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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)
Comcast Phone of California, LLC (U5698C), Complainant, vs. AT&T Corp., Defendant.	Case 07-11-015 (Filed November 26, 2007)

COMCAST PHONE OF CALIFORNIA, LLC'S APPLICATION FOR REHEARING OF D.08-12-002 AND REQUEST FOR ORAL ARGUMENT

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SUMMARY

As discussed *infra*, D.08-12-002's ("the Decision") overriding legal error is the Commission's lack of subject matter jurisdiction. It is paramount that the Commission revisit and vacate its assertion of jurisdiction because a careful reading of applicable Federal Communications Commission's ("FCC") decisions makes clear that the Commission does not have, and has never had, jurisdiction over the subject matter of this complaint. Instead, *ab initio,* the Commission should have dismissed the complaint, advising Pac-West to seek relief either in federal court or before the FCC.

Beyond this fatal legal error, the Commission has also committed legal error by asserting jurisdiction over a complaint for the collection of tariff charges since PU Code Section 737 states that such actions are to be filed in a court of competent jurisdiction. This, in turn, dovetails with the further legal error that the Commission is awarding damages in the Complaint, which is barred by statute, but could be sought in court under PU Code Section 737.

Further, the Commission, in its Decision, never identified the section of the Pac-West tariff that allegedly applies to the non-local ISP-bound traffic in this case. Nor did the Commission address Comcast Phone's arguments that the proper section of the tariff, 13.1, actually provides that such traffic can only be billed in accordance with an executed interconnection agreement. Thus, even if the Commission, somehow, has subject matter jurisdiction in this proceeding, it has neither identified or applied the correct section of the Pac-West tariff governing the traffic at issue.

Finally, as further discussed below, the record evidence and the findings do not support the determination that Comcast Phone was billed for Comcast Phone traffic terminated by Pac-West.

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COMCAST PHONE OF CALIFORNIA, LLC'S APPLICATION FOR REHEARING OF D.08-12-002 AND REQUEST FOR ORAL ARGUMENT

Comcast Phone of California, LLC ("Comcast Phone") by its attorney and pursuant to Commission Rule of Practice and Procedure 16.1, hereby submits its Application for Rehearing of D.08-12-002 (the "Decision") and requests Oral Argument on the jurisdictional issue pursuant to Rule of Practice and Procedure 16.3.[1]

1. The Commission Exceeded Its Power and Does Not Have Jurisdiction Over the Subject Matter of the Complaint.

Conclusions of Law 1, 2 and 3 of the Decision state that the Commission has jurisdiction to hear the dispute between two California CLECs regarding ISP-bound traffic, that neither Pac-West's intrastate tariff nor the Commission's jurisdiction to enforce it are preempted by federal

[1] As stated *infra*, Comcast Phone is limiting its request for Oral Argument on this specific issue. It will also provide oral argument on the other matters raised in this Application for Rehearing at the discretion of the Commission.

law and that the Pac-West tariff applies to so-called ISP-bound traffic.[2] These statements are all false. Rather, the recently issued *Order on Remand ISP-Bound Traffic,* FCC 08-262, released November 5, 2008 ("Mandate Order") read (as it must be), in conjunction with the 2001 *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, *Order on Remand and Report* and *Order*, 16 FCC Rcd 9151 (2001) ("ISP Remand Order"), reaffirms that all ISP-bound traffic is interstate interexchange traffic. As a result, the Commission lacks subject matter jurisdiction to adjudicate this case, the Pac-West intrastate tariff cannot possibly apply to interstate traffic and therefore there is no tariff for the Commission to enforce.

The *Mandate Order* states that the FCC has determined *de novo* that this traffic falls within its jurisdiction under Section 251(b)(5), in addition to continuing its prior determination that the FCC had jurisdiction over the traffic pursuant to Section 201 of the Communications Act of 1934, as amended (the "Act").[3] In addition, the *Mandate Order* clearly states that "the transport and termination of **all** telecommunications exchanged with LECs is subject to the reciprocal compensation regime in Sections 251(b)(5) and 252(d)(2) of the Act."[4] One-way tariffs such as that of Pac-West are, by definition, not reciprocal and, therefore, in conflict with the *Mandate Order*.[5]

The *Mandate Order* was not mentioned in the Decision, a remarkable oversight since it is the seminal order issued by the FCC explaining jurisdiction over the subject matter of the instant

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[2] Decision at 18.

[3] *Mandate Order* at paras. 6-7, 17

[4] *Id.*at para. 15.

