the ICA confirms that physical collocation service is governed by Section XI of the ICA. In particular, Section XI.A. states:

Pacific will provide for physical collocation of transport and termination equipment necessary for interconnection of CLEC's network facilities to Pacific's network or access to unbundled network elements at its Wire Center premises. Such collocation shall be provided on a nondiscriminatory basis *according to the rates, terms and conditions in Pacific's Schedule Cal.P.U.C. Tariff No. 175-T, Section 16, except as modified below,*¹⁸ (emphasis added)

The case law is clear that ICAs have the binding force of law, and in this case the ICA incorporates Section 16 or Tariff 175-T to control the rate due for collocation and cross connect service. Accordingly, by directing AT&T to collect no more than the TELRIC rate for the disputed cross connects, our Decision erred.

Although we find there is an error, further proceeding is not necessary to resolve this matter because the issue is one of law not fact. Consequently, we modify D.10-07-005 to discuss the overlooked legal principles, and direct XO to pay cross connect charges pursuant to the terms of Section 16 of Tariff 175-T, as adjusted in Section XI.A.1. of the ICA. Those charges should be paid from January 1, 2008, through

¹⁷ See e.g., *Verizon California v. Peevey* (2006) 462 F.3d 1142, 1151; *Verizon New York v. GlobalNAPs, Inc.* (2006) 463 F.Supp.2d 330, 342.

¹⁸ See Complaint of XO, filed July 20, 2009, Exh. A, ICA Between Nextlink California, Inc. and Pacific Bell, Section XI.A.

present. Specific modifications to the text of D.10-07-005 are contained in the Ordering Paragraphs of this Order.

III. CONCLUSION

For the reasons stated above, D.10-07-005 is modified as set forth in the below Ordering Paragraphs of this Order. Rehearing of D.10-07-005, as modified is denied.

THEREFORE, IT IS ORDERED that:

1. Decision 10-07-005 is modified as follows:
 - a. Delete all text in Section 3 beginning with the first full paragraph on page 4 through the end of Section 3 on page 5. Replace with the following language:

“We note that neither AT&T nor XO directly address Section 252(a)(1) which operates to require that when there is an applicable voluntary ICA, that document will determine the rates, terms and conditions of service. In paragraph 66 of the *Local Competition Order*, the FCC specifically found that Section 252(a)(1) affords carrier’s the ability to deviate from the preferred outcomes under the Act. Our review of the ICA between AT&T and XO reveals that Section XI applies to the service in dispute here. That Section of the ICA specifically states that the applicable rates, terms and conditions will be those in Section 16 of AT&T’s P.U.C. Tariff 175-T, as adjusted by the modifications enumerated in Section XI.A.1. of the ICA.

We recognize that ICAs have the binding force of law, and are aware of no circumstances which would defeat the ICA’s application to resolve this dispute. Accordingly, we find that AT&T is entitled to charge XO the rates for collocation (including physical cross connects) that are identified in the ICA. Specifically, from January 1, 2008, through the present XO is directed to pay any withheld charges above the TELRIC rate which are necessary to conform with the rates identified in Section 16 of Tariff 175-T, as adjusted by Section XI.A.1. of the ICA.”

- b. Conclusion of Law 1 is modified to read:

“Section 252(a)(1) of the Act applies to require that the ICA between AT&T and XO governs the rate to be charged for the disputed Service.”

c. Conclusion of Law 2 is modified to read:

“AT&T California must provide cross connection to XO, including cables between cages and main distribution frames, at the rates specified in Section XI of the interconnection agreement and described herein.

d. Conclusion of Law 3 is modified to read:

“From January 1, 2008, through the effective date of this Order, XO owes AT&T any withheld charges for cross connect services in excess of TELRIC rates which are necessary to conform with the rates identified in Section 16 of Tariff 175-T, as adjusted by Section XI.A.1. of the interconnection agreement.”

e. Ordering Paragraph 1 is modified to read:

“Pacific Bell Telephone Company d/b/a AT&T California is entitled to charge XO Communications Services, Inc. the rates identified in Section XI of the interconnection agreement for providing physical cross connect service.”

f. Ordering Paragraph 2 is modified to read:

“From January 1, 2008, XO Communications Services, Inc. shall pay Pacific Bell Telephone Company d/b/a/ AT&T California any withheld charges for cross connect services in excess of TELRIC rates which are necessary to conform with the rates identified in Section 16 of Tariff 175-T, as adjusted by Section XI.A.1. of the interconnection agreement.”

2. Rehearing of D.10-07-005, as modified, is denied.

3. This proceeding, Case (C.) 09-07-021, is closed.

This order is effective today.

Dated July 14, 2011, at San Francisco, California.

MICHAEL R. PEEVEY

President

TIMOTHY ALAN SIMON

MICHEL PETER FLORIO

CATHERINE J.K. SANDOVAL

MARK J. FERRON

Commissioners