

Decision 04-05-022 May 6, 2004

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks.

Rulemaking 93-04-003
(Filed April 7, 1993)

Investigation on the Commission's Own Motion Into Open Access and Network Architecture Development of Dominant Carrier Networks.

Investigation 93-04-002
(Filed April 7, 1993)
(Permanent Line Sharing Phase)

OPINION GRANTING MOTION TO VACATE STAY IN DECISION 04-03-044

Summary

This decision grants Covad Communications Company's (Covad) motion to vacate Decision (D.) 04-03-044, our order staying D.03-01-077, the Interim Opinion Establishing a Permanent Rate for the High-Frequency Portion of the Loop (the HFPL Order) on the grounds that the changed federal timeline for addressing the line sharing issues have made the stay of the HFPL Order neither short term nor temporary. D.04-03-044 is vacated effective today.

Background

On April 1, 2004, Covad moved¹ this Commission to expeditiously vacate D.04-03-044, our order staying the HFPL Order.² Covad further moved the Commission to enforce the HFPL Order by requiring Pacific Bell Telephone Company, doing business as SBC California, and Verizon California Inc. (Verizon) to incorporate the rates, terms, and conditions of the HFPL Order into Covad's Interconnection Agreement (IA).

Covad first moved this Commission to enforce the HFPL Order on December 23, 2003. Parties responded on January 14, 2004. Covad replied to SBC California's and Verizon's oppositions to its motion on January 26, 2004. On January 29, 2004, SBC California filed an opposition to MCI's motion to join Covad's request. Following the D.C. Circuit Court of Appeals issuance of its Opinion³ in the appeal of the Federal Communications Commission's (FCC) *Triennial Review Order*, Covad moved for leave to file supplemental comments on its motion to enforce the HFPL Order on March 12, 2004. Verizon responded to Covad's motion to file supplemental comments on March 29, 2004; with leave, SBC California late-filed its response to the supplemental comments on April 5, 2004.

¹ Entitled "Covad Communication Company's (U-5752-C) Emergency Motion To Vacate Stay and To Enforce D.03-01-077" (Emergency Motion).

² D.03-01-077 (January 30, 2003).

³ *United States Telecom Association v. FCC*, 359 F.3rd 554 (D.C. Cir. 2004) (*USTA II*).

Pursuant to the April 5, 2004 assigned administrative law judge's (ALJ) ruling, SBC California and Verizon timely filed responses on April 12, 2004 to Covad's Emergency Motion. In this order, we solely address the Emergency Motion; we shall address Covad's earlier motion in a separate decision.

Positions of the Parties

Covad argues that the Commission's stay of and failure to enforce the HFPL Order has, in effect, ensured that residential broadband competition in California will cease on October 2, 2004. It asserts that on this date, SBC California and Verizon will refuse to allow California competitive local exchange carriers (CLECs), like Covad, to add new line sharing customers and will charge these CLECs, 50% of the stand-alone loop rate to provide line sharing to existing line sharing customers added in the last year. Covad contends that if the Commission permits the stay to remain in effect, the inability to add new line sharing customers and economically serve the existing ones guarantees the demise of residential digital subscriber line (DSL) competition in California.

Covad further declares that D.04-03-044's effect is neither short term nor temporary. (Emergency Motion at 5.) The stay lasts until 60 days after the United States Supreme Court's (Supreme Court) decision on whether to accept an appeal of the D.C. Circuit Court of Appeal's *USTA II* decision. The Supreme Court's decision on whether or not to entertain the appeal appears unlikely before the fall. If the Court does decide to review the FCC's line sharing rules, it is not apt to issue an opinion before next summer; some time after residential DSL competition has faded from California. Ultimately, delay yields the same result as outright elimination of line sharing. Covad maintains that it destroys its own and similar CLECs' ability to plan on the availability of line sharing in California beyond October 2, 2004. Covad needs that certainty to continue

selling line sharing in California, and urges the Commission to enforce the HFPL Order.

SBC California opposes the Emergency Motion, and insists that no “emergency” exists. It asserts that no facts or law relating to the HFPL have changed since Covad filed its original motion to enforce or since the Commission entered its stay. SBC California notes that Covad itself admits that it does not face the “allegedly adverse consequences” for at least another six months. Indeed, Covad can lease new HFPLs from SBC California today under the same rates, terms, and conditions that it and SBC California have been operating under for more than three years on a 13-state basis. (SBC California Opposition⁴ at 1.)

SBC California further points out “the FCC took great pains to set up a process that would allow CLECs to gradually transition away from the HFPL and SBC California is seeking to implement and abide by that transition process.” (*Id.* at 4.) Covad faces no imminent harm if the HFPL Order is not enforced, according to SBC California and, even if it did, none of Covad’s remedies lie with this Commission. Its remedies lie with either the federal courts, or the dispute resolution provisions of its interconnection agreement with SBC California. Moreover, lifting the stay would have no effect on the price Covad pays SBC California for an HFPL. Consequently, as between SBC California and Covad, lifting the stay would be a meaningless act, and Covad’s motion should be denied.

⁴ SBC California’s (U 1001 C) Opposition to Covad’s Emergency Motion to Vacate Stay and to Enforce D.03-01-077.

Verizon also opposes the Emergency Motion, describing it as “completely meritless.” It argues that Covad’s calls for enforcement of the HFPL Order must be viewed as “irresponsible at best, and tantamount to arguing that this Commission is free to ignore controlling state or federal precedent until someone takes an appeal and secures a reversal of this Commission’s order.” (Verizon Opposition⁵ at 2.) Verizon insists that Covad’s declaration that residential broadband competition will end on October 2 is wrong. It notes that, in contrast to its dire warnings, Covad and others are entering into commercial agreements to provide linesplitting. Verizon contends that it will grandfather existing linesharing arrangements and offer new linesharing arrangements pursuant to the FCC’s three-year transitional period under a separate “non-§ 251 wholesale arrangement.”

Verizon declares that granting Covad’s motion and enforcing the HFPL Order would be a futile exercise and a waste of Commission resources. It advises the Commission to reject Covad’s arguments and maintain the stay.

Discussion

When we issued our stay of the HFPL Order in D.04-03-044, we anticipated that it would be a matter of weeks before the Supreme Court would issue its decision to grant or deny certiorari. In late March 2004, the FCC called on incumbent local exchange carriers and CLECs to negotiate commercial agreements, and asked the D.C. Circuit Court of Appeals to extend the stay of its mandate on the *Triennial Review Order* an additional 45 days. On April 13, 2004,

⁵ Verizon California Inc.’s Opposition to Covad Communication Company’s Emergency Motion to Vacate Stay and Enforce D.03-01-077.

the Court extended the stay of its mandate through June 15, 2004. The D.C. Circuit's extension of the stay of its mandate means that the grant or denial of certiorari could come well past October 2nd. This timeline shift has indeed changed circumstances. Thus, we find persuasive Covad's assertion that effectively, the stay of the HFPL Order is neither short term nor temporary.

In their comments on the Draft Decision (DD), SBC California and Verizon insist that neither the 45-day extension of the stay of the D. C. Circuit's mandate nor the filing deadline for the Supreme Court petitions for certiorari presents this Commission with a changed timeline. They maintain that the stay of the mandate is irrelevant to the effect of our stay of D.04-03-044, and that the timing estimates with respect to the Supreme Court were simply wrongheaded. These remarks are disingenuous, at best, and conveniently ignore the impact that the FCC's call for commercial negotiations and the resultant stay of the D. C. Circuit's mandate has had. Prior to these actions, as Covad notes in its reply comments, the industry-wide (including regulators) expectation was that " parties would immediately -- or as soon as practical -- seek review (certiorari) of that decision by the Supreme Court." (Covad Reply Comments on DD at 2.) Since parties have been admonished by the FCC to negotiate commercial agreements, and not to seek Supreme Court review, it is in fact the case now that the Supreme Court will not have the opportunity to review USTA II or the Triennial Review Order, until SBC California and Verizon have unilaterally terminated Covad's and similar CLECs' ability to provide line sharing in California at UNE rates, after October 2, 2004.

Moreover, the effect of the stay has been one-sided: it has “stilled” the hand of the Commission with respect to line sharing while SBC California and Verizon steadfastly implement the provisions eliminating line sharing. We do not consider the impending harm to Covad and other similar CLECs to be remote or trivial. Under the stay, line sharing will cease to be an unbundled network element (UNE) in California in less than six months. SBC California comments on the DD that the CLECs have provided no evidence of any harm. If there are no competitive broadband alternatives in California on October 3, 2004 because of the defiant actions of the incumbent carriers, Covad and other similar CLECs will obviously be harmed, as will the people of California. SBC California and Verizon continue to indicate that it is sufficient for them to declare preemption and claim victory awaiting October 2, 2004. We disagree. By lifting the stay, we affirm the HFPL Order; we uphold line sharing as a UNE in California; and we continue to strive towards making “comparatively affordable, competitive broadband alternatives ...widely available to residential consumers.” Accordingly, we vacate D.04-03-044.

Need for Expedited Consideration

Rule 77(f)(9) of the Commission’s Rules of Practice and Procedure provides relevant part: “...the Commission may reduce or waive the period for public review and comment under this rule...for a decision where the Commission determines, on the motion of a party or on its own motion, that public necessity requires reduction or waiver of the 30-day period for public review and comment.”

We balance the public interest in expeditiously vacating D.04-03-044 against the public interest in having a full 30-day comment cycle on the proposal to do so. We conclude that the former outweighs the latter. By promptly lifting

the stay of the HFPL Order, we protect the public welfare by maintaining residential broadband competition in California. Delaying would further actions to eliminate line sharing in this state. We seek valuable public review of, and comment, on the proposed action and find that a reduced period balances the need for that input with the need for timely action.

Comments on Draft Decision

Pursuant to Rule 77.7(f)(9), comments on the draft decision must be filed by April 28, 2004 and reply comments by May 3, 2004. We have reviewed the comments, and taken them into account, as appropriate, in finalizing this order.

Assignment of Proceeding

Carl Wood is the Assigned Commissioner and Jacqueline A. Reed is the Assigned ALJ in this proceeding.

Findings of Fact

1. Given the 45-day stay of the D.C. Circuit Court's mandate on the *Triennial Review Order* and the FCC's call for incumbent local exchange carriers and CLECs to negotiate commercial agreements, the stay of the HFPL Order is neither short term or temporary.
2. Under the stay, in less than six months line sharing will cease to be a UNE in California.

Conclusions of Law

1. The Commission should grant Covad's motion to vacate D.04-03-044 in order to affirm the HFPL Order and uphold line sharing as a UNE in California.
2. The period for public comment and review on the draft decision should be reduced.
3. This decision should be effective today so that line sharing can continue to be offered as a UNE in California.

O R D E R

IT IS ORDERED that:

1. Covad Communication Company's Emergency Motion to Vacate the Stay ordered by Decision (D.) 04-03-044 is granted.
2. D.04-03-044 is vacated.

This order is effective today.

Dated May 6, 2004, at San Francisco, California.

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