Decision 03-07-040 July 10, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Pac-West Telecomm, Inc., Complainant, vs. Pacific Bell Telephone Company, Defendant.	Case 02-03-011 (Filed March 12, 2002)

ORDER DENYING REHEARING OF DECISION 03-03-045

I. SUMMARY

This case concerns the application and interpretation of Pacific Bell Telephone Company's (Pacific) intrastate special access tariff. Pacific's tariff contains two monthly recurring rates for channel terminations associated with DS-1 circuits, depending on the point of termination of the circuit. One rate, $165.94 per channel termination (the TMECS rate), applies to circuits terminating at an end-user location; i.e., they are sold to end-users for their own use. They connect the Pacific serving wire center to an end-user location. The other rate, $71.12 per channel termination (the TMEPS rate), applies to circuits sold to a carrier-customer who is not using the circuit for itself but rather to provide service to its end-user customers. These circuits connect Pacific's serving wire center to an IC (interexchange carrier) POT (point of termination) location. Pacific's tariff defines a POT as the terminating point of Pacific's network; i.e., it is the point at which Pacific's responsibility for the provision of service ends.

A little over eight years ago, Pac-West Telecomm, Inc. (Pac-West) began purchasing 1.544Mbps/DS-1 circuits from Pacific. These are special access circuits

which Pac-West uses to connect Pac-West switch locations with Pacific and other Pac-West facilities in order to provide competitive telecommunications services. Pac-West had been ordering these circuits at the lower TMEPS rate for approximately six years. Beginning in April 2001, Pacific stopped invoicing some of Pac-West's newly installed DS-1 circuits at that rate and began charging the substantially higher TMECS rate for those circuits. Gradually, Pacific began charging the higher rate for all of Pac-West's newly installed DS-1 circuits. After unsuccessful attempts to resolve the situation informally with Pacific, Pac-West filed a complaint against Pacific.

A hearing was held before Administrative Law Judge Grau, who is the Presiding Officer in this case. Briefs were filed, and ultimately the Presiding Officer's Decision (POD), which found in favor of Pac-West, became Commission Decision (D.) 03-03-045 (the Decision). Pacific, which had attempted to file an appeal of the POD but had failed to timely file it, then filed an application for rehearing. Pac-West filed a response in opposition.

Our Decision states that the sole issue in the proceeding is whether the DS-1 circuits ordered by Pac-West should be priced at Pacific's TMEPS or TMECS tariffed rate. (D.03-03-045, mimeo at 3.) The Decision then looks at all relevant tariff provisions, including definitions, and applies those tariff provisions to the facts as presented on the record. The Decision finally examines two prior Commission decisions which Pacific claims support its charging the higher rate, and finds them unpersuasive. In sum, both the facts and the law are found to support Pac-West. The Decision orders Pacific to charge the lower TMEPS rate to Pac-West for its DS-1 circuits, and to refund charges in excess of that rate.

In its application for rehearing, Pacific argues the Decision commits both factual and legal error. Pacific first argues that most of the facts of this case are undisputed, and complains that we have misconstrued those facts to come out with the wrong decision. Pacific then continues to argue that the two prior Commission decisions

compel the opposite result to that reached in D.03-03-045. Pac-West disputes all of Pacific's contentions.

Pacific's arguments reiterate those it has made throughout this case. As we will discuss below, they are still unpersuasive. The record supports our factual determinations and our application of Pacific's tariff to those determinations. Moreover, the two prior Commission decisions Pacific cites are not helpful to Pacific's case.

A. Factual Allegations.

Pacific first maintains: "There is no dispute that Pac-West purchases DS-1 circuits from SBC California [Pacific] to connect Pac-West's network to its retail end-users." (App.Rhg., p. 2.) Pacific next asserts that "There is no dispute that these dedicated DS-1 circuits have two ends -- the CO-to-POP and CO-to-end-user links[1] [as depicted in the diagrams entered by Pac-West into evidence at the hearing]." (Ibid.) Pacific's third factual assertion is that "[t]here is no dispute that the sole issue is the proper tariff rate to be charged for the end [of the DS-1 circuit] depicted on the right side of the diagrams -- i.e., the end with the end-user." (Ibid.)

