LEXSEE 62 FCC 2D 703

In the Matter of

MCI Telecommunications Corporation

American Telephone and Telegraph Company and the Pacific Telephone and Telegraph Company

FEDERAL COMMUNICATIONS COMMISSION

62 F.C.C.2d 703; 1976 FCC LEXIS 2119

RELEASE-NUMBER: F.C.C. 76-685

July 30, 1976 Released; Adopted: July 15, 1976

ACTION: [1]**

Memorandum Opinion and Order

JUDGES:

By the Commission: Commissioners Wiley, Chairman; Hooks and Washburn concurring in the result; Commissioner Robinson absent.

OPINION:

[*703] 1. On April 20, 1976, MCI Telecommunications Corporation (MCI) filed a "Petition for Emergency Relief" in which it asks the Commission to order the Pacific Telephone and Telegraph Company (PT&T) not to terminate service for nonpayment of past-due bills for private line circuits that MCI ordered between Oakland and Los Angeles. American Telephone and Telegraph Company (AT&T) and PT&T filed an "Opposition" to MCI's petition on May 5, 1976, and MCI replied on May 13, 1976.

2. MCI offered private line service to General Motors (GM) to connect GM's San Francisco office with points in the midwest. Since MCI's western operating centers were in Los Angeles and Phoenix at that time, it was necessary for MCI to connect GM's San Francisco office with MCI's Los Angeles or Phoenix operating centers. MCI chose to utilize AT&T facilities to meet this requirement, and initially ordered two Telpak-C services under AT&T's tariff FCC No. 260 from AT&T's Long Lines Department between a CCSA switch (Common Control Switching Arrangement) in Oakland used **[**2]** by General Motors Corporation n1 and an MCI provided switch which purportedly was on GM premises in Los Angeles. MCI asserts that it acted as GM's agent when it ordered the Telpak-C service. AT&T Long Lines, however, **[*704]** stated that it could not accept MCI's order because, "it does not relate to the provision of facilities as covered in Tariff F.C.C. No. 266 and as modified in Docket 20099." n2 The bill for two Telpak-C services between Oakland and Los Angeles is about $32,000 per month. With the requirement to link GM's San Francisco office with MCI's Los Angeles or Phoenix operating centers still unmet, MCI ordered what it

believed to be the next cheapest service. It requested 116 circuits from GM's CCSA switch in Oakland to MCI's terminal in Phoenix, Arizona, under AT&T's Other Common Carrier (OCC) Facilities Tariff F.C.C. No. 266. MCI replaced Los Angeles with Phoenix as the termination point for AT&T's service because certain facilities are provided under Tariff 266 only when they cross state lines. The charge for this service at single circuit Hi-Lo rates is approximately $52,000 per month. According to MCI, on April 22, 1975, AT&T informed MCI that only 46 of the 116 ordered circuits **[**3]** could be provided by July 1, 1975, the requested service date, with the remaining 70 circuits to be provided within a normal interval of 25 weeks. Inasmuch as MCI previously had made a commitment to GM that the circuitry would be installed by July 1, 1975, and since MCI could not obtain all of the requested circuitry from AT&T Long Lines by July 1, 1975, MCI again reconfigured its network, and ordered single circuits between the Oakland CCSA switch and MCI's Los Angeles terminal from PT&T under PT&T's OCC Facility Tariff F.C.C. No. 126. n3 The charge for the 118 single circuits under PT&T Tariff 126 is about $181,000 per month.

n1 A Common Control Switching Arrangement (CCSA) is a private line system for linking the various offices of a large company through large switches on a local telephone company's premises instead of through PBX switches on the customer's premises. The private lines furnished in a CCSA are provided for the exclusive use of the CCSA customer. The switching machines, however, are shared with other private line service customers.

n2 Letter of April 1, 1975, from D. G. Haynes of AT&T Long Lines to Skip Knowles of MCI Services Corporation. AT&T provides facilities to other common carriers (OCCs) pursuant to its Tariff F.C.C. No. 266. Telpak service is not available under AT&T Tariff No. 266.

[4]**

n3 PT&T provides facilities to OCCs under its Facilities Tariff F.C.C. No. 126. Although MCI originally ordered 116 circuits, it later increased the order to 118 circuits.

