



**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

FILED
5-26-16
01:18 PM

Application by Webpass Telecommunications, LLC
(U7278C) pursuant to Decision 98-10-058 for
Arbitration of Dispute over Denial by Pacific Bell
Telephone Company (U1001C) of Nondiscriminatory
Access to Utility Support Structures.

A1605015A.

**APPLICATION BY WEBPASS TELECOMMUNICATIONS, LLC
(U7278C) FOR ARBITRATION OF DISPUTE**

GOODIN, MACBRIDE,
SQUERI & DAY, LLP
John L. Clark
505 Sansome Street, Suite 900
San Francisco, California 94111
Telephone: (415) 392-7900
Facsimile: (415) 398-4321
Email: jclark@goodinmacbride.com

Attorneys for Applicant Webpass
Telecommunications, Inc.

Dated: May 25, 2016

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Application by Webpass Telecommunications, LLC (U7278C) pursuant to Decision 98-10-058 for Arbitration of Dispute over Denial by Pacific Bell Telephone Company (U1001C) of Nondiscriminatory Access to Utility Support Structures.

A.

**APPLICATION BY WEBPASS TELECOMMUNICATIONS, LLC
(U7278C) FOR ARBITRATION OF DISPUTE**

Pursuant to Decision (D.) 98-10-058 and Article 2 of the Rules of Practice and Procedure of the California Public Utilities Commission (“Commission”), Webpass Telecommunications, LLC (“Webpass”) requests arbitration under the expedited dispute resolution procedures established by D.98-10-058 of a pending dispute with Pacific Bell Telephone Company (“AT&T California”) regarding access to AT&T California’s conduit systems.

AT&T California has denied Webpass the ability to install splice cases and similar equipment in AT&T California’s conduit systems and has also stated that it will deny Webpass the right to install fiber optic cable in a conduit that is partially occupied by an existing AT&T California cable except in entrance facilities owned by other parties or unless AT&T California’s cable is enclosed in an innerduct. Even then, however, AT&T California will never allow joint occupation of available space in conduit unless a “full vacant spare” remains available to AT&T California. In cases where Webpass is allowed to override an AT&T

California innerduct, AT&T California requires Webpass to install an extra innerduct in the conduit for AT&T California's use.

None of these same restrictions and requirements apply to AT&T California's own use of its conduit systems. AT&T California's reliance on these policies in refusing to provide Webpass with requested access to AT&T California's conduit systems is discriminatory, in breach of AT&T California's contractual obligations, and violates the Commission's rules.

I. INTRODUCTION AND FACTUAL BACKGROUND

Webpass holds authority under D.15-04-011 to operate as a competitive local exchange carrier ("CLEC") within the service territories of AT&T California, Frontier California Inc. (formerly known as Verizon California Inc.), Consolidated Communications of California Company (formerly known as SureWest Telephone), and Citizens Telecommunications Company of California, Inc. Consistent with that authority, Webpass is engaged in the buildout of "last-mile" broadband network infrastructure for use by its wholesale customers in the provision of advanced data and voice telecommunications capabilities to California consumers.

Webpass is constructing its network using combinations of overhead and underground facilities. In many areas, such as San Francisco, the ability to use aerial facilities is limited, which requires Webpass to install a good portion of its facilities, such as fiber optic cabling, underground. While Webpass has authority from the Commission to construct its own underground conduit systems and other support structures, so long as exemptions from CEQA exist, it is generally uneconomical and, due to the imposition of moratoriums and other restrictions on trenching within roadways, often highly impractical, to do so. Therefore, like other CLECs, Webpass must rely on the availability of unused capacity in existing utility infrastructure, such as that owned by AT&T California.

Under D.98-10-058 and 47 U.S.C. § 224, Webpass has the right to access such utility support structures, including ducts, conduit, and other support structures, along with utility rights-of-way (“ROW”) for the purpose of installing cabling and other facilities to be used by it in providing telecommunications services.

To that end, Webpass has entered into an interconnection agreement (“ICA”) with AT&T California, which includes provisions in “Attachment 03 Structure Access” (the “Structure Access Attachment”) requiring AT&T California to “provide CLEC [i.e., Webpass] with equal and nondiscriminatory access to Pole space, Conduits, Ducts, and ROW on terms and conditions equal to those provided by [AT&T California] to itself or to any other Telecommunications Service provider.”¹ A copy of the “Structure Access Attachment” is attached hereto as Exhibit A.