[5] The *Mandate Order* was issued to clarify and provide a further rationale for the *ISP Remand Order*. As previously stated, the latter order provided that the FCC had jurisdiction over ISP-bound traffic, based solely on its authority under Section 201 of the Act, despite the fact that ISP-bound traffic fell outside the language of Section 251(b) of the Act because it was not local.[5] The *Mandate Order* changed that rationale finding that all ISP-bound traffic is **interstate** interexchange traffic and falls within the FCC's jurisdiction under Section 251(b)(5) of the Act, and, as previously stated, that "the transport and termination of all telecommunications exchanged with LECs is subject to the reciprocal compensation regime in Sections 251(b)(5) and 252(d)(2) of the Act. *Id.* at para. 15.

complaint. Indeed, despite the clear language of the *Mandate Order,* the presiding ALJ denied a further briefing in this proceeding concerning the effect of *Mandate Order* on the Commission's draft Modified Presiding Officer's Decision ("MPOD").[6] Instead, the Decision holds that the instant case is indistinguishable from AT&T Communications of California, Inc., C.04-10-024, which was decided in favor of Pac-West and affirms the Conclusions in D.06-06-055 here.[7]

This is pure legal error and legal fiction. As D.07-03-016 (the rehearing decision of D.06-06-055) states, AT&T never raised the issue that the Commission lacked subject matter jurisdiction and that "If AT&T had raised lack of subject matter jurisdiction early on, sure the case would have proceeded differently.[8] To the contrary, Comcast Phone has raised the matter of lack of subject matter jurisdiction from the date of the filing of its Amendment to Answer on February 4, 2008.[9] Thus, this case is absolutely distinguishable from the AT&T case, the interstate nature of all of the traffic at issue is now uncontested in light of the *Mandate Order* and the Commission has no subject matter jurisdiction.

The Decision's failure to address the *Mandate Order* creates the false impression that the *Mandate Order* asserted jurisdiction over ISP-bound traffic, but did not preempt this Commission's jurisdiction under the mistaken notion that express preemption language is even needed to divest a state Commission of jurisdiction over interstate traffic. This is a legal falsehood.

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[6] November 25, 2008 *ALJ Ruling Taking Official Notice of FCC Order Denying And Denying Motion to Set Aside Submission and Set Additional Briefing Schedule* ("ALJ Ruling"). The ALJ Ruling claimed that it took judicial notice of the Mandate Order, yet the Decision makes no mention of this fact.

[7] *Id.* at 8.

[8] D.07-03-016 at 5-6.

[9] *See* Fifth Affirmative Defense, "The Commission does not have subject matter jurisdiction to resolve this complaint." *Id.* at 19.

By definition, once the FCC has determined that the traffic in question, ISP-bound traffic is interstate, this Commission has no authority over such traffic, except for that delegated to it by the FCC.[10] Prior to the enactment of the Telecommunications Act of 1996 ("TCA") it was, of course, well-recognized that regulation of interstate service was the sole of preserve the federal government.[11] The 1996 Telecommunications Act made no change of consequence in that regard. Rather, a small specific carve-out was made providing the states' authority over interstate telecommunications service only in the specific circumstances of ***arbitrating and approving interconnection agreements*** pursuant to Section 252 of the Act.[12] However, that is not the case here; this is a complaint setting.

Because this Commission's jurisdiction concerning interstate matters resides solely in arbitrating and approving interconnection agreements that may contain interstate matters, it cannot assert jurisdiction over interstate compensation rates outside the scope of that limited delegated authority in a complaint setting. Rather, the Commission only has that authority in the context of intrastate traffic. As the *Mandate Order* affirms, no such activity is at issue here because all ISP bound traffic is interstate. Thus, outside the confines of an interconnection agreement proceeding, the Commission has no authority over it.

It is important to note that none of the federal cases that have previously addressed ISP-bound compensation occurred in complaint cases. Rather, they all arose in the context of

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[10] *Pacific Bell v Pac-West Telecomm, Inc and California Public Utilities Commission* (9th Cir, 2003) 325 F.3d 1114, 1126.

[11] *Ivy Broadcasting v. AT&T Co.*, 391 F.2d 486, 490 (2d Cir. .NY 1968); *LDDS Communications, Inc. v. United Telephone of Florida*, 15 FCC Rcd 4950 [2000 FCC LEXIS 1181] (2000) at ¶ 2.

