

Decision 09-03-016 March 12, 2009

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Blue Casa Communications, Inc. (U6764C),

Complainant,

vs.

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

Defendant.

Case 07-10-015
(Filed October 18, 2007)

Goodin, MacBride, Squeri, Day & Lamprey, LLP,
John L. Clark, Attorney at Law, for Blue Casa
Communications, Inc., complainant.

Mayer Brown, LLP, and Anna Kapetanakos, Michael T. Sullivan,
Attorney at Law, for AT&T California, defendant.

MODIFIED PRESIDING OFFICER'S DECISION DENYING COMPLAINT

Summary

Blue Casa Communications, Inc. (Blue Casa or Complainant) asks the Commission to determine whether Pacific Bell Telephone Company, doing business as AT&T California, has a right under two agreements requiring Blue Casa to pay charges for information services provided to its end-users by third party information service providers. Defendant's motion to dismiss the cause of action arising out of the ancillary private agreement is granted. Complainant's motion to dismiss the cause of action arising out of the interconnection

agreement (ICA) is denied. We find Complainant obligated under the ICA to pay \$267,394.47 for the outstanding 900/976 charges, plus late payment fees, accrued by its end-users between April 7, 2006 and February 7, 2008. This proceeding is closed.

Background

On October 18, 2007, Blue Casa filed a complaint against AT&T California (Defendant) alleging the violation of Pub. Util. Code § 451 and other applicable laws, and seeking injunctive relief. Blue Casa contends that AT&T California's attempts to discontinue or otherwise disrupt its ability to provide service to its existing and new customers are unjust and unreasonable. Blue Casa maintains that AT&T California's actions are because of Blue Casa's refusal to pay amounts claimed owed to AT&T California for 900/976 information services provided by third-party ISPs to Blue Casa end-users.

AT&T California responds that pursuant to the language that Complainant agreed to in both the interconnection agreement (ICA) and the ancillary or Local Wholesale Complete Agreement (LWCA), Blue Casa is liable for 900/976 charges associated with calls made by its end-users. AT&T California further argues that the LWCA is a private contract between the two parties, outside of the Commission's jurisdiction. Consequently, AT&T California urges the Commission to dismiss those portions of the complaint that rely on the LWCA.¹ Blue Casa maintains that its complaint appropriately includes the LWCA, and

¹ AT&T California's Motion to Partially Dismiss Blue Casa Communications' Complaint at p. 8 (December 3, 2007).

the Commission has jurisdiction over it because the agreement involves the services of the public utility.

Concurrent with its complaint, Blue Casa filed an emergency motion for injunctive relief seeking an order prohibiting AT&T California from either discontinuing service to Blue Casa or its customers, or failing to accept and timely complete its wholesale service orders. On October 25, 2007, the assigned Administrative Law Judge (ALJ) convened a hearing on the motion, and directed Blue Casa to substantiate the irreparable harm it faced; to detail its ability to escrow the disputed amount or alternatively post a surety bond; and to meet and confer with AT&T California to see if an accord could be reached to prevent the interruption of services. On November 2, 2007, Blue Casa advised the ALJ that it had agreed upon a payment arrangement with AT&T California to escrow the disputed amount until resolution of the matter.

On December 3, 2007, AT&T California moved the Commission to order Blue Casa to escrow the balance of the amount disputed under the ICA, because Blue Casa had reneged on the second installment of the escrow agreement. Blue Casa reported that it had made alternative arrangements to obtain the services that AT&T California provided to it under the ICA, because it objected to the escrow provision. At the same time, AT&T California urged the Commission to dismiss that portion of the complaint that arises out of the LWCA. Unilaterally, Blue Casa decided to cease payment under the escrow agreement, because it could not be compelled by AT&T California's interruption or discontinuance of services, services which it claims to have subsequently obtained elsewhere. On December 11, 2007, the ALJ directed Blue Casa either to place the remaining disputed funds immediately into escrow, in accordance with the ICA, or to

honor the terms of the escrow agreement. As ordered, Blue Casa reaffirmed the terms of the November 2, 2007 agreement.²

On December 18, 2007, Blue Casa responded to AT&T California's motion, opposing dismissal of the LWCA-related portions of the complaint. On December 19, 2007, Blue Casa moved the Commission to dismiss the ICA-related portions of the complaint and to issue an order releasing the attendant escrowed amounts. On January 3, 2008, AT&T California opposed Blue Casa's request, and urged the Commission to resolve the pending dispute.

