



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA

FILED

05-11-10
11:25 AM

Pac-West Telecomm, Inc. (U5266C),

Complainant,

vs.

PNG Telecommunications, Inc. (6336C),

Defendant.

C1005011

C. _____

COMPLAINT

Pac-West Telecomm, Inc. (U5266C) (“Pac-West”) brings this Complaint against PNG Telecommunications, Inc. (U4344C and U6336C) d/b/a PowerNet Global Communications (“PNG”) pursuant to California Public Utilities Code (“P.U. Code”) § 1702 and Article IV of the Rules of Practice and Procedure of the Public Utilities Commission of the State of California (the “Commission”).

I. SUMMARY AND BACKGROUND

1. PNG and Pac-West entered into an agreement dated February 8, 2007, as modified by amendments dated January 31, 2007, April 18, 2008, December 17, 2008 and April 3, 2009 (collectively, the “Master Services Agreement” or “MSA”). In several locations, the MSA incorporates by reference Pac-West’s Tariffs.

2. Pac-West is a competitive local exchange carrier (“CLEC”) and interexchange carrier (“IXC”) offering telecommunications services in California. It provides wholesale

communications, interconnection and traffic termination services that enable other carriers to serve their customers.

3. PNG is a CLEC and IXC certificated by the Commission and is a provider of integrated voice, data, and Internet services to both residential and commercial customers.

4. The MSA implements obligations between carriers under § 251 of the Telecommunications Act of 1996 (the “Act”),¹ related to interconnection of their networks and compensation for transport and termination of telecommunications traffic. PNG and Pac-West agreed in the MSA that Pac-West would supply PNG numerous interconnection and traffic termination services at substantial discount from Pac-West’s applicable Tariff charges in California and elsewhere. As part of the MSA, the parties agreed that PNG would deliver traffic originated by its customers to Pac-West, and that Pac-West would terminate this traffic through its own network and through other carriers’ networks when necessary to terminate calls.

5. Pac-West provided these discounts in reliance on PNG’s promises to use its best efforts to deliver a substantial amount of traffic from its customers to Pac-West.

6. Beginning in approximately March 2009, PNG has refused to honor the MSA and refused to pay Pac-West’s lawful charges for interconnection and traffic termination in violation of the P.U. Code, Commission decisions, Pac-West’s Commission-approved intrastate tariff, and § 251 of the Act.

7. PNG has repudiated and breached the MSA by refusing to comply with the billing dispute provisions established by the MSA and Pac-West’s intrastate tariff, including CLEC Schedule Cal. CLC 1-T (“Tariff”), Original Cal. P.U.C. CLC 1-T Sheet No. 22.1, § 2.11.2. Upon information and belief, PNG wrongfully contends that it is not bound by the dispute resolution provisions of the MSA and Pac-West’s Tariff.

¹ 47 U.S.C. § 251, *et seq.*

8. In approximately May of 2009, in violation of the MSA, PNG stopped delivering traffic from its customers to Pac-West.

9. PNG has not paid and, upon information and belief, refuses to pay Pac-West for certain usage, monthly recurring, and non-recurring charges owed under the MSA and Pac-West's Tariff.

10. Pac-West has attempted to resolve this matter by negotiation with PNG but those efforts have not been successful.

II. CATEGORY OF PROCEEDING, NEED FOR HEARING, ISSUES AND PROPOSED SCHEDULE

11. Because this is a formal complaint the proposed category for the proceeding is adjudicatory. An opportunity for hearing is necessary. The issues to be resolved are:

- a. Whether PNG is bound by the billing dispute provisions of the MSA and Pac-West's Tariff.
- b. Whether Pac-West may enforce the dispute resolution provisions of the MSA and its Tariff against PNG.
- c. Whether PNG has wrongfully repudiated and breached the MSA by refusing to honor the billing dispute provisions of the MSA and Pac-West's Tariff.
- d. Whether PNG has breached the MSA by failing to provide traffic to Pac-West.

