

Decision 00-03-046 March 16, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Petition of AT&T Communications of California, Inc., for Arbitration Pursuant to Section 252 of the Federal Telecommunications Act of 1996 to Establish an Interconnection Agreement with GTE California, Incorporated.

Application 96-08-041
(Filed August 19, 1996)

In the Matter of the Petition of MCI Telecommunications Corporation for Arbitration Pursuant to 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Pacific Bell.

Application 96-08-068
(Filed August 30, 1996)

In the Matter of the Petition of MCI Telecommunications Corporation for Arbitration Pursuant to 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with GTE California, Incorporated.

Application 96-09-012
(Filed September 19, 1996)

O P I N I O N

Summary

This decision adopts an all-party settlement agreement submitted by AT&T Communications of California, Inc. (AT&T), GTE California Incorporated (GTE), and MCI WorldCom, Inc. (MWCOCM). The adopted agreement resolves the following two issues remanded to the Commission by the U. S. District Court for the Northern District of California ("the Court"): (i) Whether AT&T's remote

switching modules (RSMs)¹ collocated in GTE's central offices are actually used for interconnection or access to unbundled network elements (UNEs); and (ii) whether MWCOT's RSMs collocated in GTE's central offices are "necessary" for interconnection or access to UNEs as defined by the Federal Communications Commission (FCC).²

Procedural Background

On August 19, 1996, AT&T filed Application (A.) 96-08-041 for arbitration with respect to a proposed interconnection agreement with GTE. On September 19, 1996, MWCOT filed A.96-09-012 for arbitration with respect to a proposed interconnection agreement with GTE. The Commission conducted the arbitrations in accordance with § 252 of the Telecommunications Act of 1996 ("the Act"). In Decision (D.) 97-01-022, the Commission adopted an interconnection agreement between AT&T and GTE. In D.97-01-045, the Commission adopted an interconnection agreement between MWCOT and GTE.

The parties to A.96-08-041 and A.96-09-012 filed complaints and cross-complaints with the Court seeking to overturn portions of D.97-01-022 and D.97-01-045. On September 29, 1998, the Court remanded to the Commission the following two issues: (i) whether AT&T's RSMs collocated in GTE's central offices are actually used for interconnection or access to UNEs, and (ii) whether

¹ RSMs are switches that have no connection to the network except through a host switch. The host switch typically provides most processing and control functions for the remote switch.

² The Court also remanded to the Commission an issue regarding Customer Proprietary Network Information (CPNI). This issue is currently being addressed by the Commission.

MWCOM's RSMs collocated in GTE's central offices are "necessary" for interconnection or access to UNEs as defined by the FCC.³

In D.99-07-032, the Commission reopened and consolidated A.96-08-041 and A.96-09-012 for the purpose of deciding the RSM issues remanded by the Court.⁴ Parties filed opening comments on September 30, 1999, and reply comments on October 12, 1999. After comments were filed, the parties informed assigned Administrative Law Judge (ALJ) Kenney that there was no need for a prehearing conference.

On January 6, 2000, the assigned ALJ issued a ruling that (i) instructed the parties to file written testimony on the RSM issues, and (ii) set an evidentiary hearing for the week of February 14, 2000. On February 3, 2000, the parties submitted a settlement agreement that purported to resolve the RSM issues remanded by the Court.

Regulatory Background

Section 251(c)(6) of the Act requires incumbent local exchange carriers (ILECs) to allow competitors to physically collocate equipment on the ILEC's premises if the equipment is "necessary" for interconnection or access to UNEs. On August 8, 1996, the FCC released its First Collocation Order⁵ in which the FCC

³ Order Regarding Parties' Cross Motions for Summary Judgement, [MWCOM], et al., v. Pacific Bell, et al., No. C 97-0670 SI; [GTE], v. P. Gregory Conlon, [AT&T], et al., C 97-1756 SI; and [GTE], v. P. Gregory Conlon, [MWCOM], et al., C 97-1757 SI; filed Sept. 29, 1998, U.S. Dist. LEXIS 17556.

⁴ D.99-09-012 also reopened A.96-08-068 and consolidated this proceeding with A.96-08-041 and A.96-09-012 for the purpose of deciding the CPNI issue remanded by the Court.