On April 2, 2008, the assigned Commissioner issued the Scoping Memo and Ruling of the proceeding, setting forth four issues as the parameter of this dispute and scheduling April 1, 2008 for the evidentiary hearing.

Statement of the Case

AT&T California and Blue Casa are both local exchange carriers operating in California. Since May 2003, Blue Casa has purchased resale and wholesale products and services from AT&T California out of the Resale Appendix of the parties' ICA. Since August 2005, Blue Casa has also purchased a variety of products and services from AT&T California at a discount rate out of the parties' ancillary compact, the LWCA. Using the products and services purchased under these agreements, Blue Casa is in turn able to offer telecommunications services to its own customers.

The charges at issue in this proceeding relate to calls made to 900 and 976 numbers by Blue Casa end-users. Some of these end-users have service as a

² On December 11, 2007, Blue Casa moved for reconsideration of the ruling on the Emergency Motion and the Motion to Require Escrow.

result of resold services that Blue Casa obtains under the ICA's Resale Appendix; others as a result of the AT&T California-Blue Casa LWCA. From early April 2006 through early 2008, certain of Blue Casa's end-users have incurred 900/976 charges and failed to pay them. AT&T California paid the 900/976 invoices submitted by various Information Service Providers (ISPs) and looked to Blue Casa to reimburse it on behalf of the Complainant's end-users that incurred the charges. Blue Casa has refused to pay the charges.

Position of the Parties

Blue Casa denies any responsibility for the unpaid information services' charges of its end-users. It asserts that its relationship with AT&T California was that of an autonomous co-carrier, as it believes is evident from an objective interpretation and comprehensive reading of the ICA and LWCA.

Consequently, Blue Casa insists that it should not be held liable for the ISP charges that AT&T California paid because Complainant failed to place 900/976 call blocking on lines serving the end-users who made chargeable calls to the ISPs. Moreover, Blue Casa contends that AT&T California's payments to the ISPs violated its own tariff, which required AT&T California to block 900/976 calls and withhold payments to ISPs when, as here, it had no billing arrangement for such calls. Blue Casa argues that AT&T California's position is the equivalent of "a special indemnification arrangement," which would be unenforceable on public policy grounds, because it would absolve AT&T California of responsibility for its tariff violation.³

³ Blue Casa Opening Brief at p. 7 (May 14, 2008).

AT&T California maintains that both agreements obligate Blue Casa to pay for all 900/976 calls incurred by its end-users. Defendant notes that the parties' ICA expressly provides that if Blue Casa "does not wish to be responsible for payment of charges for . . . information services (for example, 900) calls, it must order the appropriate blocking for lines provided under the agreement."⁴ Similarly, AT&T California submits that the parties' LWC agreement states that Blue Casa "is solely responsible for 900/976 . . . calls originating from [Blue Casa customer lines] and attributable to LWC Numbers, and associated charges," and that AT&T California will, upon request, provide Blue Casa "the functionality of blocking . . . 900/976 calls on a per-LWCAL basis."⁵ AT&T California further asserts that Blue Casa had all the information necessary to block call capability on all of its customers' lines; yet, failed to do so.

AT&T California contends that Blue Casa understood that it had a contractual obligation to block 900/976 calls and knew how to order the appropriate blocking. Despite this knowledge, Blue Casa failed to make sure that blocks were placed on the lines of any of its customers making 900/976 calls: even after receiving 19 months worth of bills showing that its customers were making such calls and after being told that one customer was making over \$10,000 worth of 900/976 calls month after month. Moreover, Blue Casa declined to dispute most of the 900/976 charges at issue until over a year and half after the challenged charges for 900/976 first appeared on Blue Casa's bills. AT&T California insists that in accordance with the governing agreements, Blue

⁴ AT&T California Opening Brief at p. 1 (May 14, 2008); Exhibit #3 (Fuentes Niziolek Direct-Corrected), Attach. DFN-1, at p. 14 (ICA Resale Appendix, Section 8.13).