[12] *Pacific Bell v Pac-West Telecomm, Inc and California Public Utilities Commission, supra.*

arbitration settings.[13] Moreover, none of these cases were confronted with the fact that the FCC has now in its recent *Mandate Order* –but not when those cases occurred-- clearly stated that ISP-bound traffic is interstate interexchange traffic and that it is subject to Section to 251(b)(5) reciprocal compensation requirements. Furthermore, the *Mandate Order* creates no safe harbor for VNXX ISP-bound traffic as a subset of traffic that is not interstate. Quite the contrary, the *Mandate Order* makes clear that all ISP-bound traffic is covered by federal jurisdiction that preempts the states.[14]

The *Mandate Order* also broadly affirms the FCC's authority over all ISP-bound traffic between CLECs and any other carriers because it clearly states its authority applies to all local exchange carriers ("LECs") and between LECs and other carriers.[15] This holding, as a matter of clarification, is also new and directly conflicts with the U.S. District Court's Order upon which the Decision relies.[16] In other words, the FCC's *Mandate Order* clarifies that the 2001 *ISP Remand Order* did cover 'the question of how two CLECs should be compensated for the exchange of ISP-bound traffic.' The District Court, because it did not have the November 5, 2008 guidance from the *Remand Order*, wrongly decided that CLEC to CLEC traffic somehow fell outside the requirements of the *ISP Remand Order*. Clearly, it did not and it is reversible error for the Commission to rely on this District Court case for support for its wrongful assertion of jurisdiction in the instant case.

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[13] *See e.g. Verizon California, Inc. v. Peevey*, 462 F.3d 1142 (9th Cir. Cal.2006); *Global NAPS, Inc. v. Verizon New Eng.*, Inc., 454 F.3d 91 (2nd Cir. Vt. 2006); *Global NAPS, Inc. v. Verizon New England, Inc.*, 444 F.3d 59 (1st Cir. Mass. 2006).

[14] "That is because the ISP-bound traffic at issue here is clearly interstate in nature and thus also subject to our section 201 authority." *Id.* at para. 17.

[15] *Id.* at para. 8; Incumbent Local Exchange Company is specifically defined as its own category that is no different from a mere local exchange company by Section 251(h) of the Act.

[16] Order on Cross Motions for Summary Judgment in Case No, C.06-07-2721 JSW at pps.17-18. Decision at 14.

The *Mandate Order* also states that the FCC has the authority over traffic that originates or terminates on a third carrier's network – the circumstances here since Comcast Phone's traffic was sent via AT&T, the ILEC, to Pac-West. Furthermore, it points out that if there is a gap in the FCC's pricing rules, "the [Federal Communications] Commission [not the states] has the authority under Section 201(b) to adopt rules to fill that gap."[17] No role is assigned to the states if there is a pricing issue; it is arrogated solely to the FCC.

In summary, the *Mandate Order* must be read in conjunction with the *ISP Remand Order*, which is and has been in effect since 2001. The *ISP Remand Order* clearly states that "Because we now [in 2001] exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic, however, state commissions will no longer have authority to address this issue."[18] In turn, the *Mandate Order* confirms that all ISP-bound traffic is interstate and applies to all local exchange carriers, which includes all CLECs and provides that the FCC will fill any pricing gap. It also clarifies that all ISP-bound traffic is subject to reciprocal compensation; the enforcement of one carrier's tariff is not, by definition, reciprocal compensation. As a result, the Commission must reverse its determination that it has jurisdiction in this proceeding, grant rehearing, dismiss the complaint and direct Pac-West to pursue its claims in an appropriate federal forum.

2. Request for Oral Argument

Comcast Phone requests oral argument concerning the issue of Commission jurisdiction as set forth in Section 3 of this Application for Rehearing. The *Mandate Order* raises a Commission jurisdictional issue of exceptional legal controversy, complexity and public importance. It is particularly compelling that the Commission has the benefit of oral argument on

[17] *Id.* at para. 12.

[18] *Id.* at para. 82.

this question because the Commission's Decision did not address the *Mandate Order* in its Decision, a significant legal error.[19] The lack of analysis of the *Mandate Order* mean that the Commission has not had the benefit of the parties' views of the effect of the *Mandate Order* and how it would change or refine existing Commission precedent, notably D.06-06-055, which itself was decided prior to the issuance of the *Mandate Order*. As a result, Oral Argument should be granted.

3. The Decision Errs Because It Awards Monetary Damages to Pac-West But The Commission Does Not Have Jurisdiction To Entertain A Complaint For Monetary Damages.

