Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

AT&T Communications of California, Inc. (U 5002 C), TCG Los Angeles, Inc. (U 5462 C), TCG San Diego (U 5389 C) and TCG San Francisco (U 5454 C), Complainants, vs. Verizon California Inc. (U 1002 C), Defendant.	Case 04-08-026 (Filed August 19, 2004)

INTERIM OPINION ADDRESSING THE APPEAL OF VERIZON CALIFORNIA INC.'S TO THE CATEGORIZATION OF THIS CASE

I. Summary

The Commission denies the appeal of Verizon California Inc. (Verizon) and affirms the categorization of this case as "adjudicatory", as previously determined in the Instructions to Answer mailed to Verizon on August 24, 2004.

II. Background

Under Pub. Util. Code § 1701.1 et seq.[1] and Article 2.5 of the Commission's Rules of Practice and Procedure, (Rule) the procedures applicable to a particular proceeding depend on how the proceeding is categorized. Pub. Util. Code

[1] Unless otherwise stated, all statutory references are to the Pub. Util. Code.

§ 1701.1 and Rule 5 define three categories of Commission proceedings, two of which are considered in the instant appeal. These categories are adjudicatory and ratesetting.

In the Instructions to Answer the complaint, mailed to Verizon on August 24, 2004, this complaint was categorized as adjudicatory. Verizon filed a timely appeal of this categorization on September 2, 2004.

III. Parties' Positions

Verizon

Verizon believes that a ratesetting categorization is more appropriate in this complaint case. The typical complaint case, according to Verizon, involves adjudicating a set of factual allegations in an attempt to determine whether a particular law or Commission rule has been violated. Here, Verizon believes the essence of the complaint involves interpreting the applicable federal law and Federal Communications Commission (FCC) regulations to determine whether Verizon is required to provide unbundled packet switching in California. Verizon states that this issue of first impression is best handled under the ratesetting procedures, since the complaint case issues tangentially relate to those being considered in another active proceeding (Rulemaking (R.) 95-04-043, the FCC Triennial Review 9-Month Phase), which Verizon states is also designated as ratesetting.

Verizon believes that the issues in this proceeding require policy implementation, rather than policy enforcement and, as such, the ratesetting

categorization is appropriate.[2] Verizon also states that because arbitration proceedings involving negotiations to form an interconnection agreement permit reported ex parte communications, disputes concerning the rights and obligations under an executed interconnection agreement similarly should be categorized as ratesetting so that reportable ex parte communications can occur.

AT&T

Complainants, collectively AT&T,[3] do not oppose the appeal, but reject Verizon's rationale. AT&T states the predominant issue is one of interpreting and enforcing AT&T's interconnection agreements. AT&T explains that it proposed the adjudicatory categorization because it attempted to raise its issue on a more generic basis in R.95-04-043, but in that proceeding Verizon argued that the Commission could not lawfully issue a generic ruling without

---

[2] Verizon cites to Decision (D.) 97-11-021, Opinion on Final Rules Implementing SB 960, 76 CPUC2d 423, 426 regarding the distinction between policy enforcement and policy implementation:

> "It is clear from both SB 960 and our implementing rules that policy enforcement, whether initiated by the Commission itself or by a complainant, is by nature adjudicatory and should be so categorized; policy development, on the other hand, involves entirely or predominantly legislative determination, and proceedings concerned entirely or predominantly with such determinations should be categorized as quasi-legislative. Policy *implementation*, however, is not simply a matter of adjudicatory facts or legislative facts but commonly mixes the two. The ratesetting category most nearly approximates the mixed nature of policy implementation, and for this reason our rules state that a proceeding not clearly falling within any of the statutorily defined categories will be conducted under the rules applicable to the ratesetting category *unless* we find that another category (or a special hybrid of procedural rules) is better suited to that particular proceeding." (Emphasis in the original.)

[3] Complainants are AT&T Communication of California, Inc., TCG Los Angeles, Inc., TCG San Diego, and TCG San Francisco.

considering the specific terms of the interconnection agreements between Verizon and the competitive local exchange carriers, citing to *Pacific Bell v. Pac West Telecomm, Inc.*, 325 F.3d 114, 1127 (9th Cir. 2003). According to AT&T, the Administrative Law Judge in R.95-04-043 cited *Pacific Bell* as the primary reason for denying the motion to require Verizon to continue to provide certain unbundled network elements until its interconnection agreements were properly amended. Therefore, AT&T recommended the adjudicatory category to comply with *Pacific Bell*.

Telescape

Several parties, collectively Telescape[4], have petitioned to intervene in this case. The Commission will address the petition separately. Telescape has no objection to Verizon's request and concurs in AT&T's response.

IV. Applicable Statutes and Rules

Section 1701.1 (c)(2) defines adjudicatory proceedings as "enforcement cases and complaints except those challenging the reasonableness of any rates or charges as specified in § 1702."

Rule 5(b), implementing § 1701.1, further elaborates that adjudicatory proceedings are "(1) enforcement investigations into possible violations of any provision of statutory law or order or rule of the Commission; and (2) complaints against regulated entities, including those complaints that challenge the accuracy of a bill, but exclude those complaints that challenge the reasonableness of rates or charges, past, present, or future."