⁵ *Id.*, at Attach. DFN-2, at p. 15 (Attachment Local Wholesale Complete, Section 9.1).

Casa should be held responsible for the 900/976 charges Blue Casa's customers incurred, and which AT&T California has already paid to and cannot recover from the ISPs that billed the charges.

Motions to Partially Dismiss

AT&T California urges the Commission to dismiss Blue Casa's claim related to the LWC agreement. It argues that, as opposed to the ICA, the LWC agreement is a private contract outside of the Commission's authority. AT&T California maintains that Blue Casa's allegation that it has acted in violation of Pub. Util. Code § 451 with respect to the LWC agreement is misleading and untrue. Instead, Blue Casa is asking the Commission to adjudicate the breach of a private agreement which properly belongs either in the courts or in commercial arbitration. AT&T California insists that it has not contravened "any provision of law or of any order or rule of the commission." Moreover, the Commission is not the appropriate forum in which to settle a private contract dispute.⁶ In its response, Blue Casa denies that the Commission lacks subject matter jurisdiction over the LWC agreement. Complainant asserts that the Commission has authority over the private agreement because it "directly pertains to the provision of public utility service."

Two weeks later, Blue Casa moved for leave to dismiss its claim related to the ICA because it no longer utilized services purchased under that agreement. Consequently, it has no concerns about AT&T California currently discontinuing services to it, and asks the Commission to release all funds escrowed pursuant to

⁶ See, AT&T California Motion to Partially Dismiss Complaint at pp. 4-7 (December 3, 2007).

the ICA. Contending that the ICA is squarely within the Commission's jurisdiction, AT&T California opposes the motion and asserts that the monies in escrow are owed in payment of a number of ISP charges incurred utilizing services obtained under the ICA.

While the LWC agreement choreographs the logistics of a business relationship with a public utility, the agreement is still a private contract.⁷ As such, disputes regarding the LWC agreement are most appropriately adjudicated in the courts or any other forum agreed to, and included in the accord, by the parties. With respect to the law and the facts of this case, we agree that the cause of action regarding the LWC agreement should be dismissed. The Commission is not the arbiter of private accords, and this specific contract is not a matter over which we have subject matter jurisdiction. Therefore, we shall grant AT&T California's motion and dismiss the cause of action stemming from the LWC agreement.

Blue Casa submits that, in light of it discontinuing serving customers using products acquired from AT&T California under the ICA, the ICA-related claim is moot and the Commission should permit it to voluntarily dismiss the cause of action. But, the matter is not moot; it has become an affirmative defense of AT&T California's. Moreover, granting Blue Casa's request to dismiss this cause of action would only induce AT&T California to counterclaim and file its own complaint. Further, the ICA does not appear to condition Blue Casa's obligation to escrow disputed amounts on whether the carrier is obtaining services under

⁷ The agreement sets forth the terms and conditions for providing "certain non-251/252 telecommunications-related products and/or services." Section 1.1 of the LWCA General Terms and Conditions.

the agreement at the time. Consequently, we will not grant Blue Casa leave to withdraw or dismiss the cause of action derived from the ICA, and we deny Blue Casa's motion to partially dismiss its complaint, as well as its request for related relief.