The Commission lacks jurisdiction to hear a complaint by a public utility for the collection of charges from its customer. In 1979, the Commission stated that:

> "Division 1, Chapter 9, Article 1 of the Public Utilities Code, concerning complaints (Section 1701-1709) does not grant us jurisdiction regarding collection of overdue utility bills."[20]

National Communication Center also notes that:

> "Section 1707...allow[s] one public utility to complain against another on the same basis as provided for individuals (and certain entities) in Section 1702 and the remainder of Chapter 9." (Emphasis added.)

An individual cannot make a contract claim against a utility for service rendered. It can only seek a refund of amounts paid. In other words, Pac-West cannot make a tariff claim - - which is a contract claim[21] - - for amounts due from Comcast Phone; it can only seek recovery of

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[19] The Commission is required to weigh the relevant evidence and arguments to meet the longstanding requirement that a decision contain findings of fact and conclusions of law on all material issues. Public Utilities Code ("PU") Section 1705; *United States Steel Corporation v. Public Utilities Commission* (1981) 29 Cal. 3d 603, 609; *Industrial Communications Systems* (1978) 22 Cal. 3d 572.

[20] *National Communication Center Corp. v. PT&T Co.* (1979) 2 CPUC2d 533.

[21] "A tariff is in the nature of a contract." *Transmix Corp. v. Southern Pacific Co* (1960) 187 Cal. App2d 257, 263; *Stanislaus Food Products Co. v. PG&E* (1981) 6 CPUC2d 299.

amounts it paid i.e. reparations, if that were the circumstances in this case. Because Pac-West is not seeking reparations, it has brought a complaint in the wrong forum.

This does not leave Pac-West without a remedy, if its case has merit. Rather, if Pac-West is aggrieved, its remedy is to bring an action under PU Code Section 737, which specifically provides that a complaint for the collection of a lawful tariff charge may be filed in a court of competent jurisdiction. In this instance, a court of proper jurisdiction is federal court since ISP bound traffic is interstate. Indeed, this is the only way that footnote one in the Decision can apply a 3.5 year statute of limitations pursuant to PU Code Section 737 because PU Code Section 737 applies only to actions "that may be filed in any court of competent jurisdiction . . . ."

4. The Decision Refuses to Treat ISP-Bound Traffic as "Non-Local," As Determined By The FCC, Even If The Pac-West Tariff Is Applied.

The Decision fails to deal with the issue raised by Comcast Phone that Pac-West has applied the wrong section of its tariff to ISP-bound traffic, another reversible legal error.[22] Pac-West's claim is based on Section 12.1.2 of its tariff Schedule Cal. CLC 1-T, relating to the completion of local calls and intra-LATA calls.[23] (Pac-West sharply increased the rates in this schedule during the pendancy of this matter; in the case of local termination, the increase was to a level almost five times that fixed by the FCC for ISP-

[22] The Commission must make Findings of Fact on all material issues. *Southern Pacific Company* (1968) 68 Cal. 2d 243; *Greyhound Lines, Inc.* (1967) 65 Cal. 2d 811.

[23] Section 12.1.2 provides, in pertinent part: The Company will complete local calls and intraLATA calls, as defined by the distance between the rate centers associated with the calling and called parties' telephone numbers, for incumbent local exchange carriers and competitive local exchange carriers with which the company has direct of indirect interconnections. The terms, conditions and compensation methods for handling such calls will be negotiated on a case-by-case basis; provided that, where no agreement is in place for the completion of such calls, the rates provided in the Tariff, following, shall be charged to originating carrier for calls terminated by the Company of for which the Company provides transit (tandem switching) service.

Initially. the termination rate established pursuant to Section 12.1.2 was a fixed charge of $0.002 per call plus $0.001 per minute of use. In February of 2008, Pac-West more than tripled the MOU charge to $.003403, almost five times the FCC maximum rate for ISP-bound traffic.

bound traffic.) Comcast Phone demonstrated in its pleadings that any ISP-bound call is a nonlocal call that is subject instead to Section 13.1 of the Pac-West tariff.[24] The pertinent part of Section 13.1 reads as follows:

> **"If the Commission decides that traffic to Internet Service Providers (ISPs) is non-local,** then Non-Local ISP (NOLISP) Switched Access will apply to such traffic. NOLISP traffic is traffic to an ISP where the originating and terminating numbers are assigned to rate centers in the same local calling area. When NOLISP traffic is completed over Local Interconnection Trunks, the terms, conditions, and reciprocal compensation methods and rates will be specified in the Companies' Interconnection Agreement. When NOLISP traffic is completed over FG-D trunks, the terms, conditions and access rates that apply to other interexchange calls will apply." [Emphasis supplied.]

