PUBLIC UTILITIES COMMISSION
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TO PARTIES OF RECORD IN CASE 07-09-010

This is the proposed decision of Administrative Law Judge (ALJ) Karl J. Bemesderfer. It will not appear on the Commission's agenda sooner than 30 days from the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the proposed decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the proposed decision as provided in Article 14 of the Commission's Rules of Practice and Procedure (Rules), accessible on the Commission's website at www.cpuc.ca.gov. Pursuant to Rule 14.3, opening comments shall not exceed 15 pages.

Comments must be filed pursuant to Rule 1.13 either electronically or in hard copy. Comments should be served on parties to this proceeding in accordance with Rules 1.9 and 1.10. Electronic and hard copies of comments should be sent to ALJ Bemesderfer at kjb@cpuc.ca.gov and the assigned Commissioner. The current service list for this proceeding is available on the Commission's website at www.cpuc.ca.gov.

/s/ KAREN V. CLOPTON
Karen V. Clopton, Chief
Administrative Law Judge

KVC:gd2

Attachment

Decision **PROPOSED DECISION OF ALJ BEMESDERFER**
(Mailed 9/18/2012)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Pac-West Telecomm, Inc. (U5266C), Complainant, vs. Comcast Phone of California, LLC (U5698C), Defendant.	Case 07-09-010 (Filed September 20, 2007 reopened January 5, 2009)

DECISION ORDERING REFUND OF PAYMENT WITH INTEREST

Summary

We order Pac-West Telecomm, Inc. (Pac-West) to refund to Comcast Phone of California, LLC (Comcast) the sum of $379,446.43, less $0.0007 per minute of use for all Internet Service Provider -bound calls originated by Comcast and terminated by Pac-West during the period April 4, 2004 through August 27, 2007 plus interest thereon from the date of payment to the date of refund.

Background

In Decision (D.) 08-12-002 (Final Decision) the Commission ordered Comcast Phone of California, LLC (Comcast) to pay termination charges at intrastate tariff rates to Pac-West Telecomm, Inc. (Pac-West) for terminating calls from Comcast customers to dial-up Internet Service Providers (ISP-bound calls). The Final Decision was based on the Commission's earlier decision D.06-06-055,

resolving Case (C.) 04-10-024 (*Pac-West Telecomm, Inc. vs. AT&T Communications of California, Inc.*). In D.06-06-055, the Commission concluded that the so-called *ISP Remand Order* of the Federal Communication Commission (FCC),[1] establishing a federal termination charge regime for ISP-bound calls, does not apply to traffic between two competitive local exchange carriers (CLECs) such as Comcast and Pac-West. AT&T appealed D.06-06-055 to the Federal District Court which upheld the Commission's interpretation of the *ISP Remand Order*. On further appeal, the Ninth Circuit reversed the District Court, holding that the *ISP Remand Order* applies to ISP-bound traffic exchanged between CLECs. *AT&T Communications, et al. v. Pac-West Telecomm Inc., et al.* (9th Cir. 2011) 651 F.3d 980 (Ninth Circuit Decision). On October 11, 2011, the United States District Court for the Northern District of California issued an order implementing the Ninth Circuit Decision (District Court Order). The District Court Order includes the following language:

> AT&T is entitled to a declaration that CPUC Decision 06-06-055 (the "Decision") is preempted by the Communications Act of 1934, the Telecommunications Act of 1196, and the FRCC's Implementing Regulations, and therefore is invalid, because the ISP Remand Order's compensation regime applies to ISP-bound traffic exchanged between two CLECs. The Court also shall issue the injunction requested by AT&T, specifically, that "[t]he Defendants are enjoined from enforcing the Decision against AT&T, **and from enforcing Pac-West's California intrastate tariff for payment**

[1] *Implementation of the Local Competition Provision in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001).

> **for any ISP-bound traffic originated by AT&T that is terminated by PacWest.**" [Emphasis supplied.]

Discussion

In the Final Decision, the Commission ruled that the instant case is "legally indistinguishable from *Pac-West Telecomm, Inc. vs. AT&T Communications of California, Inc.* C.04-10-024." We reiterated that view in our recent *Order Granting Rehearing of D.08-23-003* (D.12-01-034 [January 13, 2012]). The termination charges collected by Pac-West from Comcast resulted from applying Pac-West's intrastate tariff to ISP-bound calls originated by Comcast and terminated by Pac-West, in short, from circumstances identical to those enjoined by the District Court Order. The District Court Order is inclusive; it applies to **any** ISP-bound calls originated by AT&T and terminated by Pac-West. It does not contain an exception for so-called "VNXX calls."[2] Since this case is legally indistinguishable[3] from C.04-10-024, no good reason exists to reach a different outcome in this case.[4]

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[2] VNXX calls are calls dialed to a local number but routed to a switch outside the local calling area. From the point of view of the originating customer, the call is a local call to which toll charges do not apply. From the point of view of the terminating carrier (in this case, Pac-West) the calls are intrastate toll calls to which the termination charges specified in Pac-West's intrastate tariff apply.

