PRESIDING OFFICER'S DECISION (Mailed 9/19/2005)

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)

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PRESIDING OFFICER'S DECISION GRANTING COMPLAINT

Table of Contents

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This decision grants the complaint of Pac-West Telecomm, Inc. (Pac-West) and awards it $7.115 million in unpaid tariff charges owed by defendant AT&T Communications of California, Inc. (AT&T).[1] However, we hold that AT&T is not liable for interest and late charges on these unpaid tariff amounts.

I. Procedural Background

The complaint in this case alleged that AT&T and its three subsidiaries had 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 the two principal California incumbent local exchange carriers (ILECs), Pacific Bell Telephone Company (Pacific)[2] 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 that it was entitled to the termination charges set forth in its intrastate tariffs for traffic that originates with AT&T customers and is

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[1] As used in this decision, "AT&T" also refers to three additional defendants that are subsidiaries of AT&T Communications of California, Inc. The three subsidiaries are Teleport Communications Group of San Francisco (T-SF), Teleport Communications Group of Los Angeles (T-LA), and Teleport Communications Group of San Diego (T-SD). AT&T Corp., a New York corporation that is the parent of AT&T Communications of California, Inc., obtained control of these three companies in 1998 when it acquired their corporate parent, Teleport Communications Group, Inc. However, T-SF, T-LA and T-SD have retained their separate corporate identities, and have been operated as subsidiaries of AT&T Communications of California, Inc.

[2] Pacific Bell Telephone Company now does business as SBC California, the name by which it is referred to in the complaint.

transmitted to Pac-West by the two ILECs. Pac-West alleged that AT&T has refused to pay any of the statements Pac-West has rendered for these charges, which now total over $7 million.[3] As relief, Pac-West asked not only that AT&T be ordered to pay all the charges for which it had been invoiced, but also to pay all future charges based on Pac-West's intrastate tariffs "unless and until the AT&T Companies enter into a direct interconnection agreement with Pac-West."

In its answer, 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), AT&T argued, this case should be governed by the so-called "ISP Remand Order" issued by the Federal Communications Commission (FCC) in April 2001.[4] In the

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[3] The complaint originally alleged that "the AT&T Companies have refused to pay over $3.5 million of applicable tariffed Pac-West charges that they have incurred." However, in an e-mail message sent to the assigned Administrative Law Judge (ALJ) on December 21, 2004, Pac-West's counsel stated that she had discovered this amount was incorrect, that errors had been made in preparing Pac-West's bills to AT&T, and that the amount that should have been billed to AT&T under Pac-West's theory of the case exceeded $6 million.

In the testimony submitted on March 7, 2005, Pac-West's witnesses contended that the correct amount due from AT&T, as of January 31, 2005, was $7,115,014.16. As explained *infra*, AT&T does not dispute that this is the proper amount if the Commission accepts Pac-West's theory of the case.

[4] The technical citation for the ISP Remand Order is *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. In its pleadings, AT&T acknowledged that the United States Court of Appeals for the District of Columbia Circuit subsequently found that the statutory provision relied on by the FCC did not support the ISP Remand Order. However, AT&T noted, the D.C. Circuit remanded the order to the FCC for further consideration without vacating it. *Worldcom, Inc. v. FCC*, 288 F.3d 429, 434 (D.C. Cir 2002), *cert. denied sub nom. Core Communications, Inc. v. FCC*, 538 U.S. 1012 (2003). As a result of this unusual procedural posture, other courts (including the Ninth Circuit) have noted that

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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 these CLECs to substantial amounts of reciprocal compensation),[5] 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,[6] rather than

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the provisions of the ISP Remand Order remain in effect despite the D.C. Circuit's conclusions about the deficiencies in its statutory analysis. *See, e.g., Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1122-23 (9th Cir. 2003). In this decision, the ISP Remand Order is sometimes referred to simply as the "Remand Order."

[5] Under § 251(b)(5) of the Telecommunications Act of 1996, each local exchange carrier has a "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." In *Wisconsin Bell, Inc. v. Bie*, 216 F. Supp.2d 873 (W.D.Wisc. 2002), the district court explained reciprocal compensation arrangements as follows:

> "As new entrants and incumbents have interconnected their local exchange networks, some calls originating on one carrier's network are completed, or 'terminated,' on another carrier's network. For example, if a customer of carrier A calls a customer of carrier B, the call originates on carrier A's equipment but terminates on carrier B's equipment. Absent a reciprocal compensation arrangement, carrier A would charge its customer for the call, but carrier B would receive no compensation for the use of its equipment in terminating the call. In a reciprocal compensation regime, carrier A pays carrier B on a per minute basis for terminating the local call. This insures that both carriers are compensated for local intercarrier calls. In contrast, under a 'bill-and-keep' arrangement, each carrier recovers from its own customers the costs of terminating calls that originate with other carriers." (216 F. Supp.2d at 875-76.)

[6] As noted in the quotation from *Wisconsin Bell, Inc. v. Bie, supra,* in a "bill and keep" arrangement each carrier recovers from its own customers the costs of terminating calls that originate with other carriers. The definition of "bill and keep" that appears in footnote 6 of the ISP Remand Order is quite similar to the one in *Wisconsin Bell, Inc. v. Bie*:

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allow the CLECs to continue reaping windfalls from the payment of reciprocal compensation.[7]

> "'Bill and keep' refers to an arrangement in which neither of two interconnecting networks charges the other for terminating traffic that originates on the other network. Instead, each network recovers from its own end-users the cost of both originating traffic that it delivers to the other network and terminating traffic that it receives from the other network . . . Bill and keep does not, however, preclude intercarrier charges for transport of traffic between carriers' networks." (16 FCC Rcd at 9153; citations omitted.)

[7] In the ISP Remand Order, after noting in ¶ 20 that reciprocal compensation had grown up because of the assumption that "traffic back and forth on . . . interconnected networks would be relatively balanced," the FCC described the problem of regulatory arbitrage connected with ISPs as follows:

> "Internet usage has distorted the traditional assumptions because traffic to an ISP flows exclusively in one direction, creating an opportunity for regulatory arbitrage and leading to uneconomical results. Because traffic to ISPs flows one way, so does money in a reciprocal compensation regime. It was not long before some LECs saw the opportunity to sign up ISPs as customers and collect, rather than pay, compensation because ISP modems do not generally call anyone in the exchange. In some instances, this led to classic regulatory arbitrage that had two troubling effects: (1) it created incentives for inefficient entry of LECs intent on serving ISPs exclusively and not offering viable local telephone competition, as Congress had intended to facilitate with the 1996 Act; (2) the large one-way flows of cash made it possible for LECs serving ISPs to afford to pay their own customers to use their services, potentially driving ISP rates to consumers to uneconomical levels. These effects prompted the Commission to consider the nature of ISP-bound traffic and to examine whether there was any flexibility under the statute to modify and address the pricing mechanisms for this traffic . . ." (ISP Remand Order ¶ 21; 16 FCC Rcd at 9162.)

To illustrate the magnitude of the arbitrage problem, ¶ 5 of the ISP Remand Order points to evidence that on average CLECs terminate 18 times more traffic than they originate, and that this imbalance results in "annual CLEC reciprocal compensation

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In its answer, 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.[8] AT&T concluded that since the ISP Remand Order preempted state law in this area (including any charges in intrastate tariffs), and since AT&T had met its obligation to exchange traffic on a bill-and-keep basis, it owed Pac-West nothing.

