

Decision 07-03-016

March 1, 2007

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Pac-West Telecomm, Inc.,

Complainant,

vs.

AT&T Communications of California,  
Inc., Teleport Communications Group  
of San Francisco, Teleport  
Communications Group of Los  
Angeles, Teleport Communications  
Group of San Diego,

Defendants.

Case 04-10-024  
(Filed October 20, 2004)

**ORDER DENYING REHEARING OF DECISION (D.) 06-06-055**

**I. SUMMARY**

This decision denies the application for rehearing of Decision (D.) 06-06-055, filed by AT&T Communications of California, Inc., Teleport Communications Group of San Francisco, Teleport Communications Group of Los Angeles and Teleport Communications Group of San Diego (collectively referred to as AT&T). We have carefully considered each and every argument raised in the application for rehearing and are of the opinion that good cause does not exist to grant rehearing.

**II. BACKGROUND**

D. 06-06-055 resolves a complaint filed by Pac-West Telecomm, Inc. (Pac-West) against AT&T Communications of California, Inc. (AT&T). The complaint alleged that AT&T and its three subsidiaries refused to pay Pac-West the charges due for calls AT&T originates for its local exchange customers and routes to Pac-West through the tandem switches of incumbent

local exchange carriers (ILECs) Pacific Bell Telephone Company (Pacific) and Verizon California, Inc. (Verizon). The complaint noted that while Pac-West and AT&T each have interconnection agreements with Pacific and Verizon, they do not have an interconnection agreement with each other. In the absence of such an agreement, Pac-West contended it was entitled to the termination charges set forth in its intrastate tariffs for traffic that originates with AT&T customers and is transmitted to Pac-West by the two ILECs.

AT&T contended that no charges were due since the overwhelming majority of the traffic that the two ILECs transmit for AT&T to Pac-West was ultimately bound for Internet service providers (ISPs). According to AT&T, this traffic is governed by the so-called “*ISP Remand Order*” issued by the Federal Communications Commission (FCC) in April 2001.<sup>1</sup> In the *ISP Remand Order*, the FCC concluded that because of the regulatory arbitrage that had resulted from certain competitive local exchange carriers (CLECs) targeting ISPs as their customers (thus entitling the CLECs to substantial amounts of reciprocal compensation), the FCC should use its authority to preempt this area and require the affected carriers to make a three-year transition to a “bill and keep” compensation system (where each carrier recovers from its own customers the costs of terminating calls that originate with other carriers), rather than allowing CLECs to reap the windfalls from the payment of reciprocal compensation. AT&T placed particular reliance on ¶ 81 of the *ISP Remand Order*, which states that for carriers not having an interconnection agreement in effect on the issuance date of the *ISP Remand Order* (as AT&T and Pac-West did not), ISP-bound traffic must be exchanged on a bill and keep basis (this is referred to as the “New Markets Rule”). According to AT&T, since the *ISP Remand Order* preempted state law in this area, and since AT&T had met its obligation to exchange traffic on a bill and keep basis, it owed Pac-West nothing.

In the Decision, we ruled in Pac-West’s favor, and awarded Pac-West \$7.115 million in unpaid tariff charges owed by AT&T. We found that ¶ 81 of the *ISP Remand Order* could not be applied standing alone, but rather can only be applied as part of an integrated FCC plan for transitioning CLECs that serve ISPs from reciprocal compensation to bill and keep. (See

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<sup>1</sup> *Order on Remand and Report and Order*, CC Docket Nos. 96-98 and 99-68, F.C.C. 01-131 (rel. April 27, 2001) 16 F.C.C.R. 9151 (*ISP Remand Order*).

D.06-06-055, pp. 23-24.) We agreed with Pac-West that in order for the New Markets Rule to apply, AT&T had to first opt in to the FCC's plan in its entirety by making a "mirroring offer" (i.e., by offering to exchange all traffic subject to § 251(b)(5) of the 1996 Telecommunications Act (1996 Act) at the same rate). Since AT&T was not an ILEC, it could not do this as a matter of law (and even if it could do so as a CLEC, it never did).<sup>2</sup> Accordingly, we held that AT&T could not rely on ¶ 81 of the *ISP Remand Order* as justification for insisting that the ISP-bound traffic it exchanges with Pac-West must be handled on a bill and keep basis. We further held that AT&T failed to establish that the common practice within the telecommunications industry is for CLECs to exchange traffic among themselves on a bill and keep basis. (D.06-06-055, pp. 23-24.) We ultimately found that 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. (See D.06-06-055, pp. 33-34, 44 [Conclusion of Law 6].)

