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Decision 01-11-067 November 29, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion Into Reciprocal Compensation for Telephone Traffic Transmitted to Internet Services Providers Modems.	Rulemaking 00-02-005 (Filed February 3, 2000)

OPINION ON PAC-WEST MOTION ON IMPLEMENTATION OF FCC ORDER ON INTERNET TRAFFIC

I. Background

On June 15, 2001, Pac-West Telecomm, Inc. (Pac-West) filed a motion in this docket for an order relating to Incumbent Local Exchange Carriers (ILEC) compliance with existing interconnection agreements and related measures. The motion was filed as a result of recent actions in response to the Order of the Federal Communications Commission (FCC) which establishes a rate structure for intercarrier compensation in handling calls to Internet Service Providers (ISPs).[1]

[1] *See Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, FCC 01-131 (rel. Apr. 27, 2001) (*FCC Order*).

On April 27, 2001, the FCC released its Order on Remand[2] establishing a new rate regime for Internet service provider (ISP) traffic. The order was published in the Federal Register on May 15, 2001, and became effective on June 14, 2001. The FCC declared that ISP-bound traffic constitutes "information access" and thus is not subject to the reciprocal compensation requirement of Section 251(b)(5) of the Telecommunications Act of 1996 (ACT). The FCC concluded that it has the authority under Section 201 of the Act to regulate ISP-bound calls and to establish inter-carrier compensation rules for such calls.

Under the FCC plan, reciprocal compensation rates for ISP-bound traffic are subject to declining rate caps over a 36-month period. Traffic exceeding a three-to-one ratio of terminating to originating traffic is presumed, unless proven otherwise, to be ISP-bound traffic subject to the FCC's rate structure. After the 36-month period, bill-and-keep compensation would apply to such traffic instead of reciprocal compensation.

While the new rate regime went into effect on June 14, 2001, for carriers entering into new or renegotiated interconnection agreements, the FCC envisioned prospective application of the new rates for existing interconnection agreements. The FCC stated:

> "The interim compensation regime we establish here applies as carriers re-negotiate expired or expiring interconnection agreements. It does not alter existing contractual obligations, except to the extent that parties are entitled to invoke contractual change-of-law provisions. This Order does not preempt any state commission decision regarding

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[2] *Order on Remand and Report and Order*, CC Docket No. 96-98 and CC Docket No. 99-68 (released April 27, 2001).

> compensation for ISP-bound traffic for the period prior to the effective date of the interim regime we adopt here."[3]

In its motion, Pac-West asks the Commission to address substantive questions as to whether the ILECs are properly implementing the provisions of the FCC Order. Pac-West's motion also raises jurisdictional questions regarding the proper role for this Commission relative to that of the FCC in resolving issues relating to implementation of the FCC Order. To the extent this Commission does have jurisdiction to implement the measures proposed by Pac-West, the question is whether Pac-West's proposed measures are procedurally appropriate and administratively efficient. We deny Pac-West's motion, in part, and grant it, in part. The motion is denied to the extent that it seeks to establish generic review and preapproval procedures as a condition of carriers' implementing the provisions of the FCC Order.

The motion is granted to the extent that it seeks confirmation that this Commission retains jurisdiction to adjudicate and enforce the terms of existing contracts relating to payment of reciprocal compensation (where change-of-law provisions do not provide for the immediate unilateral implementation of capped rates under the FCC Order).

II. Overview of Pac-West's Motion

In its motion, Pac-West asks the Commission to order each ILEC to take certain actions prior to any implementation of the FCC Order in California. Specifically, Pac-West seeks a Commission order requiring that before any ILEC may implement the FCC Order, it must first:

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[3] *Order on Remand,* ¶ 82.

- submit to the Commission in this proceeding, and to all certificated carriers in California, detailed plans for implementing the *FCC Order*;
- identify any California certificated carriers with whom it has an Interconnection Agreement and with which the ILEC does not propose to implement the FCC Order's rate caps on the same date and in the same manner as with any other carrier certificated in California;
- refrain from implementing any rates based upon the FCC Order until it in fact has offered effective and available rates for all Section 251(b)(5) applicable to ISP-bound traffic;
- honor its existing Interconnection Agreement obligations until modified in accordance with the terms of those agreements and the Commission's applicable rules; and
- establish memorandum accounts to track all out-of-balance traffic and related reciprocal compensation payments.

