

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking on the  
Commission's Own Motion into Competition  
for Local Exchange Service.

Rulemaking 95-04-043  
(Filed April 26, 1995)

Order Instituting Investigation on the  
Commission's Own Motion into Competition  
for Local Exchange Service.

Investigation 95-04-044  
(Filed April 26, 1995)

**ADMINISTRATIVE LAW JUDGE'S RULING  
GRANTING THE PAC-WEST TELECOMM, INC.'S MOTION  
FOR DISPUTE RESOLUTION**

This ruling grants the motion filed on October 6, 2005, by Pac-West Telecomm, Inc. (Pac-West), seeking expedited resolution of a dispute with Pacific Bell Telephone Company dba SBC Pacific Bell Telephone Company (Pacific) pursuant to the applicable provisions of the parties' currently effective interconnection agreement (ICA).<sup>1</sup>

**Position of Pac-West**

In its motion, Pac-West seeks Commission resolution of a dispute concerning the treatment of intercarrier compensation for telephone calls that originate in the Internet Protocol (i.e., "Voice Over Internet Protocol (VoIP)

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<sup>1</sup> The ICA was approved by the Commission in Decision (D.) 03-05-031, pursuant to an application for arbitration filed by Pacific.

traffic) and terminate on the public switched telephone network (PSTN). Pac-West indicates that at the time the current ICA was being neogotiated, the parties were unable to reach an understanding as to the specific nature and amount of intercarrier compensation applicable to VoIP and Internet Telephony (IT) traffic.

Pac-West and Pacific disagreed over whether VOIP and IT traffic should be treated as local traffic subject to reciprocal compensation under the ICA. Pac-West indicates that Internet Service Provider (ISP) customers purchase call termination service from Pac-West in accordance with the long-standing “[Enhanced service provider] ESP exemption” created by the FCC decades ago. Pac-West claims that this ESP exemption provides that enhanced services and information services, such as VoIP traffic, are not subject to originating or terminating carrier access charges.

The parties did agree, pursuant to Sec. 13.6 of the ICA, that: “The Parties reserve the right to raise the appropriate treatment of [VOIP] or other Internet Telephony traffic under the Dispute Resolution provisions of this [ICA].” Based on this provision, Pac-West moves to have the issue resolved through the Commission’s Dispute Resolution process outlined in D.95-12-056. As a basis for its motion, Pac-West also cites Section 30.7 and 30.13.3 of the ICA and Section III(D) of D.95-12-056. ICA Sec. 30.13.3 states that: “Subject to Sec. 30.7, if the parties are unable to resolve the dispute through negotiations, then either party may invoke the Dispute Resolution procedures described herein.” ICA Sec. 30.7 addresses the division of responsibility for resolving claims made under the ICA between federal and state jurisdictions.

Pac-West requests a ruling concluding that VoIP and IP telephone traffic should be treated for purposes of intercarrier compensation payable under the

ICA pursuant to current law as traffic subject to the reciprocal compensation obligations of Sec. 251(b)(5) of the Communications Act (47 USC Sec. 251(b)(5)).

Pac-West argues that this issue needs to be resolved now in light of the increased volume of VoIP traffic. Pac-West customers have begun to deliver VoIP traffic to Pac-West for termination, via the Pac-West network, to local telephone subscribers of Pacific.

### **Response of Pacific**

Pacific filed a response to the motion on October 24, 2005, denying that the dispute resolution process sought by Pac-West is applicable here. Pacific claims that Pac-West is not asking the Commission to interpret or enforce *existing* ICA provisions, but is seeking to arbitrate *new* ICA language to address an issue that Pac-West elected not to raise in the negotiation or arbitration of its existing ICA. Pacific argues that in the absence of a change of law, any such effort to compel the adoption of *new* ICA language can only be accomplished through arbitration of a new ICA, but cannot be undertaken through the dispute resolution process under D.95-12-056. Pacific claims that the dispute resolution process outlined in D.95-12-056 is to be invoked only in the event of a dispute over terms of the *existing* ICA.