Based on its recitation of these "undisputed facts", Pacific finally alleges the Decision is factually erroneous in finding that Pac-West is entitled to the lower IC POT rate at both ends of the DS-1 circuit. "The justification for this finding appears to be that the end of the circuit terminating at Pac-West's end-user first passes through PBX equipment owned by Pac-West. According to the Decision, this somehow transforms the end of the circuit at issue into an IC POT termination." (App.Rhg., p. 3.) Pacific also argues this "finding" is contrary to the plain language of the tariff and contrary to prior Commission decisions.

Pac-West responds that Pacific's claims of factual error are based on its misrepresentation of the record. Concerning Pacific's first "undisputed fact," Pac-West points out that its witness Wallin testified that the DS-1 circuits are used as part of Pac-

[1] CO refers to the utility's central office; POP refers to a competitor's point of presence.

West's network, and are not used to connect the Pac-West network to its end-user customers. (Response, p. 5.) Pac-West argues the distinction is an important one, "as it determines whether the circuits terminate at IC POT or end-user locations, and therefore controls the rate that applies. As such, it was a vigorously contested issue during the hearings." (Id. at p. 7.) In response to Pacific's second "undisputed fact," Pac-West asserts that this argument appeared for the first time in Pacific's opening brief. Pac-West contends it is false and in conflict with Pacific's own witness Douglas' testimony. (Id. at pp. 7-8, citing Pac-West's reply brief and Ms. Douglas' testimony.) To Pacific's third "undisputed fact," Pac-West once again counters that this is neither undisputed nor accurate, but rather is what Pacific wants the Commission to conclude. Pac-West contends the issue before the Commission is "whether that 'end' at the 'right side of the diagram' is an end-user location or an IC POT location." Pac-West points out that the parties have been vigorously disputing this point for several years; thus the representation that it is undisputed is "misleading, at best." (Id. at p. 9.)

Pac-West further asserts that rather than as characterized by Pacific, the Decision concludes as follows: "… the circuits provided by Pac-West do not terminate at the customer's facilities. Thus, Pacific terminates its circuits at the Pac-West's[sic] facilities, not at the end-user's." (Response, p. 10, citing D.03-03-045, mimeo at 4.) Moreover, the Decision contains no discussion at all about "both ends of the circuit" or about a circuit terminating at Pac-West's end-user after first passing through Pac-West-owned PBS equipment. Pac-West argues there is no evidence to support Pacific's "new" "two ends of a circuit" theory, and that based on the evidence that was presented, the Decision expressly rejected Pacific's argument that the circuit actually terminates at a Pac-West end-user location.

Pac-West is correct that none of the "undisputed" facts stated by Pacific are truly undisputed. Rather, they all reflect positions Pacific has taken in this case, and consequently represent what Pacific wants us to have concluded.

As D.03-03-045 states: "The sole issue in this proceeding is whether the 1.544 Mbps/DS-1 circuits ordered by Pac-West should be priced at Pacific's TMEPS or TMECS tariffed rate." (D.03-03-045, mimeo p. 3.) However, in order to answer that question, it must first be determined whether the circuit is at an IC POT location or at an end-user location. This is hardly an undisputed fact.