Discussion

The issue now before the Commission is whether AT&T California has a right under the ICA to require Blue Casa to pay charges for information services provided to Blue Casa's end-users by third party ISPs. The evidence indicates that Complainant is obligated to pay for all 900/976 charges. The AT&T California-Blue Casa ICA expressly provides that if Blue Casa "does not wish to be responsible for payment of charges for . . . information services (for example, 900) calls, it must order the appropriate blocking for lines provided under this Agreement."⁸ Blue Casa witness Oas, company founder and president, testified that he was aware of Complainant's obligation to either pay for 900/976 charges or order blocking for lines incurring such outstanding charges.⁹

Oas stated that in the fall of 2006, the company first observed "a sharp increase in charges that AT&T California was billing Blue Casa in connection with data exchange settlements."¹⁰ Upon investigation, he and AT&T California

⁸ Exhibit 3 (Corrected Direct Testimony of Fuentes Niziolek), Attachment (Attach.) DFN-1, p. 14 (ICA Resale Appendix 8.13).

⁹ Reporter's Transcript (RT), Volume (Vol.) 2, at p. 49, lines (ll.) 10-28 through p. 51, l. 7 (April 1, 2008).

¹⁰ Data exchange settlements "is a mechanism through which billing data is exchanged and revenues are distributed to AT&T California for third-party-billed, collect, and calling card calls chargeable to Blue Casa customers." Direct Testimony of Don Oas at p. 2, ll. 12-16.

discovered that a single Blue Casa customer was responsible for information service (i.e., 900) calls averaging \$10,000 a month since July 2006. Oas testified that Complainant was not obligated to pay the accumulated arrears because it did not have a billing and collection agreement with AT&T California for 900/976 charges.¹¹ Moreover, Oas stated that Blue Casa had difficulties blocking the lines of its “big fraud user”¹² and other customers amassing substantial 900 charges because of AT&T California's business rules and ordering systems.¹³ In addition, he asserted that Complainant believes that the onus was on AT&T California to place “blocking” on any lines that it had failed to block.¹⁴

The record does not support Blue Casa’s view that it is not responsible for the billing and collection of the 900/976 calls made by its customers. The ICA obligated Blue Casa, as well as similarly situated carriers opting into the accord, to pay for the 900/976 associated charges, unless Blue Casa or its equivalent blocked those calls.¹⁵ Blue Casa was aware of the problem because it received bills totaling tens of thousands of dollars from April 2006 through October 2007, when AT&T California gave notice that it would discontinue service for nonpayment of the 900/976 fees. While the evidence shows that no later than December 5, 2006, Blue Casa became aware of the identity of the single customer who was incurring the majority of the disputed 900/976 charges, it also shows

¹¹ Ex. 1 at p. 5, ll. 7-9 (Direct Testimony of Oas).

¹² RT, Vol. 2, at p. 54, ll. 18-20 (April 1, 2008).

¹³ Ex. 1 at p. 6, ll. 3-27.

¹⁴ *Id.*, at p. 6, line 23 through p. 8.

¹⁵ We find Blue Casa's argument that AT&T California's 900/976 Tariff should control in this case to be unpersuasive.

that Blue Casa did not submit to AT&T California a correct Local Service Request (LSR) blocking the problematic single customer until September 13, 2007.¹⁶

There is no indication that Blue Casa attempted to contact the customer, billed it for the 900/976 calls, or conducted any investigation regarding the customer's call activities. While Blue Casa asserts that AT&T California should have mitigated its damages by intervening and blocking the single customer's line, the record indicates that when AT&T California blocked the customer's line (following several erroneous Blue Casa order submissions and rejections), Blue Casa issued an LSR the next day removing the 900/976 block from the problem line.¹⁷ Blue Casa also argues that it has not waived the right to dispute all 900/976 charges billed prior to August 2007 because the dispute provision of the ICA does not apply in this instance. We disagree, and find that the agreement is applicable here. The ICA's dispute provision, which is set forth in Section 29.13.4.1 of the General Terms and Conditions, requires a carrier to provide written notice within 90 calendar days from the billing due date of the objected charges, or it waives the right to dispute them. The record indicates that Blue Casa submitted a formal dispute resolution claim on November 21, 2007, and timely disputed the invoices due on or after August 23, 2007.¹⁸ Consequently, we find Blue Casa fully liable under the ICA

¹⁶ Ex. 15C at p. 8 (Direct Testimony of Frederick C. Christiansen -- Confidential version).