12. Pac-West proposes the following schedule for this proceeding:

Service of Complaint	Day 1
Answer	Day 31
Prehearing Conference	Day 60
Scoping Memo	Day 90
Complainant's Opening Testimony	Day 160
Respondent's Reply Testimony	Day 190
Complainant's Rebuttal Testimony	Day 220
Hearings	Days 240 and 241
Briefs	Day 270
Reply Briefs	Day 300

III. PARTIES

13. Complainant Pac-West is a corporation organized under the laws of the State of California. Pac-West is authorized by the Commission to provide facilities-based and resold competitive local exchange and interexchange services in California.

14. The address and telephone number for Pac-West is:

Pac-West Telecomm, Inc.
4210 Coronado Avenue
Stockton, CA 95204
(209) 926-3300 (telephone)
(209) 926-4585 (facsimile)

15. All pleadings, correspondence, and other communications concerning this complaint should be sent to Pac-West and its attorneys at the following address:

James M. Tobin
William C. Harrelson
August O. Stofferahn
Tobin Law Group
1628 Tiburon Blvd.
Tiburon, CA 94920
(415) 732-1700 (telephone)
(415) 789-0276 (facsimile)
jim@tobinlaw.us

with a copy to:

Jennifer Eubanks
Chief Financial Officer
Pac-West Telecomm, Inc.
4210 Coronado Avenue
Stockton, CA 95204
(571) 338 2115 (telephone)
(209) 444 3902 (facsimile)
jeubanks@pacwest.com

16. Defendant PNG is a corporation organized under the laws of the State of Ohio. PNG is authorized by the Commission to provide competitive local exchange and interexchange services in California.

17. The address and telephone number for PNG is:

PNG Telecommunications, Inc.
100 Commercial Drive
Fairfield, OH 45014
(513) 942-7900 (telephone)

18. PNG is represented by:

Paul H. Burleigh
LeClairRyan
888 S. Figueroa Street, Suite 1800
Los Angeles, CA 90017
(213) 488-0503 (telephone)
Paul.Burleigh@leclairryan.com

IV. JURISDICTION

19. Sections 701, 702, 1702, and 1707 of the P.U. Code provide the Commission with jurisdiction over breaches by California utilities of the P.U. Code and Commission decisions, rules, and policies.

20. The Commission has jurisdiction to interpret and enforce interconnection agreements between local exchange carriers under § 251 of the Act, even where certain traffic

covered by those agreements is jurisdictionally interstate,² and to enforce effective contracts, agreements, and tariffs governing intrastate services.

21. Pac-West is a California public utility subject to the P.U. Code.
22. PNG is a California public utility subject to the P.U. Code.
23. PNG has violated the P.U. Code and Commission decisions as set forth below.

V. GENERAL FACTUAL ALLEGATIONS

24. Pac-West has provided telecommunications services and facilities, at its expense, that have been used by PNG, and has invoiced PNG for these services.

25. Section 2.3 of the Master Services Agreement portion of the MSA provides that “All disputes and claims for refunds must be submitted to Pac-West within sixty (60) days of the Bill Date. If Customer [PNG] does not submit a claim as stated above, Customer waives all rights to file a claim thereafter.”

26. Pac-West’s Tariff also specifies that carriers must either submit billing disputes in a timely fashion or waive any claim. Pac-West filed its initial Intrastate Tariff for the termination of traffic by Advice Letter No. 46 on December 11, 1998 and it was effective on December 30, 1998. This Tariff was subsequently revised in various locations at various times. The currently effective Tariff, Schedule Cal. CLC 1-T, Original Cal. P.U.C. 1-T Sheet No. 22.1, Section 2.11.2, was established by Advice Letter No. 206, filed on December 28, 2007 and effective on February 1, 2008. The rates, terms, and conditions contained in Pac-West’s Tariff

² See *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1126 (9th Cir. 2003) (“*Pac-Bell*”) (the 1996 Act “granted the state commissions limited defined authority over interstate traffic under §§ 251 and 252”). See also *Cox California Telcom, LLC vs. Global NAPs California, Inc.*, Opinion Granting Complainant’s Motion for Summary Judgment, D.07-01-004; *Cox California Telcom, LLC vs. Global NAPs California, Inc.*, D.07-09-050, Order Denying Request for Immediate Stay and the Rehearing of Decision (D.) 07-06-044 (citing Cal. Const., Art. XII).

became effective, were lawfully approved by the Commission, and are presumptively just and reasonable. Pac-West also has an interstate tariff on file with the Federal Communications Commission that has been effect during the time period relevant to this complaint.

