



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

**FILED**

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Pac-West Telecomm, Inc. (U5266C),  
  
Complainant,  
  
vs.  
  
PNG Telecommunications, Inc. (U6336C),  
  
Defendant.

C. 10-05-011  
(Filed May 11, 2010)

**ANSWER OF PNG TELECOMMUNICATIONS, INC  
TO COMPLAINT OF PAC-WEST TELECOMM, INC.**

Pursuant to the California Public Utilities Commission Rules of Practice and Procedure (“Rules”) Rule 4.4 and the Administrative Law Judge’s ruling, dated July 28, 2010, PNG Telecommunications, Inc. (U-6336-C) (“PNG”) submits this answer in response to the Complaint of Pac-West Telecomm Inc. (“Pac-West”).

**I. INTRODUCTION**

Pac-West “provides wholesale communications” among other services to “enable other carriers to serve their customers.”<sup>1</sup> Pac-West does not serve retail end-users who actually originate telephone calls. PNG, on the other hand, does serve retail end-user customers and must deploy a network and related services to serve those customers and ensure that the telephone calls of its customers – which are located in California and in other states - are completed.

Instead of deploying its own network in certain areas and otherwise developing all services necessary to serve its customers, PNG engaged Pac-West as a service provider to perform functions that PNG could otherwise provide itself. PNG customers originate traffic (i.e. dial telephone calls) and Pac-West assists PNG in delivering that traffic to the carrier who actually serves the dialed party (which is not Pac-West). Importantly, with respect to the issues raised in the Complaint, Pac-West itself does not have customers that dial telephone calls (i.e. originate traffic) as Pac-West provides wholesale services to PNG

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<sup>1</sup> Complaint, ¶ 2.

and other carriers. This is important because it means that PNG and Pac-West are not interconnected and mutually exchanging traffic as those terms are contemplated under the federal Telecommunications Act of 1996 (“Act” or “FTA”), Section 251.

The dispute between the parties concerns Pac-West overcharging for services it provided to PNG under the Master Services Agreement that the parties executed in 2007 and Pac-West refusing to provide a refund for the amounts it overcharged.

## **II. ANSWER**

In response to the allegations set forth in the Complaint, PNG responds as follows:

1. Responding to Paragraph 1:<sup>2</sup> PNG admits the parties entered into an agreement titled “Master Services Agreement,” such agreement has an effective date of February 8, 2007 and that the parties have executed certain amendments. To the extent that the Complaint alleges that the Master Services Agreement includes specific terms, the terms of the agreement speak for themselves. PNG lacks sufficient information to admit or deny any remaining allegations in this paragraph, and on that basis, denies them.

2. Responding to Paragraph 2: Based on information and belief, PNG admits the allegations in this paragraph.

3. Responding to Paragraph 3: PNG admits that it is certificated by the Commission to serve as a CLEC and IXC in California. PNG admits that it provides services regulated by the Commission to residential and business customers in California. PNG denies any remaining allegations in this paragraph.

4. Responding to Paragraph 4: PNG denies the allegations in this paragraph in that PNG purchases services from Pac-West under the Master Services Agreement and the parties are not implementing legal requirements pursuant to FTA Section 251. Specifically, PNG and Pac-West do not interconnect for the purpose of mutually exchanging traffic as contemplated in FTA, Section 251. Rather, PNG utilizes Pac-West’s services such that PNG may mutually exchange traffic with other

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<sup>2</sup> All paragraph references hereafter are to the Complaint, unless otherwise noted.

carriers who provide services to end-users. To the extent that this paragraph interprets the Master Services Agreement, the agreement speaks for itself. PNG denies any remaining allegations in this paragraph.

5. Responding to Paragraph 5: To the extent that this paragraph interprets the Master Services Agreement, the agreement speaks for itself. PNG lacks sufficient information to admit or deny the allegations included in this paragraph, and on that basis, denies them.

6. Responding to Paragraph 6: PNG denies the allegations in this paragraph and further states that it has paid properly invoiced charges and is current on all of its accounts with Pac-West. PNG further states that after Pac-West issued the initial credit, PNG has not received any notice from Pac-West indicating that PNG has not paid then-current charges. This paragraph consists of allegations that include legal conclusions to which no response is required.

7. Responding to Paragraph 7: To the extent that this paragraph interprets the Master Services Agreement and Pac-West's tariff, those documents speak for themselves. PNG otherwise denies the allegations in this paragraph.

8. Responding to Paragraph 8: To the extent that this paragraph interprets the Master Services Agreement, the agreement speaks for itself. PNG otherwise denies the allegations in this paragraph.