The Decision goes on to make that determination. It states, at page 4, mimeo:

> "Pac-West orders a DS-1 circuit from Pacific to a Pac-West location at or near Pac-West's customer's premise. That location is the site for Pac-West's equipment, including Channel Service Units (CSU), and the point of termination where Pacific terminates the circuit. Pac-West can serve multiple end-users with the capacity provided by the DS-1 circuit. Pac-West uses the DS-1 circuits in combination with other Pac-West provided transmission facilities and switching equipment to create the Pac-West network. *Pac-West's DS-1 configuration corresponds to the configuration described in Pacific's Technical Publication, a configuration that corresponds to the TMEPS rate*.
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> "Pacific disagrees with Pac-West's characterization of its network and states that Pac-West's circuits terminate at Pac-West's end-user's locations and are subject to the TMECS rate. Pac-West's operations differ from Pacific's. Pac-West rents DS-1 circuits from Pacific and alters those circuits to create a unique resale environment that is not part of Pacific's network. Pac-West then uses its own equipment and facilities to connect to the facilities of its customers and the circuits provided by Pacific do not terminate at the customer's facilities. Thus Pacific terminates its circuits at the Pac-West's facilities, not at the end-user's. Schedule Cal. P.U.C. No. 175-T 7.5.8(C)(1) charges $71.12 monthly for channel termination at an IC POT location. Under a reasonable interpretation of Pacific's tariff, Pac-West is eligible for the lower TMEPS rate." (Empasis added.)

Pacific obviously disagrees with our construction of the evidence. However, that does not mean our decision is in error. Our reevaluation of the record in the course

of resolving the application for rehearing confirms that our construction of the evidence and our conclusions relative thereto are fully supported.

B. Prior Commission Decisions.

Pacific argues the Decision commits legal error by failing to apply the principles established in two prior Commission decisions, D.88-09-059 and D.94-09-065. D.88-09-059 (the 1988 Decision), a decision involving a settlement addressing certain local exchange company issues, directed Pacific to restructure its high speed digital service tariff schedules to consist of two elements: (1) the link from the Pacific central office to the end-user (the CO-to-end-user link), and (2) the link from the Pacific central office to a competitor's point of presence (the CO-to-POP link). Pacific argues the first link is at issue in this case. The 1988 Decision called for it to be priced at the same rate whether provided by Pacific to an end-user as part of Pacific's service, or whether provided by Pacific to a competitor (e.g., Pac-West) as part of the access service connecting the competitor's network to the competitor's customer. Pac-West, on the other hand, argues the second link is what is at issue. This link does not directly connect to end-users, but connects Pacific's central office to the competitor's point of presence. Per the 1988 Decision, this link was to be priced at fully allocated or direct embedded cost, a lower rate than the first link.

We see two problems with Pacific's argument. First, regardless of the directives of the 1988 Decision, the present tariffs do not contain the distinction set forth in that decision. D.03-03-045 makes that very point, and then continues:

> "Under the tariff a customer purchasing a DS-1 circuit finds a rate for an end-user location and a POT location. If the intended termination point is the purchasing carrier's facilities, that carrier would assume it could purchase the circuit at the TMEPS rate." (D.03-03-045, mimeo at 5.)

Moreover, even if it is appropriate to impute an intention to tariff language which in no way states that intention, the factual situation presented by this case is not addressed. In other words, simply saying that the higher rate applies whether the end-user

is served directly by Pacific or whether it is served by a competitor does not address the specific facts of this case. To reiterate, this case involves a specialized network configuration wherein Pac-West rents the DS-1 circuits and then alters those circuits to create "a unique resale environment that is not part of Pacific's network. Pac-West then uses its own equipment and facilities to connect to the facilities of its customers and the circuits provided by Pacific do not terminate at the [Pac-West] customer's facilities." (D.03-03-045, mimeo at 4.) The 1988 Decision did not include discussion of the intent behind the rate distinction it established, and certainly did not discuss distinctions in network configurations among competitors. As the record shows that Pac-West's configuration involves a significant additional step - involving only Pac-West's facilities - between the DS-1 circuit and Pac-West's end-users, we cannot conclude that the 1988 Decision necessarily intended to include it within the end-user rate it established.

