



FILED

07-05-12
04:59 PM

**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
REPLY BRIEF**

Richard A. Chapkis
Comcast Corporation
One Comcast Center
55th Floor
Philadelphia, PA19103
Tel: (215) 286-5237
Fax: (215) 286-5039
Email: richard_chapkis@comcast.com

Susanne K. Toller
Jane J. Whang
Davis Wright Tremaine LLP
505 Montgomery Street
Suite 800
San Francisco, CA 94111-6533
Tel: (415) 276-6536 (Toller)
Tel: (415) 276-6576 (Whang)
Fax: (415) 276-6599
Email: suzannetoller@dwt.com
janevhang@dwt.com

Michael C. Sloan
Davis Wright Tremaine LLP
1919 Pennsylvania Avenue, N.W.
Suite 800
Washington, DC 20006
Tel: (202) 973-4227
Fax: (202) 973-4499
Email: michaelsloan@dwt.com

Attorneys for Comcast Phone Of
California, LLC

July 5, 2012

**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
REPLY BRIEF**

Comcast Phone of California, LLC (“Comcast”), through counsel, hereby submits this Reply to the Opening Brief of Pac-West Telecomm, Inc. (“Pac-West”) in the above captioned proceeding.¹

I. INTRODUCTION AND SUMMARY

In its Opening Brief, Comcast demonstrated that state-determined compensation for the termination of VNXX ISP-bound traffic is preempted by federal law, and further showed that there are good policy reasons against applying Pac-West’s state tariff to the VNXX ISP-bound traffic at issue here. More specifically, Comcast explained that:

- The *ISP Mandamus Order* provides that the FCC’s Section 251(b)(5) reciprocal compensation regime “is not limited geographically (‘local,’ ‘intrastate,’ or ‘interstate’) or to particular services (‘telephone exchange service,’ ‘telephone toll service,’ or ‘exchange access’).” The *ISP Mandamus Order* is, thus, clear that a single compensation scheme, governed by federal law, applies to all locally dialed ISP-bound traffic,² including VNXX ISP-bound traffic.³

¹ On June 27 and 28, 2012, ALJ Bemesderfer, via email, extended the due date for the filing of reply briefs from June 29 to July 5, 2012.

² “Locally dialed” means a call for which the called party’s telephone number is within the calling party’s local or mandatory extended area service territory, such that no toll charges apply.

- In a case that the Commission deemed “essentially identical” to the instant proceeding, the federal district court for the Northern District of California found that the same Pac-West tariff at issue here was preempted by federal law and could not be applied against AT&T, and ordered Pac-West to provide AT&T with a full refund plus interest.⁴ The same result should apply here.
- It would be counterproductive to allow Pac-West to engage in arbitrage when terminating VNXX ISP-bound traffic given that the FCC and the states have been trying to eliminate such arbitrage for over a decade.
- Pac-West itself, in similar cases before other state commissions, has argued that the states are preempted from determining the compensation regime applicable to VNXX ISP-bound traffic.

In its Opening Brief, Pac-West does not address – let alone attempt to refute – any of this.

In particular, Pac West does not – and cannot – show that its position in California (which contradicts its position in other states) is consistent with the *ISP Mandamus Order*; Pac-West does not – nor could it – grapple with the policy deficiencies inherent in allowing it to engage in arbitrage when states and the FCC have been attempting to eliminate this arbitrage; and Pac-West does not – nor is there any reasonable basis to – justify the adoption of a regime that would apply different federal and state rates to the same traffic. To this last point, Pac-West would have the Commission apply the federal rate (\$0.0007) to ISP-bound traffic when the caller is physically “local” to the ISP, but a five-times higher rate when the ISP is located outside the local calling area, even though both calls are dialed as local calls. It would be illogical for the Commission to impose such a result.