⁵ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order*, CC Docket Nos. 96-98 and 95-185, FCC No. 96-325.

interpreted § 251(c)(6) to mean that equipment is “necessary” for interconnection or access to UNEs if the equipment is “used or useful” for this purpose.⁶

In D.97-01-022, the Commission held that AT&T may collocate RSMs in GTE’s central offices so long as the collocated RSMs are capable of being used for interconnection. In D.97-01-045, the Commission held that MWCOCM may not collocate RSMs since GTE had demonstrated during the arbitration that RSMs are not required for interconnection or access to UNEs.

The parties appealed the Commission’s decisions regarding the collocation of RSMs. In its decision, the Court found that the Commission had failed to determine (i) if AT&T’s RSMs are actually used for interconnection or access to UNEs, and (ii) if MWCOCM’s RSMs are “necessary” for interconnection or access to UNEs as defined by the FCC. The Court then remanded these two issues to the Commission.

On March 31, 1999, the FCC released its Second Collocation Order⁷ in which the FCC took a number of actions that are relevant to this proceeding. First, the FCC held that RSMs are “used or useful” for interconnection and access to UNEs. Second, the FCC concluded that because RSMs are used or useful for interconnection and access to UNEs, they are also “necessary” for this purpose. Third, the FCC ruled that because RSMs are “necessary,” Section 251(c)(6) of the Act requires ILECs to allow competitors to physically collocate RSMs.⁸ Finally,

⁶ Ibid., ¶ 579.

⁷ *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability, First Report and Order and Further Notice of Proposed Rulemaking*, CC Docket 98-127, FCC No. 99-48.

⁸ We have doubts about the FCC’s determination that RSMs are “necessary” for interconnection and access to UNEs pursuant to § 251(c)(6) of the Act because RSMs are “used or useful” for this purpose. Several U.S. District Courts have found that the

(Footnote continued on next page.)

the FCC ruled that ILECs must allow competitors to use all the capabilities of their collocated RSMs.⁹

Following the issuance of the FCC's Second Collocation Order, MWCOC petitioned the Court to reconsider its earlier decision to remand the issue of whether RSMs are "necessary" for interconnection or access to UNEs. According to MWCOC, the FCC's Second Collocation Order rendered this issue moot. On October 19, 1999, the Court ruled that while the FCC's Second Collocation Order may simplify the Commission's resolution of the issue remanded by the Court, the Court nonetheless considered it "appropriate for the CPUC to ascertain whether [MWCOC's] RSMs will be actually used and are necessary, as defined by the FCC, for use at GTE's premises."

The Settlement Agreement

On February 3, 2000, AT&T, GTE, and MWCOC jointly filed a settlement agreement. The salient provisions of the settlement agreement are as follows. First, the settlement states that "RSMs are actually used or would be used for interconnection or access to [UNEs] when collocated by AT&T or MWCOC in a GTE central office." Second, the settlement allows AT&T and MWCOC "to collocate and use all the features and functionalities of RSMs." Third, the settlement states that if a court of competent jurisdiction modifies or rejects the "used or useful" standard adopted by the FCC, then GTE may seek to (i) remove previously collocated RSMs, and (ii) challenge the use of all the features and

Act does not require ILECs to allow physical collocation of RSMs that are "used or useful," but not "necessary," for interconnection or access to UNEs. (See 46 F. Supp. 2d 1004; 46 F. Supp. 2d 1068; 55 F. Supp. 2d 968; and 41 F. Supp.2d 1157.)

⁹ Ibid., ¶¶ 28-31.

functionalities of collocated RSMs.¹⁰ Finally, the settlement states that it resolves the RSM issues remanded by the Court.

Discussion

The two RSM issues remanded by the Court are (i) whether AT&T's RSMs collocated in GTE's central offices are actually used for interconnection or access to UNEs, and (ii) whether MWCOC's RSMs collocated in GTE's central offices are "necessary" for interconnection or access to UNEs as defined by the FCC. The task before us is to decide if the all-party settlement agreement submitted by AT&T, GTE, and MWCOC resolves the RSM issues remanded by the Court.

