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

Pac-West Telecomm, Inc. (U5266C),

Complainant,

v.

Comcast Phone of California, LLC (5698C)

Defendant.

C.07-09-010

(Filed September 20, 2007)

**COMCAST PHONE OF CALIFORNIA, LLC
AMENDMENT TO OPENING BRIEF
CONSISTING OF NEW SECTION V**

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June 20, 2012

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Comcast Phone of California, LLC (“Comcast”), through counsel, hereby submits this Amendment to its Opening Brief to bring to the Commission’s attention the U.S. District Court’s order in *AT&T Communications of Calif., Inc., et al. v. Pac-West Telecomm, Inc., et al.*, No. C 06-07271 JSW, Order Following Remand (U.S. District Court for the N. Dist. of Calif. Oct. 11, 2011) (“District Court Order”) (attached). This amendment adds new Argument Section V to the Opening Brief, which Comcast requests be considered as inserted at page 14 of the originally-filed Opening Brief.

Counsel for Comcast did not become aware of the District Court Order until after it filed its Opening Brief in this proceeding. Because this Amendment is being filed nearly 10 days before reply briefs are due, Pac-West has ample time to formulate a response. As a result, Pac-West cannot claim any prejudice as a result of this Amendment.

V. THE DISTRICT COURT ORDER IS BINDING ON PAC-WEST

The District Court Order was issued in response to the Ninth Circuit’s order in *AT&T Commc’ns of Cal., Inc. v. Pac-West Telecomm, Inc.*, 651 F.3d 980 (9th Cir. 2011). Based on the

guidance provided by the Ninth Circuit, the district court ruled as follows:

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 1996, and the FCC’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 for *any* ISP-bound traffic originated by AT&T that is terminated by PacWest.”

District Court Order at 2 (internal citations omitted) (emphasis added). The district court further ordered Pac-West to provide AT&T with a full refund, with interest. *Id.* It appears that neither Pac-West nor the Commission appealed.

The District Court Order is binding here.¹ The Commission ruled 3-1/2 years ago that this proceeding is “legally indistinguishable from *Pac-West Telecomm, Inc., AT&T Communications of California, Inc.*, C.04-10-024, which we decided in favor of Pac-West in D.06-06-055, currently on appeal to the United States District Court.” Decision 08-12-002 (Dec. 4, 2008). The Commission reiterated that view in its recent Order Granting Rehearing of Decision 08-12-002 (Decision 12-01-034, mimeo at 1 (Jan. 13, 2012)). Legally indistinguishable cases deserve legally indistinguishable results. *See, e.g., Application 08-06-006 of Southern Gas Co.*, Decision 09-06-019, mimeo at 32 (Conclusion of Law 1) (June 4, 2009) (holding that

¹ Although the District Court Decision is labeled, “Not for Citation,” that designation does not affect its dispositive status here. The district court’s rule governing such designations provides that, “Any order or opinion that is designated: “NOT FOR CITATION,” pursuant to Civil L.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(e) (emphasis added). Because Comcast is specifically citing the District Court Decision for collateral estoppel purposes, and because Comcast is not citing the case to the district court, Comcast’s reliance on the case here is appropriate.

“[o]nce an adjudicating body has decided an issue of fact or law necessary to its judgment, collateral estoppel precludes relitigation of the issue in a different cause of action involving a party to the first proceeding”).

CONCLUSION

The law of the case is now clear. Pac-West may not rely on its “California intrastate tariff for payment for any ISP-bound traffic.” For that reason, and for the reasons stated in Comcast’s Opening Brief, the Commission should find that Pac-West’s California tariff is not applicable to the Comcast-originated ISP-bound traffic at issue in this proceeding, and should order Pac-West to provide Comcast with a full refund of all amounts paid to date, with interest.

Respectfully submitted:

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