3. As of the date of the last pleading in this proceeding, PT&T purportedly was only supplying MCI with seven circuits. Subsequent to utilizing the 118 facilities obtained from PT&T, MCI began to shift its requirements for facilities from PT&T to Long Lines' facilities provided under AT&T's OCC Facility Tariff F.C.C. No. 266. MCI's former need for facilities between the Oakland CCSA switch and Los Angeles now is apparently satisfied by Long Lines facilities between the Oakland CCSA switch and MCI's Phoenix terminal pursuant to AT&T Tariff 266. Nevertheless, according to AT&T MCI's delinquent obligations to PT&T for the original 118 circuits obtained under PT&T's OCC Tariff 126 began accruing in October, 1975, and totaled $889,340.03 as of March 7, 1976. PT&T rendered monthly bills of $181,000 for 118 circuits. MCI, however, made payments of only $32,000 per month, the approximate cost of the requested Telpak-C service. By letter of March 22, 1976, PT&T notified MCI that the facilities which PT&T is providing **[**5]** MCI, "are subject to disconnection for non-payment on April 22, 1976, as provided under Section 2.1.9 of our (PT&T) Tariff F.C.C. No. 126." n4 PT&T, however, has stated that it, "will forebear exercising its legal right to discontinue provision of the **[*705]** seven remaining facilities between Oakland and Los Angeles. . . ." n5 This commitment is for an indefinite period. n6

n4 Exhibit 1 to the "Opposition" filed by AT&T and PT&T. Section 2.1.9 of PT&T Facility Tariff F.C.C. No. 126 provides in pertinent part that:

(A) . . . if the OCC fails to comply with the provisions of 2.1.4.(E) preceding on 2.2, 2.3.3, 2.3.5, 2.4, 2.5.1, 2.5.2, 2.5.3, 2.5.4, 2.5.6 or 2.7.1 following including any payments to be made by it on the dates or at the times herein specified, and fails within thirty (30) days after written notice by certified mail from the Telephone Company to an officer of the OCC to correct such non-compliance, the Telephone Company may discontinue the provision of facilities involved.

n5 Page 5 of "Opposition" filed by AT&T and PT&T.

n6 We note that none of the parties advance any jurisdictional arguments in this proceeding.

4. MCI seems to argue that it should not be required **[**6]** to pay the tariffed rate for facilities ordered pursuant to PT&T Tariff 126 because provisions in AT&T Tariff 260 unreasonably prohibited it from obtaining the lower priced Telpak-C service. AT&T refused to provide the Oakland to Los Angeles facilities at Telpak-C rates pursuant to Tariff 260 because GM did not have a regular and continuing requirement for the origination and termination of communications services at its Los Angeles premises. n7 MCI contends that the foregoing restriction violates (a) the principle in Hush-A-Phone Corp. v. United States, 238 F.2d 266 (D.C. Cir. 1956), that users of communications common carrier services have the right reasonably to use the services in ways which are privately beneficial without being publicly detrimental, and (b) Commission orders regarding the interconnection of telephone company facilities with specialized common carrier facilities. n8 Although MCI fails to expressly state what it believes is its financial obligation to PT&T, MCI concludes that absent the above-referenced tariff restriction, which it describes as discriminatory, AT&T would have been compelled to honor MCI's request for Telpak-C service and that it would have been **[**7]** billed only $32,000 per month rather than $181,000 per month.

n7 See 2.6.3(A) and 2.6.9 of AT&T Tariff F.C.C. No. 260.

n8 MCI relied on the same arguments in American Telephone and Telegraph Company (Restrictions on Interconnection of Private Line Services), FCC 76-684, 60 FCC 2d 939 (1976), which we also have decided today.

5. Bell, on the other hand, maintains that the only issue involved in this proceeding is MCI's refusal to pay voluntarily incurred and lawfully binding facility tariff charges. As for its refusal to provide Telpak-C service to MCI as GM's agent, AT&T states that:

M|CI concocted a spurious "customer" premises in Los Angeles located in fact on MCI's premises and purported to order TELPAK-C service, as agent for Bell's customer, to terminate in MCI's office_a termination which it knew full-well violated Bell's tariffs. The customer had no service equipment in Los Angeles for these 118 CCSA trunks. n9 n9 Footnote at pp. 3-4 of the "Opposition" filed by AT&T and PT&T.

If MCI's petition raises any questions regarding the reasonableness of these Tariff 260 interconnection restrictions, Bell claims that a notice of inquiry or proposed rulemaking is **[**8]** the proper procedural vehicle for considering such issues. Moreover, Bell argues that MCI's refusal to pay PT&T's Facility Tariff charges violates the Settlement Agreement reached in Docket No. 20099. n10 Bell specifically asserts that the rates in question were reflected in an illustrative Facilities Tariff which was an integral part of the settlement agreement in Docket No. 20099; that MCI was a signatory to that agreement; and that MCI now seeks an extension of its services by utilizing Bell-provided facilities at rates other than those rates agreed to in Docket No. 20099.

n10 The Commission accepted the settlement agreement without approving the contents thereof, and terminated without prejudice Docket No. 20099. 52 FCC 2d 727.

