STATE OF CALIFORNIA GRAY DAVIS, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

October 3, 2002

TO: PARTIES OF RECORD IN CASE 02-06-032

This proceeding was filed on June 21, 2002, and is assigned to Commissioner Carl Wood and Administrative Law Judge (ALJ) Jeffrey O'Donnell. This is the decision of the Presiding Officer, ALJ O'Donnell.

Any party to this adjudicatory proceeding may file and serve an Appeal of the Presiding Officer's Decision within 30 days of the date of issuance (i.e., the date of mailing) of this decision. In addition, any Commissioner may request review of the Presiding Officer's Decision by filing and serving a Request for Review within 30 days of the date of issuance.

Appeals and Requests for Review must set forth specifically the grounds on which the appellant or requestor believes the Presiding Officer's Decision to be unlawful or erroneous. The purpose of an Appeal or Request for Review is to alert the Commission to a potential error, so that the error may be corrected expeditiously by the Commission. Vague assertions as to the record or the law, without citation, may be accorded little weight.

Appeals and Requests for Review must be served on all parties and accompanied by a certificate of service. Any party may file and serve a Response to an Appeal or Request for Review no later than 15 days after the date the Appeal or Request for Review was filed. In cases of multiple Appeals or Requests for Review, the Response may be to all such filings and may be filed 15 days after the last such Appeal or Request for Review was filed. Replies to Responses are not permitted. (See, generally, Rule 8.2 of the Commission's Rules of Practice and Procedure.)

If no Appeal or Request for Review is filed within 30 days of the date of issuance of the Presiding Officer's Decision, the decision shall become the decision of the Commission. In this event, the Commission will designate a decision number and advise the parties by letter that the Presiding Officer's Decision has become the Commission's decision.

/s/ CAROL A. BROWN
Carol A. Brown, Interim Chief
Administrative Law Judge

CAB:tcg

Attachment

ALJ/JPO/POD/tcg

PRESIDING OFFICER'S DECISION (Mailed 10/3/2002)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

U.S.TelePacific Corp. (U-5721-C), Complainant, vs. Pacific Bell (U 1001 C), Defendant.	Case 02-06-032 (Filed June 21, 2002)

John Clark, Attorney at Law, for U.S.TelePacific Corp., complainant.
Ed Kolto and Kevin W. Coleman, Attorneys at Law, for Pacific Bell, defendant.
Elaine Duncan, Attorney at Law, for Verizon California Inc.; interested party.

OPINION DISMISSING COMPLAINT

Summary

U.S. TelePacific Corp. (UST) complains that Pacific Bell Telephone Company (Pacific) would not allow it to use the collocation facilities and arrangements (collocation facilities) used to serve customers acquired from Advanced TelCom Group, Inc. (ATG) without an explicit transfer from ATG to UST of ATG's collocation leases and other rights. In addition, UST alleges that Pacific refused to begin planning for the migration of any existing unbundled

network elements and related interconnections until the collocation issue is resolved. The parties have agreed to cooperate in planning for the transfer of the acquired customers from ATG to UST using the options proposed by each of them. Therefore, the issue of Pacific's cooperation in planning is moot.

The remaining dispute hinges upon what rights, if any, UST has to the collocation facilities currently used by ATG. We find that UST has not acquired such rights. As a result, Pacific has no obligation to let UST take over the collocation facilities used by ATG. Therefore, we dismiss the complaint because no cause of action exists.

I. Background

On May 2, 2002, ATG filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code (Bankruptcy Code) in the Santa Rosa Division of the U.S. District Court for the Northern District of California (Bankruptcy Court). On June 7, 2002, the Bankruptcy Court approved an asset sale agreement whereby UST will acquire a portion of ATG's customer base, and ATG's facilities used to serve those customers.

The parties did not request hearings in this proceeding. However, on July 9, 2002 evidentiary hearings were held on a motion for interim injunctive relief. The matter was submitted on July 22, 2002.

II. UST's Complaint

UST alleges that Pacific has violated Pub. Util. Code Section 451, its obligations under federal law, and the Commission's decisions that require incumbent local carriers, such as Pacific, to provide interconnections, unbundled network elements, and collocation arrangements to competing carriers, such as UST.

UST asks that Pacific be ordered to cooperatively plan and carry out the migration of the collocation facilities and arrangements used by ATG to UST's account, and other activities necessary to transfer the acquired customers.