9. Responding to Paragraph 9: PNG denies the allegations in this paragraph.

10. Responding to Paragraph 10: PNG admits that the parties have conducted negotiations in an attempt to resolve the dispute, including negotiations conducted after Pac-West issued a credit to PNG in approximately May 2009. PNG denies any remaining allegations.

11. Responding to Paragraph 11: PNG agrees that to the extent the Commission has jurisdiction over the dispute, the categorization for this proceeding is adjudicatory and that an opportunity for hearing is necessary.

12. Responding to Paragraph 11(a) – (d): PNG disagrees that Pac-West identified issues that require resolution in this proceeding and further denies Pac-West is entitled to the requested relief. PNG

reserves the right to seek further relief from the Commission with respect to the issues raised in the Complaint.

13. Responding to Paragraph 12: PNG disagrees with Pac-West's proposed schedule to the extent it does not include a date for submission of any dispositive motions to be submitted and ruled on by the Commission prior to the parties' submitting written testimony and it would permit Pac-West the right to automatically submit rebuttal testimony. PNG reserves the right to propose an alternate schedule, when and if applicable.

14. Responding to Paragraph 13: Based on information and belief, PNG admits the allegations in this paragraph.

15. Responding to Paragraph 14: Based on information and belief, PNG admits the allegations in this paragraph.

16. Responding to Paragraph 15: Based on information and belief, PNG admits the allegations in this paragraph.

17. Responding to Paragraph 16: PNG admits the allegations in this paragraph.

18. Responding to Paragraph 17: PNG admits the allegations in this paragraph and further states that the following should be added as a contact for PNG: Dennis Packer, General Counsel, PowerNet Global Communications, 100 Commercial Drive, Fairfield, OH 45014; T: (513) 645-4932.

19. Responding to Paragraph 18: PNG admits the allegations in this paragraph.

20. Responding to Paragraph 19: PNG denies the Commission has authority to resolve this contract dispute to the extent it concerns traffic that is not subject to the Commission's jurisdiction. To the extent these allegations purport to interpret California Public Utilities Code ("Code")<sup>3</sup> Sections 701, 1702, 1707, other Sections or Commission rules, decisions and policies, those Sections, Commission rules, decisions and policies speak for themselves. To the extent this paragraph consists of allegations that include legal conclusions, no response is required.

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<sup>3</sup> All Section references herein are to the Code unless otherwise noted.

21. Responding to Paragraph 20: PNG denies that the Master Services Agreement is an agreement through which the parties perform their legal obligations under FTA, Section 251 in that the parties are not interconnecting for the purposes of mutually exchanging traffic. Instead, Pac-West is providing services to PNG such that PNG may mutually exchange traffic with other carriers who are subject to FTA, Section 251. To the extent this paragraph consists of allegations that include legal conclusions, no response is required. PNG denies any remaining allegations in this paragraph.

22. Responding to Paragraph 21: PNG admits this allegation.

23. Responding to Paragraph 22: PNG admits it is certificated by the Commission to serve as a CLEC and an IXC and when acting as such, it serves as a public utility and subject to the Code, as applicable. PNG denies any remaining allegations in this paragraph.

24. Responding to Paragraph 23: This paragraph consists of allegations that include legal conclusions and no response is required.

25. Responding to Paragraph 24: PNG admits it received invoices from Pac-West and invoices for a certain period and such invoices included the wrong rate such that Pac-West overcharged PNG. PNG otherwise denies the allegations in this paragraph.

26. Responding to Paragraph 25: This paragraph refers to the Master Services Agreement, Section 2.3 and PNG submits that such agreement speaks for itself.

27. Responding to Paragraph 26: This paragraph consists of allegations concerning Pac-West's tariff and PNG denies such allegations on the basis that those documents speak for themselves. PNG denies that Pac-West's tariffs are applicable to services not provided in California. PNG otherwise lacks sufficient information to admit or deny the allegations included in this paragraph, and on that basis, denies them.

28. Responding to Paragraph 27: This paragraph consists of allegations concerning the Master Services Agreement and Pac-West's tariff and PNG denies such allegations on the basis that those documents speak for themselves. To the extent this paragraph consists of allegations that include legal conclusions, no response is required.

29. Responding to Paragraph 28: PNG admits it disputed charges of approximately \$458,935.28 imposed by Pac-West for certain services provided between approximately September 2008 – March 2009 and further states that a portion of these charges are for services that Pac-West provided to PNG outside of California. PNG denies any remaining allegations in this paragraph.

30. Responding to Paragraph 29: PNG admits that Pac-West proposed a credit of approximately, \$206,116.51.

31. Responding to Paragraph 30: This paragraph refers to the Master Services Agreement, Section 2.3 and PNG submits that section of the agreement speaks for itself.