6. We find that MCI is legally obligated to pay PT&T all charges properly billed pursuant to PT&T Facility Tariff F.C.C. No. 126. MCI's self-help approach is contrary to Section 203 of the Communications **[*706]** Act of 1934, as amended, and existing case law. Section 203(c) of the Act specifically forbids carriers from charging or collecting different compensation than specified in an effective tariff. n11 Tariffs which are administratively valid operate to **[**9]** control the rights and liabilities between the parties. Rates published in such tariffs are rates imposed by law. n12 Withdrawal from this position would invite unlawful discrimination. Indeed, PT&T is obligated to bill MCI at rates reflected in its Tariff F.C.C. No. 126 for services ordered pursuant to that tariff. If PT&T did otherwise, it presumably would bill MCI at rates different than those which it applies to its other customers, and thus would discriminate among its customers. We cannot condone MCI's refusal to pay the tariffed rate for voluntarily ordered services.

n11 Section 203(c) provides in pertinent part that:

n|o carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation, for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect. . . .

n12 See United States v. Associated Air Transport, Inc., 275 F.2d 827, 833 (5 Cir. 1960); American Telephone and Telegraph Company v. Florida Texas Freight, Inc., 357 F. Supp. 977, affirmed 485 F.2d 1390 (1973); and cases cited therein.

7. A finding that self-help is not **[**10]** an acceptable remedy does not leave MCI without recourse. If MCI thought that AT&T acted unlawfully by refusing to provide either the Telpak service or the single circuits between Oakland and Phoenix, it had recourse to Sections 206-209 of the Communications Act which set forth a complaint procedure to be used by persons who believe that a carrier is violating the Act. This procedure still is available to MCI.

8. Although we have found that MCI must pay PT&T all charges properly billed pursuant to PT&T Facility Tariff F.C.C. No. 126 for the 118 circuits, we recognize that a requirement to immediately pay over $889,000 could severely affect MCI. PT&T and AT&T also recognize the difficulties encountered in disbursing such a large sum of money; and, as noted, have expressed a willing-

ness to meet with MCI under the aegis of the Chief, Common Carrier Bureau to discuss a reasonable payment plan. Inasmuch as we believe that such a plan serves the public interest, we note with approval AT&T's and PT&T's proposal to meet with the Chief, Common Carrier Bureau and MCI to arrive at a reasonable payment plan.

9. A question remains, however, as to why AT&T Long Lines could provide MCI with only **[**11]** 46 of the requested 118 circuits between Oakland and Phoenix by July 1, 1975. Long Lines had approximately 2-1/2 months to meet MCI's service request. Long Lines, however, stated that a normal interval of 25 weeks was needed to satisfy MCI's request for 118 circuits. If MCI could not provide the full 118 circuits for GM usage by July 1, 1975, GM may have taken its business elsewhere. If AT&T's purported inability to fill MCI's order by July 1, 1975, was, in actuality, an attempt to divert GM's business from MCI, or to force MCI to order higher priced service, AT&T may have acted unlawfully by not satisfying MCI's request for 118 circuits between the Oakland CCSA and MCI's Phoenix terminal. We realize, however, that AT&T actually may have been unable to provide all the requested circuitry by July 1, 1975, because of a shortage of circuits or because of the impact which MCI's order may have had on AT&T's construction plans. On the basis of the pleadings before us we are unable to determine why **[*707]** AT&T needed 25 weeks, instead of approximately 2-1/2 months, to provide the requested circuitry. Accordingly, we shall direct AT&T to submit within 20 days of the release date of the Memorandum **[**12]** Opinion and Order a complete, detailed explanation of the factors which prevented it from providing the requested circuitry between the Oakland CCSA and MCI's Phoenix terminal by July 1, 1975. AT&T also shall serve a copy of that report on MCI since MCI clearly is an interested party. Moreover, if AT&T's report fails to provide a satisfactory explanation, we shall adopt further procedures pursuant to Section 4i, 4j, and 403 of the Communications Act of 1934, as amended, to determine why AT&T did not meet MCI's request for 118 circuits between Oakland and Phoenix by July 1, 1975. Our concern over this issue does not, however, alter our finding that MCI is obligated to pay PT&T the amount due for service voluntarily ordered under PT&T's Facility Tariff F.C.C No. 126.

10. Accordingly, IT IS ORDERED, That the "Petition for Emergency Relief" filed by MCI Telecommunications Corporation on April 20, 1976, IS DENIED.

11. IT IS FURTHER ORDERED, That American Telephone and Telegraph Company IS DIRECTED to submit a report within twenty (20) days of the release date of this Memorandum Opinion and Order fully detailing the factors which prevented it from providing MCI with 118 terminations at **[**13]** the Oakland, California CCSA utilized by General Motors Corporation and extension of those facilities to MCI's terminal in Phoenix, Arizona by July 1, 1975.