27. All services provided by Pac-West pursuant to the MSA are subject to either the billing dispute resolution provisions of the MSA or an applicable Pac-West tariff.

28. On March 23, 2009, PNG disputed approximately \$458,935.28 of Pac-West invoices dating back to September 2008.

29. On April 16, 2009, Pac-West addressed the dispute by proposing to credit PNG's account with Pac-West in the amount of \$206,116.51.

30. Section 2.3 of the MSA provides that refunds are to be credited on a customer's next invoice.

31. On April 22, 2009, PNG demanded that Pac-West wire \$458,935.28 to PNG's bank account by April 28, 2009, or PNG would pursue legal action.

32. On May 22, 2009, based on additional information, Pac-West agreed to provide a larger credit to PNG, in the amount of \$208,044.81, which included the entire amount of the disputed charges falling within the time period established by Sec. 2.3 of the MSA for disputes to be delivered to Pac-West.

33. PNG has accepted this credit and used in excess of \$175,000.00 of this credit by delivering traffic to Pac-West that incurred charges subject to this credit.

34. Any dispute of remaining amounts paid by PNG is barred by Section 2.3 of the MSA.

35. On subsequent occasions PNG has threatened Pac-West with litigation if Pac-West did not refund to PNG the entire disputed amount.

36. In the MSA, PNG agreed that it would use best efforts to achieve a stated number of minutes of traffic per month to Pac-West.

37. Under the MSA, Pac-West agreed to waive certain monthly recurring and non-recurring charges in exchange for PNG's promises to deliver this traffic.

38. Since approximately May of 2009, PNG has failed to deliver the promised amount of traffic to Pac-West, thereby breaching the MSA.

39. PNG's actions impose on Pac-West financial harm in an amount to be proven at hearing. Pac-West's waivers of material monthly recurring and non-recurring charges incurred by PNG were contingent on PNG fulfilling its traffic commitments, and Pac-West is entitled to receipt of these waived charges because of PNG's failure to fulfill its commitments. PNG has failed to deliver traffic that would have resulted in significant and material revenues for Pac-West.

40. In addition to the reduced charges made in reliance on PNG's volume representations, during the September 2008 to April 2009 time period, Pac-West underbilled PNG for certain usage charges established by the MSA in an amount to be proven at hearing.

VI. 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.

41. Pac-West incorporates by reference paragraphs 1 through 40, above.

42. The MSA, including by reference the provisions of Pac-West's Tariff where applicable, contain the terms by which any billing dispute is to be resolved.

43. The provisions of the Pac-West's Tariff were approved by the Commission and thus have the force of law.

44. PNG has refused to honor these procedures by repeatedly repudiating its obligations under the MSA and threatening Pac-West with litigation.

45. Wherefore, Pac-West demands the relief set forth in Section IX below.

VII. 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.

46. Pac-West incorporates by reference paragraphs 1 through 40, above.

47. P.U. Code § 702 provides that “[e]very public utility shall obey and comply with every order, decision, direction, or rule made or prescribed by the commission... and shall do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees.”

48. Pac-West's Commission-approved Tariff has the force of law as it constitutes an “order, decision, direction, or rule made or prescribed by the commission.” PNG's refusal to honor the billing dispute resolution provisions of the MSA and Pac-West's Tariff constitutes a violation of P.U. Code § 702.

49. P.U. Code § 761 grants the Commission authority to determine and require utilities to fix unreasonable practices.

50. PNG's repudiation and breach of the MSA by its refusal to honor the billing dispute resolution provisions of the MSA constitutes an unjust, unreasonable, and improper practice in violation of P.U. Code § 761.