Finally, Pac-West requests that the Commission establish an expedited process for addressing challenges to the FCC's rebuttable presumption regarding the nature of any out-of-balance traffic.

Responses to the motion were filed on June 27, 2001. Opposition to the motion was expressed in responses of Pacific Bell Telephone Company (Pacific), Verizon California Inc. (Verizon), and Roseville Telephone Company (RTC). Support, in part, for the motion was expressed in responses filed by Focal Communications Corporation of California (Focal), AT&T Communications of California (AT&T) and AT&T Wireless.

The ILECs oppose the motion. Verizon cites four principal reasons for its opposition to the motion. First, Verizon claims that the FCC Order divests state commissions of jurisdiction to order the measures sought by Pac-West. Second, Verizon believes the actions sought by Pac-West would entail a rewriting of the FCC rules for implementing intercarrier compensation for Internet-bound traffic (which it believes would be imprudent and an unlawful infringement on FCC jurisdiction). Third, Verizon claims it has properly initiated every action required by the FCC to implement the order, and more. Fourth, Verizon believes that Pac-West's proposals would undermine the FCC's goal of transitioning "immediately away" from the existing ISP reciprocal compensation regime which Verizon views as "anticompetitive and anticonsumer."

In the event, however, that the Commission pursues the issues in the motion, Pacific argues that any procedural rules adopted should address the application of the FCC rate caps to all traffic, not just ISP-bound traffic, and should afford comparable rights to ILECs and CLECs.

AT&T supports the relief measures proposed in the motion (but does not concur with all of Pac-West's characterizations of the FCC Order). AT&T attached a letter ruling from the Maryland Public Service Commission, interpreting an interconnection agreement between Verizon and Core Communications, Inc. The Maryland Order concluded that, in the circumstances of that case, Verizon is not entitled to begin withholding reciprocal compensation payments until such negotiated amendments have been approved by the Maryland Public Service Commission.

AT&T Wireless supports Pac-West's request that ILECs adhere to existing obligations under their interconnection agreements. To the extent that revised language is required in a particular interconnection agreement, AT&T Wireless believes that the revisions should be filed as amendments by Advice Letter under Rule 6.2 of the Commission's Rules for Implementing the provisions of

Section 252 of the Act. AT&T Wireless opposes other proposals in the motion, however, arguing they are unnecessary and will only serve to delay implementation of the new "capped" rate structure. AT&T Wireless takes no position on the memo account proposal.

Focal supports the motion, arguing that the Commission could play a useful limited role in ensuring that the ILECs implement the FCC's Order in a uniform fashion in California. More specifically, before receiving the benefit of a reduced rate payable to CLECs for terminating Internet traffic, an electing ILEC must satisfy the condition that it offer to terminate all "§ 251(b)(5) traffic"[4] originated by other carriers at the same rate applicable to ISP-bound traffic.[5] Focal argues that Verizon cannot unilaterally implement the new rate caps without amending the underlying agreement. Focal's agreement with Verizon requires any amendment to be negotiated pursuant to effective notice and reduced to writing.

III. Disposition of Pac-West's Motion

A. Submission of Implementation Plans Parties Position

[4] Pursuant to the ISP Remand Order, "251(b)(5) traffic" now includes all telecommunications traffic, with the exception of access traffic delivered to an IXC or traffic delivered to an information services provider. *See* Footnote 177.

[5] ISP Remand Order ¶ 89.

Pac-West proposes that each ILEC desiring to implement the FCC Order in California be required to provide to the Commission and all interconnecting parties with "detailed implementation plans," including plans for satisfying the FCC's "fairness" condition. In other words, the FCC Order requires that an ILEC cannot benefit from paying the FCC's lower capped rates for ISP-bound traffic termination unless and until all other carriers within the state are permitted to pay the ILEC the same rate for termination of all Section 251(b)(5) traffic. Yet, Pac-West states that it is not aware that any ILEC has offered to amend its interconnection agreements in California to apply the lower capped rates to all traffic terminated by the ILEC.

Pac-West argues that it would be premature for any ILEC to implement the FCC's capped rates for ISP-bound traffic while continuing to require other carriers to pay higher rates for Section 251(b)(5) traffic contrary to the FCC's directive.