We have carefully reviewed the all-party settlement agreement. Based on this review, we find that the settlement resolves the RSM issues remanded by the Court. We also find that the settlement agreement satisfies our requirements pertaining to settlements set forth in Article 13.5 of our Rules of Practice and Procedure, including Rule 51.1(e) which states that the Commission will not approve a settlement unless the settlement is "reasonable in light of the whole record, consistent with law, and in the public interest." We further find that the settlement satisfies the criteria set forth in D.92-12-019 which states an all-party settlement may be approved if (i) all affected interests are adequately represented, (ii) the settlement does not contravene any statutory provision or Commission decision, and (iii) the settlement, together with the record in the proceeding, convey sufficient information for the Commission to make an informed evaluation.

¹⁰ GTE has challenged the FCC's "used and useful" standard in the D.C. Circuit Court of Appeals. The court has not yet acted on GTE's challenge.

For the forgoing reasons, we shall adopt the all-party settlement agreement submitted by AT&T, GTE, and MWCOM. The adopted agreement is attached to this decision as Appendix A.

Closure of A.96-08-041

In D.99-07-032, the Commission reopened A.96-08-041 for the purpose of deciding the RSM issues remanded by the Court. Since this decision resolves the RSM issues, we hereby close A.96-08-041. The other two dockets reopened by D.99-07-032, A.96-08-068 and A.96-09-012, shall remain open pending our resolution of the CPNI issue remanded by the Court.

Pub. Util. Code § 311(g)(2)

This is an uncontested matter in which the decision grants the relief requested. Therefore, pursuant to Pub. Util. Code § 311(g)(2), the otherwise applicable 30-day period for public review and comment is waived.

Findings of Fact

1. The Court remanded to the Commission the following issues: (i) whether AT&T's RSMs collocated in GTE's central offices are actually used for interconnection or access to UNEs, and (ii) whether MWCOM's RSMs collocated in GTE's central offices are "necessary" for interconnection or access to UNEs as defined by the FCC.

2. The FCC has determined that (i) RSMs are necessary for interconnection and access to UNEs, (ii) ILECs must allow competitors to collocate RSMs, and (iii) competitors may use all the capabilities of their collocated RSMs.

3. On February 3, 2000, all the parties to the RSM issues remanded by the Court filed a settlement agreement that includes the following provisions: (i) AT&T's and MWCOM's RSMs collocated in GTE's central offices are used, or would be used, for interconnection or access to UNEs; (ii) AT&T and MWCOM may collocate their RSMs in GTE's central offices; (iii) AT&T and MWCOM may

use all the capabilities of their collocated RSMs; and (iv) the settlement resolves the RSM issues remanded by the Court.

Conclusions of Law

1. The settlement agreement conforms to the FCC's determination that (i) RSMs are necessary for interconnection and access to UNEs, (ii) ILECs must allow competitors to collocate RSMs, and (iii) competitors may use all the capabilities of their collocated RSMs.
2. The settlement agreement is an all-party agreement.
3. The settlement agreement, together with the record in this proceeding, convey sufficient information to permit the Commission to make an informed evaluation of the agreement.
4. All affected interests were adequately represented in arriving at the settlement agreement.
5. The settlement agreement is reasonable in light of the whole record, consistent with law, and in the public interest.
6. The settlement agreement conforms to Article 13.5 of the Commission's Rules of Practice and Procedures.
7. The settlement agreement satisfies the all-party settlement criteria set forth in D.92-12-019.
8. The settlement agreement resolves the following issues remanded by the Court: (i) whether AT&T's RSMs collocated in GTE's central offices are actually used for interconnection or access to UNEs, and (ii) whether MWCOR's RSMs collocated in GTE's central offices are "necessary" for interconnection or access to UNEs as defined by the FCC.
9. The settlement agreement should be adopted.

10. A.96-08-041 should be closed.
11. This following order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. The settlement agreement filed by AT&T Communications of California, Inc., GTE California Incorporated, and MCI WorldCom, Inc. is approved. The approved agreement is attached to this decision as Appendix A.
2. The parties to the approved settlement agreement shall comply with the terms of the agreement.
3. Application 96-08-041 is closed.
4. Application 96-08-068 and A.96-09-012 remain open pending this Commission's resolution of the Customer Proprietary Network Information issue remanded by the U.S. District Court for the Northern District of California.

This order is effective today.

Dated March 16, 2000, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
CARL W. WOOD
LORETTA M. LYNCH
Commissioners

APPENDIX A
ADOPTED SETTLEMENT AGREEMENT

(SEE CPUC FORMAL FILES FOR APPENDIX A.)