Pacific claims that it is no defense for Pac-West to invoke Section 13.6 of Appendix Reciprocal Compensation of the ICA, pursuant to which parties each reserved the right to argue for the appropriate treatment of VoIP and IT traffic. This reservation of rights clause permits the parties to raise that issue pursuant to the "Dispute Resolution provisions" of the ICA. Because those provisions include "any remedy available ... pursuant to law, equity, or agency proceeding," Pac-West interprets this provision as covering its request to request an ALJ ruling finding in its favor on the legal applicability of reciprocal

compensation. Pacific argues, however, that the “Dispute Resolution provisions” of the ICA merely permit parties to dispute the proper characterization of VoIP traffic for purposes of intercarrier compensation *under the terms of the existing ICA*, assuming one party sought to deliver VoIP or “other Internet Telephony traffic” to the other. Pacific denies, however, that the “Dispute Resolution provisions” authorize either party to arbitrate new agreement language addressing the issue, as Pac-West seeks to do here.

Pacific further argues that because the dispute process set forth in D.95-12-056 is to be based only upon “short pleadings,” such an abbreviated process is not suitable for litigating all of the complexities associated with proposed new contract language addressing the treatment of IP-to-PSTN calls.

Pacific argues that the issue over new contract language should be resolved through the negotiation, and if necessary, arbitration of Pac-West’s new ICA. On May 16, 2005, Pac-West gave notice that it did not intend to extend the term of its existing ICA, and requested renegotiation of a replacement agreement. Pacific therefore argues that through the currently pending process of negotiating, and if necessary, arbitrating a successor agreement, a forum already exists to address and resolve the new contract language at issue in the Pac-West motion.

The issue of intercarrier compensation for IP-to-PSTN calls is also presently pending in three separate FCC proceedings. In light of the possibility that the FCC will resolve the issue in the near future through these FCC proceedings, Pacific argues that the Commission should decline Pac-West’s motion to decide this issue on an expedited basis.

Pacific indicates that it has not presented a complete defense of its legal position on this issue in its response in opposition to the Pac-West motion, but

nonetheless presented certain substantive arguments in support of its position that IP-to-PSTN calls are subject to access charges, not reciprocal compensation. Pacific also argues that Pac-West's reliance on the ESP Exemption is misplaced, and contends that the ESP Exemption only applies to an ESP's use of the PSTN as a link between the ESP and its own subscribers. By contrast, Pacific disputes that the ESP exemption applies in the situation applicable to VOIP traffic delivered by Pac-West.

### **Discussion**

It is concluded that Pac-West's motion for dispute resolution should be granted. Pacific has not justified its objection claiming that Pac-West's motion is beyond the scope of the Dispute Resolution Process referenced in Section 13.6 of the ICA.

Pacific objects that Pac-West's motion is improper based on the claim that Pac-West seeks to arbitrate new ICA language rather than resolve a dispute over existing ICA language. Yet, in seeking dispute resolution on this issue, Pac-West is doing nothing more than exercising its rights, as reserved in Sec. 13.6 of the ICA. The "reservation of rights" language in Sec. 13.6 appears to be broadly defined. While parties reserve their rights in Sec. 13.6 to raise their VOIP arguments in other forums beyond the ICA, they also expressly reserve the right to raise such arguments under the Dispute resolution provisions "of this Interconnection Agreement."

Pacific concedes that *if* Pac-West were to deliver to Pacific for termination interexchange IP-to-PSTN calls, "it would be open to both parties to argue that the traffic in question, even though originating in different local calling areas, is "local" traffic *under the terms of the existing ICA*, and therefore subject to reciprocal compensation." [Opposition at 7.] Yet, Pac-West *is* currently

delivering such traffic to Pacific, and likewise, *is* attempting to exercise its rights (as reserved under Sec. 13.6 of the ICA) to argue that such traffic is “local.”