Instead, Pac-West cites a number of factually and legally distinguishable cases, all but one of which were decided *before* the FCC’s *ISP Mandamus Order* clarified that there is one

³ *High-Cost Universal Service Support*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475, ¶ 8 (2008) (“*ISP Mandamus Order*”).

⁴ See Comcast Amendment to Opening Brief, C.07-09-010 (filed June 20, 2012) (*citing AT&T Communications of Calif., Inc., et al. v. Pac-West Telecomm, Inc., et al.*, No. C06-07271 JSW, Order Following Remand (U.S. District Court for the N. Dist. of Calif. Oct. 11, 2011)).

federal compensation regime, based on Section 251(b)(5) of the Act, that applies to *all* locally-dialed ISP-bound traffic, VNXX or otherwise. Simply put, Pac-West's cases are no longer good law.

Accordingly, the Commission should find that it is preempted from applying Pac-West's tariff, reverse its finding in Decision ("D.") 08-12-002, and require Pac-West to refund amounts previously paid, plus interest.

II. FEDERAL LAW PRECLUDES THE ENFORCEMENT OF PAC-WEST'S TARIFF ON VNXX ISP BOUND TRAFFIC

Pac-West asks the Commission to apply its state tariff, rather than federal law, to the VNXX ISP-bound traffic at issue in this case because the caller is not geographically "local" to the ISP, even though the call is "dialed" as a local call. As noted, Pac-West supports this request by citing cases from non-controlling jurisdictions that were decided *before* the *ISP Mandamus Order* and that arose from very different factual circumstances.⁵

Comcast addressed the development of the controlling law in its Opening Brief.⁶ We summarize that discussion here because it demonstrates how the precedent relied upon by Pac-West has been overtaken by subsequent developments:

- The FCC determined that ISP-bound traffic is interstate in nature and, therefore, subject to its regulatory authority, in 1999.⁷
- The FCC first promulgated binding federal regulations for this traffic in the 2001 *ISP Remand Order*, rooting its authority in Section 251(g) of the Act, rather than Section

⁵ The same is true of Pac-West's reliance on the Administrative Law Judge's Ruling in *OI Communications, Inc. v. Verizon California, Inc.*, C.08-02-013 (Mar. 17, 2009). See Pac-West Opening Br. at 5 and n.14. That interlocutory decision is not a final Commission order. Moreover, the decision does not address the *ISP Mandamus Order*. See *id.* at 1, n.1. It is, thus, not controlling here.

⁶ See Comcast Opening Br. at 7-10.

⁷ See *id.* at 7 (citing *Intercarrier Compensation for ISP-Bound Traffic*, Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd 3689 (1999)).

251(b)(5).⁸ The FCC capped LEC intercarrier compensation obligations for ISP-bound traffic at \$0.0007 per minute for traffic exchanged between 2004 and 2007.

- In 2002, the DC Circuit rejected the FCC’s reliance on Section 251(g), but kept the rules established in the *ISP Remand Order* in place. The FCC was instructed to come up with a new justification for its rules.⁹
- Six years later, in the 2008 *ISP Mandamus Order*, the FCC provided the justification the court had asked for. The FCC explained that the reciprocal compensation duties of Section 251(b)(5) squarely apply to ISP-bound traffic, without limitation to “geograph[y]” or any particular “service” arrangement.¹⁰ Thus, 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. To 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).”¹¹

Pac-West addresses none of this. Instead, its brief consists of a string-cite to cases that it claims supports its position.¹² They do not. Indeed, three of them – the *Global Naps I* and *II* decisions (from the First and Second Circuits, respectively), as well as the Ninth Circuit’s ruling in *Peevey* – were all decided *before* the FCC issued the *ISP Mandamus Order*.¹³ All three were predicated on the view that ISP-bound traffic is *not* governed by Section 251(b)(5) – a view that is no longer good law.

