Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Pac-West Telecomm, Inc. (U5266C), Complainant, vs. Telscape Communications, Inc. (U6589C), Defendant.	Case 07-10-018 (Filed October 19, 2007)

DECISION GRANTING COMPLAINT

Summary

Telscape Communications, Inc. is ordered to pay unpaid call termination fees to Pac-West Telecomm, Inc. in the amount of $554,605.39.

Background

Complainant and defendant are competitive local exchange carriers (CLECs) licensed to do business in the state of California. The parties do not directly interconnect but exchange traffic with one another via transport services provided by Pacific Bell Telephone Company (Pacific Bell), which is not a party to this proceeding. When Pac-West terminates a call originated by a Telscape customer, it generates an invoice charging Telscape for terminating the call. Pac-West calculates the call termination fee owing with respect to any terminated call by applying its local tariff.

For at least the three years preceding the filing of the complaint in this matter, Telscape has declined to pay the call termination fees invoiced to it by Pac-West. Telescape asserts that all or nearly all the calls terminated by Pac-West for Telscape were not subject to Pac-West's local tariff.

An evidentiary hearing was held on April 28, 2008. Opening briefs were filed on May 26, 2008 and reply briefs were filed on June 10, 2008.

Discussion

The majority of Telscape calls terminated by Pac-West are calls to dial-up Internet Service Providers (ISPs) from customers residing outside the local calling areas in which the ISPs are located. For routing purposes, these are interexchange calls but because the ISPs' access numbers are in the customers' local calling areas, the calls are otherwise treated as local calls, *i.e.,* the customers do not incur any toll charges in connection with the calls. These are so-called "virtual NXX" (VNXX) calls. The parties agree that 84% of the traffic at issue in this case is VNXX traffic.[1]

Telscape does not dispute the factual accuracy of the Pac-West invoices. Instead, Telscape argues that it is not obligated to pay the invoices because:

1. The Commission lacks jurisdiction to hear this case. According to Telscape, it is a "collection action" that seeks "damages" from Telscape. Accordingly, it has to be brought in Superior Court rather than before the Commission.

[1] Telscape Exhibit 3 (Compton Reply Testimony), pp. 1-3; Pac-West Exhibit C (Sprague Reply Testimony), p. 1. Although the parties agree on the percentage of VNXX traffic, the record does not establish what portion of that traffic went to ISPs. However, it appears from the testimony that most, if not all, of the VNXX traffic was also ISP-bound traffic and vice-versa.

2. The Federal Communications Commission has exempted calls to ISPs from state regulation.
3. Pac-West's local tariff does not apply to ISP-bound calls.
4. Pac-West's local tariff does not apply to VNXX calls.
5. A two-year federal statute of limitations applies to the Pac-West claims rather than the three-year state statute relied on by Pac-West.

For the reasons set out below, we reject each of these arguments.

A. Commission Jurisdiction to Hear the Case

Telscape characterizes this case as a collection action no different from an action by a utility against a customer for failure to pay a local phone bill. In support of this position, Telscape cites a series of cases in which the Commission declined to hear billing disputes between utilities and their customers. All the Commission cases cited by Telscape deal either with a customer that seeks reparations from a utility under Sections 734, 735 and 736 of the Public Utilities Code[2] or a customer that seeks damages beyond the reparations allowed by those Code sections.[3] This case is different. It involves a dispute between two utilities

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[2] Section 734 deals with the situation where the Commission has found that a utility has overcharged its customers and directs the utility to refund the excess charges. Section 735 gives the customers the right to sue the utility in the Superior Court in the event the utility disobeys the Commission's refund order. Section 736 establishes a three-year statute of limitations for such complaints.

[3] *Garcia v. PT&T Co.* (1980) 3 CPUC 2d 534 rejects a customer's attempt to rescind a Yellow Pages contract and recover "consequential" damages beyond the reparations he may seek under the P. U. Code. *Marie Quan Mak (Quan Back Lean) v. PT&T Co.* (1971) 72 CPUC 735 rejects a customer's claim for damages for alleged tortuous conduct by a utility. *National Communications Center Corp. v. PT&T Co.* (1979) 2 CPUC2d 533 disallowed a set-off claim by a utility for overdue Yellow Pages bills against a customer's award for reparations for a utility's overbilling.

about the correct application of a tariff and related questions of state and federal law. These are issues squarely within our jurisdiction.

