

Decision 12-01-034

January 12, 2012

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)

**ORDER GRANTING REHEARING  
OF DECISION (D.) 08-12-002**

**I. INTRODUCTION**

In Decision (D.) 08-12-002 (or “Decision”), we found that Comcast Phone of California, LLC (“Comcast”) owed unpaid termination charges to Pac-West Telecomm, Inc. (“Pac-West”) for terminating traffic originated by Comcast during the period of April 4, 2004 through August 27, 2007. Many, if not all, of these charges are for “dial-up” Internet service provider (“ISP”)-bound calls. (D.08-12-002, p. 3.) Comcast and Pac-West are both registered as competitive local exchange carriers (“CLECs”) with the Commission. The two CLECs had not entered into an interconnection agreement for the traffic at issue in this case. Calls originated by Comcast customers were delivered to Pac-West’s switch by the transiting carrier, AT&T Corp. (“AT&T”). Pac-West then terminated all or a significant part of the traffic to dial-up ISPs.

The Decision determined that the instant proceeding is legally indistinguishable from *Pac-West Telecomm, Inc. v. AT&T Communications of California, Inc.*, Case (C.) 04-10-024. The Decision found that *Decision Granting Complaint*

[D.06-06-055] (2006) \_\_Cal.P.U.C.3d \_\_, issued in C.04-10-024, made the following conclusions: (a) the Commission has the jurisdiction to hear a dispute between two CLECs regarding ISP-bound calls originated by one and terminated by the other; (b) neither Pac-West's Intrastate Tariff nor the Commission's jurisdiction to enforce the intrastate tariff is pre-empted by federal law; (c) Pac-West's Intrastate Tariff applies to so-called ISP-bound traffic including VNXX traffic;<sup>1</sup> and (d) a complaint to the Commission is an appropriate means to enforce Pac-West's tariff. The Decision affirmed the conclusions of D.06-06-055 and applied them to the instant case. (D.08-12-002, pp. 8 & 18 [Conclusions of Law ("COLs") 1-4].)

Comcast and AT&T both filed timely applications for rehearing of D.08-12-002. Pac-West filed a response opposing the rehearing applications.

Comcast's rehearing application alleges the following: (1) the Commission lacks subject matter jurisdiction over the complaint, as the intrastate tariff does not apply in this case;<sup>2</sup> (2) the Commission lacks jurisdiction to award monetary damages to Pac-West; (3) the Commission applied the wrong section of Pac-West's tariff; and (4) the record does not support that the billed traffic belonged to Comcast. Comcast also requests oral argument.

AT&T's rehearing application alleges that: (1) the Commission erroneously asserts subject matter jurisdiction over ISP-bound traffic that the Federal Communications Commission ("FCC") has determined to be interstate traffic that is outside of a state's tariff jurisdiction over intrastate communication services; and (2) the Commission relies on exceptions to federal preemption that do not exist.

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<sup>1</sup> "VNXX, or 'Virtual Local' codes ... correspond to a particular rate center, but ... are actually assigned to a customer located in a different rate center. Thus a call to a VNXX number that appears to the calling party to be a local call is in fact routed to a different calling area." (*Verizon California, Inc. v. Peevey, et al.* (9th Cir. 2006) 462 F.3d 1142, 1148.). As explained below, there remains some question as to whether and to what extent the VNXX traffic is governed by the FCC's order, *Intercarrier Compensation for ISP-Bound Traffic* (2001) 16 F.C.C.R. 9151 ("ISP Remand Order").

<sup>2</sup> Comcast's rehearing application conflates the jurisdiction and preemption issues. (See e.g. Comcast Rehr. App., p. 7.) As discussed further below, these are two separate issues.

We have reviewed each and every issue raised in the rehearing applications, and are of the opinion that we have the jurisdiction to hear Pac-West's complaint but rehearing of D.08-12-002 is warranted as the Ninth Circuit in *AT&T Communications, et al. v. Pac-West Telecomm Inc., et al.* (“*AT&T v. Pac-West*” or “Ninth Circuit’s Opinion”) (9th Cir. 2011) 651 F.3d 980 has effectively reversed the prior Commission decision on which D.08-12-002 was based. On rehearing, we will consider whether Pac-West’s complaint, which is based on allegations of intrastate tariff violations, should be dismissed. With the grant of rehearing, we deny Comcast’s request for oral argument for the reasons stated below.