[3] The cases are legally indistinguishable because both involve ISP-bound calls originated by a CLEC (Comcast or AT&T) and terminated by Pac-West. In both cases, Pac-West charged the originating CLEC at its intrastate tariff rates for terminating the calls. The instant case differs from the earlier case in one material factual respect: in this case, Comcast and AT&T were parties to a Network Services Agreement (NSA) that obligated AT&T to pay Pac-West's invoices to Comcast. The Final Decision held that, notwithstanding the NSA, Comcast remained liable to Pac-West for any termination charges not paid on its behalf by AT&T. Thus the Final Decision places Comcast in

Footnote continued on next page

In compliance with the ordering paragraphs of the Final Decision, Comcast paid Pac-West $379,446.43 in tariff-based termination charges. That sum, less $0.0007 per minute of use for all ISP-bound calls originated by Comcast and terminated by Pac-West in the period from April 4, 2004 through August 27, 2007 (Refund Period) should be refunded to Comcast with interest from the date of payment to the date of refund.

Pac-West argues that this outcome is precluded by the decision of the Federal Court of Appeals for the Ninth Circuit in the earlier case of *Verizon vs. Peevey* 462 F.3d 1142. In that case, the court cited with approval the language of the 2d Circuit Court of Appeals in *Global NAPs, Inc.*, 444 F.3d at 72 that "the *ISP Remand Order* does not clearly preempt state authority to impose access charges for interexchange VNXX ISP-bound traffic". While we agree that the *ISP Remand Order* does not **clearly** pre-empt such state authority, we conclude that the better reading of the order is that it does not preclude such pre-emption.

In reaching that conclusion, we look to the history and purpose of the *ISP Remand Order.* Prior to the advent of dial-up Internet service, telephone

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precisely the same legal position relative to Pac-West as AT&T occupies in the earlier case.

[4] Although the District Court decision is labeled "Not for Citation" that designation does not prevent its application in this proceeding. The district court's rule governing such designations provides that, "Any order or opinion that is designated 'NOT FOR CITATION'" pursuant to Civil I. R. 7-14 or pursuant to a similar rule of any other issuing court, may not be cited *to this Court*, either in written submissions or oral argument, *except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel."* United States District Court Northern District of California, Civil Local Rule 3-4€ (Emphasis supplied). Because the District Court Order is being cited for purposes of collateral estoppel and because it is not being cited to the District Court, it is appropriate for us to rely on it in this case.

companies exchanging intra-state phone calls generally did so pursuant to state-approved regimes of reciprocal compensation. Under a typical reciprocal compensation arrangement, whether imposed by tariff or contained in inter-connection agreements, the originating carrier pays the terminating carrier a fee, generally expressed in cents per minute of use, for terminating a call. So long as traffic between the inter-connecting carriers is roughly balanced--i.e, the number of calls from customers of phone company A to customers of phone company B roughly equals the number of calls from customers of B to customers of A—the net effect on the revenues of each of the interconnecting carriers is near zero. However, if callers in A's local calling area are dialing an ISP in B's local calling area, these calls are not offset by calls coming from B to A. The traffic is "unbalanced" and termination charges paid by A to B far exceed those paid by B to A.

This possibility gave rise to a species of "regulatory arbitrage" in which a CLEC such as Pac-West would sign up a number of ISPs. Calls to those ISPs originating in the service territories of another carrier, most often an ILEC, would be routed to a switch located outside the service territory of the originating carrier. Those calls would be rated as intrastate toll calls for reciprocal compensation purposes and the termination charges imposed by the terminating carrier would, as explained above, vastly exceed termination charges for calls flowing in the opposite direction. It was in order to prevent such arbitrage that the FCC issued the *ISP Remand Order*.

The *ISP Remand Order* adopts a common sense approach to determining whether or not calls are ISP-bound. If the volume of traffic flowing from A to B is three times or more the volume of traffic flowing from B to A, the *ISP Remand Order* creates a rebuttable presumption that a substantial portion of the A-to-B

traffic is ISP-bound and imposes a relatively low termination charge of $0.0007 cents per minute of use on that traffic in place of the otherwise applicable charges in the terminating carrier's state tariff or in the parties' interconnection agreement.

By its terms, the *ISP Remand Order* applies to "local" traffic, without defining what constitutes local traffic. A call from a party physically located in a local calling area, as defined by the originating carrier, to another party physically located in the same local calling area, is the clearest example of a local call. But what about a VNXX call?

As noted above, a VNXX call is a call to a local calling area number that is routed to a switch located outside the local calling area.[5] Dial-up ISPs make extensive use of VNXX calls to allow their customers to dial a local number, which gives rise to no additional charge on the monthly bills from their local phone company, and connect to servers located many miles from the local calling area. On the customers' bills, only the calls to the local number appear. But the originating carrier gets billed by the terminating carrier, typically at intrastate toll rates.