In support of its argument that we lack jurisdiction to hear this case, Telscape further alleges that Pac-West is seeking damages and that we have no statutory authority to award damages. But that argument mischaracterizes the case. Pac-West is seeking a decision that it is entitled to payment for call termination services under its local tariff and an order directing Telscape to make such payment. Under Section 701 of the Public Utilities Code, we have broad regulatory power over public utilities in this state including the power to "do all things…which are necessary and convenient in the exercise of such power and jurisdiction." We conclude that a decision interpreting Pac-West's local tariff and an order directing that Telscape make payments in accordance with terms of the tariff are among those "necessary and convenient" things.

Indeed, to concede that we lack power to enforce our own orders would be to abandon our basic duty under the Constitution of the State of California and the Public Utilities Code to ensure that regulated utilities in this state charge "just and reasonable" rates and otherwise carry out the obligations imposed on them by our laws.

B. Federal Pre-emption of ISP-bound Calls

We have considered the federal pre-emption arguments advanced by Telscape in a series of other cases in recent months. In each case, we have concluded that the Federal Communications Commission has not exempted ISP-bound traffic exchanged between CLECs from state regulation.[4] In D.06-06-055,

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[4] See e.g., D.07-09-050, *Cox California Telecom, LLC vs. Global NAPS California, Inc.*(2007) where we suspended the license of Global NAPS until it paid nearly a million dollar in

Footnote continued on next page

Pac-West Telecomm, Inc. v. AT&T Communications of California, Inc. et al., (*Pac-West v. AT&T*), whose facts closely resemble the facts in this case, we specifically considered the situation in which two CLECs exchange traffic some of which is ISP-bound. AT&T in that case asserted that the Federal Communications Commission's so-called "ISP Remand Order"[5] pre-empted state tariffs and established a federally mandated bill-and-keep regime for all ISP-bound traffic. We concluded to the contrary that

> "AT&T cannot rely on ¶ 81 of the ISP Remand Order as a justification for insisting that the ISP-bound traffic it exchanges with Pac-West must be handled on a bill-and-keep basis, because we agree with Pac-West that only ILECs that have made the mirroring offer described in ¶ 89 of the Remand Order are free to invoke the bill-and-keep arrangements set forth in ¶ 81. As a CLEC, AT&T cannot make a mirroring offer, and so cannot invoke ¶ 81."[6]

Having decided that Federal law does not mandate a bill-and-keep arrangement for ISP-bound traffic exchanged between CLECs, we further found that application of a local tariff to fix rates for call termination was appropriate:

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termination fees owed to Cox. Although these fees were incurred pursuant to the terms of an interconnection agreement as opposed to the application of a tariff, the federal pre-emption argument we rejected was essentially identical to the argument raised by Telscape in this case.

[5] *Order on Remand and Report and Order*, CC Docket Nos. 96-98 and 99-68 (FCC 01-131), released April 27, 2001, 16 FCC Rcd 9151.

[6] D.06-06-055 at 23.

> "We also conclude that Pac-West's intrastate tariff is the appropriate source to look to for the compensation that AT&T must pay Pac-West for terminating ISP-bound calls."[7]

The facts in this case differ immaterially from the facts in *Pac-West v. AT&T,* and accordingly we conclude here, as we concluded there, that (1) the ISP Remand Order does not pre-empt state jurisdiction over CLEC-to-CLEC ISP-bound traffic and (2) the terminating carrier's intrastate tariff sets the compensation that the originating carrier must pay to the terminating carrier.

C. Application of the Local Tariff to ISP-bound Calls

Telscape argues that Pac-West has applied the wrong section of its tariff to most of the calls in dispute. Pac-West's claim for compensation 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.[8] According to Telscape, any call to an Internet Service Provider is a non-local call that is subject instead to Section 13.1 of the Pac-West tariff. The pertinent part of Section 13.1 reads as follows:

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[7] *Ibid.*

[8] 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.

The termination rate established pursuant to Section 12.1.2 is a fixed charge of $0.002 per call plus $0.001 per minute of use.

> **"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 fundamental problem with Telscape's argument that Section 13.1 should be applied to the ISP-bound portion of the calls terminated by Pac-West is that we have never found that ISP-bound traffic is non-local. Since we have never made the finding that triggers the application of Section 13.1, it is irrelevant to this case.

D. Application of the Local Tariff to VNXX Calls

Telscape argues that whether or not Section 13.1 of the Pac-West tariff applies to them, VNXX calls are categorically exempt from Section 12.1.2 because they are not local calls. While it is true that VNXX calls originate and terminate in different rate centers, for regulatory purposes we have treated such calls as local for rating purposes since our so-called "VNXX decision" in 1999.[9] This practice of treating VNXX calls as local calls for rating purposes was recently affirmed by the 9th Circuit in *Verizon Cal., Inc. v. Peevey*, 462 F.3d 1142 at 1155:

> "[I]n the CPUC's view, reciprocal compensation turns on whether a call is local, and determining whether a call is local based on the NPA-NXXs of the calling and called parties, not the routing of the call, is consistent with the CPUC's traditional

[9] *In re Competition for Local Exchange Service*, D.99-09-029 (September 2, 1999).