In support of its complaint, UST made the following allegations:

1. ATG occupies and uses collocation facilities at certain of Pacific's wire centers pursuant to leases or contracts between ATG and Pacific.
2. ATG has installed its equipment to and within the collocation spaces, and has interconnections between its facilities and Pacific's facilities. These facilities are used by ATG to serve its customers.
3. ATG is currently operating under the protection of the Bankruptcy Code.
4. ATG and UST have entered into an asset sale agreement whereby UST will acquire specified ATG assets, including customer accounts and all of the equipment used to serve the acquired customers.[1]
5. The asset sale agreement was approved by the Bankruptcy Court by an order dated June 7, 2002.
6. UST and ATG filed advice letters seeking approval of the sale and transfer of customers on June 6, 2002.[2]
7. In order for UST to provide service to the acquired customers without interruption, the collocation facilities ATG uses must be migrated to UST's account without any physical changes.

[1] The acquired customers are in the communities of Bishop Ranch, Concord, Danville, Dublin, Livermore, Pleasanton, Walnut Creek, Corte Madera, Ignacio, Mill Valley, Novato, San Rafael, Napa, Sausalito, Calistoga, St. Helena, Belvedere/Tiburon, and Yountville.

[2] UST Advice Letter No. 83 and ATG Advice Letter No. 30. Both advice letters went into effect on July 16, 2002.

8. UST and Pacific are parties to an interconnection agreement that permits UST to occupy and use collocation facilities in the same manner as ATG at the wire centers used by ATG to serve the acquired customers.
9. UST did not enter into an agreement with ATG for the assignment, transfer to, or assumption by UST of ATG's collocation arrangements, collocation agreements, leases or other rights to use Pacific's facilities.
10. UST has agreed to be responsible for Pacific's reasonably incurred costs of migrating ATG's collocation facilities to UST's account. UST has also proposed terms and conditions relating to the migration.
11. UST asked Pacific to cooperatively plan for the above migration.
12. Pacific has stated that it will not allow UST to occupy or use the collocation facilities used by ATG pursuant to the UST interconnection agreement. Pacific has insisted that UST may use the ATG collocation facilities only if there is a transfer or assignment by ATG of the ATG collocation agreements or other rights to UST in a manner that would allow Pacific to collect from UST amounts that have or would be discharged under the Bankruptcy Code. In addition, Pacific refuses to cooperate with UST with respect to migration of other facilities and interconnections that UST will need to serve the acquired customers until UST assumes responsibility for ATG's collocation-related debts.
13. UST believes that its ability to transfer the acquired customers is impaired by Pacific, and that as a result, service may be interrupted.
14. UST claims Pacific's above actions or failures will result in irreparable harm to customers, UST's reputation and good will, and telecommunications competition.

UST says it has the right to access and use the subject collocation facilities under the asset sale agreement and federal law without taking an assignment of ATG's interconnection agreement. UST argues that the right to collocate is an independent right granted to competitive local carriers ("CLCs") by federal law.

Under section 251(c)(6) of the Telecommunications Act of 1996 ("1996 Act"), an incumbent local exchange carrier, such as Pacific Bell has:

> "The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier . . . ."

Thus, UST argues that ATG did not acquire its collocation rights at the subject wire centers through its interconnection agreement. Instead, ATG already had those rights under federal law.

UST believes that ATG's interconnection agreement establishes mutually agreed rates, terms, and conditions for collocation, which are in lieu of the rates, terms, and conditions for collocation specified in Pacific's tariff or in other interconnection agreements that were available to ATG under section 252(i) of the 1996 Act.[3] Therefore, UST says, the right to collocate is distinct from and independent of the specific rates, terms, and conditions for collocation in the interconnection agreement.

UST further argues that ATG can convey specific collocation rights without having to assign its interconnection agreement. In this instance, ATG has not assigned its interconnection agreement to UST. However, the subject collocation rights are intangible assets covered by the catch-all provision of the asset sale agreement that includes within the assets transferred to UST "all other assets, tangible or intangible, directly associated with the markets." Thus, by the asset sale agreement's terms, ATG effectively has conveyed its collocation rights

[3] Section 252(i) provides; "A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."

to UST, even though there has been no attempt to assign ATG's interconnection agreement. Therefore, UST says, the plain language of the asset sale agreement, which must be followed so long as it is clear and not absurd,[4] provides for UST to have the full, unfettered and exclusive right to access and use the subject collocation facilities, and neither ATG nor any potential successor will have any right to stand in UST's way.

