

Decision 08-12-002 December 4, 2008

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)

And Related Matter.

Case 07-11-015
(Filed November 26, 2007)

James Tobin, Attorney at Law, and
William C. Harrelson, for
Pac-West Telecomm, Inc., complainant.

Peter A. Casciato, Attorney at Law,
for Comcast Phone of California, LLC,
and Randolph Deutsch, Attorney at Law,
for AT&T Corp., defendant.

MODIFIED PRESIDING OFFICER'S DECISION

1. Summary

The first captioned case, Case (C.) 07-09-010, involves legal and factual issues essentially identical to those involved in C.04-10-024, *Pac-West Telecomm, Inc. vs. AT&T Communications of California, Inc.*, which was decided in favor of Pac-West Telecomm, Inc. (Pac-West) in Decision (D.) 06-06-055. Following the reasoning of D.06-06-055, we find that Comcast Phone of California, LLC

(Comcast) owes unpaid termination charges in the amount of \$379,446.43 to Pac-West for terminating traffic originated by Comcast during the period April 4, 2004 through August 27, 2007.

The second captioned case, C.07-11-015, was consolidated with C.07-09-010 by order of the presiding Administrative Law Judge (ALJ). It involves contractual and procedural issues that are here addressed for the first time. We find that:

- (a) Pursuant to the terms of a Network Services Agreement (NSA) entered into between Comcast and AT&T Corp. AT&T Corp. is responsible for payment of termination charges imposed by Pac-West on Comcast-originated traffic pursuant to Pac-West's intrastate tariff;
- (b) Notwithstanding the terms of the NSA, Comcast remains liable to Pac-West for the unpaid termination charges;
- (c) A Stipulation and Mutual Release (Release) entered into between Pac-West and AT&T Corp. on November 19, 2007 bars Pac-West from recovering the unpaid termination charges from AT&T Corp.;
- (d) The Release does not bar Pac-West from recovering the unpaid termination charges from Comcast; and
- (e) Case 07-09-010 is closed but C.07-011-015 remains open to resolve the question of whether Comcast may recover the unpaid termination charges from AT&T Corp.

2. Discussion

2.1. Factual Issues

1. Did Pac-West correctly identify Comcast as the originating carrier of the calls it billed Comcast for terminating?

Beginning in April 2004¹ and continuing to the present, Pac-West, a CLEC licensed by this Commission, has been applying its local tariff to calls originated by Comcast, another licensed CLEC, and terminated by Pac-West. Pac-West and Comcast do not directly interconnect and have never entered into an interconnection agreement. All calls originated by Comcast customers are delivered to Pac-West's switch by the transiting carrier, Pacific Bell Telephone Company (AT&T California). Until recently, monthly bills for these charges were sent to AT&T Corp., believed by Pac-West to be Comcast's agent for payment. Many, if not all, of these calls are so-called "ISP-bound" calls, *i.e.*, they are calls from a Comcast subscriber to a dial-up Internet service provider.

To construct its monthly bills to Comcast, Pac-West relies on data identifying Comcast as the originating carrier of such calls supplied to Pac-West by AT&T California, the transiting carrier. Pac-West constructs each month's bill by examining call detail reports (Cat-50 Reports) provided to it by AT&T California. Each such report identifies a call by its area code and central office code (NPA/NXX), which are generally the first six digits of a ten-digit phone number, and its Originating Carrier Number (OCN). The Cat-50 report does not identify the line number of the originating caller (generally, the last four digits of a 10-digit phone number).

¹ The applicable statute of limitations for unpaid tariffed charges is three years from the date service is rendered under a tariff. Pub. Util. Code § 737. The statute is tolled for six months by a written refusal to pay. Comcast sent Pac-West a written refusal to pay the billed charges on April 6, 2007. Comcast had six months from April 6, 2007 in which to file this action for unpaid charges dating from April 4, 2004. The action was timely filed.

Thus in preparing a bill with respect to termination charges for a particular call, Pac-West's billing department is in possession of a report from AT&T California that identifies the call as one that originated from a line assigned to Comcast in a particular NPA/NXX and lasted for a certain amount of time but does not indicate the full telephone number of the originating caller. Pac-West follows the same billing practice with regard to approximately thirty other CLECs besides Comcast for whom it terminates calls.