The *Mandate Order* affirmed that ISP-bound traffic is nonlocal, stating that:

> Specifically, we hold that although ISP-bound traffic falls within the scope of Section 251(b)(5), this interstate, interexchange traffic is to be afforded different treatment from other Section 251(b)(5) traffic pursuant to our authority under Section 201 and 251(i) of the Act.[25]

The Mandate Order leaves only the question of whether Section 13.1 actually requires a formal finding by this Commission that "traffic to Internet Service Providers (ISPs) is non-local" or whether only an authoritative determination that such traffic is "non-local" is required. Under the rules of tariff construction employed by the Commission, any doubt would be resolved against the drafter of the tariff, here Pac-West. "General Rule 8.2.1 of GO 96-B provides in pertinent part: "Any ambiguity in a tariff provision shall be construed in the way most favorable to the customer."[26]

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[24] *See* Comcast Phone Opening Brief at 9; Comcast Phone Appeal at 8.
[25] *Mandate Order* at para 6. (Emphasis supplied.)

[26] *California Building Industry Association, Complainant, vs. Southern California Edison Company,* Decision 08-08-001; 2008 Cal. PUC LEXIS 303 (Cal. PUC 2008).

> "This Commission has stated consistently that "ambiguous tariff provisions are to be construed strictly against a utility and any doubt resolved in favor of the customer." (*Carlton Hills School v. SDG&E* 1982 Cal. PUC LEXIS 1259; *Ellickson v. Gen. Tel. Co.* (1981) 6 CPUC2d 432.)"[27]

If the tariff ambiguity is resolved in favor of Comcast Phone, as it must, by construing Section 13.1 to have been triggered because the ISP-bound traffic must now be deemed "non-local," then Pac-West could only assess charges to Comcast Phone pursuant to an interconnection agreement. Since none exists, the exchange of this traffic between the parties would be conducted on a "bill-and-keep" basis under which neither would charge the other. This result, in turn, is consistent with the *Mandate Order* that all traffic exchanged be based on reciprocal compensation.[28] Thus, even if the Commission, somehow, has jurisdiction over the interstate traffic at issue, the correct section of the Pac-West tariff to be applied would require that traffic be exchanged on a bill-and-keep basis, unless and until the parties executed an interconnection agreement to the contrary.

5. The Decision Commits Legal Error Because It Does Not Make A Finding or Determination That Pac-West Has Established By Substantial Evidence In Light of the Full Record That The Traffic Billed Comcast Phone Was Accurate.

The Decision's determination that Pac-West is entitled to prevail on the facts of its claim based on its utilization of the Cat-50 records for billing purposes is not supported by the findings or by substantial evidence in light of the record as a whole. The Commission has not determined previously, as a matter of law, that Cat-50 records are permissible billing records so that the Commission in the instant case is required to weigh the evidence to determine whether Pac-West has proven that it has billed Comcast Phone for its actual traffic in accordance with the Pac-West/ AT&T California interconnection agreement ("ICA") excerpts it submitted into evidence,

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[27] *Irvine Apartment Management v. Southern California* Edison, 2002 Cal. PUC LEXIS 359 (Cal. PUC 2002).

[28] *Id.* at para. 15.

and the further evidence submitted by Comcast Phone that much of the traffic was not its customer traffic but the customer traffic of others (e.g., that of TCG, an AT&T affiliate). In so doing, the Commission must reverse the Decision and find that the only permissible records that the Commission can allow for accurate verifiable billing are switch records, which Pac-West admits it did not use in billing Comcast Phone.

A. The ICA Excerpts and Comcast Phone Evidence Establish That Cat-50 Records Can Not Be Relied Upon For Accurate Billing.