Consistent with its rights under the ICA and pursuant to AT&T California’s business procedures, Webpass has submitted detailed applications to install its fiber facilities at various locations. Exhibit B, is a sample of mapping and design drawings submitted to AT&T California for a proposed installation along Main Street, San Francisco. Pages 2-5 contain details for installations at three different manholes. The drawings identify conduits in which Webpass seeks to install fiber, and points at which Webpass intends to locate splice cases and cable coils.

AT&T California denied Webpass’ application in part, specifying its reasons (shown in red) on the plans included in Exhibit B. As shown by these notations, AT&T California rejected Webpass’ plans to install splice cases and coil loops. In addition, while the drawings show that many ducts are only partially-filled, AT&T California has stated to Webpass

¹ Structure Access Attachment, section 3.1.1.

that a fiber optic cable override (i.e., installation of fiber optic cable in available space that is already partially occupied by an existing AT&T California cable) is never allowed except in entrance facilities owned by other parties² or unless AT&T California's cable is enclosed in an innerduct, which is rarely the case. This means that even though there may be ample space in multiple partially-used conduits, in most cases AT&T California refuses to allow Webpass to install fiber in those conduits. And, in cases where Webpass is allowed to override an existing AT&T California innerduct containing a fiber optic cable, AT&T California requires Webpass to install two additional innerducts, one for Webpass' use and one to be reserved for AT&T California's use.

What is more, AT&T always denies access to the last open conduit in any location, because AT&T California claims a right to reserve that conduit for AT&T California's exclusive future use. Such conduit might be for entrance to a new building to which AT&T California just installed service (for which a spare conduit would likely remain unneeded for many years) or it could be an open conduit between two manholes in the street. In either event, if it is the last open conduit, AT&T California has been very clear that access will be denied 100% of the time.

AT&T California's policies are blatantly discriminatory and anticompetitive.

AT&T California installs its own splice cases in manholes, and Webpass is informed that AT&T

² Entrance facilities (or laterals) are the pathways from a building to AT&T California's underground conduit system. If a building owner had installed a direct conduit from the basement of the building to an AT&T California manhole, that conduit is deemed to be owned by the building. Therefore Webpass can and does override any existing cables in the conduit to access the building. The only buildings to which Webpass has been permitted to connect its fiber optic network have this arrangement. On the other hand, if a building owner had installed a conduit from the basement to an AT&T California "sub box" and another conduit from the sub box to an AT&T California manhole, that second conduit is deemed to be owned by AT&T California.

California has permitted other communications providers to do so as well. Exhibit C is a photograph of splice cases in an AT&T California manhole. Webpass is also informed that AT&T California freely overrides its own cables and innerducts (as well as cables and innerducts owned by other companies) in partially vacant conduit, including where the existing cable in the conduit consists of copper pairs.³ Additionally AT&T California does not go through the same roping and tagging process to reserve space that competitive providers are compelled to follow. AT&T California just sends out crews to install cable in any available open space and documents the build upon completion.

AT&T California's anti-competitive and discriminatory policies are not consistent with the ICA. The ICA specifically contemplates that Webpass will install splices in AT&T's manholes or other elements of the conduit system (see, e.g., Structure Access Attachment, section 4.4.1.3, 4.6.1, and 4.14.1). Moreover, with respect to conduit access, the ICA provides that "[a]ssignment of space on Poles, in Conduit or Ducts and within ROW's will be made pursuant to licenses granted by [AT&T California] *on an equal basis* to [AT&T California], CLEC and other Telecommunications Providers. (Structure Access Attachment, section 3.9.1, emphasis added.) In addition, the ICA states, "Further, [AT&T California] shall not withhold or

³ While AT&T California admits that it overrides copper cable with its own fiber cable, it does not allow CLECs to do so because of the potential for damage to the copper pairs. However, the potential for damage to copper cable is very slight, because of the designed durability of such cables. Moreover, Webpass always uses qualified employees to install its facilities and in cases where work within a conduit in which AT&T California's copper facilities are installed could result in harm to those facilities, there is no reason why Webpass should not have the same right as AT&T California to install facilities. Webpass coordinates all work with AT&T California so that appropriate AT&T California personnel could be deployed very quickly, at Webpass' expense, in the unlikely event that copper cabling is damaged during the fiber installation and repairs are required, just as would be the case where AT&T California is doing such work. Further, the fact is that these runs are typically short easy pulls, and Webpass has overridden AT&T California cables in buildings that own their entrance facilities without any damage to existing AT&T California cables.