Pac-West is arguing that such VOIP treatment should apply *under the terms of the existing ICA*, and asserts that its customers “*have begun* to deliver VoIP traffic to Pac-West for termination, via the Pac-West network, to local telephone subscribers of [Pacific].” Pac-West characterizes the VOIP traffic volumes *that are already being handled* as “growing and material.” Therefore, it would appear that Pac-West’s motion satisfies the criteria under which Pacific concedes Sec. 13.6 would apply.

Pacific claims, however, that under Sec. 13.6 of the ICA, Pac-West can only base its argument on *existing language in the ICA prescribing how VOIP traffic is to be handled*. Yet, Pacific fails to explain how Pac-West *could* make reference to existing ICA language concerning the treatment of *currently delivered* VOIP traffic since parties expressly incorporated no language in the ICA purporting to define how VOIP traffic is to be treated. In this regard, Sec. 13.6 states: “The Parties further agree that this Appendix shall not be construed against *either party* as a ‘meeting of the minds’ that VOIP or Internet Telephony traffic *is or is not* local traffic subject to reciprocal compensation.” [Emphasis added.] Parties thereby agreed to disagree so that the ICA expressly remained silent concerning the applicability of reciprocal compensation to VOIP traffic.

Pacific’s interpretation, therefore, creates a logically impossible standard for Pac-West to meet. Under Pacific’s standard, Pac-West could only invoke the Dispute Resolution provisions pursuant to the existing ICA by referencing disputed language therein relating to VOIP treatment. Yet, no such reference exists in the ICA because parties agreed not to include one. Such an interpretation would seem to render the language meaningless in Sec. 13.6

reserving any rights for Pac-West to raise its arguments within the context of the existing ICA, given that parties expressly omitted any ICA language prescribing the treatment of VOIP.

Nonetheless, Pacific objects to Pac-West invoking the dispute resolution process, claiming that Pac-West is seeking to arbitrate new ICA language. Pacific, however, does not explain how Pac-West could make its argument without articulating it in the form of specific “new” language since both parties expressly avoided including *any* language in the ICA addressing the treatment of VOIP traffic.

Pacific argues that the proper vehicle through which Pac-West should address the dispute is the negotiation and arbitration of parties’ *new* ICA. The problem with this argument is that any negotiation reached or outcome imposed in connection with a *new* ICA would presumably apply only to *future* VOIP traffic delivered under that new ICA. Unless parties agreed to apply any resolution reached under the *new* ICA retroactively to VOIP traffic delivered under the *current* ICA, however, they would leave unresolved the appropriate treatment of VOIP traffic *that is currently being delivered*.

Absent such agreement, Pac-West would be left with no forum in which to argue its position with respect to the treatment of VOIP traffic *currently being delivered*. Such a result would conflict with Sec. 13.6 of the ICA expressly stating that: “Parties reserve the right to raise the appropriate treatment of [VOIP] or other [IT] traffic under the Dispute Resolution provisions of [the currently effective ICA].”

In summary, Pac-West’s interpretation appears to be consistent with the intent of Sec. 13.6, reserving each party’s right to have their arguments addressed through the Dispute Resolution process. Accordingly, it is concluded that

Pac-West is entitled to invoke the Dispute Resolution Provisions of the ICA on the issue of whether VOIP traffic currently being delivered should be subject to reciprocal compensation.

SBC also objects to Pac-West's motion on more pragmatic grounds, arguing that this issue is already pending before the Federal Communications Commission (FCC) in various dockets. SBC therefore argues that the Commission should decline to decide this issue in advance of guidance from the FCC. SBC also questions claims made by Pac-West as to its need for "business certainty" as a basis for expedited resolution of the dispute at this time.