The Decision states that Pac-West's explanation of the manner in which calls are recorded on the Cat-50 records is not challenged by Comcast Phone or AT&T. The Decision then goes on to find that Pac-West is entitled to rely on the Cat-50 records and then draws a negative and, apparently, dispositive inference from the fact that AT&T did not put on a witness to suggest that an AT&T witness would have supported Pac-West's testimony.[29]

The Decision's reasoning is nonsensical and specious. Both AT&T and Comcast Phone challenged the very use of Cat-50 records for billing purposes and noted the Commission has not specifically held in any previous generic proceedings that the use of Cat-50 records for inter-carrier billing is a proper use of those records.[30] The instant case highlights why.
As Pac-West's own evidence established, the proper way to perform carrier billing is to use SS7[31] to capture the original calling party number (CPN) in its switch records to verify that it was correctly billing Comcast Phone for its traffic. This Pac-West did not do despite the fact that

[29] Decision at 5. Even more puzzling, the Decision unfairly faults Comcast Phone for somehow not putting on an AT&T California witness. AT&T is not under Comcast Phone's control so that Comcast Phone could not put an AT&T witness on, assuming it wanted to or could even identify one. Rather than unfairly draw a negative and dispositive inference against Comcast Phone for failure of a non-party to testify, it would be more appropriate to draw an inference against Pac-West for its failure to produce 85% of the call detail records in a timely fashion in discovery.

[30] This was not an issue in D.06-06-055.

[31] (which Pac-West uses in its network; *see* para. 22 of its complaint)

it is its practice when billing ILECs for traffic exchange[32] and in light of the fact that Pac-West knew, as the record evidence established, that the ILEC Cat-50 records are not accurate for billing purposes, having discovered this fact previously in 2004 when billing other CLECs.

As AT&T Exhibit 3 specifically indicated, Pac-West's billing expert, Barry Lear (who testified in the Pac-West action v. AT&T that resulted in D.06-06-055) had established in 2004 that the Cat-50 records Pac-West gets from AT&T California are not, standing on their own, viable records for billing and can only be used for accurate billing if compared with records of the actual calling numbers which are captured at the Pac-West switch. As ATT Ex. 3 states:

> In the analysis made by **[CLEC]**[33] they began to see patterns where the From Number field in the EMI records was being populated incorrectly with the originating Local Routing Number (LRN) also referred to as the JIP. **[CLEC]** engaged Pac-West in analyzing what was present in the records provided to MACC [Pac-West's billing company]. **Pac-West retrieved the actual files received from SBC and extracted the EMI records that tied back to [CLEC] requested records. With further analyzes [sic] by Pac-West it was realized that the Originating Number was as [CLEC] had seen with an additional unique Originating LRN also present. The next action taken by Pac-West was to retrieve the Pac-West switch recordings made when the call was received over the Local Interconnect (LI) trunk. The From Number in the EMI record sent by SBC did not agree with the Originating Number captured in the Pac-West recording.** At this point **[CLEC]** was requested to see if they could locate a call that would match by date, time, duration and terminating telephone number and see what they believed was the originating number. The final finding can be seen on the sequence of Emails. **It appears that SBC is somehow either not capturing the correct AMA Automatic Number Identification (ANI) or is incorrectly populating the From Number field when Creating EMI records sent to Pac-West** (emphasis supplied).[34]

[32] (Pac-West/Tutt RT at 10 & 27.)

[33] The CLEC carrier name is redacted based on AT&T's assertion of confidentiality.

[34] *See* AT&T Ex. 3, Email from Barry Lear of Pac-West to Bill Cole SBCSI (now AT&T) dated September 20, 2004 concerning "Transit Traffic (CAT 500) Call Records" at 8.

Pac-West knew it could avoid a repeat of this CLEC billing problem with Comcast Phone by using the "original and true" calling party number ("CPN") provided it by AT&T California and captured at its switch as indicated in Pac-West Exhibit Sprague-2, which contains excerpts from the Pac-West interconnection agreement ('ICA") with SBC (now AT&T California). Section 5.2.2 of the ICA (the second unnumbered page of Exhibit Sprague-2) states that "Each Party will include in the information transmitted to the other for each call being terminated on the other's network, where available, the originating Calling Party Number ('CPN')." Immediately thereafter, section, 5.2.3, states an expectation between the parties that fully 90% of the calls would reach the Pac-West switch with the true CPN made available. In turn, "Appendix Reciprocal Compensation" included as part of Exhibit Sprague-2, Section 4.2 states: "Where SS7 (Signaling System 7) connections exist, each Party will include in the information transmitted to the other for each call being terminated on the other's network, where available, the original and true Calling Party Number (CPN). Section 4.3 states: "[I]f one Party is passing CPN but the other party is not properly receiving information, the Parties will work cooperatively to correct the problem."

