L/rbg

Date of Issuance
September 27, 2010

Decision 10-09-049 September 23, 2010

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Pacific Bell Telephone Company d/b/a AT&T California (U1001C), Complainant, vs. Sprint Spectrum L.P., Wireless Co., L.P. and Cox Communications PCS, L.P., jointly d/b/a/ Sprint PCS (U3064C), Defendant.	Case 07-12-019 (Filed December 19, 2007)

ORDER MODIFYING DECISION (D.) 08-12-005 AND DENYING REHEARING OF DECISION, AS MODIFIED

I. SUMMARY

This decision addresses the application for rehearing of Decision (D.) 08-12-005 (or "Decision"), filed by Sprint Spectrum L.P., Wireless Co., L.P. and Cox Communications PCS, L.P. (collectively "Sprint"). In D.08-12-005 (or "Decision"), the Commission found that Sprint violated the terms of its interconnection agreement ("ICA") with Pacific Bell Telephone Company d/b/a AT&T California ("AT&T") by refusing to pay the transiting service rates mandated by the terms of the ICA.[1] The

[1] The federal Telecommunications Act of 1996 ("Act"), Pub L. No. 104-104, 110 Stat. 56 requires incumbent local exchange carriers ("ILECs"), such as AT&T, to provide a requesting telecommunications carrier interconnection with the ILEC's network. (47 U.S.C. § 251(c)(2).) The Act establishes procedures for telecommunications carriers to enter into ICAs. (47 U.S.C. §§ 251, 252.) Sprint and AT&T entered into a negotiated ICA as permitted by 47 U.S.C. § 252(a)(1).

Decision determined that the transiting service[2] rates that AT&T charged Sprint under its ICA were not discriminatory even though they were significantly higher than the rates that other carriers paid. (D.08-12-005, p. 19 [Conclusion of Law 3].) The Commission ordered Sprint to pay AT&T all amounts AT&T had billed for transiting service that Sprint had withheld and ordered Sprint to make late payment charges. (D.08-12-005, pp. 19-20 [Ordering Paragraphs 2 and 3].)

Sprint filed a timely application for rehearing of D.08-12-005. Sprint challenges the Commission's determination that there was no discrimination, and the correctness of two findings of fact in the Decision. Sprint also requests oral argument under Rule 16.3 of the Commission's Rules of Practice and Procedure.[3] AT&T filed a Response opposing Sprint's rehearing application.

Specifically, Sprint alleges in its application for rehearing that the Commission erroneously determined that AT&T did not unlawfully discriminate against Sprint when AT&T refused to update Sprint's transiting rates in the same manner as AT&T had done with the transiting rates of Verizon Wireless ("Verizon"). AT&T had updated Verizon's rates after the Commission issued D.04-09-063 ("*UNE Relook Decision*").[4] Sprint alleges that this incorrect determination results from Commission adoption of erroneous Findings of Fact 6 and 7 which state:

> 6. The carriers that received the revised transiting rates either had a provision in their ICAs that linked those rates to the tandem switching rates or some other provision in their ICA linking their transit rates to rates adopted in the OANAD proceeding.

[2] Transiting traffic is traffic carried by a carrier that is not the originating or terminating carrier. It is transport between the originating and terminating carrier. (D.08-12-005, p. 1, fn. 1.) AT&T provides transiting service when it carries transiting traffic.

[3] All subsequent rule references are to the Commission's Rules of Practice and Procedure, unless otherwise stated.

[4] *Opinion Establishing Revised Unbundled Network Element Rates for Pacific Bell Telephone Company dba SBC California* ("*UNE Relook Decision*") [D.04-09-063] (2004) ___ Cal.P.U.C.3d ___.

> 7. Sprint PCS has not identified any carrier with ICA provisions similar to those in the Sprint PCS agreement that had their transit rates updated following the issuance of D.04-09-063.