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billings of approximately two billion dollars, ninety percent of which is for ISP-bound traffic." (16 FCC Rcd at 9154-55.)

[8] ¶ 81 of the ISP Remand Order states in full:

> "Finally, a different rule applies in the case where carriers are not exchanging traffic pursuant to interconnection agreements prior to adoption of this Order (where, for example, a new carrier enters the market or an existing carrier expands into a market it previously had not served). In such a case, as of the effective date of this Order, carriers shall exchange ISP-bound traffic on a bill-and-keep basis during this interim period. We adopt this rule for several reasons. First, our goal here is to address and curtail a pressing problem that has created opportunities for regulatory arbitrage and distorted the operation of competitive markets. In so doing, we seek to confine these market problems to the maximum extent while seeking an appropriate long-term resolution in the proceeding initiated by the companion [notice of proposed rulemaking]. Allowing carriers in the interim to expand into new markets using the very intercarrier compensation mechanisms that have led to the existing problems would exacerbate the market problems we seek to ameliorate. For this reason, we believe that a standstill on any expansion of the old compensation regime into new markets is the more appropriate interim answer. Second, unlike most carriers that are presently serving ISP customers under existing interconnection agreements, carriers entering new markets to serve ISPs have not acted in reliance on reciprocal compensation revenues and thus have no need of a transition during which to make adjustments in their business plans." (16 FCC Rcd at 9188-89; footnote omitted.)

AT&T also contended that as a CLEC rather than an ILEC, it had no obligation under the Telecommunications Act of 1996 to enter into an interconnection agreement with Pac-West. Thus, AT&T contended, the Commission should dismiss the complaint.

A. The Prehearing Conference (PHC) and Scoping Memo

Shortly before the PHC scheduled for January 7, 2005, both parties submitted statements on the issues to be addressed at the PHC. In its statement, after summarizing the pleadings, Pac-West stated that the parties "do not fundamentally disagree over the legal issues that give rise to the dispute," and proposed that the Commission should have a two-phase proceeding, with the first phase devoted to the question of "whether the law requires AT&T to compensate Pac-West and the structure of that compensation mechanism," and the second phase devoted to an investigation of "the facts underlying the amounts allegedly due."

Pac-West also proposed that the parties should exchange opening briefs on February 18 and reply briefs on March 11, 2005. This schedule, Pac-West asserted, would "allow[] the Commission ample time to issue a decision and conduct any subsequent proceedings, should they be necessary," within the 12-month period for resolving adjudication matters set forth in Pub. Util. Code § 1701.2(d).

In its statement, AT&T agreed that the case presented threshold legal issues as to the scope and effect of the ISP Remand Order, and asserted that the parties' contentions could be set forth in "briefs that can be characterized as briefs on cross-motions for summary judgment." (AT&T PHC Statement, p. 2.) Although differing somewhat with Pac-West in its formulation of the issues to be briefed, AT&T endorsed the briefing deadlines proposed by Pac-West. AT&T also agreed with Pac-West that if a decision in Pac-West's favor was issued on the threshold legal questions, then a second phase of the proceeding -- with adequate time for discovery -- should be held to determine the amount of compensation due to Pac-West.

At the PHC, the Administrative Law Judge (ALJ) agreed that the parties' proposal for briefs on the threshold legal issues was a good one, although he altered the proposed due dates somewhat. The ALJ noted, however, that because of the 12-month period set forth in Pub. Util. Code § 1701.2(d), it would not be feasible to have a two-phase proceeding. Instead, the ALJ stated that at the same time the parties were drafting briefs on the legal issues raised by the ISP Remand Order, they would be required to submit testimony on the amount of compensation that should be paid to Pac-West in the event it prevailed on its liability theory.

Pac-West's and AT&T's counsel replied that while it would be feasible to submit testimony in this fashion, it was likely that even if their clients could agree on the number of traffic minutes at issue, Pac-West and AT&T would probably be submitting a menu of possible compensation awards in their testimony. Such a menu would be necessary, the parties emphasized, because of their significant differences over which rates should apply to the minutes at issue, as well as to their differences concerning the limitations period that applied to Pac-West's claims.[9]

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[9] For example, AT&T's counsel stated:

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Following the discussion at the PHC, the Assigned Commissioner and assigned ALJ issued a scoping memo on February 14, 2005. The scoping memo directed that opening briefs on legal issues should be filed on February 11, 2005, with reply briefs due a month later, on March 11. February 25, 2005 was established as the due date for testimony on the compensation that would be owed in the event Pac-West prevailed on liability,[10] and hearings on the

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> "I want to make sure that you understand this, that it wouldn't be just one number. That based on the possibilities of how the legal arguments go, there could be different numbers presented to you for you to decide . . .
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> * * *
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> For example – I don't know this yet because we haven't seen [support for Pac-West's] change from 3-1/2 to 6 million, but we might want to argue that some of that is barred by estoppel or statute of limitations or whatever . . ." (PHC Transcript, pp. 12-13.)

At another point, AT&T's counsel noted that as a result of Commission decisions, special rules apply as to how long one can back-bill for various types of telecommunications charges; *e.g.*, 90 days for residential customers and 18 months for access charges. (*Id.* at 14.)

Although AT&T raised a limitations issue in its February 11 opening brief on legal questions, counsel for AT&T sent a letter to the assigned ALJ on March 18, 2005 acknowledging that his principal limitations argument was based on a case that had been subsequently overruled. In subsequent briefs, AT&T's counsel has not disputed that this case is governed by the three-year limitations period applicable to uncollected tariff charges. *See*, Pub. Util. Code § 737.

[10] On February 17, 2005, AT&T filed a motion asking that the due date for this testimony be extended to March 7, 2005, and stating that Pac-West did not oppose this request. The ALJ granted the motion in an e-mail message the same day, and later confirmed the ruling in writing. *See*, Administrative Law Judge's Ruling Extending Time for Filing Testimony, issued March 7, 2005.

compensation issues were scheduled for April 12-15, 2005. In addition to these dates, the scoping memo set forth the issues to be decided as follows:

> 1. "Does ¶ 81 of the ISP Remand Order control here, so that AT&T is not obliged to compensate Pac-West for ISP-bound traffic originating with AT&T local exchange customers and terminated by Pac-West, but rather is required only to exchange such traffic with Pac-West on a bill-and-keep basis?
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> 2. "Under federal law, does ¶ 81 of the ISP Remand Order not apply to the situation here, in which two CLECs that indirectly exchange ISP-bound traffic have not entered into an interconnection agreement, but rather exchange the traffic pursuant to transit arrangements with an ILEC that has entered into separate interconnection agreements with each of them?
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> 3. "In the event the answer to Question 2 is that ¶ 81 of the ISP Remand Order does not control here, does the ISP Remand Order nonetheless preempt state regulation of the kind of traffic exchanges described in Question 2? If so, what compensation, if any, is required to be paid to the CLEC that terminates the ISP-bound traffic?
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> 4. "If the ISP Remand Order does not preempt state regulation of the situation described in Question 2, what compensation, if any, does Commission precedent require to be paid to the CLEC that terminates the ISP-bound traffic?"

B. The Motion to Strike Portions of Pac-West's Compensation Testimony

In accordance with the schedule set forth in the Scoping Memo, the parties filed their opening and reply briefs on legal issues on February 11 and March 11, 2005, and Pac-West served testimony on the compensation issues on March 7.