Section 4.5 of the ICA, which Pac-West Ex. Sprague-2 emphasizes with italics begins by stating: "[W]here the Parties are performing a transiting function as defined in Section 8.0 below, the transiting Party will pass the original and true CPN if it is received from the originating third party." In this case, it is <u>only if</u> the original and true CPN is not received from the originating third party that the Category 50 record is used as a back-up process. However, Pac-West utilizes SS7 (*see* para. 22 of its complaint) so that CPN should have been passed and, if not, Pac-West should have contacted AT&T California and 'work[ed] cooperatively to correct the problem,' as

it did with its other CLEC problem noted above in 2004, coincidentally the same year that it submits that Comcast Phone commences to owe Pac-West compensation under its tariff.

Nonetheless, Pac-West chose not to follow its ICA with AT&T California. Because the recipient carrier's (Pac-West's) switch recorded information must be compared with EMI records, as the Barry Lear e-mail clearly indicates, for billing verification, the integrity of the billing process requires that the Commission not allow nor find that Cat-50 records can be used unless compared with switch information. As a result, the Decision should be reversed and changed to reflect that Pac-West did not accurately bill Comcast Phone in light of its failure to use switch records in accordance with its ICA with AT&T California.

B. The Record Evidence Demonstrates Pac-West Has Billed Comcast Phone For Traffic That Is Not Comcast Phone's.

The proof that the Cat-50 records can not be relied upon and are not relied upon by any responsible carrier was established in the uncontroverted Comcast Phone study of the only call detail records ("CDRs") timely provided it for analysis in discovery before hearing, those for December, 2006, September through December, 2007 and January, 2008. There, Comcast Phone found that Pac-West was charging Comcast Phone for traffic that was not Comcast Phone's. Rather, only 20-25% of actual Comcast Phone traffic was verified for the first five months of CDRs and only 42% of Comcast Phone traffic was verified for January, 2008.[35] Further, as Comcast Phone witness Blimmel indicated, only 424,095 of the 1.61 million call detail records provided by Pac-West showed Comcast Phone assigned phone numbers i.e. the proper NXX code along with a seven digit number assigned to Comcast Phone (Ex JB-2).[36] Rather, the

[35] CP Ex. 1, 3- 4.

[36] As Mr. Blimmel also testified, Comcast Phone painstakingly went through the CDRs attempting to match every phone number on the CDRs to its past and present inventory. Comcast Phone/Blimmel RT at 72-73.

LERG established that these numbers were assigned to other carriers in 1000 number blocks and have never been assigned to Comcast Phone.

Another substantive error established by Comcast Phone's study was that Pac-West assumed that all traffic passed to it by AT&T California was done over trunks dedicated solely to Comcast Phone as a facilities-based carrier using the OCN 7610. As Pac-West witness Sprague erroneously testified in Pac-West Ex. D,

> The Category 50 EMI records provided to Pac-West by AT&T Corp.'s affiliate Pacific Bell Telephone, d/b/a AT&T California ("AT&T California") shows that traffic was originated by Comcast and delivered to Pac-West over interconnected trunk groups ("ITG") **dedicated** to Comcast.[37] (emphasis supplied) For example, when Comcast (then TCI) established interconnection with AT&T California and placed orders for trunk groups for the exchange of traffic with AT&T California, an NPA-NXX had to be assigned to each of those trunk groups. Every time a call comes from Comcast and is destined for another the corresponding carrier OCN number, in this case carrier, AT&T California's switch identifies the Comcast NPA-NXX as the "from" number and places 7610, in the OCN field on the Cateogry 50 EMI.[38]

This prefiled Pac-West testimony is inaccurate because it is not based on what Mr. Sprague knew, but on his false assumptions, as cross examination demonstrated.[39] First, Mr. Sprague admitted on cross examination that he had no specific document supporting his position that the TCG or TCI trunks carrying Comcast Phone traffic were dedicated to Comcast Phone; he only assumed that the trunks used to deliver Comcast Phone's traffic were dedicated to Comcast Phone based on his general discussions with AT&T concerning the use of Category 50 records

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[37] *Id* at 3.

[38] *Id* at 5.