Further, in its rehearing application, Sprint contends that it demonstrated that Sprint's ICA and Verizon's ICA were similar and that the Commission adopted Finding of Fact 6 based upon a mistaken reading of the Verizon ICA as amended in 1999. Sprint argues that Commission adoption of Finding of Fact 6 was based on AT&T's "patch-up rationale" offered in its Reply Comments on the Proposed Decision, to which Sprint did not have an opportunity to respond.

We have reviewed each and every allegation set forth in Sprint's application for rehearing, and do not find grounds for granting rehearing. For purposes of clarification, we modify the Decision as set forth below. Rehearing of D.08-12-005, as modified, is denied.

II. DISCUSSION

A. Sprint's claim of discrimination fails.

Sprint contends the Decision erroneously concludes that AT&T did not unlawfully discriminate against Sprint. Sprint, however, does not put forth any specific legal basis for its allegation.[5] Sprint does not cite to any statue or law in support of its alleged discrimination claim, and thus, does not comply with Rule 16.1(c) of the Commission's Rules of Practice and Procedure and Public Utilities Code section 1732.[6]

[5] However, we note, during the proceeding Sprint argued that AT&T's actions violated sections 251 and 252 of the Act (47 U.S.C. §§ 251, 252). In its rehearing application Sprint does not raise a claim of discrimination under these statutes. We note that Sprint's ICA is a negotiated agreement and Section 252(a)(1) permits carriers to privately negotiate an ICA without regard to the discrimination standard set forth Section 251(c) The nondiscrimination provision in section 252(e)(2)(A)(i) addresses when a state commission can reject a negotiated ICA and states in part that a state commission may only reject an ICA if the agreement "discriminates against a telecommunications carrier who is *not a party to the agreement.*" (Emphasis added.) Thus the discrimination provisions in sections 251 and 252 do not apply to Sprint's claim. Our discussion of what was raised in briefs does not mean that Sprint has set forth a specific claim that would meet the requirements mandated in section 1732.

[6] All subsequent section references are to the Public Utilities Code, unless otherwise noted.

Rule 16.1(c) requires that "[a]pplications for rehearing shall set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous, and must make specific references to the record or law." (Code of Regs., tit. 20, §16.1, subd. (c); see also, Pub. Util. Code, § 1732, which states: "The application for a rehearing shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful. . . . ") Sprint's allegation of discrimination does not comply with Rule 16.1 or section 1732, and thus, we need not address the issue.

However, even if we consider Sprint's claim, it has no merit. "To be objectionable, discrimination must 'draw an unfair line or strike an unfair balance between those in like circumstances having equal rights and privileges.' "[7] Sprint does not show that it was similarly situated to any company whose transit rates were reduced to tandem switching rates after the Commission issued the *UNE Relook Decision* [D.04-09-063], *supra*.

Sprint contends that it demonstrated that Sprint's and Verizon's ICAs were similar in that both carriers' ICAs contained fixed transiting rate. (See Rehrg. App., p. 2.) Sprint argues that although Verizon initially had an ICA linking its transit rates to tandem transit rates adopted in the Open Access Network Architecture Development "OANAD" proceeding, it eliminated this linking clause and replaced it with fixed transit rates when Verizon amended its ICA in 1999. (See Rehrg. App., pp. 5-6.) Sprint argues that after this amendment, Sprint and Verizon were similarly situated because both had fixed transit rates.

---

[7] *Application of Pacific Gas and Electric Company (U 39-E) for Adoption of its 2006 Energy Resource Recovery Account (ERRA) Forecast Revenue Requirement and for Approval of Its 2006 Ongoing Competition Transition Charge (CTC) Revenue Requirement and Rates* (*Order Denying Rehearing of Decision (D.) 05-12-045*) [D.06-04-041] __ Cal P.U.C.3d __, at pp. 5-6 (slip op.) relying on *Hansen v. City of San Buenaventura* (1986) 42 Cal.3d 1172, 1180.