We concluded 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. In making this determination, we relied on the FCC's "*T-Mobile Ruling*",<sup>3</sup> which stated that when carriers interconnect indirectly, the FCC's reciprocal compensation rules do not preclude carriers from accepting alternative compensation arrangements. We found that under the *T-Mobile Ruling*, tariffs are an appropriate alternative in those circumstances where they have not been expressly prohibited or they do not supersede or negate the federal provisions under Section 251 and 252 of the 1996 Act. (D.06-06-055, pp. 32-34.) We further reasoned that since AT&T cannot be forced

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<sup>2</sup> Further complicating the issue is the fact that the FCC concluded that it should forebear from enforcing the New Markets Rule after October 8, 2004. See *Petition for Core Communications, Inc. for Forebearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, Order, WC Docket No. 03-171, F.C.C. 04-241, 19 F.C.C.R. 20179 (rel. October 18, 2004) ("*Core Order*"). The Commission agreed with Pac-West's argument that because the FCC forebore from enforcing the New Markets Rule effective October 8, 2004, the intercarrier rates in Pac-West's state tariff are the only rates that could be applied after that date, even if the Commission were to agree with AT&T that the New Markets Rule could be invoked without a mirroring offer.

<sup>3</sup> *Developing a Unified Intercarrier Compensation Regime; T-Mobile Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling and Report and Order, CC Docket No. 01-92, F.C.C. 05-42, 20 F.C.C.R. 4855 (rel. Feb. 24, 2005) (*T-Mobile Ruling*).

to enter into an interconnection agreement with Pac-West (because AT&T is a CLEC), no interference with the Act's statutory scheme would result from applying Pac-West's intrastate tariff here. (D.06-06-055, p. 24.)

AT&T filed a timely application for rehearing of D.06-06-055 on July 31, 2006.<sup>4</sup> AT&T raises the following allegations of legal error in the Decision: (1) the Commission lacks jurisdiction to regulate ISP-bound traffic, except to the extent permitted by the 1996 Act; and (2) even if the Commission has jurisdiction over the complaint, the *ISP Remand Order* preempts application of intrastate tariffs to ISP-bound traffic. On August 15, 2006, Pac-West filed a response to the application for rehearing.

### III. DISCUSSION

#### 1. Whether the Commission has Jurisdiction to Resolve Pac-West's Complaint.

AT&T first argues that the Commission has overstepped its jurisdiction by ruling on Pac-West's complaint, because the FCC has determined that ISP-bound traffic is interstate in nature. According to AT&T, this Commission has no jurisdiction to regulate interstate telecommunications traffic, except to the extent permitted by 47 U.S.C. § 252 to arbitrate, approve and enforce interconnection agreements.

AT&T cites to the Ninth Circuit's decision in *Pacific Bell v. Pac-West Telecomm, Inc.* (9<sup>th</sup> Cir. 2003) 325 F.3d 1114 for support. In that decision, the Ninth Circuit invalidated a rulemaking decision of the Commission which had held, on a generic basis, that the reciprocal compensation provisions in all interconnection agreements arbitrated by the Commission applied to ISP-bound traffic. At the same time, the Court upheld a Commission decision that the reciprocal compensation provisions in a *specific* interconnection agreement applied to ISP-bound traffic. In striking down the generic rulemaking decision, the Court stated that the "FCC has defined ISP traffic as 'interstate' for jurisdictional purposes, thereby placing it under the purview of federal regulators rather

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<sup>4</sup> On November 27, 2006, AT&T filed a complaint in the U.S. District Court, Northern District of California, seeking review of D.06-06-055. Although briefing has not yet been scheduled, a case management conference in that proceeding is set for March 23, 2007.

than state public utility commissions. Under this scheme the CPUC lacks authority under the Act to promulgate general ‘generic’ regulations over ISP traffic.” (*Id.*, at p. 1125.) The Ninth Circuit further stated that the Commission’s only authority over interstate traffic is its authority under 47 U.S.C. § 252 to approve new arbitrated interconnection agreements and to interpret existing ones according to their own terms. (*Id.*)

According to AT&T, even if the *ISP Remand Order* compensation scheme is limited to ISP-bound traffic between ILECs and CLECs, the Commission has no jurisdiction to consider whether an intrastate tariff applies to ISP-bound traffic between CLECs because such traffic is interstate, thus only the FCC has the jurisdiction to determine whether such a tariff could be applied to such traffic. As to the Commission’s reliance on the *T-Mobile* ruling, AT&T argues that regardless of any similarities, *T-Mobile* was an FCC ruling issued by the FCC pursuant to its own jurisdiction. According to AT&T, the fact that the FCC exercised its jurisdiction over the issues in *T-Mobile* to determine that state tariffs could be applied there does not provide this Commission with jurisdiction over the issues in Pac-West’s complaint to determine that state tariffs can be applied here.