In its testimony, Comcast argues that many of the calls for which Pac-West billed it were calls that did not originate with a Comcast customer. By way of explanation, Comcast states that each NPA/NXX supports 10,000 individual customer lines. Although Comcast may be listed as the owner of all 10,000 lines, in many instances it has sub-contracted the use of those lines to other carriers. For example, in NPA/NXX 206/594, Comcast uses only lines 0001-2000 for its own customers; lines 2001-8000 are sub-contracted to Metro PCS; and lines 8001-9999 are sub-contracted to T-Mobile. A Cat-50 report that identified a call by listing only OCN 7610 (Comcast's OCN) and the NPA/NXX 206/594 followed by four zeros might actually be a call from either a Metro PCS customer or a T-Mobile customer.

To support this position, Comcast's witness Blimmel testified that he compared originating telephone numbers of calls from specific NPA/NXXs for whose termination Pac-West billed Comcast with Comcast's telephone number inventory for those locations and found that substantially more than half of the originating line numbers were not in the Comcast inventory. Comcast argues that this comparison proves that Pac-West billed it for calls made by non-Comcast customers.

In its rebuttal, Pac-West argues that such erroneous billing is impossible. AT&T California, the transiting carrier, knows which CLEC originated any call and automatically assigns the proper OCN to each call that it delivers to Pac-West. If a number has been ported to another CLEC from Comcast, AT&T California will receive calls originated by that other CLEC's customer via the other CLEC's trunks and will automatically assign the other CLEC's OCN to such calls. Pac-West explains the apparent discrepancy between the call detail records and Comcast's telephone number inventory by reference to the treatment of calls identified by four zeros in the last four positions of the telephone number. NPA/NXX/0000 is not a telephone number. It is a number assigned to the central office switch from which the call originates. Since it is not a telephone number, it will not appear in the Comcast telephone number inventory even if the call was originated by a Comcast customer.

Pac-West's explanation of the manner in which calls are recorded on the Cat-50 records is not challenged by AT&T or Comcast. AT&T Corp., as the transiting carrier, records the OCN for each call that it delivers to Pac-West and displays that information on the Cat-50 record. We find that Pac-West is entitled to rely on the billing information it gets from AT&T California to construct its bills to any CLEC for whom it terminates calls transited by AT&T California. Furthermore, we find it significant that although AT&T Corp. is a party to this proceeding, neither Comcast nor AT&T Corp. introduced testimony from AT&T California regarding the manner in which Cat-50 reports are prepared. A representative of AT&T California could have testified definitively about a central factual issue in this case. The fact that Comcast and AT&T Corp. declined to put on such a witness strongly suggests that such testimony would support the position taken by Pac-West.

2. What amount may Pac-West seek to recover?

Pac-West's complaint sought a total of \$379,466.43 in termination charges for the period April 6, 2004 to August 27, 2007 plus all late payment charges and post-August 27, 2007 termination charges imposed by Pac-West in accordance with its intrastate tariff. Pac-West witness Tutt testified that the unpaid termination charges for the period April 2004 through January 2008 totaled \$383,528.36, an increase of \$4,060.93 over the originally pled amount, and that late payment charges for the same period totaled \$209,850.04. In his March 21st reply testimony, Pac-West witness Sprague re-calculated the amounts allegedly due Pac-West by referring to an additional code that appears at position 149 of the Cat-50 records supplied to Pac-West by AT&T California. This is the so-called "settlement code" which, according to the Ordering and Billing Forum (OBF) guidelines employed by all parties to this dispute, indicates whether a call is to be rated as "local" or "toll." Witness Sprague examined the settlement code on a 15% sample of bills rendered to Comcast by Pac-West and determined that 44% of them which had previously been rated as "local" for termination charge purposes should be rated "toll." Applying Pac-West's termination charge for toll calls to 44% of the calls at issue in this case, increases the termination charges allegedly due to Pac-West by an additional \$325, 875.16.