Sprint's contention is incorrect. Sprint's ICA and Verizon's ICA are not similar. As discussed in the Decision, Verizon's initial ICA stated that after the Commission adopted rates for tandem transit by final order in the OANAD proceeding those rates would apply to transit service. Following Commission issuance of D.99-11-050 (*"OANAD Order")*,[8] Verizon and AT&T amended the 1997 ICA ("1999 Amendment") and adjusted Verizon's transit rates. Verizon's 1999 Amendment replaced the rate in the 1997 ICA with a fixed transit rate. However, as the Decision recognizes, the 1999 Amendment stated "all interim OANAD prices identified in the Agreement are hereby deleted and replaced with the prices contained in the above-referenced OANAD Order." (D.08-12-005, p. 11.) Verizon's 1999 amended ICA continued to contain a provision which linked transit rates to rates adopted in the OANAD proceeding.

Unlike Verizon's amended ICA, Sprint's ICA has no language linking its transit rates to the OANAD proceeding. Sprint's ICA is clear and unambiguous. It sets the specific rates for Transit Set-Up and Transit Duration. (Exhibit J, Appendix Pricing, p. 2.) Sprint's ICA does not tie the transiting rates to the rates for any other service nor does it tie the transiting rates to rates adopted in the OANAD proceeding. Sprint is not similarly situated to Verizon, and thus, Sprint's claim of unlawful discrimination fails.

B. Findings of Fact 6 and 7 are correct.

Sprint contends the Decision mistakenly concludes that AT&T did not discriminate against Sprint based on erroneous Findings of Fact 6 and 7. Sprint argues that the Decision mistakenly relies upon language from the 1997 Verizon ICA to conclude that Verizon's transit rates were tied to tandem transit rates adopted in the OANAD proceeding but that this language was replaced by the 1999 Amendment. (See Rehrg. App., pp. 5-6.)[9] Sprint also contends that neither the 1997 Verizon ICA nor the

---

[8] *Interim Decision Setting Final Prices for Unbundled Network Elements Offered by Pacific Bell ("OANAD Order")* [D.99-11-050] (1999) 3 Cal.P.U.C.3d 414.

[9] Sprint claims that the Decision errs in its reading of Sprint's Opening Comments on the Proposed

(footnote continued on next page)

1999 Amendment mention tandem switching rates as indicated by the Decision. (See Rehrg. App., p. 9.) To support its allegations, Sprint cites to language on page 6 of the Decision which states: "[a]s set forth above, the Verizon Wireless ICA Amendment explicitly provided that the transit rates contained therein were the result of the tandem switching rates adopted in D.99-11-050."

The Decision discusses both the initial Verizon ICA and the 1999 Amendment in reaching the conclusion that only carriers that had provisions in their ICA linking transiting to tandem switching, or some other provision in their ICA linking their transit rates to rates adopted in the OANAD proceeding, had their rates updated after we issued the *UNE Relook Decision*, D.04-09-063. However Sprint has identified some language in our Decision that could lead to some ambiguity regarding the basis of our findings.

Therefore, we modify the Decision, as set forth in the ordering paragraph below, to clarify language in the text of the Decision that could lead to ambiguity regarding the basis of Finding of Fact 6 and 7.

C. The rationale supporting Findings of Fact 6 and 7 is not erroneous.

Sprint contends that because the Administrative Law Judge revised Finding of Fact 6 after AT&T advanced a new "patch-up rationale" in its Reply Comments on the Proposed Decision there are errors in the rationale upon which Finding of Fact 6 is based. First, Sprint contends that the rates implemented by the 1999 Verizon Amendment were not the tandem switching rates adopted in the *OANAD Order*, and thus AT&T's rationale that the *UNE Relook Decision* required it to update the tandem switching rates adopted in *OANAD Order* does not apply to Verizon. (See Rehrg. App., p. 12.) Sprint is incorrect.