delay assignment of such Facilities to CLEC because of the potential or forecasted needs of itself or Third Parties.” (Structure Access Attachment, section 3.1.1.) Instead, AT&T California may withhold available space only if it is already assigned and will be used, whether by AT&T California or any other assigned entity, within twelve months of assignment. (Structure Access Attachment, section 2.4.) What is more, there is nothing in the ICA or the Commission’s rules that authorizes AT&T California to require Webpass to install innerducts for AT&T California’s use or that approves AT&T California’s discriminatory practice of refusing to allow Webpass to install fiber in conduit space that is partially occupied by AT&T California’s own cable.

AT&T California’s violations of its obligations under federal and state law, and the ICA, are not insignificant. AT&T California’s refusal to allow Webpass to install splice cases within the existing conduit system means that Webpass would be required to install a duplicate manhole or other underground structure at every point where a splice is required in order to serve customers’ premises along a fiber route. Webpass has invited bids from contractors and found that installing the least expensive type of splicing structure along the Main Street route depicted in Exhibit B, for example, would cost a minimum of \$18,000 per splice point. This price does not include street surface repair work, such as repaving, repairing sidewalks, and handicap ramps, the costs of which can be huge, particularly where a street has recently been repaved by the City. AT&T California’s limitation on access to individual conduits presents the potential for even higher, indeed enormous, costs that must be incurred by a competitor seeking to build out a network as it leaves no alternative but to install entirely new conduit structure. What is more, AT&T California’s policies would result in highly inefficient use of the public right-of-way, unnecessary inconvenience to the traveling public, abutting store

and other property owners, and others during the construction process, and duplicate, wasteful investment in unnecessary facilities.

As a new competitive service provider, Webpass simply cannot justify the investment needed to construct ubiquitous infrastructure capable of serving potential end user locations. Doing so would be tremendously expensive and there would be no guaranty, by any means, that Webpass could ever recover its cost of making such an investment. By contrast, AT&T California has built facilities that extend to virtually every home and building in San Francisco and other areas it serves; but it has taken decades for it to construct these facilities and, to a significant extent, they were likely funded at monopoly ratepayer expense. These options simply are not available to Webpass.

Even in cases where Webpass has facilities that are close to a service location, it may not be economically practical to construct additional infrastructure to provide a link between Webpass' facilities and the service location. For example, in order for Webpass to be able to extend facilities to end users in a multi-unit building from fiber cabling in the street, Webpass needs to have access to a pathway from the cabling into the building. This would require a manhole or other suitable means to access the cabling, trenching and installation of conduit between the manhole and the building, and an entry duct into the building. Unless there were a large number of end users in the building who were willing to commit to taking service from Webpass' wholesale customers for such period of time as would enable Webpass and its customers a reasonable opportunity to recover their costs, the risk of investing in the needed facilities might well be too high; and, this would likely be the case for any prospective competitive service provider, not just Webpass and its wholesale customers.

Thus, under AT&T California's policies, Webpass would be unable to go forward with its network buildout. It is likely that other potential competitors would find themselves to be in the same position and, as a result, be thwarted in their own efforts to bring innovative, advanced service choices to end users on a competitive basis.

Webpass requested, by letter sent on February 2, 2016, that AT&T California engage in executive-level negotiations pursuant to the dispute resolution provisions of D.98-10-058. (A copy of that request is attached as Exhibit D.) However, AT&T refused to do so, stating that Webpass first had to complete dispute resolution under the ICA. Webpass then attempted further discussions with AT&T California's assigned business contact; however, those efforts failed. As Webpass had already escalated the matter as far as it could, short of the requested executive-level review, there was nothing further for Webpass to do under the ICA dispute resolution process except wait for the expiration of the ICA's sixty-day informal dispute resolution period before once again exercising its rights under D.98-10-058. Once the waiting period passed, Webpass renewed its request for executive-level dispute resolution. (See Exhibit E.) However, AT&T California has offered no solution and no justification whatsoever for its discriminatory policies notwithstanding that, under D.98-10-058, the burden is on AT&T California to justify any refusal to permit access to its support structures.