AT&T did not serve any compensation testimony on the due date. Instead, on March 11, 2005, it filed a motion seeking to strike portions of the compensation testimony submitted by Pac-West witnesses John Sumpter and Barry Lear. In Sumpter's case, AT&T contended that the testimony was really legal argument and, in Lear's case, AT&T argued that he was trying to introduce evidence about AT&T's billing for access charges, an issue not included in the Scoping Memo. As an alternative to striking the testimony, AT&T sought leave to serve rebuttal testimony making two points: (1) that the material AT&T had provided in discovery was sufficient to establish the 3-to-1 traffic ratio referenced in the ISP Remand Order, and (2) that the bills cited by Pac-West represented claims for intercarrier access charges rather than reciprocal compensation.

Pursuant to an e-mail ruling by the ALJ, Pac-West filed a reply to AT&T's motion on March 18, 2005. In its reply, Pac-West argued that (1) the material in Sumpter's testimony challenged by AT&T was well within the limits of permissible policy testimony accepted at the Commission, and (2) the challenged material in Lear's testimony did not introduce a new issue, but simply sought to establish that AT&T's own billing practices were inconsistent with its position in this case.

On March 25, 2005, the ALJ denied the motion to strike without prejudice, and permitted AT&T to file limited rebuttal testimony by April 1, 2005. If Pac-West concluded that it needed discovery with respect to the rebuttal testimony, it was instructed to advise the ALJ of this fact by April 5, so that the hearings could be postponed until May 2, 2005 and Pac-West could be permitted to conduct necessary discovery.

Pursuant to the ALJ ruling, AT&T's limited rebuttal testimony was served on April 1, 2005. Pac-West did not request a delay in the compensation hearings to pursue discovery, so the hearings went ahead as scheduled on April 12-13, 2005.

II. The Parties' Positions on the Legal Issues Raised by the ISP Remand Order

A. Elements of the Interim Compensation Plan in the ISP Remand Order

The essential dispute in this case is whether, as AT&T contends, the rule set forth in ¶ 81 of the ISP Remand Order -- which both parties refer to as the New Markets Rule -- can be applied standing alone, or whether, as Pac-West contends, this rule can only be applied as part of an integrated FCC plan for transitioning CLECs that serve ISPs from reciprocal compensation to bill-and-keep (or some other form of intercarrier compensation).

The New Markets Rule is quoted in full in footnote 8 of this decision. However, in order to make the debate between the parties comprehensible, some understanding of the *other* elements of what the FCC describes in the Remand Order as the "interim compensation plan" is necessary. These other elements are known as the "rate cap," the "growth cap," the "mirroring rule," and the "3-to-1 ratio," and a good description of them appears in ¶ 8 of the Remand Order. In ¶ 8, the FCC described these other elements as follows:

> "Beginning on the effective date of this Order, and continuing for six months, **intercarrier compensation for ISP-bound traffic will be capped** at a rate of $.0015/minute-of-use (mou). Starting in the seventh month, and continuing for eighteen months, the rate will be capped at $.0010/mou. Starting in the twenty-fifth month, and continuing through the thirty-sixth month or until further Commission action (whichever is later), the rate will be capped at $.0007/mou. Any additional costs incurred must be recovered from end-users. These rates reflect the downward trend in intercarrier compensation rates contained in recently negotiated interconnection agreements, suggesting that they are sufficient to provide a reasonable transition from dependence on intercarrier payments while ensuring cost recovery.

- We also impose a **cap on total ISP-bound minutes** for which a local exchange carrier (LEC) may receive this compensation. For the year 2001, a LEC may receive compensation, pursuant to a particular interconnection agreement, for ISP-bound minutes up to a ceiling equal to, on an annualized basis, the number of ISP-bound minutes for which that LEC was entitled to compensation under that agreement during the first quarter of 2001, plus a ten percent growth factor. For 2002, a LEC may receive compensation for ISP-bound minutes up to a ceiling equal to the minutes for which it was entitled to compensation in 2001, plus another ten percent growth factor. In 2003, a LEC may receive compensation for ISP-bound minutes up to a ceiling equal to the 2002 ceiling. These caps are consistent with projections of the growth of dial-up Internet access for the first two years of the transition and are necessary to ensure that such growth does not undermine our goal of limiting intercarrier compensation and beginning a transition toward bill and keep. Growth above these caps should be based on a carrier's ability to provide efficient service, not on any incentive to collect intercarrier payments.

- Because the transitional rates are *caps* on intercarrier compensation, they have no effect to the extent that states have ordered LECs to exchange ISP-bound traffic either at rates below the caps or on a bill and keep basis (or otherwise have not required payment of compensation for this traffic). The rate caps are designed to provide a transition toward bill and keep, and no transition is necessary for carriers already exchanging traffic at rates below the caps.

- In order to limit disputes and costly measures to identify ISP-bound traffic, we adopt a **rebuttable presumption** that **traffic exchanged between LECs that exceeds a 3:1 ratio of terminating to originating traffic is ISP-bound traffic** subject to the compensation mechanism set forth in this Order. This ratio is consistent with those adopted by state commissions to identify ISP or other convergent traffic that is subject to lower intercarrier compensation rates. Carriers that seek to rebut this presumption, by showing that traffic above the ratio is not ISP-bound traffic or, conversely, that traffic below the ratio is ISP-bound traffic, may seek appropriate relief from their state commissions pursuant to Section 252 of the Act.

- Finally, the rate caps for ISP-bound traffic (or such lower rates as have been imposed by states commissions for the exchange of ISP-bound traffic) apply only if an incumbent LEC offers to exchange all traffic subject to Section 251(b)(5) at the same rate. An incumbent LEC that does not offer to exchange Section 251(b)(5) traffic at these rates must exchange ISP-bound traffic at the state-approved or state-negotiated reciprocal compensation rates reflected in their contracts. The record fails to demonstrate that there are inherent differences between the costs of delivering a voice call to a local end-user and a data call to an ISP, thus the **"mirroring" rule** we adopt here requires that incumbent LECs pay the same rates for ISP-bound traffic that they receive for Section 251(b)(5) traffic." (ISP Remand Order ¶ 8; 16 FCC Rcd at 9156-57; boldface emphasis supplied.)

B. Pac-West's Position on the ISP Remand Order

The essence of Pac-West's argument in this case is that the interim compensation plan in the ISP Remand Order must be viewed as an integrated whole, and that AT&T is wrong because it seeks to apply only one element of that plan, the New Markets Rule in ¶ 81, thereby taking that element out of context. In its March 11 reply brief on legal issues, Pac-West summarizes its position as follows:

> "AT&T's claim that the New Markets Rule supports its refusal to pay Pac-West's tariff-based invoices for termination of AT&T's transit traffic is unfounded and wrong as a matter of law, and must be rejected based upon several independent grounds. 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. It cannot do this as a matter of law because it is not an ILEC, and even if it could do so as a CLEC, it never did." (Pac-West Reply Brief, p. 41.)

Pac-West goes on to argue that because there is no interconnection agreement between itself and AT&T, the ISP Remand Order is simply irrelevant to the issues here. Citing *Verizon North Inc. v. Strand,* 367 F.3d 577, 586-87 (6th Cir. 2004), Pac-West states:

> "[A]ppellate courts have found that the *ISP Remand Order* is simply irrelevant in the absence of a Section 252 interconnection agreement . . . [T]he *ISP Remand Order* is crafted specifically to not interfere with the Section 252 agreements between Incumbent and Competitive Carriers and it cannot be implemented in the absence of an interconnection agreement. The Interim FCC Plan requires that the carriers have or be able to negotiate a Section 252 Interconnection agreement. It is clear, however, that AT&T and Pac-West, as Competitive Carriers, cannot satisfy this essential condition. Therefore, the *ISP Remand Order* is not relevant to traffic which is the subject of this Complaint." (Pac-West Opening Brief, p. 18; footnotes omitted.)