¹⁷ *Id.*

¹⁸ Ex. 3 at p. 12 and Attachments DFN-5 and DFN-5A-B (Direct Testimony of Fuentes Niziolek).

for the outstanding 900/976 charges accrued between April 7, 2006 and February 7, 2008,¹⁹ including late payment fees.²⁰

Appeal of the Presiding Officer's Decision

Complainant has appealed from the decision of the Presiding Officer (POD), alleging three errors. First, it argues that the POD failed to consider all the evidence and arguments presented, and incorrectly applied California law governing contract interpretation. Second, Complainant maintains that the POD erred in finding that Blue Casa was required to follow the procedures set forth in the ICA for disputing AT&T California's bills. Finally, Blue Casa contends that the POD incorrectly concluded that AT&T California is entitled to collect late payment charges based on Complainant's failure to pay its bills for charges associated with its customers' 900/976 calls.

AT&T California responded that the POD appropriately considered the evidence and all of the arguments presented. It asserted that the plain and unambiguous language of the ICA requires Blue Casa to pay for 900/976 charges if Blue Casa decides not to order blocking, and none of the ICA provisions that Blue Casa cites in its appeal changes this conclusion. AT&T California also noted that the clear contractual language of the ICA, as well as common sense, demonstrate that if Blue Casa believed it did not owe AT&T California for the 900/976 charges its own customers incurred, then Blue Casa was under an obligation to file a dispute with AT&T California and follow the procedures set

¹⁹ Totaling \$266,394.47

²⁰ Late payment charges under Sections 34.1.5 and 34.1.5.1 of the General Terms and Conditions of the ICA should total more than \$76,208.45, the amount AT&T California calculated using an assumed payment date of July 31, 2008.

forth in the ICA. In response to Complainant's contention regarding the POD's holding with respect to the late payment charges, AT&T California stated that not only did Blue Casa waive its right to challenge the holding on this point by failing to address late payment charges in its opening or reply briefs, Blue Casa's new arguments do not support its position in any event.

We have thoroughly reviewed the record, and have found that Complainant has not identified any legal or factual errors in the POD; therefore, we affirm the decision.

Assignment of Proceeding

Timothy Alan Simon is the assigned Commissioner and Jacqueline A. Reed is the assigned ALJ in this proceeding.

Findings of Fact

1. Blue Casa and AT&T California entered into two telecommunications services agreements: an ICA and an ancillary accord, the LWCA.
2. The LWCA is a private agreement.
3. Both agreements make a carrier responsible for the payment of unpaid 900/976 charges incurred by its end-users, unless the carrier orders a block placed on the lines of the transgressing end-users.
4. Both agreements require a carrier to submit written notice of any disputed charges within 90-calendar days of the billing due date of the invoice in which the charge appears, and prescribe the carrier must place any disputed amounts in an escrow account.
5. In April 2006, AT&T California began billing Blue Casa for a large volume of 900/976 charges that Blue Casa customers incurred with third-party ISPs.
6. AT&T California reimbursed the third-party ISPs for the charges, which remained unpaid by Blue Casa.

7. In August 2006, Complainant received the first collection notices for outstanding 900/976 charges.

8. In December 2006, Complainant learned the identity of the single Blue Casa customer that was incurring approximately \$10,000 per month in unpaid 900/976 charges.

9. The record indicates that although Blue Casa knew how to successfully order the blocking of 900/976 calls on a line, it did not attempt to specifically order a 900/976 block on its problem customer's line until August 2007.

10. Correcting Complainant's order submission errors, AT&T California placed a block on the Blue Casa line responsible for the majority of outstanding 900/976 charges in early September 2007.

11. A day after AT&T California established the 900/976 line block, Blue Casa removed the block and submitted a valid line blocking request eight days later.

12. In October 2007, Complainant filed the instant complaint asking the Commission to enjoin AT&T California from disconnecting its services or interfering with its provision of services for its customers.