In short, whether the call is a true local call or a VNXX call, the dial-up ISP customer sees no additional charges on his bill. But unless the federal rate established in the *ISP Remand Order* applies to the call, the originating carrier pays substantial non-reciprocated termination charges to the receiving carrier.

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[5] "NXX" stands for the first three digits of a 7-digit local phone number. Those digits identify the local exchange in which the telephone is located. In the number "234-5678" for example, "234" identifies the local exchange and "5678" identifies a specific phone within that exchange.

This policy-based analysis of the reach of the *ISP Remand Order* is supported by an examination of the legal history of the order and the FCC's subsequent "*ISP Mandamus Order.*"[6] When the FCC issued the *ISP Remand Order* in 2001, it based the order on Section 251(g) of the Federal Telecommunications Act[7] rather than Section 251(b)(5). In 2002, the Federal District Court for the District of Columbia rejected the FCC's reliance on Section 251(g) but kept the rules established in the *ISP Remand Order* in place.[8] The court instructed the FCC to come up with a new justification for the rules. In its 2008 *ISP Mandamus Order*, the FCC provided the justification the court had ordered. The FCC explained that the reciprocal compensation duties of Section 251(b)(5) apply to ISP-bound traffic without limitation in geography or any particular service arrangements. Paragraph 8 eliminates any doubt on that score:

> Section 251(b)(5) imposes on all LECs the "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." The Act broadly defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Its scope is not limited geographically* ("local," "intrastate," or "interstate") *or to particular services* ("telephone exchange service," telephone toll service," or "exchange access"). We find that the traffic we elect to bring within this framework fits squarely within the

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[6] *High-Cost Universal Service Support*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Red 6475,¶ 8 *2008) ("*ISP Mandamus Order*").

[7] 47 USC Section 251(g) (entitled "Continued enforcement of exchange access and interconnection requirements").

[8] *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

> meaning of "telecommunications." We also observe that had Congress intended to preclude the Commission from bringing certain traffic types within the Section 251(b)(5) framework, it could have easily done so by incorporating restrictive terms in Section 251(b)(5). Because Congress used the term "telecommunications," the broadest of the statute's defined terms, we conclude that Section 251(b)(5) is not limited only to the transport and termination of certain types of telecommunications traffic, such as local traffic.[9]

In other words, the rules established in the *ISP Remand Order* are not limited to traffic that is bound for a modem that is geographically "local" to the calling party. On the contrary, the FCC specifically said that "the jurisdictional nature of traffic is not dispositive of whether reciprocal compensation is owed under Section 251(b)(5)."[10]

Having determined that the *ISP Remand Order* does not contain an exemption for VNXX traffic, we conclude, in keeping with the Ninth Circuit Decision and the District Court's subsequent refund order, that Comcast is entitled to a refund from Pac-West of all amounts previously paid to Pac-West for terminating ISP-bound calls from Comcast customers at rates in excess of the federal reciprocal compensation rate of $0.0007 per minute of use.

Assignment of Proceeding

Timothy Alan Simon is the assigned Commissioner and Karl J. Bemesderfer is the assigned Administrative Law Judge.

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[9] *ISP Mandamus Order* ¶ 8 (emphasis added, footnotes omitted).

[10] *Id.* ¶ 22.

Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and procedure. Comments on the proposed decision were received from the parties on _____ 2012. Reply comments were received on _____ 2012.

Finding of Fact

Pursuant to the Ordering Paragraphs of D. 08-12-004, Comcast paid Pac-West $379,446.43 in termination charges for terminating ISP-bound calls.

Conclusions of Law

1. ISP-bound traffic originated by one CLEC and terminated by another is subject to the compensation regime established by the FCC's *ISP Remand Order*.
2. A terminating carrier may not charge an originating carrier at intrastate tariff rates for terminating ISP-bound calls.
3. Pac-West should refund with interest $379,446.43 in termination charges paid to it by Comcast pursuant to the Ordering Paragraphs of D.08-12-004, less $0.0007 per minute of use for all ISP-bound calls originated by Comcast and terminated by Pac-West during the Refund Period.

O R D E R

1. Within 60 days of the date hereof, Pac-West Telecomm, Inc. (Pac-West) shall refund to Comcast Phone of California, LLC (Comcast) the sum of $379,446.43, less $0.0007 per minute of use for all Internet Service Provider-bound calls originated by Comcast and terminated by Pac-West during the period from April 4, 2004 through August 27, 2007, together with interest thereon from the date of payment to the date of refund at the

11th District Monthly Weighted Average Cost of Funds in effect from time to time.

2. The refund ordered in Ordering Paragraph 1 shall be accompanied by a schedule prepared by Pac-West Telecomm, Inc. (Pac-West) identifying all Internet Service Provider-bound calls originated by Comcast Phone of California, LLC and terminated by Pac-West during the period from April 4, 2004 through August 27, 2007.

3. Case 07-09-010 is closed.

This order is effective today.

Dated _____, at San Francisco, California.