UST further argues that its interpretation is consistent with the parties' intent as manifested in other provisions of the asset sale agreement. For example, under section 1.3(b) of the asset sale agreement, UST has agreed to be responsible for various costs accrued on or after June 1, 2002, including "co-location facility costs for the Markets," which contemplates the transfer of collocation rights to UST, rather than their retention by ATG, as Pacific contends. Indeed, under Pacific's view of the asset sale agreement, UST would be on the hook indefinitely for paying ATG's collocation costs without ever having the right to take over the collocation facilities, which is an impermissibly absurd intent to attribute to the asset sale agreement.[5]

III. Pacific's Response

Pacific says that it cannot allow UST to utilize the collocation facilities occupied by ATG because the rights to use them still belong to ATG. It also says that there are alternatives available to UST that would permit UST to provide

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[4] *See,* Civ. Code § 1638. Under ordinary rules of contract construction, where the plain language of "the contract is clear and not absurd, it will be followed." Witkin, 1 Summary of Cal. Law, (9th ed. 1987) § 681 p. 615.

[5] Courts should "avoid an interpretation which will make the contract unusual, extraordinary, harsh, unjust or inequitable [cites]' or which would result in an absurdity [cites]." *Harris v. Clure* (1962) 205 Cal.App.2d 574, 578.

service to the acquired customers. The alternative ways to provide service include resale of Pacific's retail service, and leasing of collocation and related facilities from Pacific.

Pacific says that with the first alternative, customers could be migrated to Pacific's network, and be serviced under a resale agreement or through the leasing of an unbundled network platform. With the second alternative, customers could be migrated to UST's facilities in a virtually seamless manner, using a process Pacific follows with CLCs hundreds of times per day.

Pacific says that the buyer of ATG's remaining California assets is GE Business Productivity Solutions (GE). On June 25, 2002, the Bankruptcy Court gave ATG conditional approval to assign its interconnection agreement to GE. Although GE has not made a final decision to take an assignment of the interconnection agreement, it has until the closing of its sale in September 2002 to do so.[6]

IV. Discussion

At a hearing held on July 9, 2002, the parties agreed to cooperate in planning for the transfer of customers from ATG to UST using the options proposed by each of them. Therefore, the issue of Pacific's cooperation in planning is moot.

The remaining dispute between the parties is over the collocation facilities used by ATG. In its complaint, UST said:

> "All that TelePacific wants to do is to "move in" to the existing collocation cages at the very same time as ATG "moves out" with no changes in any existing interconnections, facilities, or

[6] There were other bidders for the assets to be purchased by GE. Therefore, if the sale to GE falls through, the assets may be sold to another entity.

> other equipment. When TelePacific "moves in," it will begin to pay Pacific Bell's recurring charges for the collocation space and arrangements in accordance with the provisions of its interconnection agreement. In addition, TelePacific will pay any appropriate nonrecurring costs that are incurred by Pacific Bell in order to carry out the migration, such as painting over ATG's name on cages, re-tagging cross-connects, and modifying its records to change the name on facilities assignments."

The key issue is what rights, if any, UST has to the collocation facilities currently used by ATG. UST did not acquire ATG's interconnection agreement. In addition, the asset sale agreement does not specifically say that the rights to the specific collocation facilities, used by ATG to serve the acquired customers, are acquired by UST.

In its complaint, UST said that it "did not enter into an agreement with ATG for the assignment or transfer to, or assumption by TelePacific of the Collocation Arrangements, or any leases or other rights" that ATG may have to use Pacific's network facilities or any other property in which Pacific has an ownership interest. This statement appears to mean that UST did not acquire any of ATG's rights to use Pacific's facilities or property through the asset sale agreement. Therefore, since the collocation facilities are Pacific's property, UST did not acquire the right to use them. As a result, there would be no cause of action. However, in a subsequent pleading, UST asserted that it has the exclusive right to use the collocation facilities used by ATG to serve the affected customers under the asset sale agreement, and federal law, without acquiring ATG's interconnection agreement with Pacific. Notwithstanding the statement in the complaint, we will address UST's subsequent contention.

UST advances two arguments in support of its contention that the asset sale agreement grants it such rights. First, UST says that pursuant to the asset

sale agreement, it assumed certain liabilities. Among those liabilities are ATG's collocation facility costs beginning June 1, 2002. UST argues that it would make no sense for it to assume these liabilities unless it had acquired the attendant collocation rights. Therefore, the asset sale agreement must have assigned it those rights. We disagree.

There is another logical reason why UST might have assumed those liabilities. It may have assumed them in order to ensure that the acquired customers continue to receive service until the purchase is completed. Such an assumption of liabilities may be a reasonable way to prevent customers from being lost by ATG, thereby reducing the value of the purchased assets. Therefore, UST's argument is not persuasive. In addition, we are not convinced that there is a substantial long-term risk to UST due to the liabilities it alleges it assumed.