(footnote continued from previous page)

Decision and states that it did not cite the 1997 Verizon ICA provision quoted on page 10 of the Decision. (Rehrg. App., p. 5.) The Decision did not misquote Sprint as Sprint's Opening Comments cite Section 3.1.1.c of both the 1997 Verizon ICA and the 1999 Verizon Amendment.

The record and the language of the 1999 Verizon ICA Amendment support that the transit rate implemented in the 1999 Amendment was established by the *OANAD Order*.

The initial Verizon ICA stated that once the Commission adopted rates for tandem transit by final order in the OANAD proceeding, those rates would replace the transit rates in the agreement. The Commission issued the *OANAD Order* in September 1999 and adopted tandem switching rates. The 1999 Verizon ICA Amendment changed the transit rates as of November 18, 1999 and stated that all interim OANAD prices identified in the Agreement are deleted and replaced with the prices contained in the *OANAD Order*. From this language, it is reasonable to conclude that the 1999 Amendment replaced the transit rate in Verizon's ICA with the tandem switching rates contained in the *OANAD Order*. This conclusion is further supported by Sprint's admission that prior to September 2004, it was charged the transit rate established by the *OANAD Order*.[10] The record shows that prior to September 2004, Sprint was billed a single rate for transiting of $0.00124, the same rate in Verizon's 1999 Amended ICA. (Exhibit O.) While the *OANAD Order* adopted set-up and hold time rates for tandem switching, it is reasonable to conclude from the record and from Sprint's admission that Sprint and Verizon were billed a single combined rate for transit. Sprint has not demonstrated factual error in the rationale supporting Findings of Fact 6 and 7.

Next Sprint contends that the Decision erroneously maintains that in the *UNE Relook Decision*, the Commission stated that it was replacing the tandem switching rates adopted in *OANAD Order*. (Rehrg. App., pp. 13-14). Sprint argues that in the *UNE Relook Decision*, the Commission actually stated that it was replacing the interim rates for switching that were set in D.02-05-042.[11]

---

[10] Sprint Reply Brief, p. 17, fn 50. *See also* Sprint Opening Brief, p. 18, fn 44.

[11] *Interim Opinion Establishing Interim Rates for Pacific Bell Telephone Company's Unbundled Loop and Unbundled Switching Network Elements* [D.02-05-042] (2002) ___ Cal.P.U.C.3d ___.

Sprint has discovered an ambiguity in the language of the Decision. We modify D.08-12-005 to address this ambiguity. Before the Commission issued the *UNE Relook Decision* setting final Unbundled Network Elements ("UNE") rates, the Commission issued D.02-05-042 adopting interim rates for unbundled loops and unbundled switching to replace the rates adopted in the OANAD proceeding. (D.02-05-042, *supra*, at Appendix A (slip op.).) D.02-05-042 replaced the tandem switching rates adopted in the *OANAD Order* on an interim basis and the *UNE Relook Decision* replaced those interim rates with final rates.

We modify the text of the Decision, as set forth in the ordering paragraph below, to clarify that the *UNE Relook Decision* replaced the previously adopted interim switching rates in D.02-05-042 that replaced the rates adopted in *OANAD Order*.

Sprint next contends there is no basis for a decision in the *UNE Relook Decision* to cause a change in the transit rates for Verizon as its 1997 ICA referenced the OANAD proceeding. (See Rehrg. App. p. 14, fn 29.) We disagree. The *OANAD Order* set up a process for future review of rates adopted in that decision. (*OANAD Order* [D.99-11-050], *supra*, 3 Cal.P.U.C.3d at p. 516 [Ordering Paragraph 11].) Under this process, the Commission opened the "UNE Relook" proceeding and issued D.02-05-042 and D.04-09-063. Because these decisions replaced the rates adopted in the *OANAD Order*, it was not unreasonable for AT&T to adjust Verizon's transit rates given the provision in its 1999 Amendment linking Verizon's transit rates to rates adopted in the OANAD proceeding.