Moreover, the facts in each case are very different from the current situation. In the *Global Naps* cases, the issue was whether the *ILEC* (Verizon) could charge the *CLEC* (Global Naps) originating access for the VNXX ISP-bound traffic that Pac-West was terminating to its

⁸ *Id.* at 8 (citing *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) (“ISP Remand Order”).

⁹ *Id.* at 8 (citing *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002)).

¹⁰ *Id.* at 9-10.

¹¹ *ISP Mandamus Order* ¶ 22.

¹² See Pac-West Opening Br. at 6-8.

¹³ See *id.* at 6-8 (citing *Global Naps, Inc. v. Verizon New Eng. Inc.*, 444 F.3d 59 (1st Cir. 2006) (“*Global Naps P*”) and *Global Naps, Inc. v. Verizon New Eng. Inc.*, 454 F.3d 91 (2nd Cir. 2006) (“*Global Naps IP*”); *Verizon Cal., Inc. v. Peevey*, 462 F.3d 1142, 1147-48 (9th Cir. 2006)).

ISP customers. The Massachusetts and New York Commissions ruled that it could because the VNXX traffic – which all agreed was interexchange in nature – was not “local” traffic governed by Section 251(b)(5). Thus, the state commissions in those cases *rejected* Global Naps’ attempt to recover reciprocal compensation from Verizon and, instead, required Global Naps to *pay* Verizon originating access.

Peevey, which affirmed a decision of this Commission, is similar. Like the *Global Naps* cases – and unlike the situation here – *Peevey* arose from a dispute over the requirements of a Section 252 interconnection agreement already in place between Pac-West and Verizon, as well as the arbitration of a successor agreement – there was, thus, no question about the Commission’s jurisdiction to impose a compensation requirement on ISP-bound traffic.¹⁴ Unlike the Massachusetts and New York commissions, however, the Commission required Verizon “to pay reciprocal compensation for delivery of [VNXX] internet-bound calls” and rejected Verizon’s attempt to charge Pac-West for originating access.¹⁵

But the Commission did not give Pac-West everything it wanted. First, the reciprocal compensation rate the Commission imposed was based on the federal law rate (\$0.0007), *not* Pac-West’s tariff governing intrastate traffic. Second, over Pac-West’s objection, the Commission ordered Pac-West to pay Verizon for the cost of transporting the traffic beyond the local rate zone from which it originated.¹⁶

Pac-West argued that such transport charges were precluded under the FCC Rule 703(b) (47 CFR § 703(b)), which precludes originating carriers from imposing transport charges on

¹⁴ See Comcast Opening Br. at 3-6.

¹⁵ *Peevey*, 462 F.3d at 1159.

¹⁶ *Id.*

terminating carriers.¹⁷ In ruling otherwise, the Commission relied on the logic of the *ISP Remand Order*. FCC Rule 703(b) only applied to traffic subject to Section 251(b)(5), and since (at that time), under the *ISP Remand Order*, ISP-bound traffic was *not* subject to Section 251(b)(5), the Commission found that it was not bound by FCC Rule 703(b).¹⁸

Thus, *Peevey* is inapplicable for at least three reasons. First, and most simply, the instant case does not involve the assessment of a transport charge. Second, the fact that ISP-bound VNXX traffic was found to be *not* subject to Section 251(b)(5) does not mean that such traffic is *intrastate*, and, therefore, subject to Pac-West's intrastate tariff. Indeed, the Commission expressly applied the federal rate in setting the reciprocal compensation rate that Verizon was required to pay. Finally, like *Global Naps I* and *II*, the logic justifying the transport charge simply does not survive the *ISP Mandamus Order*. While the D.C. Circuit had rejected the reasoning in the *ISP Remand Order* that ISP-bound traffic was governed by Section 251(g), the FCC still had not provided a new legal basis for its rules when *Peevey* was issued. That void was filled by the *ISP Mandamus Order*. Thus, because *Peevey* depends on the view that ISP-bound traffic is not governed by Section 251(b)(5), it is simply no longer controlling precedent.