If the purchase is completed, the acquired customers will become UST's customers and be served through UST's collocation facilities. Since ATG will have no customers, there will be no ongoing ATG collocation costs for UST to pay. The asset sale agreement does not further define what these costs would be. It is possible that they may include costs for decommissioning ATG's collocation facilities. However, there would be no further costs arising out of service to ATG's customers since it would have none. If the purchase is not completed, the asset sale agreement would be terminated, and UST would have no further obligation regarding the liabilities. It is not clear, however, that UST actually assumed the specified liabilities.

The term "Assumed Liabilities" appears only in sections 1.1(c), 3.1(b), and 3.1(c) of the asset sale agreement.[7] It is used only in determining the amount of the purchase price, and the amount of the accounts receivable to be acquired. The term is not used to identify specific ATG obligations to Pacific assumed by UST.[8] Therefore, UST has not demonstrated that it actually assumed any liabilities.

For the above reasons, UST's argument that it has acquired ATG's rights to collocation facilities by virtue of its assumption of the "Assumed Liabilities", including an obligation to pay Pacific for ATG's collocation costs, has no merit.

In its second argument in support of its contention that the asset sale agreement grants it ATG's collocation rights, UST says the right to collocate is distinct from and independent of the specific rates, terms, and conditions for collocation in the interconnection agreement. We agree that the right to collocate

[7] Section 1.1(c) defines the term "Assets" to include "all accounts receivable…less those accounts receivable collected on or after June 1, 2002, and used to satisfy Assumed Liabilities (as defined below)". Section 1.3 of the asset sale agreement deals with the purchase price. Section 1.3 (b) defines "Assumed Liabilities". Section 1.3(b)(vi) indicates that "co-location facility costs for the Markets"are among the assumed liabilities. Section 1.3 (c) says that upon closing, UST shall pay ATG the lesser of the amounts associated with the Assumed Liabilities for the period June 1, through June 30, 2002, less other specified amounts, or $200,000. In addition, UST would pay ATG the amounts associated with the Assumed Liabilities for the period July1, 2002 through the closing date less specified amounts.

[8] Section 9.5, "Headings", says "The section and other headings contained in this Agreement are for convenience of reference only, shall not be deemed to be a part of this Agreement and shall not be referred to in connection with the construction or interpretation of this Agreement." Therefore, The fact that Section 1.3(b) has the heading "Limited Assumption of Certain Liabilities"does not mean that the liabilities were actually assumed.

is independent from the interconnection agreement. However, the right to use specific collocation facilities is not.

Physical collocation is provided to ATG by Pacific pursuant to the collocation appendix to an interconnection agreement. ATG obtained its rights to the specific collocation facilities it uses through its interconnection agreement with Pacific. The parties agree that UST did not purchase the interconnection agreement. If UST had acquired ATG's interconnection agreement, it would also have acquired the right to use the collocation facilities used by ATG. However, since it did not do so, it did not acquire ATG's collocation rights.

An additional reason why we find that UST did not acquire ATG's collocation rights is that they are in the process of being sold to GE. The interconnection agreement is part of the assets approved by the Bankruptcy Court for sale to GE. The sale is pending. In addition, the interconnection agreement provides that it is not severable.[9] As a result, ATG can not sell part of it to GE, and keep the rest to dispose of as it sees fit. Therefore, the interconnection agreement, including ATG's rights to use the subject collocation facilities, is still ATG's property, pending its sale to GE. Furthermore, the asset sale agreement is dated June 4, 2002. The bankruptcy court's conditional approval of GE's purchase of ATG's interconnection agreement with Pacific is dated June 25, 2002. It is not reasonable to assume that ATG and GE proposed, or the Bankruptcy Court conditionally approved, a sale to GE of rights previously assigned to UST. For all of the above reasons, we find that ATG did not sell its collocation rights to UST pursuant to the asset sale agreement.

[9] Section 25.1 of the interconnection agreement.

UST has also argued that even if GE assumes the interconnection agreement, it will have no use for the collocation rights used to serve the customers acquired by UST, because GE did not acquire those customers. Whether it has a use for those rights is up to GE. GE could use those rights to initiate service in the same areas UST will serve. Alternatively, GE could sell those rights to another carrier wishing to serve those areas, subject to agreement with Pacific. Even if GE ultimately has no use for the rights, it does not follow that UST has acquired them. Therefore, what GE may choose to do with those rights in the future has no bearing on the issue at hand.

As discussed above, we find that UST did not acquire ATG's rights to use the subject collocation facilities. Therefore, Pacific did not violate such rights. As a result, we conclude that there is no cause of action, and the complaint should be dismissed.