32. Responding to Paragraph 31: PNG admits that in approximately April 2009, PNG requested that Pac-West refund the entire amount that it overcharged PNG.

33. Responding to Paragraph 32: PNG admits that Pac-West provided a credit of \$208,044.81 in approximately May 2009.

34. Responding to Paragraph 33: PNG admits that Pac-West issued a credit of \$208,044.81 to PNG's account and denies the allegations in this paragraph.

35. Responding to Paragraph 34: To the extent this paragraph consists of allegations that include legal conclusions, no response is required. To the extent these allegations purport to interpret the Master Services Agreement, Section 2.3, such section speaks for itself.

36. Responding to Paragraph 35: PNG denies the inflammatory allegation concerning the threat of litigation in this paragraph but it admits that it presented Pac-West with a courtesy copy of the complaint PNG intended to file in federal court.

37. Responding to Paragraph 36: To the extent these allegations purport to interpret the Master Services Agreement, such agreement speaks for itself. PNG denies any remaining allegations in this paragraph.

38. Responding to Paragraph 37: To the extent these allegations purport to interpret the Master Services Agreement, such agreement speaks for itself. PNG denies any remaining allegations in this paragraph.

39. Responding to Paragraph 38: To the extent this paragraph consists of allegations that include legal conclusions, no response is required. To the extent these allegations purport to interpret the Master Services Agreement, such agreement speaks for itself. PNG otherwise denies any remaining allegations in this paragraph.

40. Responding to Paragraph 39: PNG denies the allegations in this paragraph. To the extent this paragraph consists of allegations that include legal conclusions, no response is required.

41. Responding to Paragraph 40: PNG denies the allegations in this paragraph. To the extent this paragraph consists of allegations that include legal conclusions, no response is required.

**FIRST CAUSE OF ACTION: PNG'S REFUSAL TO HONOR THE DISPUTE RESOLUTION PROVISIONS OF THE MSA VIOLATES THE MSA AND PAC-WEST'S APPLICABLE TARIFF.**

42. Responding to Paragraph 41: PNG incorporates its responses in paragraphs 1 through 41 above.

43. Responding to Paragraph 42: PNG admits the Master Services Agreement includes terms concerning dispute resolution. PNG submits that the terms of the Master Services Agreement speak for themselves, and on that basis, denies any other allegations in this paragraph.

44. Responding to Paragraph 43: PNG lacks sufficient information to admit or deny that allegations included in this paragraph, and on that basis, denies them. To the extent this paragraph consists of allegations that include legal conclusions, no response is required.

45. Responding to Paragraph 44: PNG denies the allegations in this paragraph.

46. Responding to Paragraph 45: This paragraph consists of allegations that include legal conclusions and no response is required.

**SECOND CAUSE OF ACTION: PNG'S REFUSAL TO HONOR THE DISPUTE RESOLUTION PROVISIONS OF THE MSA AND PAC-WEST'S APPLICABLE TARIFF VIOLATES P.U. CODE § 702 AND CONSTITUTES AN UNJUST AND UNREASONABLE PRACTICE IN VIOLATION OF P.U. CODE § 761.**

47. Responding to Paragraph 46: PNG incorporates its responses to paragraphs 1 through 41 above.

48. Responding to Paragraph 47: This paragraph recites Section 702, and thus, no response is required.

49. Responding to Paragraph 48: To the extent this paragraph consists of allegations that include legal conclusions, no response is required. PNG denies it has refused to "honor the billing dispute resolution provisions of the MSA and Pac-West's Tariff."

50. Responding to Paragraph 49: This paragraph consists of allegations that include legal conclusions and no response is required.

51. Responding to Paragraph 50: This paragraph consists of allegations that include legal conclusions and no response is required. PNG denies it repudiated and/or breached the Master Services Agreement. PNG denies any remaining allegations.

52. Responding to Paragraph 51: This paragraph consists of allegations that include legal conclusions and no response is required. PNG denies it repudiated and/or breached the Master Services Agreement. PNG denies any remaining allegations.

53. Responding to Paragraph 52: This paragraph consists of allegations that include legal conclusions and no response is required. PNG admits it sought to resolve the dispute with Pac-West. PNG denies any remaining allegations.

54. Responding to Paragraph 53: This paragraph consists of allegations that include legal conclusions and no response is required.

**THIRD CAUSE OF ACTION: PNG'S REFUSAL TO PERFORM ITS OBLIGATIONS UNDER THE MSA CONSTITUTES AN UNJUST AND UNREASONABLE PRACTICE IN VIOLATION OF P.U. CODE § 761.**

55. Responding to Paragraph 54: PNG incorporates its responses to paragraphs 1 through 41 above.

56. Responding to Paragraph 55: This paragraph consists of allegations that include legal conclusions and no response is required. PNG and Pac-West are not exchanging traffic as contemplated by the federal Telecommunications Act of 1996 and the requirements therein are not applicable to resolution of Pac-West overcharging PNG and refusing to refund such amounts.

