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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Evaluate
Telecommunications Corporations Service
Quality Performance and Consider
Modification to Service Quality Rules.

Rulemaking 11-12-001

**ADMINISTRATIVE LAW JUDGE'S RULING DENYING MOTION OF
AT&T CALIFORNIA (U1001C) TO REOPEN BIDDING AND SELECT A NEW
AND INDEPENDENT CONSULTANT FOR THE NETWORK EVALUATION**

Summary

This ruling denies the motion of Pacific Bell Telephone Company d/b/a AT&T California (AT&T) to reopen bidding and select a new and independent consultant for the network evaluation ordered in the service quality rulemaking (Rulemaking (R.) 11-12-001).

Background

In the service quality proceeding, the Commission ordered a study of the networks of AT&T and Frontier Communications (formerly Verizon's network). (See Sept. 24, 2012 Assigned Commission's Scoping Memo (Scoping Memo); Decision (D.) 13-02-023, Decision Affirming Provisions of the Scoping Memo; and D.15-08-041, Decision Affirming Commission Direction to Conduct the Network Evaluation Study Ordered in D.13-02-023.)

The Commission issued a Request for Proposal (RFP) on October 31, 2017, after the proceeding was closed. On January 12, 2018, a Notice of Intent to Award was posted naming Economics and Technology, Inc. (ETI) as the selected bidder.

On February 28, 2018, AT&T filed its Motion, alleging that the consultant selected was biased and not able to perform an independent review.

On March 15, 2018, Frontier Communications (Frontier) and the California Association of Competitive Telecommunications Companies (CALTEL) filed responses. On March 16, 2018, a joint response was filed by the Office of Ratepayer Advocates (ORA), The Utility Reform Network, Center for Accessible Technology, and the Greenlining Institute (Joint Consumer Groups). Frontier and CALTEL support the motion, while Joint Consumer Groups oppose it.

Parties' Positions

AT&T contends that the Commission should reopen bidding and select a new and independent consultant for the network evaluation ordered in this proceeding. In the event that the Commission does not reopen bidding, AT&T recommends that the Commission impose procedural safeguards to ensure transparency and allow parties to challenge errors, assumptions, and oversights in the report. (*See* AT&T Motion at 12.)

AT&T contends that the consultant selected, Dr. Lee L. Selwyn of ETI, “lacks the necessary independence and freedom from bias or conflicts of interest” to perform the work he has been contracted to perform in a sufficiently neutral and independent manner. (AT&T Motion at 1.)

AT&T asserts that Dr. Selwyn has testified in more than 45 Commission proceedings and has never testified on behalf of an incumbent local exchange carrier (ILEC) like AT&T or Frontier. AT&T also contends that the positions Dr. Selwyn has taken in the past regarding the quality of AT&T's and Verizon's networks show bias.

AT&T specifically points to Dr. Selwyn's testimony on behalf of the ORA in the Order Instituting Investigation (OII) Investigation 15-11-007 concerning

the state of competition in telecommunications markets in California (the Competition OII). In that case, Dr. Selwyn testified that the ILEC's and other dominant carriers have persistent service quality and customer service problems, indicating a lack of competition or market failure. AT&T also singles out Dr. Selwyn's testimony on behalf of ORA in Application (A.) 15-03-005, the Frontier-Verizon Merger. There, Dr. Selwyn discussed the failure of Verizon to invest in and maintain its ILEC network facilities.

AT&T relies on Supreme Court cases addressing bias in judges and the Constitutional due process right to neutral decision makers. AT&T contends that the standard should be the same for an appointed consultant on which a decisionmaker may rely.

Joint Consumer Groups oppose the motion. First, Joint Consumers argue that AT&T's motion is procedurally improper. Joint Consumers assert that the Request for Proposal (RFP) provides for a protest period that runs from January 12, 2018 to January 22, 2018. AT&T did not file its motion until February 28, 2018.

Joint Consumers also argue that AT&T's allegation has not demonstrated that Dr. Selwyn is incapable of making an objective analysis. Joint Consumers point out that Dr. Selwyn is well-qualified and has provided consulting services to many different types of entities, such as information service providers, competitive local exchange carriers, interexchange carriers, wireless service providers, advocacy groups, and varied government agencies.

Joint Consumers contend that AT&T's citations to cases on judicial bias do not apply here because, in this case, Dr. Selwyn is not a decision maker and will not be reporting to a decisionmaker. Here, the consultant's report will be submitted to the Commission's Executive Director and the Director of the

Communication Division (CD). In addition, the RFP requires CD staff to conduct a physical inspection of the facilities based on the results of the data analysis the consultant delivers.

Joint Consumers point out that the selection process met the RFP procedural rules, including conflict-of-interest provisions. Joint Consumers further assert that if AT&T's motion were granted, it would further delay the network evaluation study ("network evaluation" or "study") which was first recommended in 2012, and ordered and confirmed in D.13-02-023 and D.15-08-041. Thus, joint Consumers contend that AT&T continues to oppose the study in order to put up roadblocks to the completion of the network evaluation.