Although Comcast argues, as indicated above, that a majority of the calls identified on the Cat-50 reports as originating from Comcast customers did not match numbers in the Comcast inventory, Comcast does not dispute the accuracy of the amounts shown on the invoices as termination charges associated with such calls. Comcast does, however, vigorously protest the retroactive re-rating of previously billed calls from local to toll and the associated increase in the amounts allegedly due to Pac-West. Comcast points out that Pac-West did

not file an amended complaint but instead asserted that additional sums were due in Sprague's reply testimony. Comcast objects to this as improper pleading, a violation of due process and prohibited back-billing.

We agree with Comcast that the retroactive re-rating of calls based on the settlement code was neither properly pled nor allowable under the Commission's rules. If Pac-West wanted to seek these additional amounts from Comcast, the appropriate way to do so would have been to file an amended complaint to which Comcast could have responded. Comcast's recovery is limited to the originally pled amount of (a) \$379,446.43 in unpaid termination charges for the period from April 16, 2004 to August 27, 2007, in accordance with Pac-West's Intrastate Tariff; (b) all termination charges for termination services provided by Pac-West to Comcast since August 27, 2007; (c) and all future termination charges Comcast incurs under Pac-West's Intrastate Tariff unless and until Comcast and Pac-West enter into an agreement superseding the Intrastate Tariff. Accordingly, the \$4,060.93 in additional termination charges set out in Tutt's testimony and the \$325,875.16 in recalculated termination charges set out in Sprague's reply testimony are disallowed.

In D.06-06-055, we declined to award Pac-West interest or late payment charges on the unpaid intrastate tariffs. We reasoned that (a) under Commission case law, the decision whether to award interest or late fees on unpaid tariff charges is a matter within the Commission's discretion; (b) no federal decision requires application of the intrastate tariffs of the carrier seeking reciprocal compensation; rather, the application of such tariffs is a matter within the Commission's equitable discretion; (c) an award of interest would not be appropriate in view of the long period of time that elapsed between AT&T Communications of California, Inc.'s initial refusal to pay Pac-West's invoices

and the filing of Pac-West's complaint in C.04-10-04; and (d) not awarding interest or late charges would bring the amount awarded to Pac-West more in line with the \$.0007 per minute-of-use cap contained in the interim compensation plan set forth in ¶ 8 of the FCC's ISP Remand Order.

As we have noted, the current case is legally indistinguishable from D.06-06-055; indeed, if the allegations of AT&T Corp. and Comcast are to be credited, it involves some of the same phone calls for which termination payments were sought in that decision. Accordingly, we have no reason to alter our conclusion regarding interest and late payment fees and they will be denied.

2.2. Legal Issues

1. Does the Commission have jurisdiction?

C.07-09-010 is legally indistinguishable from *Pac-West Telecomm, Inc., AT&T Communications of California, Inc.*, C.04-10-024, which we decided in favor of Pac-West in D.06-06-055, currently on appeal to the United States District Court. Decision 06-06-055 concluded that (a) the Commission has 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 it is pre-empted by federal law; (c) Pac-West's Intrastate Tariff applies to so-called ISP-bound traffic including virtual NXX traffic; and (d) a complaint to the Commission is an appropriate means to enforce Pac-West's tariff.

We affirm the conclusions of D.06-06-055 and apply them to this case. In particular, we affirm that Pac-West's Intrastate Tariff applies to all the traffic originated by Comcast and terminated by Pac-West including so-called VNXX traffic, *i.e.*, traffic between customers in different local calling areas that is rated as local traffic for billing purposes. Because VNXX traffic is local traffic for

billing purposes, we have no need to inquire which portion of the traffic sent to Pac-West by Comcast was locally routed and which was not.