Pac-West cites only one federal case that was decided after the *ISP Mandamus Order* – the First Circuit's *Global Naps VI* decision¹⁹ – although it relegates the discussion to a footnote. Like the *Global Naps* decisions, *Peevey* is not applicable here for the simple reason that it does not involve a CLEC seeking to impose a state-determined reciprocal compensation rate for ISP-bound traffic. To the contrary, the case affirms the court's earlier finding that the *ISP Remand*

¹⁷ *Id.* at 1157.

¹⁸ *Id.* at 1157-58.

¹⁹ Pac-West Opening Br. at 8, n.24 (citing *Global NAPs, Inc. v. Verizon New England, Inc.*, 603 F.3d 71 (1st Cir. 2010) (“*Global NAPs VI*”).

Order, even as clarified by the *ISP Mandamus Order*, did not preempt the states from imposing intrastate access charges on VNXX calls to ISPs in the context of a section 251-252 interconnection agreement. The instant case, unlike *Global NAPs VI*, involves a tariff – not an interconnection agreement – and thus *Global NAPs VI* is not applicable here.

Moreover, the reasoning in *Global NAPs VI* suggests that the First Circuit did not fully appreciate the significance of the *ISP Mandamus Order*. The First Circuit apparently viewed the *ISP Mandamus Order* as doing nothing more than providing a new legal justification for the “non-Section 251(b)(5)” regime established in the *ISP Remand Order*. The *ISP Mandamus Order*, however, was not so limited. To the contrary, the *ISP Mandamus Order* reflects the FCC’s rethinking of the scope of Section 251(b)(5). The agency’s new legal reasoning is broader than its approach from 2001 and must be given appropriate deference on its own terms.²⁰

In light of the foregoing, Pac-West’s citation to outmoded and irrelevant cases to conjure up non-existent state authority over compensation for locally dialed VNXX ISP-bound traffic should be rejected.

²⁰ In failing to appreciate the evolution of the FCC’s rules, it appears that the First Circuit fell into essentially the same error that resulted in the Supreme Court’s reversal of the Ninth Circuit in the *Brand X* case. *National Cable Television Association v. Brand X Internet Services*, 545 U.S. 967 (2005). In *Brand X*, the Ninth Circuit decided that the delivery of cable modem service to end-users necessarily included a “telecommunications service” component. When the FCC addressed that question and reached a different result, the Ninth Circuit chose not to defer to the FCC’s reading of the Communications Act, in light of the court’s own previous interpretation. The Supreme Court reversed, holding that even where a court of appeals has interpreted a statute in the past, it still must defer to a different interpretation later advanced by the agency Congress has charged with implementing that statute. In *Global NAPs VI*, it appears that the First Circuit – having previously concluded (based on the FCC’s earlier *ISP Remand Order*) that the FCC’s rules for compensation for ISP-bound traffic applied only to “local” ISP-bound traffic – failed to defer to the FCC’s new reasoning that clearly does not contain any such limitation.

III. FURTHER PROCEEDINGS ARE UNNECESSARY

Pac-West argues that its complaint should not be dismissed, and that additional evidentiary hearings will be necessary, even if the Commission were to find that it lacks authority to impose state-determined compensation rates on VNXX ISP-bound traffic. According to Pac-West, it should now be allowed to argue that some of the traffic at issue was not ISP-bound traffic, even though there is no evidentiary record to support that claim.

Pac-West's attempt to reopen the record should be rejected. As the Administrative Law Judge correctly stated, "if state-determined compensation for termination of VNXX traffic is pre-empted by federal law, then it follows that the complaint must be dismissed."²¹ Pac-West filed the complaint that initiated this case and had every opportunity to rebut the presumption established in the *ISP Remand Order* that the traffic at issue is ISP-bound. Having neglected to pursue the issue at evidentiary hearings, the Commission should not indulge Pac-West's eleventh hour invitation to reopen the evidentiary record.