13. In November 2007, Complainant and Defendant settled upon a payment arrangement to escrow the disputed amounts into a separate account until resolution of this matter.

14. In early December 2007, Blue Casa ceased to make payments under the escrow agreement.

15. On December 11, 2007, the Commission directed Blue Casa either to place the remaining disputed funds immediately into escrow, in accordance with the ICA, or to honor the terms of the escrow agreement.

16. On December 14, 2007, Blue Casa reaffirmed the terms of the November 2007 agreement.

17. Blue Casa did not timely dispute all the 900/976 charges billed prior to August 2007.

18. Blue Casa is fully liable under the ICA for the outstanding 900/976 charges accrued between April 7, 2006 and February 7, 2008, including late payment fees.

Conclusions of Law

1. AT&T California's motion to dismiss the cause of action stemming from the LWC agreement should be granted because the Commission is not the arbiter of private accords, and this specific contract is not a matter over which it has subject matter jurisdiction.

2. Blue Casa's motion to dismiss the ICA-related cause of action should be denied because the issue is ripe, and the ICA does not condition Complainant's obligations on whether it is obtaining services under the agreement at the time.

3. Blue Casa is responsible for the payment of the outstanding 900/976 charges accrued by its end-users between April 7, 2006 through February 7, 2008, because it failed to order the appropriate blocking for the associated lines, in accordance with Section 8.13 of the Resale Appendix of the ICA.

4. The specific terms of the ICA's dispute provision are applicable in this proceeding.

5. Blue Casa waived its right to dispute all 900/976 charges accrued by its end-users prior to August 23, 2007, because it failed to submit a formal and timely dispute of the charges to AT&T California, in accordance with Sections 34.4 and 29.13.4.1 of the ICA's General Terms and Conditions.

6. The assessment of late payment charges against Blue Casa is in accordance with Sections 34.1.5 and 34.1.5.1 of the ICA's General Terms and Conditions.

7. Blue Casa should cause the full amount currently escrowed in this proceeding, along with accrued interest, to be released to AT&T California within five business days of the effective date of this Order.

8. Blue Casa should pay AT&T California, via wire transfer, the remaining balance due in this matter within 10 business days of the effective date of this Order.

9. This order should be effective immediately so that the books of account at both companies may be finalized on this matter.

10. This proceeding should be closed.

11. Complainant's appeal of the Presiding Officer's Decision should be denied.

O R D E R

IT IS ORDERED that:

1. The December 3, 2007 Motion of Pacific Bell Telephone Company, doing business as AT&T California, to partially dismiss the complaint of Blue Casa Communications, Inc. (Blue Casa) to the extent that it seeks interpretation and enforcement of these parties' specific Local Wholesale Complete Agreement, a private accord, is granted.

2. The December 19, 2007 Motion of Blue Casa for leave to partially dismiss its complaint regarding the parties' interconnection agreement (ICA) and request for related relief is denied.

3. Blue Casa is obligated under the ICA to pay for the outstanding 900/976 charges, including late payment fees, accrued by its end-users between April 7, 2006 and February 7, 2008.

4. Blue Casa shall pay AT&T California \$267,394.47 for 900/976 charges invoiced under the ICA between April 7, 2006 and February 7, 2008.

5. Blue Casa shall pay AT&T California late payment charges calculated in accordance with Sections 34.1.5 and 34.1.5.1 of the General Terms and Conditions of the ICA.

6. AT&T California shall calculate the late payment charges owing and due and provide the total to Blue Casa within three business days of the effective date of this Order.

7. Blue Casa shall cause the full amount currently escrowed in Case (C.) 07-10-015, along with accrued interest, to be released to AT&T California within five business days of the effective date of this Order.

8. Blue Casa shall pay AT&T California, via wire transfer, the remaining balance due in this matter within 10 business days of the effective date of this Order.

9. Complainant's appeal of the Presiding Officer's Decision is denied.

10. C.07-10-015 is closed.

This order is effective today.

Dated March 12, 2009, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
TIMOTHY ALAN SIMON
Commissioners