Focal claims that Verizon has made an "imperfect" attempt to elect the FCC price cap scheme in California, in that Verizon did not provide general concurrent notice to all California carriers of its intention to elect the FCC scheme for all traffic, as required by the FCC Order. In particular, Focal claims that Verizon's attempt to implement the FCC's capped rates was "imperfect" because it received letters addressed to Focal Communications Corporation of Washington and Focal Communications of Virginia, but did not receive a letter addressed to Focal Communications Corporation of California. Verizon contends that Focal's claim is misleading because: (1) the interconnection agreement between Verizon and Focal Communications Corporation of California expressly requires Verizon to send notices to Focal Communications Corporation – not Focal Communications Corporation of California; and (2) Verizon claims that it did in fact send a letter to Focal Communications Corporation, as required by the California interconnection agreement.

In its Opening Comments in response to the Draft Decision, Verizon attached a copy of a letter, dated May 14, addressed to Focal Communications Corporation. However, Focal notes that the initial May 14 notices sent by Verizon to Focal referenced only Virginia and Washington. Moreover, Focal states that it did not receive the letter attached to Verizon's Opening Comments, purportedly addressed to Focal Communications Corporation. But even if it had received such a letter, Focal argues it would be of little import since the FCC plan must be elected on a state-by-state basis and the exhibit to Verizon's comments does not indicate the state in which it seeks to invoke the plan. Focal has exchanged subsequent correspondence from Verizon in which Verizon ultimately clarified that it does seek to invoke the FCC plan in California. However, Focal argues this is more than merely "form over substance" as the effective date of Verizon's election has real economic consequence. Focal claims that Verizon may be attempting to "slow-roll" the implementation of lower rates for the wireless traffic that flow predominantly to it, while insisting upon an earlier effective date to cap the rate on traffic it sends to CLECs. Focal claims that Verizon is ignoring a central condition of the FCC's order: that it not attempt to implement a cap on the rate it will pay for Internet-bound traffic until it effectively offers to terminate CLEC-originated traffic at the same rate.

Focal further claims that Verizon's proposed offer to amend the existing agreement to implement the FCC rate caps for ISP traffic terminated by CLECs, Verizon has failed to offer to terminate the CLECs' 251(b)(5) traffic at the same rate as is applicable to the Internet traffic as required by the FCC Order. Instead, Verizon has merely invited the CLECs to negotiate a future amendment to reduce the rate paid by the CLECs to Verizon for termination of 251(b)(5) traffic originated by CLECs. Thus, Focal claims that Verizon is improperly seeking to reduce the rate that it pays to CLECs for traffic that it *originates* prior to reducing on a concurrent basis the rate that Verizon receives for traffic that it *terminates*.

Verizon objects to Pac-West's proposal, arguing that this Commission lacks jurisdiction to impose additional requirements beyond those already contained in the FCC Order. Verizon further claims that it has properly implemented the provisions of the FCC Order. Verizon claims that on May 15, 2001, it sent a letter to every CLEC and CMRS provider with which it has an interconnection agreement in California, offering an optional rate plan to apply the FCC's rate caps to all Section 251(b)(5) traffic. Verizon quotes an excerpt from the letter indicating that it has offered to mirror the FCC's capped rates for ISP traffic and to apply those rates to all local traffic. The offer in the May 15 letter of precisely mirrored rates was referenced again in a second letter sent by Verizon on June 21, 2001 to every California CLEC with which Verizon has a resale or facilities-based interconnection agreement. Verizon claims it has the right to unilaterally implement the capped rates through the change-of-law provisions in its existing interconnection agreements.

Discussion

The FCC Order sets forth the process to be followed by carriers with respect to implementation of the FCC rate structure. The ILECs are already bound by the requirements of FCC orders as provided for within federal jurisdiction. There are no provisions within FCC rules that contemplate additional state commission rules or preapproval before those provisions may take effect. Therefore, we find no basis to impose additional layers of generic state filing requirements and preapprovals before carriers may otherwise implement the provisions of the FCC rate structure.

Pac-West has not justified the administrative burden or delay resulting from its proposals for comprehensive submissions of detailed implementation plans and identification of California carriers with which the ILEC does not propose to implement the rate order. Moreover, Pac-West has not explained what specific form such "detailed plans for implementing the FCC Order" would take, or what "details" would require review or approval by this Commission in light of the jurisdiction over ISP traffic exercised by the FCC. Even assuming the FCC Order contemplated additional state review and preapproval, we question whether it is the best use of this Commissions scarce time and resources to administer the preapproval process proposed by Pac-West.