AT&T's provision of structure access to Webpass is not elective; it is a requirement of the ICA and federal and state law⁴ and is fundamental to the achievement of state telecommunications policy. In this regard, the Commission recently observed that an "important goal of the State of California is the widespread deployment and use of broadband services. Like

⁴ The ICA provides at section 25.1, "Unless otherwise provided by Applicable Law, this Agreement shall be governed by and construed in accordance with the Act, the FCC Rules and Regulations interpreting the Act and other applicable federal law. The complete ICA is available at: https://clec.att.com/clec_cms/clec/docs/db3c60f8a20749288626ae9b1590d102.pdf

electricity a century ago, broadband is a foundation for improved education, new industries, economic growth, job creation, global competitiveness, and a better way of life.” (Order Instituting Rulemaking 14-05-001, May 1, 2014, at 20 [footnotes omitted].)

Webpass’ interest in seeking full access to conduits and other support structures owned by AT&T California is to enable it deploy its broadband infrastructure and services rapidly, efficiently, and economically, in furtherance of this key state policy. Webpass and other new competitors cannot feasibly do so in any other way. There are simply too many barriers to rapid ubiquitous buildout of new facilities by new carriers. Indeed, as the Commission observed in issuing D.98-10-058, “In order for broadly available facilities-based competition to succeed, CLCs need access to the poles, conduits, and ROW”(D.98-10-058, at 2.)

Consequently, because AT&T California has refused to allow Webpass access to AT&T California’s conduit system on a nondiscriminatory basis, as specifically contemplated by the ICA and applicable law, Webpass is forced to make this application for arbitration under the expedited dispute resolution process adopted by D.98-10-058.

Webpass seeks resolution of this dispute in accordance with the ICA, Public Utilities Code § 709, and state and federal policy promoting the development of broadband and other advanced telecommunications, including Section 706 of the Telecommunications Act of 1996 (codified at 47 U.S.C. § 1302), which provides, in pertinent part:

[E]ach State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including , in particular, elementary and secondary schools an classroom) by utilizing, in a manner consistent with the public interest, convenience and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”

In support of this application, Webpass makes the following general showing in accordance with Article 2 of the Commission's Rules of Practice and Procedure, followed by the specific showing required under D.98-10-058.

II. COMPLIANCE WITH ARTICLE 2

A. **Rule 2.1(A) – Information Regarding Applicant**

Applicant's exact legal name is Webpass Telecommunications, LLC. Applicant's principal place of business is 267 8th Street, San Francisco, California, and its telephone number is 415-233-4100.

B. **Rule 2.1(B) – Correspondence and Communications**

WEBPASS: All communications, correspondence, and pleadings with respect to this application should be directed to:

John L. Clark
Goodin, MacBride, Squeri & Day, LLP
505 Sansome Street, Suite 900
San Francisco, CA 94111
Telephone: (415) 392-7900
Facsimile: (415) 398-4321
E-mail: jclark@goodinmacbride.com

AT&T CALIFORNIA: Webpass is informed and believes that communications with AT&T California regarding the filing of this application should be directed to:

Contract Management
Attn: Notices Manager
311 S. Akard St., 9th Fl.
Four AT&T Plaza
Dallas, TX 75202
Facsimile: (214) 464-2006
E-mail: m41654@att.com

David J. Miller
General Attorney
AT&T Services, Inc.
2150 Webster Street, 8th Floor
Oakland, CA 94612
Telephone: (510) 645-0702
Email: DavidJMiller@att.com

C. Rule 2.2 – Corporate Documents

A copy of Applicant’s current articles of organization and certification of authorization to conduct business in California were filed as exhibits to Application 14-03-007 on March 10, 2014.

D. Rule 2.4 – CEQA Compliance

Applicant’s Proponent’s Environmental Assessment (“PEA”) is attached as Exhibit F.

III. COMPLIANCE WITH DECISION 98-10-058

A. Statement Of All Unresolved Issues

As discussed above, there currently are two unresolved issues between Webpass and AT&T California:

(1) Is AT&T California entitled to require Webpass to install splice cases and similar equipment in Webpass-owned structures even when there is available space for such equipment in AT&T California’s conduit system?

(2) Is AT&T California entitled to preclude or otherwise limit Webpass’ right to install cable in available space within conduits in which AT&T California has already installed cable?

B. Description Of Parties’ Positions On Unresolved Issues

(1) As discussed above, Webpass’ position is that it has a right to nondiscriminatory access to available space in AT&T California’s conduit system for the purpose of installing splice cases and similar equipment needed to operate Webpass’ fiber cable system. AT&T California’s position is Webpass may not install splice cases or other splicing equipment in AT&T California’s conduit system.