Finally, Sprint argues that the language in Verizon's 1999 Amendment stating that "all interim OANAD prices identified in the Agreement are hereby deleted and replaced with the prices contained in the above-referenced OANAD Order" is "*prefatory*" language and not the actual language of the Verizon Wireless ICA and does not entitle Verizon to updated transit rates after issuance of the *UNE Relook Decision*. We do not agree. The record identifies this language as Section 1.1 of the 1999 Verizon's Amendment and shows that AT&T included the provision in the language it

says it relied upon to update Verizon's transit rates after the issuance of the *UNE Relook Decision.* (Exhibit T.)

Accordingly, there are no errors in the rationale supporting Findings of Fact 6 and 7. Sprint's allegation of error concerning the basis of these findings has no merit.

D. Request for oral argument.

Sprint requests oral argument pursuant to Rule 16.3. Sprint argues that this proceeding presents "legal and factual issues of exceptional complexity" and that due to AT&T's size and market power, the integrity of the competitive marketplace is at stake which is a matter of vital and exceptional public importance. (See Rehrg. App., p. 20).

The Commission has complete discretion to determine the appropriateness of oral argument in any particular matter. (See Rule 16.3(a) of the Commission's Rules of Practice and Procedure, Cal. Code of Regs., tit. §20, 16.3, subd. (a).) Rule 16.3 states:

> (a) If the applicant for rehearing seeks oral argument, it should request it in the application for rehearing. The request for oral argument should explain how oral argument will materially assist the Commission in resolving the application, and demonstrate that the application raises issues of major significance for the Commission because the challenged order or decision:
>
> (1) adopts new Commission precedent or departs from existing Commission precedent without adequate explanation;
>
> (2) changes or refines existing Commission precedent;
>
> (3) presents legal issues of exceptional controversy, complexity, or public importance; and/or
>
> (4) raises questions of first impression that are likely to have significant precedential impact.

(Rule 16.3 of the Commission's Rules of Practice and Procedure, Code of Regs., tit. 20, § 16.3.)

The issues raised by Sprint are basic contract issues that are not of exceptional complexity. The facts demonstrate that Sprint's ICA and Verizon's ICA were not similar as argued by Sprint, and that there was no discrimination by AT&T.

Oral argument will not materially assist the Commission in resolving the rehearing application. Accordingly, there is no basis to conclude oral argument will benefit disposition of the application for rehearing.

III. CONCLUSION

For the purpose of clarification, we modify D.08-12-005 for the reasons discussed above. Good cause does not exist for the granting of Sprint's application for rehearing. Therefore, we deny rehearing of D.08-12-005, as modified.

THEREFORE, IT IS ORDERED that:

1. D.08-12-005 is modified as follows:

   a. The third, forth, fifth, and sixth sentences on page 11 are modified to read as follows:

      Several years later, in D.04-09-063, the Commission replaced the tandem switching rates adopted in D.99-11-050 [*OANAD Order*], and modified on an interim basis in D.02-05-012, with final tandem switching rates. In D.04-09-063 we stated that the switching rates we were adopting would replace the interim switching rates that were adopted in D.02-11-050. As set forth above, the Verizon Wireless 1997 ICA provided that the transit rates contained therein would be replaced with the tandem transit rates adopted in the OANAD proceeding. The 1999 ICA Amendment replaced the transit rates with the tandem switching rates adopted in D.99-11-050. In doing so, the Amendment stated "all interim OANAD prices identified in the Agreement are hereby deleted and replaced with the prices contained in the above-referenced OANAD Order. On the basis of that language, and the Commission's order in D.04-09-063 replacing the interim rates adopted in D.02-05-012 which replaced the rates adopted in D.99-11-050, AT&T updated Verizon's Wireless' transit rates in conformance with the tandem switching rates adopted in D.04-06-063.

2. Rehearing of D.08-12-005, as modified, is hereby denied.
3. This proceeding, C.07-12-019, is hereby closed.

This order is effective today.

Dated September 23, 2010, at San Francisco, California.

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

Commissioner John A. Bohn,
being necessarily absent, did not participate.