## **II. DISCUSSION**

### **A. The Commission’s Jurisdiction to Resolve this Dispute**

Comcast and AT&T dispute COL 1, which states that the Commission has jurisdiction to hear Pac-West’s complaint. Comcast and AT&T allege that the Commission lacks subject matter jurisdiction to hear Pac-West’s complaint because the FCC has declared all ISP-bound traffic to be interstate interexchange traffic, and therefore subject to the FCC’s jurisdiction. (Comcast Rehr. App., p. 7; AT&T Rehr. App., p. 4.) Both Comcast and AT&T allege that a state’s only authority over interstate telecommunications service is in arbitrating, approving, and enforcing interconnection agreements pursuant to section 252 of the Telecommunications Act of 1996 Act (“1996 Act”). (Comcast Rehr. App., p. 9; AT&T Rehr. App., p. 8.) We find that Comcast and AT&T’s allegations that we lack jurisdiction to resolve this dispute lack merit.

Even if ISP-bound traffic is jurisdictionally interstate traffic, and we are preempted from applying state tariffs to this traffic,<sup>3</sup> we still retain the jurisdiction pursuant to state law to resolve a dispute involving two California utilities subject to our regulation. We have jurisdiction over the parties and their dispute under the California

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<sup>3</sup> Section II.B, below, discusses the preemption issue.

Constitution and the Public Utilities Code. (See e.g. Cal. Const., art. XII, §§ 2-6;<sup>4</sup> Pub. Util. Code, §§ 216, 233, 234, 702, & 728.) We have broad regulatory power over the public utilities of this state, which includes telecommunications carriers, and “may do all things ... which are necessary and convenient in the exercise of such power and jurisdiction.” (Pub. Util. Code, § 701.) We have the authority to determine and fix “just, reasonable [and] sufficient rates” charged by utilities. (Pub. Util. Code, §§ 451 & 728.) We have the authority over the rules, practices, facilities and equipment of public utilities. (Pub. Util. Code, §§ 451 & 761.) We also have the power to order physical connections between telephone corporations and the payment of compensation for such connections. (Pub. Util. Code, §§ 558 & 766.)

Furthermore, we have the jurisdiction to hear complaints regarding the public utilities subject to our jurisdiction. Public Utilities Code section 1702 broadly permits complaints “setting forth any act or thing done or omitted to be done by any public utility,” including for a violation of “any provision of law,” to be filed with the Commission. Public Utilities Code section 1707 allows any public utility to file a complaint on any of the grounds upon which complaints are allowed to be filed by other parties.

While the FCC has said that ISP-bound traffic, including physically “local” traffic, is “jurisdictionally interstate,” the FCC has also acknowledged that it and the states have parallel jurisdiction over interstate and intrastate matters pursuant to the 1996 Act. (*Intercarrier Compensation for ISP Bound Traffic* (“*ISP Mandate Order*”) (2008) 24 F.C.C.R. 6475, at ¶ 18.) Courts have described the scheme of the 1996 Act as one of “cooperative federalism.” (See e.g. *Global NAPs, Inc. v. Mass. Dept. of Telecomms. & Energy* (1st Cir. 2005) 427 F.3d 34, 46; *BellSouth Telecomms., Inc. v. Sanford* (4th Cir. 2007) 494 F.3d 439, 448-449.)

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<sup>4</sup> Section 3 provides that “corporations ... that own, operate, control, or manage a line, plant, or system for ... the transmission of telephone and telegraph messages ... directly or indirectly to or for the public ... are public utilities subject to control by the Legislature.” (Cal Const., art. XII, § 3.)

Relying on *Pacific Bell v. Pac West Telecomm, Inc.* (9th Cir. 2003) 325 F.3d 1114, both Comcast and AT&T argue that a state's only authority over interstate telecommunications service is in arbitrating, approving, and enforcing interconnection agreements pursuant to section 252 of the 1996 Act. (Comcast Rehr. App., p. 9; AT&T Rehr. App., p. 8.) We have previously rejected the broad reading of *Pacific Bell v. Pac West Telecomm, Inc.* currently advocated by Comcast and AT&T. (See D.06-06-055, *supra*, at p. 29 (slip op).)