(2) As discussed above, Webpass' position is that assignment of space within AT&T California's conduit system must be on a nondiscriminatory, first-come, first-served basis and, therefore, AT&T California can neither preclude Webpass from installing cable in accordance with the same practices and policies applicable to AT&T California nor reserve, indefinitely, available capacity for its own use. AT&T California's position is that it may apply discriminatory conduit occupation practices and policies to use of its conduit system by Webpass and that it may indefinitely reserve one complete vacant spare conduit for its own purposes.

C. Proposed Agreement

In Webpass' view, its existing ICA contains all necessary provisions and no further agreement is required, other than AT&T California's agreement to abide by the terms of the ICA and applicable law.

D. Direct Testimony

D.98-10-058 requires Webpass' submission of direct testimony supporting its position on the facts pertaining to the issues raised by this application. However, on May 24, 2016, Webpass was advised by e-mail communications from the Docket Office, that the Division of Administrative Law Judges has determined that the filing of such testimony is no longer permitted by the Commission's Rules of Practice and Procedure. Accordingly, this application does not include the testimony that otherwise would be required by D.98-10-058.

E. Compliance With Time Requirements

Webpass sought to negotiate with AT&T California through various avenues, but its efforts have been rebuffed. As noted above, Webpass sought to escalate this matter to the executive level of AT&T California on February 2, 2016. (See, Exhibit D.) Webpass then sought executive-level escalation, again, on May 11, 2016, but AT&T California still has not come to terms with Webpass on the disputed issues. (See, Exhibit E.)

IV. SCOPING INFORMATION

Proposed Category: Applicant proposes that the Commission classify this proceeding as ratesetting. Although this Application does not affect rates, the definitions of “adjudicatory” or “quasi-legislative” do not clearly apply to this application. Under the Commission’s rules, when a proceeding does not clearly fit any of the categories, it should be conducted under the ratesetting procedures.

Need for hearing: The applicable expedited dispute resolution procedures provide for an arbitration conference and hearing before an appointed arbitrator.

Issues to be considered: The issues to be considered in this proceeding include:

- (1) Whether AT&T California is entitled to require Webpass to install splice cases and similar equipment in Webpass-owned structures even when there is available space for such equipment in AT&T California’s conduit system.
- (2) Whether AT&T California is entitled to preclude or otherwise limit Webpass’ right to install cable in available space within conduits in which AT&T California has already installed cable.

Proposed Schedule: Applicant proposes the following schedule:

15 days after application filed:	Due date for AT&T California response to application.
3 days after response:	Due date for joint filing of revised statement of unresolved issues
7 days after response:	Arbitration conference and hearing begins
7 days after hearing:	Due date for post-hearing brief
15 days after hearing:	Issuance of draft arbitrator’s report
10 days after issuance of draft	Due date for comments on draft

arbitrator's report:	arbitrator's report
15 days after filing of comments:	Issuance of final arbitrator's report
7 days after issuance of a final arbitrator's report:	Due date for filing arbitrated agreement
30 days after filing of arbitrated agreement:	Issuance of Commission decision

V. CONCLUSION

Webpass respectfully requests that the Commission grant its request for expedited resolution of the foregoing disputes and order AT&T California to:

- (1) Allow Webpass to install splice cases and similar equipment in available space locate within AT&T California's conduit system.
- (2) Allow Webpass to utilize any available duct capacity except for duct capacity that is properly assigned to AT&T California or another telecommunications provider for use commencing within a period of no longer than twelve months.

Respectfully submitted May 25, 2016 at San Francisco, California.

GOODIN, MACBRIDE,
 SQUERI & DAY, LLP
 John L. Clark
 505 Sansome Street, Suite 900
 San Francisco, California 94111
 Telephone: (415) 392-7900
 Facsimile: (415) 398-4321
 Email: jclark@goodinmacbride.com

By /s/ John L. Clark
 John L. Clark

Attorneys for Applicant Webpass
 Telecommunications, Inc.

VERIFICATION

I, Charles Barr, am the Managing Member of the Applicant herein and am authorized to make this verification on its behalf. The matters stated in the application and the exhibits thereto are true and correct to the best of my knowledge and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 25th day of May 2016 at San Francisco, California.

A handwritten signature in black ink, appearing to read "Ch Barr", with a stylized flourish at the end.

Charles Barr