2. May Pac-West recover the unpaid termination charges from AT&T Corp?

On November 19, 2007, Pac-West, AT&T California and AT&T Corp., together with other AT&T entities, entered into a Stipulation and Settlement Agreement as part of the resolution of Pac-West's Chapter 11 bankruptcy (Bankruptcy Stipulation). The Bankruptcy Stipulation included the Release, pursuant to which Pac-West released all the AT&T entities and their "predecessors and successors in interest, heirs, assigns, past, present, and future officers, directors, shareholders, agents, employees, managers, representatives, attorneys, accountants, advisors, owners, partners, shareholders, trustees, parent and subsidiary organizations, affiliates and partners" from all claims of any kind prior to April 30, 2007 "including but not limited to...termination liabilities and penalties, late payment fees and charges, invoices issued...amounts due...termination fees, claims under the filed rate doctrine, [and] claims for reciprocal compensation."

The Release explicitly extends to "all such claims of every kind whatsoever...direct or indirect, absolute or contingent...relating in any way to the billing which was or could have been issued for any period prior to [April 30, 2007]." The Release includes a waiver of California Civil Code § 1542 which, unless explicitly waived, exempts unknown claims from the scope of a general release. The Release clearly bars Pac-West from recovering any of the unpaid termination charges at issue in this suit prior to April 30, 2007 directly from AT&T Corp.

3. May Pac-West recover the unpaid termination charges from Comcast?

Comcast asserts that under the terms of the NSA, AT&T Corp. is the only entity liable to Pac-West for the unpaid termination charges. To support this position, Comcast introduced as an exhibit AT&T Corp. response to Comcast's Data Request 2.4. That response includes the following sentence:

"The Network Services Agreement requires AT&T to pay the invoices for legal LEC traffic fees for traffic carried over loops leased to Comcast Phone pursuant to the Agreement."

Comcast argues that this response amounts to an admission that AT&T Corp. rather than Comcast is legally liable for the termination fees billed by Pac-West. Pac-West argues that this response simply indicates that AT&T Corp. is acting as Comcast's payment agent.

The NSA consists of two parts, an equipment lease and a service agreement. The leased equipment consists primarily of switches and loops dedicated to the use of Comcast customers. The services consist of call handling services (call origination, transiting and termination) together with ancillary services such as Caller ID and voicemail. Comcast pays separate monthly fees to AT&T Corp. for the leased equipment, call handling services and ancillary services.

There are two types of call handling services covered by the NSA. The first consists of handling calls originated by a Comcast customer and terminated to an AT&T Corp. customer or vice-versa. Such calls are not an issue in this case. The second consists of calls originated by a Comcast customer and terminated to a CLEC customer or vice versa. In the latter case, AT&T Corp. or one of its affiliates acts as a transiting carrier, moving calls between Comcast and the other CLEC over AT&T's lines. When Pac-West terminates a call originated by a Comcast customer and transited to Pac-West by an AT&T entity, Pac-West bills

Comcast for terminating that call in accordance with the schedule of charges set out in its intrastate tariff. As discussed more fully below, notwithstanding that the termination charges related to calls originated by Comcast customers, Pac-West sent the invoices for terminating the calls to AT&T Corp. until October, 2006.

Paragraph A.2 of the NSA contains the following language:

The Base Price for Broadport [a package of services provided by AT&T Corp. to Comcast], for new or existing lines, includes:

A.2.a.iii Interconnection and connectivity (local, intraLATA toll, exchange access) to the ILEC, other LECs, CMRS and IXC.

Comcast argues that this language establishes that the Pac-West charges are AT&T Corp.'s responsibility.

Paragraph A.2 consists of a recitation of the services provided by AT&T Corp. to Comcast in the Broadport package. The language of A.2.a.iii cited above is ambiguous. It may mean that third-party charges for interconnection and connectivity of the Comcast-originated traffic are to be paid by AT&T Corp. from the "Base Price" or it may simply mean that AT&T Corp. will establish those connections as part of the service it provides to Comcast.² In

² During the prehearing conference on December 10, 2007, Randolph Deutsch, counsel for AT&T Corp., described the structure of the NSA as follows:

MR. DEUTSCH: [T]he agreement states that AT&T will provide the network services for Comcast to provide telephony service to Comcast end-user customers. And that telephone service not only involves providing the physical lines and switches to Comcast, but also to administer and pay or receive reciprocal compensation payments involved with other carriers who either the traffic is terminated to or who terminate traffic to Comcast. Comcast pays, in essence, a fee for the entire service to AT&T.

any case, the cited language does not relieve Comcast of the legal obligation to pay charges lawfully imposed on traffic it originates; at most it establishes that AT&T Corp. will make those payments on its behalf.