57. Responding to Paragraph 56: This paragraph consists of allegations that include legal conclusions and no response is required.

58. Responding to Paragraph 57: To the extent these allegations purport to describe and/or interpret the Master Services Agreement, such agreement speaks for itself.

59. Responding to Paragraph 58: To the extent these allegations purport to describe and/or interpret the Master Services Agreement, such agreement speaks for itself.

60. Responding to Paragraph 59: PNG denies that it failed to perform under the Master Services Agreement. This paragraph consists of allegations that include legal conclusions and no response is required.

61. Responding to Paragraph 60: This paragraph consists of allegations that include legal conclusions and no response is required. PNG denies that Pac-West has incurred any significant financial damage due to any action by PNG. PNG denies any remaining allegations in this paragraph.

62. Responding to Paragraph 61: This paragraph consists of allegations that include legal conclusions and no response is required.

63. Responding to Paragraph 62: This paragraph consists of allegations that include legal conclusions and no response is required.

## **RELIEF REQUESTED**

64. Responding to Paragraph 63: PNG denies the allegations in this paragraph to the extent they state or imply that PNG is prevented from disputing charges imposed under the Master Services Agreement, as such practice would be unjust and unreasonable. This paragraph repeats allegations included elsewhere in the Complaint and PNG denies such allegations on the same basis as stated above. This paragraph consists of allegations that include legal conclusions and no response is required.

65. Responding to Paragraph 64: This paragraph consists of allegations that include legal conclusions and no response is required.

## **III. AFFIRMATIVE DEFENSES**

66. PNG states the following affirmative defenses:

- a. The Complaint fails to state a claim sufficient to state a cause of action;
- b. The Complaint, in whole or part, is beyond the jurisdiction of the Commission;
- c. Pac-West's practice of limiting billing disputes to a period shorter than permitted under the Code is neither just nor reasonable;
- d. Pac-West has unlawfully overcharged PNG;
- e. Pac-West has failed to provide reliable services to PNG that are just and reasonable;
- f. PNG's practices are just and reasonable;
- g. PNG has engaged in good faith negotiations with Pac-West for purposes of resolving this dispute;
- h. The Complaint is barred, in whole or part, by waiver and estoppels;
- i. The Complaint is barred, in whole or part, by the doctrine of unclean hands;
- j. PNG cannot anticipate all of the affirmative defenses that may be applicable and reserves the right to assert additional defenses.

**IV. PNG RELIEF REQUESTED**

Wherefore, PNG respectfully requests that:

67. The Commission deny the Complaint and the relief Pac-West seeks;

68. The Commission award PNG such other and further relief as PNG may be entitled to in this proceeding.

Date: August 13, 2010

Respectfully submitted,

/s

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Paul Burleigh  
Attorney for PNG

LeClairRyan LLP  
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**VERIFICATION**

I, Dennis Packer, General Counsel, PNG Telecommunications, Inc., declare as follows:

The statements in the Answer of PNG Telecommunications, Inc. to Complaint of Pac-West Telecomm, Inc., dated August 13, 2010, are true of my own knowledge except as to matters which are stated therein on information and belief, and as to those matters, I believe them to be true.

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

Executed on August 13, 2010 at Fairfield, Ohio.

  
\_\_\_\_\_  
Dennis Packer

**CERTIFICATE OF SERVICE**

I, Evelyn Lockhart, the undersigned, hereby declare that, on August 13, 2010, I caused a copy of the foregoing:

**ANSWER OF PNG TELECOMMUNICATIONS, INC  
TO COMPLAINT OF PAC-WEST TELECOMM, INC.**

in the above-captioned proceeding, to be served as follows:

- Via U.S. Mail and email to the Assigned Commissioner
- Via U.S. Mail and email to the assigned Administrative Law Judge
- Via Email Service to the parties included on the attached service list

Dated: August 13, 2010 at Los Angeles, California.

/s

\_\_\_\_\_  
Evelyn Lockhart



California Public  
Utilities Commission

CPUC Home

## CALIFORNIA PUBLIC UTILITIES COMMISSION Service Lists

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**PROCEEDING: C1005011 - PAC-WEST TELECOMM, I**

**filer: PAC-WEST TELECOMM, INC.**

**LIST NAME: LIST**

**LAST CHANGED: JULY 28, 2010**

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### Parties

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JAMES M. TOBIN  
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FOR: PAC-WEST TELECOMM., INC.

### Information Only

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[TOP OF PAGE](#)

[BACK TO INDEX OF SERVICE LISTS](#)