IV. THE OTHER "FACTUAL DISPUTES" THAT PAC-WEST SEEKS TO INJECT INTO THE PROCEEDING SHOULD BE REJECTED

Pac-West claims that it should be allowed to inspect the terms of Comcast's settlement with AT&T to determine whether "AT&T has not already compensated Comcast ... so that Comcast does not receive any double recovery."²² This claim is contrary to the position that Pac-West asserted and that the Commission adopted earlier in this proceeding. Having previously urged the Commission to delink AT&T's "payment agent" role from Comcast's

²¹ Administrative Law Judge's Ruling Denying Motion of Comcast Phone of California for Return of Payment of Termination Charges and Ordering Briefs, C.07-09-010 at 3 (May 29, 2012).

²² Pac-West Opening Br. at 14.

ultimate liability – and having succeeded in that effort – Pac-West should not be permitted to re-link AT&T’s role to Comcast’s ultimate liability to avoid its refund obligation to Comcast.

Comcast’s arrangements with AT&T are irrelevant. As the Commission ruled earlier in this proceeding, the arrangement between Comcast and AT&T “does not relieve Comcast of its obligation to pay the termination charges imposed by Pac-West.”²³ And pursuant to that Commission order, Comcast paid Pac-West the amounts found due and owing – albeit under protest and subject to Comcast’s request for rehearing and refund, which it is now pursuing. While the Commission’s decision left open the possibility for Comcast to recoup some payments from AT&T,²⁴ that was an issue between Comcast and AT&T, not involving Pac-West.

Moreover, to the extent unjust enrichment considerations are relevant in this context, it is plain that allowing Pac-West to off-set its debt to Comcast by the amount that AT&T has paid Comcast (if any) would unjustly enrich Pac-West.

Finally, the Commission should disregard Pac-West’s assertion that that the “invoiced dollar amount may need to be adjusted upward to reflect the rate for toll traffic.”²⁵ Pac-West’s Opening Brief contains no argumentation in support of this request. Pac-West’s failure to explain in its brief – let alone earlier in the proceeding – why this traffic should be re-rated as toll traffic disqualifies it from pursuing the claim at this point in the case.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Comcast’s Opening Brief and in Comcast’s Amendment to its Opening Brief Amendment to Opening Brief Consisting of New

²³ *Pac-West Telecomm, Inc. v. Comcast Phone of California, LLC*, C.07-09010, Modified Presiding Officer’s Decision, D.08-12-002, mimeo at 13 (Dec. 4, 2008); *see also id.*, mimeo at 19 (Conclusion of Law 8).

²⁴ *Id.*, mimeo at 19 (Conclusion of Law 11).

²⁵ Pac-West Opening Br. at 11.

Section V, the Commission should order Pac-West to refund all monies that Comcast paid pursuant to Pac-West's California tariff related to Pac-West's termination of ISP-bound bound traffic, plus applicable interest.

Respectfully submitted:

Richard A. Chapkis
Comcast Corporation
One Comcast Center
55th Floor
Philadelphia, PA19103
Tel: (215) 286-5237
Fax: (215) 286-5039
Email: Richard_chapkis@comcast.com

/s/

Susanne K. Toller
Jane J. Whang
Davis Wright Tremaine LLP
505 Montgomery Street
Suite 800
San Francisco, CA 94111-6533
Tel: (415) 276-6536 (Toller)
Tel: (415) 276-6576 (Whang)
Fax: (415) 276-6599
Email: suzannetoller@dwt.com
janewhang@dwt.com

Michael C. Sloan
Davis Wright Tremaine LLP
1919 Pennsylvania Avenue, N.W.
Suite 800
Washington, DC 20006
Tel: (202) 973-4227
Fax: (202) 973-4499
Email: michaelsloan@dwt.com

Attorneys for Comcast Phone of California, LLC

Dated: July 5, 2012