The conclusion that Comcast is ultimately responsible for the payment of third party charges is reinforced by other provisions of the NSA. For example, Paragraph b.2.d.vi of the NSA establishes a monthly Exchange Access Usage Charge payable by Comcast to AT&T Corp.:

“The Exchange Access Usage Charge will apply to all usage (A) for which CUSTOMER [*i.e.*, Comcast] is the presubscribed carrier for the originating end user...and (B) with respect to which AT&T is billed switched access charges under the terms of a LEC tariff covering switched access...”

Pursuant to b.2.d.v of the NSA, the Exchange Access Usage Charge is calculated as the average of three months’ access charges imposed by other carriers on intraLATA traffic originated by Comcast and is subject to a true-up mechanism. The effect of these provisions is that Comcast reimburses AT&T Corp. for all such charges paid by AT&T Corp. on its behalf.

In a similar vein, the fact that Pac-West sent its invoices for terminating Comcast-originated traffic to an AT&T affiliate until October 2006³ does not

³ PacWest Exhibit A, the testimony of Debbie Tutt, includes an exhibit consisting of invoices submitted by Pac-West for terminating Comcast-originated calls beginning in April 2004. From this exhibit it appears that invoices for the months of April through September 2004 were submitted to TCI Telecommunications Services of California (TCI-CA), an AT&T affiliate in Bedminster, New Jersey. Invoices for the months of October, 2004 through May, 2006 were submitted to AT&T Communications in Alpharetta, Georgia. Invoices for June and July 2006 were submitted to TCI-CA in Alpharetta, GA. Invoices for August and September 2006 were submitted to Comcast Phone of California, LLC also in Alpharetta, GA. Invoices for October 2006 forward were submitted to Comcast Phone in Englewood, CO. All the invoices prior to the

Footnote continued on next page

establish that Comcast had no obligation to pay the invoices. To the contrary, each invoice related solely to termination of calls identified by Comcast's OCN. While all three parties recognized that AT&T Corp. or one of its affiliate would handle payment of the termination charges, the record contains no evidence that Pac-West released Comcast from its obligation to pay the charges. Further, Comcast and AT&T Corp. could not force Pac-West to accept such a release simply by entering the NSA.

We conclude that the NSA does not relieve Comcast of its obligation to pay the termination charges imposed by Pac-West.

4. May Comcast recover payments made to Pac-West pursuant to this decision from AT&T Corp.?

In his December 11, 2007 Ruling consolidating C.07-09-010 with C.07-11-015, the assigned ALJ ruled that Comcast's claim for indemnity against AT&T Corp. would be considered only if it were first determined that Comcast is liable to Pac-West for unpaid termination charges. The contingency described in the ALJ's consolidation ruling having occurred, this proceeding will remain open to address Comcast's indemnity claims.

3. Appeals of Presiding Officer's Decision

All three parties appealed the Presiding Officer's Decision.

invoice for October 2006 include the identifying language "AT&T Caller Service 6908" in the address to which the bills were sent. All the invoices, regardless of the addressee, include the Comcast OCN 7610 in a reference line.

From this billing history it appears that Pac-West was sending monthly bills for terminating Comcast-originated calls from April 2004 through September 2006 to an AT&T affiliate or to "Comcast Phone of California, LLC" at an AT&T address. Thereafter, such bills have been sent to Comcast in Colorado.

AT&T and Comcast assert 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."⁴

Following our own precedent and the reasoning of the District Court, we reject the Federal pre-emption argument of AT&T and Comcast.

⁴ 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.