---

[4] Telescape Communications, Inc., Wholesale Airtime, Inc., and Blue Casa Communications, LLC.

Section 1701.1 (c)(3) defines ratesetting proceedings as those "in which rates are established for a specific company, including but not limited to, general rate cases, performance-based ratemaking, and other ratesetting mechanisms."

Rule 5 (c) further elaborates that ratesetting proceedings are "proceedings in which the Commission sets or investigates rates for a specifically named utility (or utilities), or establishes a mechanism that in turn sets rates for a specifically named utility (or utilities). 'Ratesetting' proceedings include complaints that challenge the reasonableness of rates or charges, past present, or future. For purposes of this Article, other proceedings may be categorized as ratesetting, as described in Rule 6.1 (c)."[5]

V. Discussion

On August 19, 2004, AT&T filed this complaint against Verizon seeking an injunction ordering Verizon to continue to provide AT&T with access to the Local Switching and Common Transport network elements, at the prices set forth in the Interconnection Agreements for those unbundled network elements, until such time as the agreements are amended as set forth in the agreements. AT&T believes that Verizon's failure to provide AT&T with such access is a violation of these Interconnection Agreements. Verizon believes that its actions comply with the Interconnection Agreements. Thus, the issue before the Commission in this complaint case is whether Verizon's actions (and intended actions) are a breach of its Interconnection Agreements with AT&T.

---

[5] Rule 6.1(c) provides that when " a proceeding does not clearly fit into any of the categories as defined in Rules 5(b), 5(c), and 5(d), the proceeding will be conducted under the rules applicable to the ratesetting category unless and until the Commission determines that the rules applicable to one of the other categories, or some hybrid of the rules, are best suited to the proceeding."

This is a characteristically adjudicatory matter because complainants seek to enforce the Interconnection Agreements, or contracts, between AT&T and Verizon. Indeed, § 1701.1 (c)(2) recognized this when it defined adjudicatory matters as complaints except those challenging the reasonableness of any rates or charges as specified in § 1702.[6] Here, there is no challenge to the reasonableness of any rates or charge, but rather, an effort to obtain relief pursuant to the terms of the Interconnection Agreements. The fact that the Commission may have to apply the law to determine whether Verizon has or has failed to comply with the Interconnection Agreements does not persuade us to change the categorization, because the Commission often applies existing law in adjudicatory matters to determine the respective rights and obligations of the parties. Nor is the fact that this is a case of first impression determinative, because the Commission may decide issues of first impression in adjudicatory matters (i.e., the proper application of a tariff rule or general order to a specific set of facts.)

Verizon's analogy to the procedures for arbitrating interconnection agreements supports our conclusion. Before the parties reach an interconnection agreement, the Commission presides over arbitrations in order to achieve an agreement. Arbitrations under the Telecommunications Act of 1996 are not categorized, but reportable ex parte communications are permitted. If they were categorized, ratesetting would generally be the appropriate category, because the Commission is involved in policy implementation, involving a mix of legislative and adjudicatory facts, to arbitrate the specific terms of the agreement. (See e.g., D.97-11-021, 76 CPUC2d 422 at 426.) In contrast, when a party seeks to enforce

[6] In promulgating the rules implementing § 1701.1, we stated that "…complaints, for the most part, will be adjudicatory proceedings[.]" (D.97-07-065, 73 CPUC2d 673, 675.)

such an agreement, the Commission determines whether there has been compliance with the specific terms of an agreement. Adjudicatory is the appropriate category for this type of determination.

In summary, we deny Verizon's appeal to the categorization of this proceeding. Pursuant to § 1701.1(a), the party who has requested this appeal may obtain judicial review only at the conclusion of this proceeding.

VI. Waiver of Comment Period

Pursuant to § 311(g)(3), the public necessity requires waiver of the comment period because the Commission must issue a decision on this appeal, filed on September 2, 2004, within 30 days of its filing. (See § 1701.1(a).) Therefore, we are waiving public review and comment consistent with Rule 77.7(f)(9) ["'Public necessity' includes, without limitation, circumstances where failure to adopt a decision before expiration of the 30-day review and comment period would place the Commission … in violation of applicable law…"].

VII. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Janet A. Econome is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. The issue before the Commission in this complaint case is whether Verizon's intended actions are a breach of its Interconnection Agreements with AT&T.

2. This is a characteristically adjudicatory matter because the complaint seeks to enforce AT&T's Interconnection Agreements with Verizon and, by large, does not entail the policy-making functions often involved in rate determination, design, and implementation issues.

3. The complaint does not challenge the reasonableness of any rates or charges.

Conclusions of Law

1. The Commission's categorization of this proceeding as adjudicatory, as set forth in the Instructions to Answer, is reasonable and should be affirmed.

2. Verizon's appeal to the adjudicatory categorization of this proceeding should be denied.

3. Because Pub. Util. Code § 1701.1 requires appeals to categorization to be resolved within 30 days, this decision should be effective immediately.

INTERIM ORDER

IT IS ORDERED that the appeal of Verizon California Inc. to the categorization of this proceeding is denied.

This order is effective today.

Dated _____, at San Francisco, California.