Less radically, Pac-West also argues that FCC itself has declared that where the interrelated provisions of the ISP Remand Order do not apply, state-approved reciprocal compensation rates are the source one should consult in deciding how much compensation to pay CLECs for terminating ISP-bound calls. Relying upon the FCC's own description in the *Core Order*[11] of the mirroring rule set forth in ¶ 89 of the Remand Order, Pac-West states:

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[11] *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order,* Order, WC Docket No. 03-171, FCC 04-241, 19 FCC Rcd 20179 (released October 18, 2004). Hereinafter, this decision will be referred to as the *Core Order*.

> "The *ISP Remand Order's* ratemaking scope is limited . . . to presumed ISP-bound traffic that is subject to the Interim FCC Plan. The Interim FCC Plan only applies to traffic exchanged between Incumbent and Competitive Carriers when the Incumbent has 'opted-in' to the FCC Plan. When the Interim FCC Plan does not apply, carriers are 'required to exchange ISP-bound traffic at the state-approved or state-arbitrated reciprocal compensation rates.' With respect to applicable compensation rates, the FCC preemption, therefore, only extends to that traffic which is deemed to be ISP-bound under the presumptive methodology established by the *ISP Remand Order*. All other traffic, including both traffic exchanged between an Incumbent and Competitive Carrier that is below the 3 to 1 ratio and traffic not subject to the Interim FCC Plan, including any ISP-bound traffic exchanged between AT&T and Pac-West, remains subject to state ratemaking jurisdiction." (Pac-West Opening Brief, p. 22; footnotes omitted.)

Pac-West also notes that since no interconnection agreement is in effect between itself and AT&T, and since Pac-West cannot compel AT&T to enter into an interconnection agreement (because AT&T is a CLEC rather than an ILEC), the applicable "state-approved reciprocal compensation rates" in this case are the call termination rates set forth in Pac-West's intrastate tariff:

> "In the absence of an applicable agreement between AT&T and Pac-West the state tariff rates are the most directly applicable lawful rates that Pac-West should charge Competitive Carriers that choose to deliver traffic to Pac-West's customers. It would be both unfair and anticompetitive for the Commission to acknowledge . . . that Pac-West has a legal right to be compensated for the traffic originated by AT&T and then to prevent Pac-West from recovering such compensation. Pac-West's state tariff is the only directly applicable state-approved mechanism available to a Competitive Carrier such as Pac-West that cannot force AT&T to negotiate or arbitrate a Section 252 interconnection agreement and when AT&T refuses to negotiate a voluntary agreement. To conclude that Pac-West cannot

> include a rate for intercarrier compensation in its state tariff is to deny Pac-West the right to recover revenues to which it is lawfully entitled. Because nothing in the *ISP Remand Order* indicates an intent to deny compensation to those Competitive Carriers that were exchanging traffic on the effective date of the order, equity and fairness dictate that the state tariff rates control." (Pac-West Opening Brief, pp. 24-25.)

Pac-West also points out that because the *Core Order* concluded the FCC should forebear from enforcing the New Markets Rule after 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 can be invoked without a mirroring offer:

> "Even if the Commission concludes that AT&T is correct and the New Markets Rule dictates the intercarrier compensation mechanism for the traffic it delivers to Pac-West [*i.e.*, bill-and-keep], the Commission must find that the rates in Pac-West's California state tariff control after the effective date of the *Core Order*. As noted earlier, effective October 8, 2004, the FCC forbore from enforcing the New Markets Rule. In its absence, and because the Interim FCC Plan cannot govern in the absence of a Section 252 agreement between AT&T and Pac-West, Pac-West's California tariff establishes the lawful rates for the traffic delivered to Pac-West by AT&T." (*Id.* at 25-26.)

Pac-West also argues that the FCC's recent pronouncements in the *T-Mobile Ruling*[12] support Pac-West's position that the call termination rates set

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[12] *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, FCC 05-42, 20 FCC Rcd 4855 (released February 24, 2005). Hereinafter, this decision will be referred to as either the *T-Mobile Ruling* or *T-Mobile.*

forth in its intrastate tariff govern the compensation to be paid here. Quoting from *T-Mobile*, Pac-West describes that ruling's applicability to the situation here as follows:

> "When carriers interconnect indirectly, as is [the] case in this Complaint, 'there is no interconnection agreement or other compensation arrangement between the parties.' The absence of an agreement or arrangement does not, however, preclude intercarrier compensation. Rather, the FCC found [in *T-Mobile*] that its reciprocal compensation rules do not preclude carriers from accepting alternative compensation arrangements. Tariffs are an appropriate alternative in those circumstances where they have not been expressly prohibited or they don't supersede or negate the federal provisions under Sections 251 and 252 [of the 1996 Telecommunications Act]. Because the termination tariffs at issue in the *T-Mobile Ruling* applied only in the absence of an agreement, they were valid according to the rules in place prior to the date of [that ruling.]" (Pac-West Reply Brief on Legal Issues, pp. 33-34; footnotes omitted.)

Pac-West concludes that all of the conditions specified in *T-Mobile* for the applicability of state tariffs are met here:

> "Pac-West's intrastate tariff falls squarely within the conditions required for a valid intercarrier compensation tariff established by the *T-Mobile Ruling.* First, the FCC has not prohibited tariffs for intercarrier compensation between CLECs. Second, Pac-West's intrastate tariff does not conflict with or supersede the provisions of Sections 251 and 252. The purpose of the tariff is clear on its face [since it states that it applies only where no agreement is in place for the completion of local calls.] In addition . . . CLECs are not subject to and cannot invoke the negotiation and arbitration provisions of Section 252 as against another CLEC. Therefore, in the absence of an express prohibition and an alternative procedure for establishing a compensation mechanism, Pac-West's intrastate tariff is lawful." (*Id.* at 34-35; footnotes omitted.)

C. AT&T's Position on the ISP Remand Order

AT&T's principal argument is that in trying to argue that the Remand Order does not apply to exchanges of ISP-bound traffic between CLECs, Pac-West is effectively standing the FCC's jurisdictional ruling on its head. In its reply brief on legal issues, AT&T states:

> "The more fundamental error in Pac-West's arguments is that the arguments require the Commission to accept the premise that the FCC has bifurcated its jurisdictional holding by predicating its jurisdiction on the type of the carrier carrying the traffic rather than the nature of the traffic itself. Pac-West would have this Commission believe that the FCC's jurisdictional determination that ISP-bound traffic is primarily interstate applied only to ISP-bound traffic that originates on an ILEC network and terminates to a [CLEC] . . . But it is without question that the FCC: (1) found that all ISP-bound traffic is within its jurisdiction as interstate traffic; (2) found it is in the public interest to establish a bill-and-keep reciprocal compensation mechanism for ISP terminating traffic; and (3) precluded state commissions from independently applying a compensation rate that conflicts with the FCC's pricing scheme. *There is no exception for ISP-bound traffic that is exchanged between CLECs. . . Pac-West can point to no language that exempts certain types of ISP-bound traffic from the FCC's jurisdiction.*" (AT&T Reply Brief on Legal Issues, pp. 2-3; emphasis added.)