AT&T asserts that the Release bars Pac-West from recovering against Comcast. AT&T claims that it is solely liable to Pac-West for any unpaid termination charges and that, as found by the POD, the Release is a complete bar to Pac-West regarding any claims for termination services prior to April 30, 2007. Therefore, AT&T argues, the Release also bars Pac-West from recovering against Comcast. This argument assumes its conclusion, *i.e.*, that Comcast is among the entities included in the Release. However, Comcast is neither an AT&T entity nor a party to the Release. In the absence of proof that AT&T assumed Comcast's liability to Pac-West and that Pac-West released Comcast from its obligation to pay termination charges, the Release does not bar Pac-West from pursuing claims against Comcast. As we discuss below, there is no such proof.

The only evidence introduced by AT&T to support the proposition that AT&T is solely liable to Pac-West for any unpaid termination charges consists of the NSA between AT&T and Comcast which appears to obligate AT&T to pay termination charges on behalf of Comcast. However, as explained in the POD, the more persuasive reading of the NSA is that it makes AT&T Comcast's agent for payment. Designating an agent to act on behalf of a principal does not relieve the principal of liability to a third party unless the third party releases the principal. Pac-West did not know of the existence of the NSA prior to this litigation, never gave Comcast a release, and cannot be presumed to have released Comcast simply because AT&T and Comcast entered into the NSA.

Comcast argues that the POD errs in failing to make a determination of the percentage of the traffic at issue which is VNXXX traffic. Comcast asserts that such traffic is not subject to the Pac-West local tariff. However, as pointed out in the POD, the Commission has consistently treated VNXXX traffic as local traffic subject to reciprocal compensation. Accordingly, it is not necessary to separately

calculate the proportion of such traffic in order to determine the amounts due Pac-West for terminating calls originated by Comcast.

Comcast argues 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 damages for breach of contract; it seeks a Commission ruling that Pac-West's local tariff applies to the calls in dispute and a Commission order enforcing that tariff. Both remedies are within our jurisdiction.

Comcast argues that Pac-West failed to establish that the calls at issue were correctly identified as calls from Comcast customers. However, the testimony of Pac-West's witness Sprague that the transiting carrier specifies the originating carrier for any call delivered to Pac-West was un-rebutted. Nor was there any evidence introduced to demonstrate that the Cat-50 reports which contain the Originating Carrier Number were erroneous. Finally, it was readily within the means of AT&T to provide a witness from its affiliated transiting carrier who could have testified at first-hand regarding the accuracy of the Cat-50 reports and AT&T did not do so. The POD draws the reasonable inference that such witness would have supported the position of Pac-West.

Pac-West argues that the POD commits legal error by declining to order Comcast to pay late payment charges on its unpaid termination fees. While it is true that Pac-West's local tariff provides for late payment charges, we believe that Comcast could reasonably have assumed that the NSA relieved it of the obligation to pay termination charges. Imposing late payment fees on top of the unpaid termination charges at this point is excessively harsh. As Pac-West concedes, it is within our equitable powers to avoid harsh results and we choose to do so here.

Pac-West asks that we make a specific finding regarding the proportion of VNXXX traffic in the calls for which it seeks termination fees. For reasons set out above, we believe such a finding is unnecessary.

4. Assignment of Proceeding

Timothy Alan Simon is the assigned Commissioner and Karl Bemederfer is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. Comcast and Pac-West interconnect indirectly via AT&T California lines and tandem switches.
2. 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.
3. AT&T California delivers all calls from Comcast customers to Pac-West customers to Pac-West in southern California.
4. AT&T California identifies the originating carrier on calls it delivers to Pac-West by assigning an Originating Carrier Number to each such call.
5. Comcast's Originating Carrier Number is 7610.
6. All calls delivered by AT&T California to Pac-West bearing Originating Carrier Number 7610 originated from Comcast customers.
7. On November 19, 2007 Pac-West and AT&T Corp. entered into a Stipulation and Settlement Agreement that included mutual general releases.
8. As of January 1, 2003, Comcast and AT&T Corp. entered into a Network Services Agreement.

9. The Network Services Agreement obligated AT&T Corp. to pay termination charges imposed on Comcast-originated traffic.

10. From at least April 2003 to October 2007, Comcast sent monthly invoices for termination of Comcast-originated calls to AT&T affiliates for payment.