As to the possibility of service interruptions, UST has alternative means of providing service to the acquired customers, as pointed out by Pacific. Therefore, we have no reason to believe that dismissing this complaint will result in service interruptions.[10]

While ATG is not a party to this proceeding, we are concerned that it continues to provide service to its customers. In A.02-05-020, prior to the proposed sale, ATG requested authority to abandon service to the customers that are the subject of this proceeding. Because of the proposed sale, ATG withdrew

[10] On May 9, 2002, ATG filed A.02-05-020 to withdraw from the provision of services to the affected customers. On June 12, 2002, ATG filed a motion to withdraw the application, and have the proceeding dismissed. The motion was unopposed. On July 19, 2002, the Assigned Administrative Law Judge issued a ruling reminding ATG of its obligation to serve its customers until the instant sale is completed, or the Commission approves a withdrawal from service. By D.02-08-011, A.02-05-020 was dismissed.

the application. Prior to dismissing the application, the assigned administrative law judge (ALJ) issued a ruling reminding ATG of its obligation to provide service to its customers until a sale is completed, or it is authorized to abandon service. By D.02-08-011, A.02-05-020 was dismissed.

Assignment of Proceeding

Commissioner Wood is the Assigned Commissioner and ALJ O'Donnell is the assigned ALJ in this proceeding.

Findings of Fact

1. ATG occupies and uses collocation facilities at certain of Pacific's wire centers pursuant to its interconnection agreement with Pacific.

2. ATG has installed its equipment to and within the collocation spaces, and has interconnections between its facilities and Pacific's facilities. These facilities are used by ATG to serve its customers.

3. ATG is currently operating under the protection of the Bankruptcy Code.

4. ATG and UST have entered into an asset sale agreement dated June 4, 2002 whereby UST will acquire specified ATG assets including customer accounts and all of the equipment used to serve the acquired customers.

5. The asset sale agreement was approved by the Bankruptcy Court by an order dated June 7, 2002.

6. UST and ATG filed advice letters seeking approval of the sale and transfer of customers on June 6, 2002. The advice letters went into effect on July 16, 2002.

7. At a hearing held on July 9, 2002, the parties agreed to cooperate in planning for the transfer of customers from ATG to UST using the options proposed by each of them.

8. The asset sale agreement does not specifically say that ATG's rights to use collocation facilities are acquired by UST.

9. In its complaint, UST said that it did not enter into an agreement with ATG for UST to get the collocation arrangements, or any leases or other rights that ATG may have to use Pacific's network facilities or any other property in which Pacific has an ownership interest.

10. If the purchase is completed, there will be no ongoing ATG collocation costs to pay because ATG will have no customers.

11. If the purchase is not completed, the asset sale agreement, and any further liability, will be terminated.

12. The term "Assumed Liabilities" is used in the asset sale agreement only in determining the amount of the purchase price, and the amount of the accounts receivable to be acquired. The term is not used to identify specific ATG obligations to Pacific assumed by UST.

13. Physical collocation is provided to ATG by Pacific pursuant to the collocation appendix to an interconnection agreement.

14. ATG obtained its rights to the specific collocation facilities it uses through its interconnection agreement with Pacific.

15. The interconnection agreement is part of the assets approved by the Bankruptcy Court for sale to GE. The Bankruptcy Court's conditional approval of GE's purchase of ATG's interconnection agreement with Pacific is dated June 25, 2002. The sale is pending.

16. Since the interconnection agreement provides that it is not severable, ATG can not sell part of it to GE, and keep the rest to dispose of as it sees fit.

17. The interconnection agreement, including ATG's right to use the collocation facilities it uses to serve its customers, is still ATG's property, pending its sale to GE.

18. UST has alternative means to provide service to the acquired customers.

19. Dismissing this complaint need not result in customer service interruptions.

Conclusions of Law

1. The issue of Pacific's cooperation in planning is moot.
2. UST's argument that it has acquired ATG's rights to use collocation facilities by virtue of its assumption of the "Assumed Liabilities", including an obligation to pay Pacific for ATG's collocation costs, has no merit.
3. It is not reasonable to assume that ATG and GE proposed, or the Bankruptcy Court conditionally approved, a sale to GE of rights previously assigned to UST.
4. UST did not acquire ATG's rights to collocation facilities through the asset sale agreement.
5. Pacific did not violate UST's rights.
6. UST has not stated a cause of action against Pacific.
7. The complaint should be dismissed effective immediately.

O R D E R

IT IS ORDERED that:

1. Case 02-06-032 is dismissed.
2. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.