In support of this jurisdictional argument, AT&T places particular reliance on the Ninth Circuit's decision in *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114 (9th Cir. 2003). In that case, the Ninth Circuit invalidated two rulemaking decisions of this 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, however, the Ninth Circuit upheld the Commission's decision that the reciprocal compensation provisions in a *specific* interconnection agreement, the 1999 agreement between Pacific Bell and Pac-West, applied to ISP-bound traffic. The different outcomes, the Court stated, were based on the fact that under the Telecommunications Act of 1996, "the authority granted to state regulatory commissions is confined to the role described in [47 U.S.C.] § 252 – that of arbitrating, approving and enforcing interconnection agreements . . . The Act did not grant state regulatory commissions additional general rule-making authority over interstate traffic" such as ISP-bound calls. (325 F.3d at 1126-27.)

AT&T asserts that Pac-West's attempt to argue that compensation for ISP-bound calls should be determined by Pac-West's intrastate tariff rather than ¶ 81 of the Remand Order cannot be reconciled with the jurisdictional precepts of *Pacific Bell v. Pac-West*. On this issue, AT&T states:

> "[W]hat Pac-West is attempting to do . . . is impose a unilateral tariff obligation on AT&T, one that is clearly not 'reciprocal,' as a substitute for a contract that [Pac-West] cannot obtain under the law. As stated earlier, the Commission's authority under the Telecom Act is limited to 'that of arbitrating, approving and enforcing interconnection agreements.' The U.S. Court of Appeals for the 9th Circuit specifically found that the Commission had no general rule-making authority over interstate traffic. This Commission cannot authorize Pac-West to institute a generic reciprocal compensation 'tariff' in lieu of an interconnection agreement for ISP-bound traffic, or indeed any other form of traffic exchanged between CLECs." (AT&T Opening Brief on Legal Issues, p. 9.)

In addition to arguing that the Remand Order's language forecloses the possibility that Pac-West's intrastate tariff could apply here, AT&T argues that the *Core Order* is far less significant than Pac-West claims. After noting that the essence of Core's petition for forbearance at the FCC was that the Remand Order's compensation interim plan could cause discrimination among CLECs (because the effect of the plan was to require only some CLECs to recover their termination costs for ISP-bound traffic from end-users), AT&T argues:

> "Core's issue [was] with the scheme for transitioning the reciprocal compensation provisions in the ILEC interconnection agreements to bill-and-keep. Core raised a concern that some CLECs during the transition would still receive reciprocal compensation while others would already be subject to bill-and-keep for traffic originating from ILECs. But generally CLECs have been exchanging traffic on a bill-and-keep basis, and continue to do so today. This is not an issue for Core Communications. <u>Nothing in the *Core Order* implies that the FCC is requiring CLECs to begin paying each other reciprocal compensation fees for ISP-bound traffic when they have never done so before</u>. The Pac-West interpretation of the *Core Order* would require the Commission to accept the premise that the FCC in this narrow Order overturned the fundamental policy determination of the FCC in the *ISP Remand Order*." (AT&T Reply Brief on Legal Issues at 16; underlined emphasis added.)

AT&T's answer to Pac-West's assertion that the Remand Order simply does not address CLEC-CLEC traffic exchanges is that "the FCC did not have to set up a scheme to phase out reciprocal compensation fees for ISP-bound traffic originated by CLECs because there is no evidence that any such compensation is currently being paid." (*Id.* at 8.) After emphasizing that ¶ 81 of the Remand Order refers to "carriers," AT&T continues that "this language clearly encompasses *all* local carriers, not merely arrangements between ILECs and CLECs that have failed to enter into interconnection agreements with an ILEC." (*Id.* at 9; emphasis in original.)

AT&T also dismisses Pac-West's reliance on the mirroring rule set forth in ¶ 89 of the ISP Remand Order. In response to Pac-West's claim that ¶ 89 indicates state tariffs should be applicable where two CLECs have not entered into an interconnection agreement, AT&T says:

> "This paragraph is not, as Pac-West argues, a statement of general applicability. It is very specifically aimed at insuring that ILECs with interconnection agreements arbitrated by state commissions do not obtain an unintended competitive advantage from the FCC's pricing scheme for ISP-bound traffic. ¶ 89 states that 'we order them [ILECs] to exchange ISP-bound traffic at the state approved or state-arbitrated reciprocal compensation rates reflected in their contracts (citation omitted).' (emphasis added.) This is very different from Pac-West's claim in its Opening Brief that [s]tates may assert jurisdiction over ISP-bound traffic and may set rates in instances where the traffic is not subject to an interconnection agreement . . . ¶ 89 does not order the Commission to apply the Pac-West state tariff in terminating ISP traffic." (*Id.* at 13; citation omitted, emphasis in original.)

III. Discussion

Although there are ambiguities in the key paragraphs of the ISP Remand Order, we conclude that on balance, Pac-West's reading of these paragraphs more accurately reflects the FCC's intent than does AT&T's reading. Accordingly, we conclude 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. Moreover, AT&T offered no evidence to support its claim that the common practice within the telecommunications industry is for CLECs to exchange traffic among themselves on a bill-and-keep basis.

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. As the *T-Mobile Ruling* indicates, properly-filed state tariffs are an appropriate source to consult where reliance on them would not undermine the policy in the 1996 Telecommunications Act favoring voluntary interconnection agreements. Since both parties here acknowledge that AT&T cannot be forced 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. To rule to the contrary and in AT&T's favor on this issue would be to hold that despite the FCC's decision in the *Core Order* to forbear from enforcing the New Markets Rule after October 8, 2004, Pac-West would still not be entitled to receive any compensation for terminating AT&T's ISP-bound calls, simply because Pac-West had previously been compelled by law to accept a bill-and-keep arrangement. In our opinion, such a ruling would stand the *Core Order* on its head.

As noted in the description of the parties' positions, AT&T relies heavily on the fact that ¶ 81 refers to "carriers" – a term that encompasses both ILECs and CLECs – to justify its argument that bill-and-keep should apply to its traffic exchanges with Pac-West. We acknowledge that, as the complete quotation of ¶ 81 in footnote 8 of this decision shows, nothing within the language of ¶ 81 itself expressly limits the New Markets Rule to exchanges of ISP-bound traffic between ILECs and CLECs. Since AT&T did not have an interconnection agreement with Pac-West on the effective date of the ISP Remand Order, the language of ¶ 81, standing alone, therefore seems to support AT&T's argument that it is entitled to exchange ISP-bound traffic with Pac-West on a bill-and-keep basis.

However, applying ¶ 81 in this fashion would ignore the concerns about possible ILEC arbitrage expressed in ¶ 89 of the ISP Remand Order, which sets forth the mirroring rule. ¶ 89 makes it clear that if an ILEC wants to invoke the interim compensation plan in the Remand Order, including the New Markets Rule of ¶ 81, the ILEC must first make a mirroring offer that will foreclose the possibility of profiting from arbitrage when the ILEC is terminating ISP-bound traffic. Paragraph 89 provides in full:

> "It would be unwise as a policy matter, and patently unfair, to allow incumbent LECs to benefit from reduced intercarrier compensation rates for ISP-bound traffic, with respect to which they are net payors, while permitting them to exchange traffic at state reciprocal compensation rates, which are much higher than the caps we adopt here, when the traffic imbalance is reversed. Because we are concerned about the superior bargaining power of incumbent LECs, we will not allow them to 'pick and choose' intercarrier compensation regimes, depending on the nature of the traffic exchanged with another carrier. <u>The rate caps for ISP-bound traffic that we adopt here apply, therefore, *only* if an incumbent LEC offers to exchange all traffic subject to Section 251(b)(5) at the same rate . . . For those incumbent LECs that choose *not* to offer to exchange Section 251(b)(5) traffic subject to the same rate caps we adopt for ISP-bound traffic, we order them to exchange ISP-bound traffic at the state-approved or state-arbitrated reciprocal compensation rates reflected in their contracts.</u> This 'mirroring' rule ensures that incumbent LECs will pay the same rates for ISP-bound traffic that they receive for Section 251(b)(5) traffic." (ISP Remand Order ¶ 89; 16 FCC Rcd at 9194-94; footnotes omitted, italics in original, underlining supplied.)