11. The AT&T affiliates to whom the bills were sent did not pay the Comcast invoices.

12. When calculated at the rates set forth in the Pac-West tariff described in Finding of Fact 2, the charges due for the traffic originating on Comcast's network and terminating on Pac-West's network, for the period from April 4, 2004 to August 27, 2007, total \$379,346.43.

13. The Commission is not required to award interest in situations where utilities seek to recover unpaid tariff charges pursuant to Pub. Util. Code § 737.

14. 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 discretion.

Conclusions of Law

1. The Commission has jurisdiction to hear a dispute between two California CLECs regarding ISP-bound calls originated by one and terminated by the other.

2. Neither Pac-West's Intrastate Tariff nor the Commission's jurisdiction to enforce it is pre-empted by federal law.

3. Pac-West's Intrastate Tariff applies to so-called ISP-bound traffic including traffic that is disparately rated and routed.

4. A complaint to the Commission is an appropriate means to enforce Pac-West's tariff.

5. Pursuant to the terms of a Network Services Agreement entered into between Comcast and AT&T Corp. as of January 1, 2003, AT&T Corp. is responsible for paying third-party charges on Comcast's behalf.

6. Notwithstanding the payment arrangements contained in the Network Services Agreement, Comcast remains responsible for third-party charges imposed on its traffic.

7. The Release entered into between Pac-West and AT&T Corp. on November 19, 2007 bars Pac-West from recovering the unpaid termination charges for the period from April 4, 2004 to April 30, 2007 directly from AT&T Corp.

8. Pac-West may recover the unpaid termination charges from Comcast.

9. In the absence of either an interconnection agreement or any other reciprocal compensation arrangement between the parties, it is reasonable to require Comcast to compensate Pac-West for terminating ISP-bound traffic originating on Comcast's network at the minute-of-use and set-up rates set forth in the tariff described in Finding of Fact 2.

10. Under the circumstances of this case, it is not reasonable to require Comcast to pay Pac-West interest or late charges on the amounts computed pursuant to the preceding Conclusion of Law.

11. This proceeding should remain open to consider Comcast's indemnity claims against AT&T Corp.

O R D E R

IT IS ORDERED that:

1. Comcast Phone of California, LLC, shall pay to Pac-West Telecomm, Inc. (a) \$379,446.43 in unpaid termination charges for the period from April 6, 2004 to August 27, 2007 in accordance with Pac-West's Intrastate Tariff and (b) all

termination charges for termination services provided by Pac-West to Comcast since August 27, 2007 and all future termination charges Comcast incurs under Pac-West's Intrastate tariff unless and until Comcast and Pac-West enter into an agreement superseding the Intrastate Tariff.

2. Case 07-11-015 remains open. The Administrative Law Judge shall set a prehearing conference to scope the schedule the issue and adopt a schedule for the proceeding.

This order is effective today.

Dated December 4, 2008, at San Francisco, California.

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

I reserve the right to file a concurrence.

/s/ RACHELLE B. CHONG
Commissioner

C.07-09-010, C.07-10-018
D.08-12-002

**Concurrence of Commissioner Rachelle Chong
Decisions on Unpaid Call Termination Fees
Modified Presiding Officers' Decisions - Items 4 and 5
December 4, 2008**

We should be closely monitoring what the FCC does in its intercarrier compensation proceeding, CC Docket 01-92. In a recent Further Notice of Proposed Rulemaking, among other issues, the FCC is seeking comment on proposals that would require states to adopt a state-wide uniform reciprocal compensation rate that would apply to all carriers.

It seems increasingly unlikely that the FCC will issue a comprehensive order on intercarrier compensation in the near future, and I would not hold my breath for FCC action. I suggest that we continue to conduct reform at the state level no matter what is going on, or not going on, at the federal level. We should open a proceeding in 2009 to review reciprocal compensation rates in California to follow up on the good work led by President Peevey in recent years reforming intrastate intercarrier compensation.

Dated December 4, 2008, at San Francisco, California.

/s/ RACHELLE B. CHONG
RACHELLE B. CHONG
Commissioner