*Pacific Bell v. Pac West Telecomm, Inc.* is distinguishable from the instant case. *Pacific Bell v. Pac West Telecomm, Inc.* involved disputes over the inclusion of ISP-bound traffic in the reciprocal compensation provisions of interconnection agreements between incumbent local exchange carriers ("ILECs") and CLECs, and this Commission's attempt to promulgate general "generic" regulations relating to ISP traffic. The Ninth Circuit held that in the context of interconnection agreements, the Commission had jurisdiction to resolve individual disputes between carriers regarding ISP-bound traffic, but not to promulgate general regulations. (*Pacific Bell v. Pac West Telecomm, Inc.*, *supra*, 325 F.3d at pp. 1125-26.) Unlike the former case, the instant case involves a dispute over compensation for ISP-bound traffic exchanged between two CLECs that do not have an interconnection agreement.<sup>5</sup> The Commission is also not promulgating general "generic" regulations in this case.

Furthermore, even apart from section 252, provisions of the 1996 Act preserve the states' authority. Section 251(d)(3) provides that the FCC "shall not" preclude any state order that "establishes access and interconnection obligations of local exchange carriers" so long as it is consistent with the 1996 Act and does not substantially prevent implementation of the requirements of section 251. (47 U.S.C. § 251(d)(3).)

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<sup>5</sup> While a CLEC can compel an ILEC to arbitrate an interconnection agreement with it, it does not have the right under the 1996 Act to compel another CLEC to negotiate an interconnection agreement. (See D.06-06-055, *supra*, at p. 29 (slip op.); see also 47 U.S.C. § 252 [interconnection requests directed to "an incumbent local exchange carrier" which then "may negotiate" or arbitrate].)

Sections 261(b) and (c) also confirm state commission authority to enforce regulations in effect prior to the 1996 Act, and to prescribe regulations thereafter, as long as those regulations are not inconsistent with the local competition provisions of the Act. (47 U.S.C. §§ 261(b) & (c).)

We thus conclude that the Commission has the jurisdiction to adjudicate a dispute between two carriers subject to our regulation, including the authority to apply the federal rate for ISP-bound traffic, to the extent that it falls under the *ISP Remand Order* (see below).<sup>6</sup> This is a power necessary for the Commission to resolve interconnection disputes between California carriers, pursuant to the policy and command of section 558 that all interconnected carriers are required to carry each others' traffic, subject to the Commission's later resolution of any rate disputes. (See *Order Denying Application of Eight Small Incumbent LECs for Rehearing of Decision 97-11-024* [D.98-02-043] (1998) 78 Cal.P.U.C.2d 492, 493-94.) For the foregoing reasons, we reject Comcast and AT&T's assertions that the Commission lacks jurisdiction to hear Pac-West's complaint.

**B. The Commission's Authority to Award Termination Charges for ISP-Bound Traffic Based on Rates Set Forth in Intrastate Tariffs**

The Decision determined that the instant proceeding involved legal and factual issues essentially identical to those involved in D.06-06-055. In D.06-06-055, we determined that there was no federal authority that dictated what compensation, if any, should be paid for CLEC-to-CLEC exchanges of ISP-bound traffic. (D.06-06-055, *supra*, at p. 44 [COL 6] (slip op.)) D.06-06-055 concluded that in the absence of any federal authority, the Commission had the *discretion* to determine the compensation, if any, that should be paid for this type of traffic. (*Id.* at p. 45 [COL 7] (slip op.)) D.06-06-055

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<sup>6</sup> In *AT&T v. Pac-West*, the Ninth Circuit found that the Commission is preempted from applying a state rate to ISP-bound traffic, but expressly declined to rule on the *separate* question of whether the Commission "lacked jurisdiction to adjudicate the dispute in this case." (*AT&T v. Pac-West, supra*, 651 F.3d at p. 999, fn. 20.)

applied the rates set forth in Pac-West's intrastate tariffs to this traffic. (*Id.* at p. 45 [COL 8] (slip op.)) The Decision affirmed the conclusions of D.06-06-055 and applied them to the instant case. (D.08-12-002, pp. 8 & 18 [COLs 1-4].) Comcast and AT&T dispute these findings.

AT&T appealed D.06-06-055 to the United States District Court, which upheld the Commission on every point. (*AT&T Communications, et al. v. Pac-West Telecomm Inc., et al.* (N.D. Cal., Aug. 12, 2008, No. C06-07271 JSW) 2008 U.S. Dist. LEXIS 61740.)