51. PNG's repudiation and breach of Pac-West's Tariff by its refusal to honor the billing dispute resolution provisions of the Tariff as applicable constitutes an unjust, unreasonable, and improper practice in violation of P.U. Code § 761.

52. PNG's threats to bring legal action against Pac-West for abiding by the terms of the MSA and its Tariff constitute an unjust and unreasonable practice in violation of P.U. Code § 761.

53. Wherefore, Pac-West demands the relief set forth in Section IX below.

VIII. 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.

54. Pac-West incorporates by reference paragraphs 1 through 40, above.

55. Section 251 of the Act requires CLECs such as PNG and Pac-West to interconnect with one another and enter into compensation arrangements for transport and termination of traffic.

56. Commission decisions require telecommunications carriers to interconnect and terminate one another's traffic and authorize the filing of complaints to resolve interconnection and intercarrier compensation disputes between carriers.³

57. The MSA contains the terms and conditions for Pac-West's interconnection with PNG and for Pac-West's termination of traffic originated by PNG's customers.

58. The MSA obligates PNG to use its best efforts to deliver particular amounts of telecommunications traffic to Pac-West.

59. Since approximately May of 2009, PNG has failed to perform this obligation.

60. PNG's failure to perform under the MSA has caused significant financial damage to Pac-West and continues to do so. PNG's failure to perform constitutes an unjust, unreasonable, and improper practice in violation of P.U. Code § 761.

³ See P.U. Code § 558 and D.97-11-024, mimeo at 5-6, *Local Competition Proceeding*, R. 95-04-043; I. 97-04-044.

61. PNG's failure to comply with the MSA's traffic volume requirements violates § 251 of the Act.

62. Wherefore, Pac-West demands the relief set forth in Section IX below.

IX. RELIEF REQUESTED

63. As shown above, PNG's refusal to comply with the dispute resolution provisions of the MSA and Pac-West's Tariff, its failure to perform pursuant to the MSA, and its threats to bring legal action against Pac-West for performing as the MSA and Tariff provide, violate the MSA, Pac-West's Tariff, the P.U. Code, decisions issued by the Commission, and § 251 of the Act. Further, these failures to perform, refusals to comply with contract and tariff provisions, and threats of litigation constitute unreasonable, unlawful, and improper practices.

64. Wherefore, for the reasons set forth above, Pac-West requests that the Commission:

- a. Enter an order finding PNG in violation of P.U. Code § 702 and § 761 and upholding the MSA and Pac-West's Tariff as enforceable against PNG, including but not limited to their provisions establishing the period within which billing disputes must be made or are waived;
- b. Order PNG to immediately pay to Pac-West the monthly and non-recurring charges it waived in reliance on the traffic volume representations and undertaking of PNG, plus all late payment charges that apply in accordance with the MSA and Pac-West's applicable Tariff, for all months in which PNG failed to provide the amount of traffic specified in the MSA;

- c. Order PNG to immediately pay to Pac-West the usage charges Pac-West underbilled, plus all late payment charges that apply in accordance with the MSA and Pac-West's Tariff;
- d. Grant such other relief as the Commission may deem appropriate.

Dated: May 6, 2010, at Tiburon, California.

Respectfully submitted,

PAC-WEST TELECOMM, INC.

/s/

By: _____

James M. Tobin
William C. Harrelson
August O. Stofferahn
Tobin Law Group
1628 Tiburon Blvd.
Tiburon, CA 94920
(415) 732-1700 (telephone)
(415) 789-0276 (facsimile)
jim@tobinlaw.us
Attorneys for Pac-West Telecomm, Inc.

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VERIFICATION

I am an officer of Pac-West Telecomm, Inc. and I am authorized to make this verification on its behalf. The statements in the foregoing Complaint are true of my own knowledge or, based upon my information and belief, I believe them to be true.

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

Executed on May 6, 2010, 2010, at Oakland, California.

/s/

Jennifer Eubanks