Finally, Joint Consumers opposed the procedural safeguards proposed by AT&T arguing that they are overly burdensome and would impede completion of the study. However, Joint Consumers agree that transparency is critical for the validity of the report and recommend guidelines that would both allow parties to comment on the study and the holding of evidentiary hearings on narrow factual disputes, if needed.

Discussion and Analysis

Joint Consumer Groups raise the issue of the timeliness of AT&T's protest. However, the protest period set forth in RFP process applies to "bidders." (See RFP Section 13 at 20.) Here, AT&T is not a bidder and therefore the procedures in the RFP and State Contracting Manual do not appear to apply here. Therefore, the motion is not evaluated on the basis of it being untimely.

As provided in the September 2012 Scoping Memo, in order to maintain acceptable levels of service quality for California customers, it is necessary to ensure that carriers have access to an adequate network of infrastructure. Accordingly, the Commission determined that "an evaluation of carriers'

network infrastructure, facilities, and related policies and practices” (network evaluation study, herein) shall be conducted. As anticipated by the Commission, the study will: (1) focus on the facilities of AT&T and Verizon; (2) be conducted by “an independent consultant” under a contract managed by Commission staff; and (3) provide valuable information that will assist parties and the Commission “gauge the condition of carrier infrastructure and facilities to ensure the facilities support a level of service consistent with public safety and customer needs.” The Scoping memo provides that CD “will select a qualified team to conduct the examination [the study] via a Request for Proposal (RFP), and will manage the resulting study contract.”¹

It is noted that AT&T does not allege any violations in the RFP selection process or violations of the state contracting rules. AT&T’s claim relates only to the issue of bias and whether the consultant could be sufficiently neutral and independent.

Based on its motion, AT&T has not demonstrated that Dr. Selwyn is not “an independent consultant,”² or that he is incapable of conducting an independent evaluation, as further discussed below. In the prior Commission proceedings that AT&T referenced in its motion (the Competition OII and the Frontier-Verizon Merger), Dr. Selwyn testified on behalf of ORA, a party in those proceedings. Here, Dr. Selwyn is retained as a consultant under a contract issued and managed by CD, and Dr. Selwyn is reporting to the CD, which will actively oversee the study. Moreover, the RFP requires that the study be

¹ See the September 24, 2012 Scoping Memo, Section 5.

² See the Sept. 24, 2012 Scoping Memo at 11 and 12, and D.13-02-023 at 8.

performed “objectively” and with “adequate documentation” to support the consultant’s conclusions. (See RFP at 9-11.) The study is expected to be data-driven. Accordingly, the instances cited by AT&T in its motion are distinguishable and inapplicable here. As shown above, in the Competition OII and the Frontier-Verizon Merger, Dr. Selwyn worked as a consultant for ORA (a party in both proceedings). Here, Dr. Selwyn is retained and supervised by CD - a division of the Commission that is not a party in this proceeding.

As pointed out by Consumer Groups, cases dealing with judicial bias are not applicable here, and thus not persuasive. Of note, Dr. Selwyn is not a decisionmaker in this proceeding, and he is not reporting to a decisionmaker.

Independently, we find that Dr. Selwyn (selected by CD via RFP, as provided in D.13-02-023 and D.15-08-041) is “qualified” to conduct the network evaluation/study. Dr. Selwyn has a great deal of experience working on telecommunications issues for entities and agencies and has appeared as a witness on behalf of commercial organizations, non-profit organizations, and local, state and federal government authorities. Dr. Selwyn has served as an advisor to information service providers, telecommunications competitive local exchange carriers, interexchange carriers, and wireless service providers. Accordingly, we must deny AT&T requests to reopen bidding and select a new and independent consultant for the network evaluation ordered in this proceeding.

Lastly, we deny AT&T’s request that the Commission impose procedural safeguards to ensure transparency and to allow parties to challenge errors, assumptions, and oversights in the report, as an alternative to reopening the bidding and/or selecting of a new and independent consultant for the network evaluation. That is, while initially, the purpose of the study was to inform the

Commission and provide a foundation for the service quality rules (*see* Sept. 24, 2012 Scoping Memo in R.11-12-001), those rules were adopted and this service quality proceeding has been closed (*see* D.16-08-021, D.15-08-041 and D.13-02-023.). At this point, there is no identifiable proceeding open in which the study may be used.

After the completion of the study, the Commission may re-open this instant proceeding, initiate a new proceeding, or do something else. Accordingly, it is premature to create elaborate procedures for testing the accuracy of the report that is not yet produced, and which the Commission has not yet adopted for use. In the future, after the study is completed and a report of the study is issued, and if the Commission decides to use the study/report in a future proceeding, AT&T and Frontier will have the opportunity to challenge the report and to request that evidentiary hearings be held to resolve any factual disputes in the study/report.

Based on the foregoing therefore, the motion of AT&T to reopen bidding on the RFP and select a new and independent consultant for the network evaluation contemplated in this proceeding and/or to impose procedural safeguards is denied.

IT IS RULED that AT&T's motion is denied.

Dated June 25, 2018, at San Francisco, California.

/s/ ADENIYI A. AYOADE

Adeniyi A. Ayoade
Administrative Law Judge