Such pragmatic factors, however, do not provide proper grounds to deny Pac-West's motion. In reaching mutual agreement in the ICA concerning their reservation of rights to raise this issue under the Dispute Resolution process, parties did not make such rights conditional on the timing of action by the FCC or on a requirement that Pac-West must make show a need for "business certainty." Therefore, such pragmatic arguments do not provide a basis to deny Pac-West its contractual right to invoke the Expedited Dispute resolution process, as agreed by the parties under the ICA.

Both parties have indicated that they have not presented the full substantive merits of their arguments on this issue in their pleadings to date, and agree that additional procedural measures are need to develop a record to resolve the dispute.

Pacific indicates if Pac-West's motion is granted, that it reserves its right to pursue factual development bearing on Pac-West's claim, including discovery, submission of testimony, and cross-examination of witnesses. Pacific also reserves the right to offer competing ICA language in lieu of Pac-West's proposal, and to seek mediation of the controversy. Pacific further indicates that

it reserves the right to seek modification of the dispute resolution process set out in D.95-12-056 so as to comport with Resolution ALJ-181.

Since this ruling resolves the threshold issue affirming that Pac-West is entitled to invoke dispute resolution concerning the treatment of VOIP traffic under the existing ICA, a procedural plan must be developed to resolve the dispute most expeditiously. Parties are hereby authorized to file comments concerning their procedural proposal to resolve this dispute, including stipulation of relevant facts, discovery processes, further submission of evidence, etc. The comments shall be due within 10 business days of the effective date of this ruling. The statements shall be limited to procedural issues, and should not present substantive arguments on the merits of parties' positions.

Pac-West argues in its motion that any "protracted mediation proceeding" would not be productive given the disparity in the parties' respective positions. Yet, with the issuance of this ruling, one key point of disagreement between the parties has already been resolved. Pacific has also expressed a possible interest in further exploring mediation in the event that Pac-West's motion for dispute resolution is granted. Therefore, the prospects for mediation of the remaining points of dispute between the parties relating to VOIP may have increased with the issuance of this ruling. In their filed comments on procedural issues, parties should therefore also indicate their willingness to participate in a Commission-assisted mediation as a possible means of resolving, or at least narrowing, parties' disputes.

As a possible avenue for successful mediation of this dispute, parties may also find it useful to explore coordinating discussions on VOIP treatment with respect to the current ICA with similar VOIP-related discussions in any subsequent negotiations relating to a successor ICA. Particularly since Pacific

has expressed willingness to explore negotiations of the VOIP issue in the context of a new ICA, there may be potential for progress toward a mediated resolution if both parties agree to consider such an approach.

**IT IS RULED** that:

1. The motion of Pac-West Telecomm, Inc. (Pac-West) for dispute resolution pursuant to Sec. 13.3 of its interconnection agreement with Pacific Bell Telephone Company dba SBC is hereby granted.

2. Parties are hereby authorized to file comments concerning their procedural proposal to resolve this dispute, including stipulation of relevant facts, discovery processes, further submission of evidence, etc. In their comments, parties should also indicate their willingness to engage in Commission-assisted mediation as a possible means of resolving, or at least narrowing parties' disputes. The comments shall be due within 10 business days of the effective date of this ruling. The statements shall be limited to procedural issues, and should not present substantive arguments on the merits of parties' positions.

3. Following receipt of parties' written statements, further action to adopt procedural measures, as deemed warranted, to resolve the dispute, pursuant to Pac-West's request.

Dated February 8, 2006, at San Francisco, California.

/s/ THOMAS R. PULSIFER

Thomas R. Pulsifer  
Administrative Law Judge

**CERTIFICATE OF SERVICE**

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Granting the Pac-West Telecomm, Inc.'s Motion for Dispute Resolution on all parties of record in this proceeding or their attorneys of record.

Dated February 8, 2006, at San Francisco, California.

          /s/ FANNIE SID            
Fannie Sid

**N O T I C E**

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.