We find that AT&T incorrectly characterizes the nature of Pac-West’s complaint and the proceedings before the Commission. In reviewing Pac-West’s complaint, nowhere does Pac-West mention ISP-bound traffic. Rather, the complaint discusses “transit traffic” and frames the issue in terms of a tariff violation –namely, that AT&T’s conduct was inconsistent with the intrastate tariffs that Pac-West has on file at the Commission, as well as various state law violations. In its answer, AT&T asserted that the traffic at issue was all ISP-bound traffic, and stated as an affirmative defense that the FCC has preempted the field of pricing rules for the termination of ISP-bound traffic and that the Commission must enforce the FCC’s pricing rules. AT&T did not state as an affirmative defense that the Commission lacked subject matter jurisdiction to resolve Pac-West’s complaint.

From the beginning of this proceeding, Pac-West stipulated that the traffic at issue was all ISP-bound for the sole purpose of addressing the legal arguments raised in

this case, that is, for the purpose of determining whether AT&T's affirmative defense of federal preemption was valid. (See Opening Brief of Pac-West, pp. 5-7 (February 11, 2005); Reply Brief of Pac-West, pp. 8-10 (March 11, 2005).) Pac-West contended that it did not matter whether this traffic was ISP-bound, because the FCC's pricing scheme in the *ISP Remand Order* did not apply in this circumstance. (*Ibid.*) Pac-West specifically reserved its right to demonstrate that the traffic at issue was not ISP-bound traffic if the Commission found that the *ISP Remand Order's* compensation scheme did indeed apply to CLEC-to-CLEC ISP-bound traffic. Although AT&T argued that the Commission was *preempted* from applying a compensation scheme other than that outlined in the *ISP Remand Order*, it did not argue that the Commission entirely lacked *subject matter jurisdiction* to resolve the complaint. Indeed, AT&T agreed to this approach in resolving Pac-West's complaint. If AT&T had raised lack of subject matter jurisdiction early on, surely the case would have proceeded differently. For example, Pac-West may have exercised its right at the outset to demonstrate that this was not ISP-bound traffic. Accordingly, we find that AT&T mischaracterizes the nature of Pac-West's complaint and ignores the procedural approach of this case (to which AT&T agreed) in an attempt to now make the claim that the Commission lacks jurisdiction over the complaint.

Therefore, we find that we properly asserted jurisdiction over the dispute, insofar as the complaint involved transit traffic (which may or may not be ISP-bound) and an allegation of intrastate tariff and state law violations. Given AT&T's stated defenses, it was reasonable for this Commission to accept the parties' stipulated characterization of this traffic as ISP-bound for the sole purpose of determining whether AT&T had a valid affirmative defense that the *ISP Remand Order's* compensation scheme should apply, instead of Pac-West's tariffs.

Moreover, we reiterate our finding in the Decision that AT&T reads *Pacific Bell v. Pac-West Telecomm* too broadly. (See D.06-06-055, p. 29.) This case presents a unique situation which was not contemplated by the Ninth Circuit in *Pacific Bell v. Pac-West*. As we stated in the Decision, the Ninth Circuit's decision is silent about the extent of the Commission's powers where the exchange of ISP-bound traffic takes place between

two CLECs, a type of carrier that clearly does not have the right under the 1996 Act to compel another CLEC to negotiate an interconnection agreement. (*Id.*) We accordingly deny AT&T's application for rehearing on this point.

**2. Whether the *ISP Remand Order* Preempts Application of Intrastate Tariffs to ISP-bound Traffic.**

AT&T next argues that even if the Commission had the authority to consider this dispute, we should have concluded that application of the intrastate tariff to the ISP-bound traffic at issue is preempted by federal law. We find that the application raises no arguments that we have not already thoroughly discussed and rejected in the Decision. We accordingly deny AT&T's application for rehearing on this point.

**IV. CONCLUSION**

For the reasons stated above, we find no grounds for granting rehearing of D.06-06-055.

**THEREFORE IT IS ORDERED** that:

1. AT&T's application for rehearing of Decision 06-06-055 is denied.
2. This proceeding is closed.

This order is effective today.

Dated March 1, 2007, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
DIAN M. GRUENEICH  
JOHN A. BOHN  
RACHELLE B. CHONG  
Commissioners

I abstain.

/s/ TIMOTHY ALAN SIMON  
Commissioner