> call-rating regime, industry-wide practice, and recognition of essential differences between the parties' network architectures."

In reaching this conclusion, the 9th Circuit specifically recognized that "VNXX numbers are often assigned to ISP customers by CLECs thus allowing the ISP to serve Internet users outside the ISP's local calling area without subjecting such users to toll charges."[10] We conclude that Pac-West appropriately applied Section 12.1.2 of its tariff to the VNXX calls originated by Telscape customers.

E. Applicable Statute of Limitations

Telscape argues that the two-year federal statute of limitations contained in the Federal Communications Act[11] applies to this action rather than the three-year state statute. The basis for this argument is that the calls in question are "jurisdictionally interstate" and therefore subject to the federal limitations period. This argument substantially depends on Telescape's second argument, above, that the FCC has exempted ISP-bound calls exchanged between CLECs from state regulation. Because we rejected the exemption argument, there is no basis for concluding that the federal limitations period should apply. Accordingly, the three-year limitation period under California law applies.

Assignment of Proceeding

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

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[10] *Id.* at 1148.

[11] 47 U.S.C. § 415.

Submission of Proceeding

This case was deemed submitted on June 10, 2008, when Pac-West and Telscape both submitted reply briefs on the issues litigated at the April 28, 2008 hearing.

Appeals of the Presiding Officer's Decision

Both parties appealed the Presiding Officer's Decision.

Telscape asserts that the POD commits legal error in finding that the Commission has jurisdiction to hear this case. In reaching that conclusion, the POD follows the reasoning of the Commission in a recent decision involving nearly identical facts, Pac-West v. AT&T D.06-06-055, which was on appeal to the Federal District Court at the time the POD was issued. On August 12, 2008, the District Court ruled in favor of the Commission and Pac-West and against AT&T on cross-motions for summary judgment. In particular, the District Court held that Federal Communication's Commission's so-called "ISP Remand Order" relied on by both Comcast and AT&T as the basis for their jurisdictional argument, did not pre-empt the Commission from hearing and resolving a dispute between two CLECs regarding termination charges for ISP-bound traffic imposed under an intra-state tariff, precisely the situation at issue in this case:

> "Accordingly, the Court finds that the question of how two CLECs should be compensated for the exchange of ISP-bound traffic was not before the FCC when it crafted the *ISP Remand Order* and, therefore, concludes that the *ISP Remand Order* does not govern the parties' relationship. For the reasons set out above, the Court also concludes that the CPUC decision to apply the Pac-West tariff does not conflict with the [Federal Telecommunications Act] and the FCC's implementing

> regulations. Accordingly, the CPUC's Decision is not preempted by Federal law."[12]

Following our own precedent and the reasoning of the District Court, we reject Telscape's Federal pre-emption argument.

Telscape's arguments that Pac-West's local tariff is inapplicable to VNXXX calls and ISP-bound calls are both based on the proposition that we lack jurisdiction to adjudicate this dispute. Having rejected that proposition, we reject these arguments.

Telscape re-iterates its argument that the Pac-West complaint is in the nature of a collection action over which the state courts have jurisdiction rather than the Commission. This characterization misconstrues the nature of the complaint. Pac-West does not seek to collect damages for breach of contract; rather, it seeks a Commission ruling that Pac-West's local tariff applies to the calls in dispute and a Commission order enforcing that tariff. As noted in the POD, both remedies are encompassed within the broad grant of regulatory authority to the Commission set out in Pub. Util. Code § 701.

Finally, Telscape reiterates its argument that the two-year federal statute of limitations applies to this action rather than the state three-year statute. Having determined that the FCC has not pre-empted this matter, the state statute sets the appropriate limitation period.