In view of the concern about arbitrage that pervades the ISP Remand Order, we believe that if the FCC had intended that order to cover exchanges of ISP-bound traffic between CLECs, the FCC would have explicitly addressed the obligations of a CLEC that wished to invoke the New Markets Rule. The fact that the FCC remained silent on this question, coupled with the repeated references in ¶ 89 to ILECs, supports Pac-West's argument that the interim compensation plan in the Remand Order – including the New Markets Rule of ¶ 81 -- is intended to apply only to exchanges of ISP-bound traffic between ILECs and CLECs.

AT&T has offered two arguments in support of its position that the bill-and-keep language in ¶ 81 is not limited by the requirement of a mirroring offer in ¶ 89. *First*, AT&T argues that to apply ¶ 81 as Pac-West suggests "would require the Commission to accept the premise that the FCC has bifurcated its jurisdictional holding by predicating its jurisdiction on the type of the carrier carrying the traffic rather than the nature of the traffic itself." Asserting that the FCC has "(1) found that all ISP-bound traffic is within [FCC] jurisdiction as interstate traffic; (2) found it is in the public interest to establish a bill-and-keep reciprocal compensation mechanism for ISP terminating traffic; and (3) [has] precluded state commissions from independently applying a compensation rate that conflicts with the FCC's pricing scheme," AT&T continues that there is "no exception" from these rulings for ISP-bound traffic exchanged between CLECs. (AT&T Reply Brief on Legal Issues, pp. 2-3.) *Second,* AT&T points out that since ¶ 89 directs ILECs that have not made a mirroring offer to "exchange ISP-bound traffic at the state-approved or state-arbitrated reciprocal compensation rates reflected in their contracts," this language lends no support to Pac-West's argument that, as a CLEC, its compensation for terminating AT&T's calls should be determined according to its intrastate tariff. We consider each of these arguments in turn.

As noted in the description of AT&T's position on the Remand Order, AT&T's jurisdictional argument relies heavily on the Ninth Circuit's decision in *Pacific Bell v. Pac-West Telecomm.* In that case, as noted above, the Ninth Circuit invalidated two decisions issued in a Commission rulemaking proceeding which had held that the reciprocal compensation provisions in all interconnection agreements arbitrated in California applied to ISP-bound traffic. The basis for the Ninth Circuit's ruling was that, apart from the powers conferred by § 252 of the Telecommunications Act, the Commission does not have jurisdiction under the 1996 Act to promulgate rules regarding traffic that the FCC has declared to be interstate. However, in the same decision, the Ninth Circuit upheld the Commission's decision that ISP-bound traffic exchanged between Pacific Bell and Pac-West was subject to the reciprocal compensation provisions in the companies' 1999 interconnection agreement. This latter decision by the Commission, the Ninth Circuit ruled, was consistent with the powers conferred on state public service commissions by § 252 to interpret and enforce specific interconnection agreements.

In essence, AT&T argues that the relief Pac-West is seeking here cannot be reconciled with the jurisdictional boundaries laid out by the Ninth Circuit in *Pacific Bell v. Pac-West Telecomm.* According to AT&T, "exercising general regulatory authority over interstate traffic is exactly what Pac-West would have this Commission do in this complaint case. It not only asks the Commission to ignore the clear language of the *ISP Remand Order*, it asks the Commission to authorize fees for terminating traffic outside the bounds of an interconnection agreement arbitration and pursuant to generic state authority (i.e., state tariffs)." (AT&T Opening Brief on Legal Issues, pp. 5-6.)

We disagree with this contention for several reasons. First, we believe that AT&T reads the holding in *Pac-West Telecomm* too broadly. As described above, that decision was entirely concerned with whether the reciprocal compensation provisions in California interconnection agreements between ILECs and CLECs applied to ISP-bound traffic. The Ninth Circuit held that the Commission did not have the power to promulgate a general rule on this question, but did have authority under the Telecommunications Act to determine whether the reciprocal compensation provisions in a *specific* interconnection agreement applied to such traffic. Contrary to AT&T's suggestion, 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 – as both parties here acknowledge – clearly does not have the right under the 1996 Act to compel another CLEC to negotiate an interconnection agreement.

We also believe that AT&T gives too broad a reading to the language in ¶ 82 of the ISP Remand Order, on which AT&T also relies to support its jurisdictional argument. AT&T points to the language in ¶ 82 stating that "because [the FCC] now exercise[s its] authority under Section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic . . . state commissions will no longer have authority to address this issue." The thrust of ¶ 82, however, is not broad jurisdictional pronouncements, but the timing of the implementation of the Remand Order's interim compensation plan. Thus, the FCC noted in ¶ 82 that the interim plan "applies as carriers re-negotiate expired or expiring interconnection agreements,"[13] and ruled that as of the publication date of the Remand Order, "carriers may no longer invoke Section 252(i) to opt into an existing interconnection agreement with regard to the rates paid for the exchange of ISP-bound traffic." In view of these statements directed at timing, we conclude that ¶ 82 simply does not address the applicability of the interim

[13] This is consistent with the Ninth Circuit's observation in *Pacific Bell v. Pac-West Telecomm* that "the interim alternative payment scheme for ISP-bound traffic established in the Remand Order applies only prospectively, when existing interconnection agreements expire." (325 F.3d at 1131.)

compensation plan to situations in which both parties are CLECs and do not have an interconnection agreement in effect between them.

Of course, having decided that AT&T cannot invoke ¶ 81 of the Remand Order because it is a CLEC, we are left with the question of what compensation Pac-West should receive for the ISP-bound calls that it terminates for AT&T. As noted above, AT&T argues that ¶ 89 of the Remand Order sheds no light on this question, because in cases where a mirroring offer has not been made, ¶ 89 directs ILECs to "exchange ISP-bound traffic at the state-approved or state-arbitrated reciprocal compensation rates reflected in their contracts." Since AT&T and Pac-West are both CLECs and there is no interconnection agreement in effect between them, AT&T argues that Pac-West can take no comfort from this language in ¶ 89.

Even though we agree with AT&T that ¶ 89 does not resolve the question of what compensation should be paid here, we agree with Pac-West that the question of what compensation it should receive is best determined by resorting to the general principles that support the division of state and federal authority in the Telecommunications Act. We also agree that the FCC's recent ruling in the *T-Mobile* case furnishes useful guidance because it dealt with a compensation issue analogous to the one here, even though we are not bound to apply *T-Mobile* to the facts before us.