Subsequent to the issuance of the Decision and filing of the rehearing applications in this case, the Ninth Circuit overturned the District Court and (effectively) the finding in D.06-06-055 that there is no federal authority governing charges for CLEC-to-CLEC exchanges of ISP-bound traffic. The Ninth Circuit found that the FCC's *ISP Remand Order*, governed the traffic exchanged between AT&T and Pac-West in the prior complaint case, and that therefore, the Commission was pre-empted from applying the state tariffs to this traffic. (*AT&T v. Pac-West, supra*, 651 F.3d at p. 998.)

In light of the Ninth Circuit's Opinion, there is merit to Comcast and AT&T's allegations that the Commission is preempted from applying a state rate to ISP-bound traffic exchanged between CLECs, and thus, the Commission may not apply the rates set forth in Pac-West's intrastate tariffs to this traffic. Therefore, we grant rehearing of the Decision. On rehearing, we will consider whether Pac-West's complaint, in its present form, should be dismissed for failure to state a claim, as its allegations are based solely on Comcast's alleged refusal to pay termination charges specified in Pac-West's intrastate tariffs. (See also, Scoping Memo, dated January 15, 2008, p. 3 [scope of issues in this proceeding includes whether Comcast is liable to Pac-West for unpaid termination charges in accordance with Pac-West's intrastate tariff and, if so, in what amount].)<sup>7</sup>

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<sup>7</sup> If Pac-West successfully amends its complaint, a revised scoping memo may be required.

We also note that, in its response to the rehearing applications, Pac-West alleges that the record establishes that 96 percent of the traffic at issue in this case is VNXX. (Pac-West Response, p. 12.) According to Pac-West, the *ISP Remand Order* has no preemptive effect on VNXX traffic and therefore, the Commission has jurisdiction to determine the compensation for this traffic, even if it is ISP-bound. (Pac-West Response, p. 12.) Because the Decision found that Pac-West's tariffs applied to all ISP-bound traffic, regardless of whether the traffic was VNXX or not, it declined to make a finding as to what portion of the traffic was VNXX in this case. (D.08-12-002, pp. 8-9.) The Ninth Circuit has since held that Pac-West's tariffs do not apply to at least some ISP-bound traffic.<sup>8</sup> Therefore, the rehearing shall also consider whether and to what extent the *ISP Remand Order* has preemptive effect on VNXX traffic; and if there is no preemptive effect, what portion of Pac-West's traffic was in fact VNXX in nature.

Because we are granting rehearing of the Decision, we find it unnecessary to address the remaining allegations in the rehearing applications.

### C. Request for Oral Argument

Rule 16.3(a) of the Commission's Rules of Practice and Procedure permits rehearing applicants to submit requests for oral argument on a rehearing application. (Cal. Code of Regs., tit. 20, §16.3, subd. (a).) The Commission has complete discretion to determine the appropriateness of oral argument in any particular matter. (*Ibid.*)

Comcast requests oral argument regarding the issue of the Commission's jurisdiction. Given that we are granting rehearing of the Decision, we find that oral argument is unnecessary. Accordingly, we deny Comcast's request for oral argument.

## III. CONCLUSION

For the reasons stated above, rehearing of D.08-12-002 is granted.

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<sup>8</sup> The Ninth Circuit's Opinion noted that: "it is also well settled that, with the *ISP Remand Order* and related pronouncements, the FCC has *not* exercised its jurisdiction over *all* manifestations of ISP-bound traffic." (*AT&T v. Pac-West*, *supra*, 651 F.3d at p. 991.)

**THEREFORE, IT IS ORDERED** that:

1. Rehearing of D.08-12-002 is granted to determine whether Pac-West's complaint, which is based on allegations of intrastate tariff violations, should be dismissed in light of the holdings in *AT&T Communications, et al. v. Pac-West Telecomm Inc., et al.* (9th Cir. 2011) 651 F.3d 980.
2. The rehearing shall consider whether and to what extent VNXX traffic is preempted; and if there is no preemptive effect, what portion of Pac-West's traffic was in fact VNXX in nature.
3. Comcast's request for oral argument is denied.
4. The Executive Director shall serve upon the parties in C.07-09-010 a copy of this order.

This order is effective today.

Dated January 12, 2012, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
TIMOTHY ALAN SIMON  
MICHEL PETER FLORIO  
CATHERINE J.K. SANDOVAL  
MARK J. FERRON  
Commissioners