Pac-West argues that the POD commits legal error by declining to order Telscape to pay late payment charges on its unpaid termination fees. On

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[12] Order on Cross-Motions for Summary Judgment in Case No. C 06-07271 JSW at pp. 17-18. The order is unpublished but is referenced by both AT&T and Pac-West in their pleadings regarding the appeals in this case.

reconsideration of this matter, we conclude that Pac-West is correct and the POD will be modified accordingly. Section 2.10 of the Pac-West local tariff provides that late payment charges accrue on any unpaid portion of a bill resulting from imposition of the tariff. As Pac-West recognizes, the Commission has broad equitable powers to set aside or modify such tariff provisions in order to avoid an unjust result. However, in this case Telscape was on notice at least from the date of the decision in D.06-06-055 more than two years ago that the Commission rejects the pre-emption arguments on which Telscape based its refusal to pay termination charges to Pac-West. Furthermore, Telscape, as a state-licensed carrier, may be presumed to know that under the so-called "filed rate" doctrine Pac-West's tariff has the force of law and should be complied with in its entirety, including that portion of the tariff that provides for late payment charges.

Pac-West also argues that the POD errs in failing to order Telscape to make payments pursuant to the Pac-West local tariff from the date of the complaint (October 19, 2007) to the date, if any, on which Telscape and Pac-West enter into an agreement superseding the tariff. We concur. The failure to include an order requiring payment of charges incurred following the filing of the complaint was inadvertent error and the ordering paragraphs of the decision will be modified accordingly.

Pac-West also requests that the payment order be made effective immediately rather than 30 days after the effective date of the decision. We concur.

Findings of Fact

1. Telscape and Pac-West are both CLECs.

2. No interconnection agreement is in effect between Telscape and Pac-West, but they exchange traffic indirectly by using the transit services of Pacific Bell Telephone Company.

3. Many of the customers served by Pac-West are ISPs.

4. The overwhelming majority of the traffic terminated by Pac-West for Telscape is traffic that originates with Telscape's local exchange customers who use dial-up telephone service to connect with their ISPs.

5. The volume of local exchange traffic terminated by Pac-West for Telscape is many times greater than the volume of local exchange traffic terminated by Telscape for Pac-West.

6. The decision whether to award late payment charges on unpaid amounts due under a utility's tariff is a matter within this Commission's equitable jurisdiction

7. Under a bill-and-keep regime, neither of two interconnecting carriers charges the other for terminating traffic that originates on the other's network, but instead recovers from its own end-users (a) the costs of originating traffic that it delivers to the other carrier, and (b) the costs of terminating traffic that it receives from the other carrier.

8. Since 1998, Pac-West has had on file with this Commission a tariff, Schedule Cal. CLC 1-T, that sets forth Pac-West's charges for terminating local and IntraLATA toll traffic originated by CLECs with which Pac-West has not entered into an interconnection agreement. This tariff has been amended several times since 1998.

9. When calculated at the rates set forth in the Pac-West tariff described in Finding of Fact (FOF) 8, the charges due for the traffic originating on Telscape's

network and terminating on Pac-West's network, for the period from September 1, 2004 to February 28, 2008, total $554,605.39.

Conclusions of Law

1. Neither the ISP Remand Order nor any other federal decision dictates what compensation, if any, should be paid by one CLEC originating ISP-bound traffic on its network to another CLEC that terminates such traffic on its network.

2. In the absence of any controlling federal authority on the issue described in the preceding Conclusion of Law (COL), this Commission has discretion to determine the compensation, if any, that should be paid by one CLEC that originates ISP-bound traffic on its network to another CLEC that terminates such traffic on its network.

3. The Commission has jurisdiction over terms and conditions for interconnection and exchange of VNXX traffic, including intercarrier compensation for such traffic, whether ISP-bound or not.

4. In the absence of either an interconnection agreement or any other reciprocal compensation arrangement between the parties, it is reasonable to require Telscape to compensate Pac-West for terminating ISP-bound traffic originating on Telscape's network at the minute-of-use and set-up rates set forth in the tariff described in FOF 8.

5. Under the circumstances of this case, it is reasonable to require Telscape to pay Pac-West interest or late charges on the amounts computed pursuant to the preceding COL.

6. The applicable statute of limitations is three years.

7. This order should be made effective today.

O R D E R

IT IS ORDERED that:

1. Telscape Communications, Inc. shall pay to Pac-West Telecomm, Inc. (Pac-West), (a) the sum of $554,605.39 for the period from September1, 2004 to February 28, 2008; (b) all termination charges for termination services provided by Pac-West to Telscape since February 28, 2008 and all future termination charges Telscape incurs under Pac-West's Intrastate Tariff unless and until Telscape and Pac-West enter into an agreement superseding the Intrastate Tariff; and (c) all late payment charges on the amounts of (b) and (c) above that were not or are not paid on the date due in accordance with § 2.10 of Pac-West's Intrastate Tariff.
2. Case 07-10-018 is closed.

This order is effective today.

Dated _____, at San Francisco, California.