In *T-Mobile*, the FCC dealt with a situation in which CLECs and commercial mobile radio service (CMRS) providers were exchanging traffic indirectly without the benefit of interconnection agreements by using the transit services of ILECs. Disputes arose when the ILECs refused to compensate the CLECs for terminating the CMRS traffic, arguing that this was transit traffic and that the CMRS providers were required to pay reciprocal compensation. The *T-Mobile Ruling* described the disputes as follows:

> "For instance, many CMRS providers argue that intra[Major Trading Area, or MTA] traffic routed from a CMRS provider through a [Bell Operating Company, or BOC] tandem to another LEC is subject to the reciprocal compensation regime because it originates and terminates in the same MTA. Some LECs, however, contend that this traffic is more properly subject to access charges because it originates outside the local calling area of the LEC, is being carried by a toll provider, *i.e.*, the BOC, and is routed to the LEC via access facilities. When a LEC seeks payment of access charges from a BOC in these circumstances, the BOC often refuses to pay such charges on the basis that (1) it is merely transiting traffic subject to reciprocal compensation, and (2) the originating carrier is responsible for the reciprocal compensation due." (T-Mobile Ruling, ¶ 6, 20 FCC Rcd. at 4858; footnotes omitted.)

T-Mobile noted that because of such disputes (which had necessitated rulings by several state public service commissions), the CLECs had begun to file wireless termination tariffs with the state commissions "that apply only in the situation where there is no interconnection agreement or reciprocal compensation arrangement between the parties." (*Id.* at ¶ 7.) The CMRS providers challenged the validity of these tariffs, arguing that the CLECs "engage[] in bad faith by unilaterally filing wireless termination tariffs without first negotiating in good faith with CMRS providers." (*Id.* at 20 FCC Rcd 4855, n. 1.)

In its ruling, the FCC noted that "because the existing rules are silent as to the type of arrangement necessary to trigger payment obligations," there was no basis for finding bad faith, and that "it would not have been unlawful for incumbent LECs to assess transport and termination charges based upon a state tariff," because the FCC had been aware of this practice when it last amended the CMRS rules, prior to the passage of the 1996 Telecommunications Act. (*Id.* at ¶ 10; 20 FCC Rcd at 4860-61.)

The FCC decided, however, that the best solution was to amend its CMRS rules on a prospective basis, and held as follows:

> "In light of existing carrier disputes, we find it necessary to clarify the type of arrangement necessary to trigger payment obligations. Because the existing rules do not explicitly preclude tariffed compensation arrangements, we find that incumbent LECs were not prohibited from filing state termination tariffs and CMRS providers were obligated to accept the terms of applicable state tariffs. Going forward, however, we amend our rules to make clear our preference for contractual arrangements by prohibiting LECs from imposing compensation obligations for non-access CMRS traffic pursuant to tariff. In addition, we amend our rules to clarify that an incumbent LEC may request interconnection from a CMRS provider and invoke the negotiation and arbitration procedures set forth in Section 252 of the Act." (Id. at ¶ 9, 20 FCC Rcd at 4860; footnote omitted.)

In view of the fact that the ISP Remand Order is silent on the issue of what compensation should be paid when one CLEC exchanges ISP-bound traffic with another CLEC and no interconnection agreement is in effect between them, and the fact that this Commission has previously held that the CLEC's intrastate tariff is applicable to exchanges with an ILEC where the ILEC has not yet made a mirroring offer as required by ¶ 89, we conclude that -- subject to the limitations below -- it is appropriate to apply the CLEC's intrastate tariff for termination services where no interconnection agreement is in effect.

Having reached this conclusion, the computation of the amount payable to Pac-West by AT&T is straight-forward. In the testimony she submitted on behalf of Pac-West on March 7, 2005, Mart McCann calculated the total amount of termination charges that AT&T owed to Pac-West (pursuant to the latter's tariff) for the period July 1, 2001 to January 31, 2005 at $7,115,014.16. (Attachment to Exhibit 1, p. 6.) In the opening brief it filed on compensation issues on May 11, 2005, AT&T expressly stated that "AT&T does not challenge the calculation of the claimed invoices of Pac-West in Exhibit 1 . . . of $7,115,014.16." (AT&T Opening Brief on Evidentiary Issues, p. 3.)[14] Thus, the basic amount of termination charges that AT&T owes to Pac-West under the latter's tariff for the period in question[15] is not in dispute.

However, a further question is whether Pac-West should be able to recover "accrued late charges and interest" on the basic amount due, as Pac-West's brief requests.[16] We conclude that, as a matter of equity, AT&T should not be required to pay interest and late charges to Pac-West.

We reach this conclusion for several related reasons. First, as noted above, while the issues presented in the *T-Mobile Ruling* are analogous to the ones here, nothing in *T-Mobile* or in any other federal decision we are aware of requires that in cases where the FCC has not prescribed the appropriate form of reciprocal compensation, the intrastate tariffs of the carrier seeking such compensation must be applied. In choosing to follow *T-Mobile* and apply Pac-West's tariff in

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[14] In the reply brief on compensation issues that it filed on June 1, 2005, AT&T also stated that it "is not challenging Pac-West's claim as to the amount of AT&T traffic that terminated to Pac-West's network." (AT&T Reply Brief on Compensation Issues, p. 21, n. 34.)

[15] *See*, Pub. Util. Code § 737.

[16] Pac-West Brief on Compensation Issues, filed May 11, 2005, p. 23.

this situation, we are therefore exercising our equitable remedial powers – powers on which Pac-West also relies[17] – and those powers include the authority to apply less than all of the otherwise-applicable tariff provisions.

Second, we note that the usage charges in Pac-West's tariff are somewhat higher than those in the FCC's interim compensation plan in the ISP Remand Order. As noted in ¶ 8 of the Remand Order, the FCC's interim plan provided that for the period after April 18, 2003 (*i.e.*, two years after adoption of the order), the rate for ISP-bound traffic would be capped at $.0007 per minute-of-use (MOU). The pages from Pac-West's tariff attached to the October 18, 2004 affidavit of John Sumpter (an affidavit that accompanied the complaint in this case) indicate that for most of the time since October 20, 2001, Pac-West's MOU rate has been $.0010. In view of the unusually long time that elapsed between AT&T's initial refusal to pay Pac-West's invoices and the filing of the instant complaint, as well as Pac-West's admission that its business plan relies on targeting ISPs[18] – the situation that gave rise to the arbitrage opportunities that motivated the FCC to issue the ISP Remand Order – we conclude it is an

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[17] In its February 18, 2005 opening brief on legal issues, Pac-West argued that its tariffs were "the most directly applicable lawful rates that Pac-West should charge Competitive Carriers that choose to deliver traffic to Pac-West's customers," and that "equity and fairness dictate that the state tariff rates control." (Pac-West Opening Brief, pp. 24-25.) By the time Pac-West filed its reply brief on legal issues on March 11, 2005, *T-Mobile* had been decided, and Pac-West began to rely on that decision rather than on "equity and fairness" alone to support the argument that its tariff, Schedule Cal. CLC 1-T, should govern the compensation to be paid here. *See,* Pac-West Reply Brief, pp. 33-36.

[18] *See*, Pac-West Reply Brief on Compensation Issues, p. 9. Interestingly, Pac-West does not dispute AT&T's assertion that Pac-West carries an estimated 20% of the dial-up Internet traffic in California. *See,* AT&T Opening Brief on Compensation Issues, p. 8.

appropriate exercise of our remedial powers to relieve AT&T of the burden of having to pay interest and late charges. By ruling in this fashion, we also bring the amount due more into line with what would have been owed if the FCC's interim compensation plan had governed this case.