The Decision rejects Pacific's position that the DS-1 circuits rented by Pac-West should be priced at the higher rate because they fall under the CO-to-end-user category established in the 1988 Decision. D.03-03-045 states that while Pacific's interpretation of the settlement provision is reasonable and could have been the intent of the parties to the settlement, Pac-West was not among those parties. Our settlement rules state that the terms of a settlement are binding on the parties thereto, but unless otherwise provided, adoption of a settlement does not constitute approval of or precedent regarding any principle or issue in the proceeding or in any future proceeding. (Rules of Practice and Procedure, Rule 51.8; Cal.Code Regs, tit. 20, sec. 51.8.) Thus the Decision states we are precluded from imposing the intent urged by Pacific on Pac-West.

Pacific argues that restriction does not apply here, where the settlement provision concerned restructuring of a tariff. That restructured tariff, Pacific argues, is applicable to all carriers, not just those who were parties to the settlement agreement adopted 15 years ago. Because we did not find that the tariff failed to comply with the 1988 Decision or was ambiguous, Pacific argues it is legal error to fail to apply that unambiguous tariff to the present situation.

Pacific's argument has some initial appeal. It can be argued that if we adopt a settlement involving changes to tariffs, and then direct certain parties to file appropriate revised tariffs, we are in effect saying that the adopted settlement provisions are precedential as far as they are incorporated into new tariff provisions. However, even accepting this argument, Pacific has not made its case.

As discussed above, the tariff, while not clearly failing to comply with the 1988 Decision, can perhaps better be viewed as incomplete. It does not contain language making the distinction Pacific relies on, nor does it address specific fact situations like Pac-West's, where the DS-1 circuit does not directly connect with anyone's end-users. One can argue that despite this, it is reasonable to conclude the parties intended to cover every permutation of network configuration, and that the Pac-West situation is enough like what the settlement and the Commission were trying to address that it should be covered. However, the 1988 Decision does not say this, nor is there any other evidence of such intent. Given all of the circumstances presented here, it is not unreasonable for us to have declined to impose such intent.

Pacific finally argues that another of our decisions, D.94-09-065, compels the outcome it seeks, and that we erred in finding that decision was not dispositive in favor of Pacific. D.94-09-065 merged Pacific's high capacity private line and special access tariffs on the ground that those dedicated circuits are functionally identical. Pacific argues that since D.94-09-065 retained the distinction between pricing of the CO-to-POP and CO-to-end-user links, that decision provides further support for charging Pac-West's DS-1 circuits at the higher rate. Pac-West argues that the Decision correctly describes D.94-09-065 as having simply approved existing rates and implemented a policy to consolidate these two tariffs, and not having adopted any general principles for tariff application. Pac-West reiterates that the key to determining a proper rate, TMECS (CO-to-end-user) or TMEPS (CO-to-POP), is not determined by who purchases the circuit, but rather by the location where the circuit terminates.

The Decision correctly interprets D.94-09-065 as merely approving existing pricing and consolidating the tariffs covering private line and special access services. Any distinction that was already in existence was continued, since the Commission made no policy changes in pricing. However, the Commission also made no statements in that decision which could be read as endorsing Pacific's view of its present tariff. Once again, the matter in this case comes down to our factual determinations, and the application of the language of Pacific's tariff to those facts. The record evidence supports our factual determinations; it makes clear that Pac-West's circuits do not terminate at end users' locations, but at Pac-West's own facilities. Pacific has not demonstrated legal error in our refusal to adopt Pacific's position.

II. CONCLUSION

Based on the above discussion, the application for rehearing has not established legal error. Accordingly, we denied the rehearing application.

We note that in addition to opposing Pacific’s application for rehearing, Pac-West requests that we order affirmative relief to Pac-West, based on Pacific’s purported noncompliance with the decision. Specifically, Pac-West requests that we award it interest on the amounts owed to it by Pacific, calculated from the date its complaint was filed. Pac-West also moves for an order directing compliance with Ordering Paragraph 2 of D.03-03-045. These are not rehearing issues. Thus we decline to address them.

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THEREFORE, IT IS ORDERED that:

1. The application for rehearing of Decision 03-03-045 filed by Pacific Bell Telephone Company is hereby denied.

2. This proceeding is closed.

This order is effective today.

Dated July 10, 2003, at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners