Decision 09-01-024 January 29, 2009

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

O1 Communications, Inc. (U6065C), Complainant, vs. Verizon California, Inc. (U1002C), Defendant.	Case 08-02-013 (Filed February 15, 2008)

ORDER EXTENDING STATUTORY DEADLINE

Pub. Util. Code § 1701.2(d) provides that adjudicatory matters such as this complaint case shall be resolved within 12 months after they are initiated, unless the Commission makes findings why that deadline cannot be met and issues an order extending the 12-month deadline. In this proceeding, the 12-month deadline for resolving the case is February 15, 2009. As explained below, the instant matter has been the subject of a complex motion to dismiss, the briefing on which was not concluded until the end of April 2008. Since then, the assigned Administrative Law Judge (ALJ) has had to turn his attention to a succession of more urgent matters.

In view of all these circumstances, we have concluded that it is appropriate to extend the 12-month deadline in this case. Although we hope this case can be resolved sooner, the deadline for resolving this matter will be extended,

pursuant to our powers under Pub. Util. Code § 1701.2(d), until February 15, 2010.

1. Background

The complaint herein was filed in mid-February 2008. It alleged that under the interconnection agreement (ICA) in effect between complainant O1 Communications, Inc. (O1) and defendant Verizon California, Inc. (Verizon), Verizon owed O1 approximately $182,500 for terminating calls that were originated by Verizon customers and bound for internet service providers (ISPs) served by O1. More specifically, O1 alleged that it had properly billed Verizon for such calls for the periods August 13-September 30, 2003, January 1-31, 2004, and February 1-29, 2004, but that Verizon had refused to pay the bills.

On March 26, 2008, Verizon filed both an answer and a motion to dismiss the complaint. In its motion to dismiss, Verizon argued that it owed nothing to O1 for the periods indicated, because its obligation to pay termination charges for calls originated by Verizon customers bound for ISPs that are O1 customers was governed by the so-called "ISP Remand Order" issued by the Federal Communications Commission (FCC) in 2001.[1] Under this order, Verizon

[1] The technical citation for the ISP Remand Order is *Order on Remand and Report and Order*, CC Docket Nos. 96-98 and 99-68 (FCC 01-131), released April 27, 2001, 16 FCC Rcd 9151. After its issuance, the United States Court of Appeals for the District of Columbia Circuit found that the statutory provision relied on by the FCC did not support the ISP Remand Order. However, the D.C. Circuit remanded the order to the FCC without vacating it. *Worldcom, Inc. v. FCC*, 288 F.3d 429, 434 (D.C. Cir 2002), *cert. denied sub nom. Core Communications, Inc. v. FCC*, 538 U.S. 1012 (2003). As a result of this unusual procedural posture, several courts including the Ninth Circuit have noted that the provisions of the ISP Remand Order remain in effect despite the D.C. Circuit's conclusions about the deficiencies in its statutory analysis. *See, e.g., Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1122-23 (9th Cir. 2003).

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continued, complainant had effectively agreed (by opting into the 2003 ICA between Verizon and Pac-West Telecomm, Inc.) that O1 would be bound by the "growth caps" in the ISP Remand Order. Verizon described the growth caps and the related "rate caps" as follows:

> The *FCC Internet Order* established a transitional regime to phase out the compensation that previously may have applied to ISP-bound traffic. The *FCC Internet Order* imposed caps on the per-minute rates payable on such traffic, declining toward zero over a 36-month period. The limitations on the per-minute rate that carriers are allowed to charge for ISP-bound traffic are referred to as "Rate Caps." The FCC also capped the volume of ISP-bound minutes subject to intercarrier compensation in order to ensure that growth in ISP-bound traffic did not undermine the FCC's intent to transition away from such compensation. These limitations on allowable ISP-bound minutes are known as "Growth Caps." (Verizon Motion to Dismiss, p. 5.)

After quoting the FCC formula for computing the growth caps, Verizon's motion continued:

> In other words, the Growth Caps under a given ICA are keyed to the number of compensable minutes exchanged under that ICA during the first quarter of 2001 – a number that is sometimes referred to as the "Compensable Base." It is axiomatic that O1 had no Compensable Base under the 2003 ICA: it was not and is not entitled to any compensation for ISP-bound traffic for the first quarter of 2001 under the 2003 ICA, because the 2003 ICA did not become effective until more than two years later. Consequently, because O1 was not and is not entitled to compensation for any minutes of ISP-bound traffic from the first quarter of 2001 under the

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This decision sometimes refers to the ISP Remand Order as the "FCC Internet Order," the term both Verizon and O1 have used for the ISP Remand Order in their pleadings here.

> 2003 ICA . . ., the *FCC Internet Order*'s Growth Caps, which are incorporated into the agreement, dictate that O1 was not and is not entitled to any compensation for ISP-bound traffic until the Growth Caps were lifted on October 8, 2004." (*Id.* at 6.)[2]

Based on this analysis, which covers all the billing periods specified in O1's complaint, Verizon argued that the complaint should be dismissed.

On April 17, 2008, complainant filed its response to Verizon's dismissal motion. In this response, O1 did not dispute Verizon's analysis of the ISP Remand Order, but argued that dismissal would be improper because the calls at issue in this case are not governed by the ISP Remand Order. Instead, O1 argued, the traffic at issue in this case consists "almost entirely" of VNXX[3] traffic, which several courts have held is not governed by the ISP Remand Order.

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[2] As noted on pp. 18 and 24 of *Pac-West Telecomm, Inc. v. AT&T of California, Inc. et al.*, D.06-06-055, the FCC lifted the growth cap in the so-called Core Order, which became effective on October 8, 2004. The formal citation for the Core Order is *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order,* Order, WC Docket No. 03-171, FCC 04-241, 19 FCC Rcd 20179 (released October 18, 2004).

[3] "VNXX" stands for "virtual" NXX traffic. In *Verizon California, Inc. v. Peevey*, 462 F.3d 1142, 1148 (9th Cir. 2006), which affirmed a decision of this Commission, the court defined VNXX traffic as follows:

> VNXX, or "Virtual Local" codes are NPA-NXX codes that correspond to a particular rate center, but which are actually assigned to a customer located in a different rate center. Thus a call to a VNXX number that appears to the calling party to be a local call is in fact routed to a different calling area. The CPUC has determined that VNXX traffic should be rated to consumers as a local call, meaning that the originating LEC cannot charge the calling customer a toll despite the long-distance nature of the call's physical routing.

O1 argued that it should be allowed to file an amended complaint making clear that the vast majority of the traffic at issue in this case is VNXX traffic.

On April 28, 2008, with the permission of the ALJ, Verizon filed a reply to O1's response to the motion to dismiss. In its reply, Verizon argued that none of the invoices O1 submitted to Verizon at the time mentioned VNXX traffic, and that before being allowed to file any amended complaint, O1 should be required to exhaust its remedies under the ICA with Verizon:

> To the extent O1 is really seeking compensation for VNXX traffic, then it must identify the traffic as such, and submit invoices for that traffic to Verizon; and if a dispute ensues, it must follow the dispute resolution procedures in the 2003 interconnection agreement between Verizon and O1. Under those procedures, O1 has an obligation to negotiate with Verizon prior to filing a complaint. It has not done so with regard to its claimed VNXX traffic, so the Complaint should be dismissed. (Verizon Reply to O1 Response, pp. 2-3.)

2. Discussion

As indicated by the foregoing summary of the parties' positions, the issues raised by the pleadings here are complex. Before the assigned ALJ was able to address them, however, he was required to work on other, more urgent matters.

The first of these matters was Case (C.) 06-03-013, *Pacific Bell Telephone Company d/b/a ATT of California v. Fones4All Corporation.* In Decision (D.) 07-07-013, the Commission concluded that Fones4All Corporation (Fones4All) had overbilled Pacific Bell Telephone Company d/b/a AT&T of California (AT&T) for the carriage of intraLATA traffic, because Fones4All had sent bills based on estimated traffic rather than actual traffic volumes. As a

result of the overbillings, D.07-07-013 required Fones4All to reimburse AT&T $2,627,236.67 plus interest.[4]

When Fones4All failed to pay any of the sum due, AT&T filed a motion on January 25, 2008, seeking to set aside disbursements that would otherwise be owed to Fones4All from the Universal Lifeline Telephone Service and directing, instead, that these payments be made to AT&T.[5] On March 7, 2008, AT&T also filed a motion for an order allowing expedited discovery regarding potential alter egos of Fones4All, and setting an evidentiary hearing to determine whether the Commission should pierce the corporate veil of Fones4All and hold the persons and entities constituting alter egos liable for the amounts owed to AT&T, which had grown to $6.5 million. On April 15, 2008, Commissioner Chong granted this motion and required Fones4All to produce its financial records for AT&T within seven days. An evidentiary hearing was also set for May 2, 2008.

However, in late April, before the hearing could be held, the ALJ assigned to C.06-03-013 retired and the matter was reassigned to ALJ McKenzie. From late April until early August 2008, ALJ McKenzie held multiple discovery status conferences and resolved numerous discovery disputes. Hearings were continued several times and ultimately cancelled due to the filing by Fones4All of a voluntary bankruptcy petition pursuant to Chapter 7 of the Bankruptcy Act. In addition, the ALJ also worked to prepare the presiding officer's decision in C.07-03-026, *California Building Industry Association v. Southern California Edison*

[4] Rehearing of D.07-07-013 was denied and the decision was modified (although not with respect to the amount due) in D.08-04-043.

[5] This motion was denied in D.08-04-020, based on the Commission's reading of Pub. Util. Code § 277.

Company, which was issued on June 30, 2008. He also worked to prepare D.08-09-044, which approved an interim settlement in Application (A.) 07-04-022.

The ALJ spent the rest of the Fall handling an appeal from a citation issued pursuant to Resolution E-4017 and preparing decisions in three applications. The first was an application by Southern California Edison Company to lease land adjacent to its Walnut Substation in the City of Industry (A.08-06-027). The other two were applications by Pacific Gas and Electric Company (PG&E) seeking approval of settlements with qualifying facilities (QFs) that had provided power to PG&E pursuant to Standard Offer 2 (SO2) contracts. (A.08-07-028; A.08-07-029.)

Under all the circumstances here, an extension of time to resolve C.08-02-013 is appropriate. Since both parties recognize that an amended complaint is a possibility, and Verizon has argued that the dispute resolution procedures in the ICA should be invoked if an amended complaint is allowed, we believe that a one-year extension of time, until February 15, 2010, should be granted.

3. Waiver of Comments on Proposed Decision

Under Rule 14.6(c)(4) of the Rules of Practice and Procedure, the Commission may waive the otherwise applicable 30-day period for public review and comment on a decision that extends the 12-month deadline set forth in Pub. Util. Code § 1701.2(d). Under the circumstances of this case, it is appropriate to waive the 30-day period for public review and comment.

4. Assignment of Proceeding

Rachelle B. Chong is the assigned Commissioner and A. Kirk McKenzie is the assigned ALJ in this proceeding.

Findings of Fact

1. The complaint in this case was filed on February 15, 2008.

2. Because of the urgency of the alter ego issues raised in C.06-03-013, the importance of prompt approval of the settlement agreements in A.08-07-028 and A.08-07-029, and other matters, the ALJ has not yet been able to turn his attention to the motion to dismiss and related pleadings filed in this case.

3. An extension of time until February 15, 2010, should allow the ALJ adequate time to consider Verizon's motion to dismiss the instant complaint, allow the parties time to invoke the dispute resolution procedures under the ICA if an amended complaint is permitted, allow for the drafting of a POD, and give the losing party or any concerned Commissioner time to decide whether to file an appeal of the POD (or request review thereof) pursuant to Rule 14.4 of the Commission's Rules of Practice and Procedure.

Conclusions of Law

1. Because of the urgency of the alter ego issues in C.06-03-013 and the QF settlement issues in A.0-07-028 and A.08-07-029, as well as other matters, it will not be possible to resolve this case within the 12-month period provided for in Pub. Util. Code § 1701.2(d).

2. The 12-month statutory deadline should be extended for 12 months to allow for resolution of this proceeding.

IT IS ORDERED that the 12-month statutory deadline in this proceeding, February 15, 2009, is extended to and including February 15, 2010.

This order is effective today.

Dated January 29, 2009, at San Francisco, California.

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