As we have observed in other decisions, the payment of interest is not mandatory when a utility seeks unpaid tariff charges pursuant to Pub.Util.Code § 737. (*Re Western Union Telegraph Company,* D.87-05-063, 24 CPUC2d 350, 364.) *See also, Air-Way Gins, Inc. v. Pacific Gas and Electric Company,* D.03-04-059 (interest not awarded to utility customers who sought to recover under Pub. Util. Code § 736 overcharges paid as a result of the utility's application of the wrong tariff).[19]

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[19] In view of our resolution of the compensation issue in this decision, it is unnecessary to decide the questions that consumed most of the time at the hearings held on April 12-13, 2005. Those questions included (1) whether the sample of billing data that AT&T provided to Pac-West was statistically sufficient to establish that the ratio of traffic terminated by Pac-West for AT&T exceeded the 3-to-1 ratio set forth in the ISP Remand Order, (2) whether Pac-West had erroneously relied on access charges to support its claim that AT&T's own billing behavior was inconsistent with AT&T's claim that bill-and-keep should apply here, and (3) whether Pac-West's termination rates should apply to the small volume of traffic that AT&T terminated for Pac-West. Although our decision makes it unnecessary to examine the evidence presented on these questions in detail, we observe that there can be little doubt that, whatever the statistical objections to the data provided by AT&T in discovery, the ratio of traffic terminated by Pac-West for AT&T to the traffic terminated by AT&T for Pac-West appears to be many times greater than 3-to-1, and is thus more than sufficient to satisfy the threshold for "ISP-bound traffic" under the ISP Remand Order.

For the same reasons we need not decide the questions litigated at the hearing, it is unnecessary to rule on Pac-West's June 8, 2005 motion to set aside the submission of this case and reopen the record to allow an affidavit to be received which asserts that MCI, another CLEC with which Pac-West has no interconnection agreement, has recently agreed to pay the termination charges in Pac-West's intrastate tariff for traffic exchanged between the two carriers. On June 17, 2005, AT&T filed an opposition to this

Footnote continued on next page

IV. Assignment of Proceeding

Susan P. Kennedy is the Assigned Commissioner for this proceeding, and A. Kirk McKenzie is the assigned ALJ and presiding officer.

V. Submission of Proceeding

This case was deemed submitted on June 1, 2005, when Pac-West and AT&T both submitted reply briefs on the issues litigated at the April 12-13 hearings. As noted in footnote 19, Pac-West filed a motion to set aside submission of the case on June 8, 2005, to which AT&T responded on June 17, 2005 and Pac-West replied on June 24, 2005. Because it is unnecessary to decide the issues raised by Pac-West's June 8 motion, this decision deems that motion denied.

Findings of Fact

1. AT&T and Pac-West are both CLECs.
2. As a CLEC, AT&T cannot be compelled under § 252 of the 1996 Telecommunications Act (47 U.S.C. § 252) to enter into an interconnection agreement with another CLEC.

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motion, asserting that (1) it should have been filed under Rule 84 of the Rules of Practice and Procedure rather than Rule 45, and (2) AT&T would be prejudiced if the new material were admitted into evidence without an opportunity for cross-examination. On June 24, 2005, with leave from an Assistant Chief ALJ, Pac-West filed a reply to AT&T's opposition, arguing that (1) D.05-06-028 did not support AT&T's position that bill-and-keep should apply in this case, and (2) Pac-West would not be opposed to appropriate discovery and cross-examination concerning the newly-proffered affidavit. Because we need not rule on the issues raised by these pleadings, Pac-West's June 8, 2005 motion is deemed denied.

3. No interconnection agreement is in effect between AT&T and Pac-West, but they exchange traffic indirectly by using the transit services of ILECs such as Pacific Bell Telephone Company and Verizon.

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

5. The overwhelming majority of the traffic terminated by Pac-West for AT&T is traffic that originates with local exchange customers on AT&T's network who use dial-up telephone service to connect with their ISPs.

6. Pac-West's website indicates that Pac-West carries approximately 20% of the total dial-up Internet service in California.

7. The volume of local exchange traffic terminated by Pac-West for AT&T is many times greater than the volume of local exchange traffic terminated by AT&T for Pac-West.

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

9. AT&T did not offer proof that it is a common practice within the telecommunications industry for CLECs to exchange traffic among themselves on a bill-and-keep basis.

10. 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.

11. In its decision concerning the ISP Remand Order, Worldcom, Inc. v. FCC, 288 F.3d 429 (D.C. Cir 2002), cert. denied sub nom. Core Communications, Inc. v. FCC, 538 U.S. 1012 (2003), the United States Court of Appeals for the District of Columbia Circuit remanded the order to the FCC but did not vacate it, so the ISP Remand Order remains in effect.

12. AT&T did not make and, as a CLEC could not make, the mirroring offer described in ¶ 89 of the ISP Remand Order.

13. In the T-Mobile Ruling, the FCC held that LECs could lawfully impose transport and termination charges on CMRS providers by means of a state tariff, because at the time these tariffs were in effect, the LECs were not entitled under federal law to compel the CMRS providers to enter into interconnection agreements or negotiate reciprocal compensation arrangements with the LECs.

14. When calculated at the rates set forth in the Pac-West tariff described in Finding of Fact (FOF) 10, the charges due for the traffic originating on AT&T's network and terminating on Pac-West's network, for the period from July 1, 2001 to January 31, 2005, total $7,115,014.16.

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

16. In situations where utility customers have sought to recover overcharges paid as a result of the utility's application of the wrong tariff to the customer, this Commission has sometimes refused to award interest to the customer on the amounts that were overpaid to the utility.

Conclusions of Law

1. In order to invoke the New Markets Rule set forth in ¶ 81 of the ISP Remand Order, a carrier must also make a mirroring offer as described in ¶ 89 of the Remand Order.

2. Only ILECs are in a position to make a mirroring offer of the kind described in ¶ 89 of the ISP Remand Order.

3. Because AT&T did not make a mirroring offer, it may not invoke the New Markets Rule set forth in ¶ 81 of the ISP Remand Order.

4. Because AT&T cannot invoke the New Markets Rule, it is not entitled to exchange ISP-bound traffic that originates on its network with Pac-West on a bill-and-keep basis.

5. Because Pac-West does not have a right under federal law to compel AT&T, a fellow CLEC, to negotiate an interconnection agreement, the situation here is analogous to the one described by the FCC in the *T-Mobile Ruling.*

6. 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.

7. 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.

8. In the absence of either an interconnection agreement or any other reciprocal compensation arrangement between the parties, it is reasonable to require AT&T to compensate Pac-West for terminating ISP-bound traffic originating on AT&T's network at the minute-of-use and set-up rates set forth in the tariff described in FOF 10.

9. Under the circumstances of this case, it is not reasonable to require AT&T to pay Pac-West interest or late charges on the amounts computed pursuant to the preceding COL.

10. Pac-West's June 8, 2005 motion to set aside the submission of this case for the purpose of supplementing the record is moot and should be deemed denied.

O R D E R

IT IS ORDERED that:

1. Within 30 days after the effective date of this decision, AT&T Communications of California, Inc. shall pay to Pac-West Telecomm, Inc. (Pac-West), the sum of $7,115,014.16.

2. Pac-West may not collect interest or late-charges that would otherwise be due under its tariff, Schedule Cal. CLC 1-T, on the amount set forth in Ordering Paragraph 1.

3. Pac-West's June 8, 2005 motion to set aside the submission of this proceeding for the purpose of supplementing the record is denied.

4. This proceeding is closed.

This order is effective today.

Dated ____________________________, at San Francisco, California.