[39] Pac-West Sprague RT at 169-170.

for billing purposes.[40] Second, Comcast Phone did not establish interconnection with AT&T California. It entered into the Core Services Agreement whereby AT&T affiliate, TCG, carried its traffic. Interconnection for TCG was actually established by TCI, an AT&T affiliate, as Pac-West actually admits in its Opening Brief (at p. 11) because TCI was never an affiliate of Comcast Phone[41] Thus, the interconnection trunks were never established by Comcast Phone nor were they ever dedicated to Comcast Phone, as AT&T confirmed in its data response to Comcast Phone, and those trunk groups contained mixed traffic. ("TCG traffic is mixed with Comcast Phone traffic on trunk groups shared by TCG and Comcast Phone.")[42]

Pac-West then compounded the error in its testimony by misinterpreting what AT&T advised them in another data request. As Mr. Sprague testified, AT&T advised Pac-West in data responses in discovery that "the invoices for which [Pac-West] seeks payment pertain to traffic originated on loops assigned the code OCN 7610."[43] Mr. Sprague's testimony then twists AT&T's statement to give it a meaning that is untrue: "This response reflects a basic understanding of the AT&T California process I described above. That is, the OCN 7610 shown on the Category 50 EMI record is an indication that the traffic originated on Comcast's network or "originated on loops [trunks] assigned the code OCN 7610."[44]

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[40] Pac-West Sprague RT at 170.

[41] *See also* AT&T Opening Brief at 25, noting that TCI was an AT&T affiliate, not a Comcast Phone affiliate. Moreover, Pac-West billed TCI, not Comcast Phone, for many of the invoices at issue here as Mr. Sprague admits (Pac-West Ex. C at 6).

[42] CP Ex. 2 at 4; Comcast Phone/Blimmel RT at 92-94.

[43] Pac-West Exhibit D at 7.

[44] *Id.*

This statement is false. Rather, as the hearing record reflects, the traffic was carried over TCG's network, and the local trunks transporting the calls to the AT&T California tandem switch carried mixed traffic; the trunks were not dedicated to Comcast traffic.

Pac-West could have discovered and rectified its billing error by doing precisely what Comcast Phone or any other local exchange carrier does with its billing: (1) first check all ten of the digits passed in the CDRs including the line number (last four digits), (2) confirm all calls against the Local Routing Number ("LRN") in the Local Exchange Routing Guide ("LERG");[45] and (3) verify the calls against switch records to determine the accuracy of the numbers which are captured at the switch.[46] However, Pac-West did none of these verification checks, even though as previously noted Pac-West had identified precisely this same problem with the billing of another CLEC as early as September, 2004[47] and because as Pac-West admitted at hearing, it bills AT&T California (the ILEC) based on its own Pac-West switch recordings.[48] Ironically, Pac-West claims in its Opening Brief (at 14) that no other CLEC challenged the billing accuracy when it is clear that the CLEC noted in AT&T Ex. 3 did precisely that and Pac-West took measures to determine the accuracy of the billing, comparing switch records, which it did not do for Comcast Phone.

In summary, the record evidence is clear, Pac-West did not bill Comcast Phone for its traffic alone and Pac-West did not properly bill Comcast Phone given the traffic authentication and verification capabilities of Pac-West's SS7 billing system and switch information. As a

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[45] Ex. JB-2 at Step 2, bullet point 5.

[46] Comcast Phone/Blimmel RT at 81.

[47] *See* AT&T Ex. 3, e-mail from Barry Lear of Pac-West to AT&T.

[48] Pac-West/Tutt RT at 10 & 27.

result, neither the findings nor the record evidence support Pac-West's claim and the Decision should be reversed in this regard.

6. Conclusion

For all of the foregoing reasons, the Decision should be reversed and modified in accordance with this Application for Rehearing[49]

Respectfully submitted,

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Dated: January 5, 2009

[49] It should be noted that Comcast Phone has complied with the Decision and has paid the outstanding amount of $379,446.43 to Pac-West required by Ordering paragraph 1.(a). In turn, Comcast Phone and Pac-West have agreed that invoices beyond the dates mentioned in this ordering paragraph are being treated as "in dispute" so that Comcast Phone can verify the traffic and billing, provided for in those invoices. Thus, in this Application for Rehearing, Comcast Phone seeks reversal of the order and return of the funds paid as well as a statement that no further amounts are due Pac-West by Comcast Phone.

CERTIFICATE OF SERVICE

I, Peter A. Casciato, hereby certify that copies of the foregoing "COMCAST PHONE OF CALIFORNIA, LLC'S APPLICATION FOR REHEARING OF D.08-12 002 AND REQUEST FOR ORAL ARGUMENT" have been served on the official service list for C.07-09-010/C.07-11-015 and others as set forth below, either by electronic mail as a PDF attachment, or by hand, this 5th day of January, 2009, at San Francisco, California.

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