While we decline to adopt a generic preapproval process as proposed by Pac-West, we do agree that this Commission retains jurisdiction to resolve disputes relating to the reciprocal compensation terms of interconnection agreements that were in force prior to the effective date of the FCC Order. While the FCC has asserted jurisdiction over intercarrier compensation for ISP traffic for prospective interconnection agreements, the FCC has also stated that reciprocal compensation provisions of preexisting interconnection agreements remain in effect until contract expiration, "except to the extent that parties are entitled to invoke contractual change-of-law provisions." Therefore, until or unless existing contracts expire (except where contractual change-of-law provisions apply), carriers remain subject to ISP reciprocal compensation provisions in existing contracts.

Accordingly, we conclude that Verizon has taken an overly broad interpretation of its unilateral discretion to implement the FCC rate caps immediately in all of its interconnection agreements merely by sending a letter to interconnecting carriers stating its intention to do so. The capped rates may be applied to previously existing contracts only to the extent that under the pricing terms in such contracts, parties are entitled to invoke change-of-law provisions. This Commission retains jurisdiction to enforce compliance with the reciprocal compensation terms of existing interconnection agreements that do not contain change-of-law provisions. The question of whether a change-of-law provision exists is a question that depends on the particular language in each interconnection agreement, and is not the proper subject for a generic rulemaking such as this.

The recourse for carriers that cannot agree on whether the FCC rate caps may be invoked immediately in a particular interconnection agreement would be to initiate legal action through an appropriate dispute resolution process. Carriers have continuing rights to file formal complaints with this Commission or to seek dispute resolution under applicable contract provisions to the extent they believe a carrier is violating any contractual provisions or taking unlawful actions. For example, Pac-West has availed itself of the dispute resolution process under its interconnection agreement with Verizon relating to the implementation of the FCC rate structure under the FCC Order.[6]

Any other carrier that believes that an ILEC is improperly changing the terms of an existing interconnection agreement similarly may seek legal recourse against the offending carrier. Such disputes, however, essentially involve enforcement of existing rules and laws, rather than generic rulemaking.

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[6] *See* motion for dispute resolution filed by Pac-West dated August 3, 2001 in R.95-04-043/I.95-04-044. The contract dispute between Pac-West and Verizon as to what constitutes a "change-of-law" provision is currently before the Commission in C.01-10-036.

As noted by AT&T Wireless, the Commission also has rules in place concerning the filing of amendments to interconnection agreements as embodied in Resolution ALJ-181, effective October 5, 2000 as provided for under

Commission Rule 6.2. Carriers are obliged to comply with those Commission rules for any contract amendments that are executed, including amendments to invoke the rate cap provisions of the FCC Order. In its advice letter, the carrier shall verify compliance with the FCC Order by confirming that it has offered to all carriers statewide to exchange all traffic both originating and terminating, and including Internet-bound traffic, at the FCC's capped rates. To the extent that notice of advice letter filings appears in the Commission's Daily Calendar, all carriers within California subject to interconnection agreements will thereby receive notice of the proposed interconnection agreement amendments.

B. Memorandum Accounts

Parties' Positions

Pac-West, in its motion, also asks for an order requiring all ILECs to establish and maintain memorandum accounts to track the amount of out-of-balance traffic for which they are paying reduced reciprocal compensation payments pursuant to the FCC's rate structure. If the FCC Order is stayed or ultimately reversed on appeal, Pac-West argues, memorandum accounting would facilitate calculating the amounts owed to carriers.

Pacific responds that any memorandum accounting requirements should apply to all traffic so that all parties will be equally protected in the event that the FCC Order were to be overturned. Verizon argues that no memorandum accounting is necessary since both parties already have ready access to the information to derive the intercarrier compensation paid for out-of-balance traffic.

Discussion

We conclude that no requirement for memorandum accounting is necessary in this instance as a basis to preserve carriers' rights in the event the FCC Order were stayed or reversed. As noted by Verizon, there is no need for imposing additional accounting requirements on carriers since the information needed to derive the amount of intercarrier compensation is already available to both the ILEC and CLEC. The payment of compensation under the price caps does not require any separate calculations to identify Internet-bound traffic, but is merely based on a rebuttable presumption that traffic exceeding a three-to-one ratio of terminating to originating traffic is Internet-bound. Accordingly, we decline to impose memorandum accounting requirements on the ILECs as proposed by Pac-West.

C. Process to Rebut the 3:1 Ration Presumption

Parties Position

In its Order on Remand, the FCC adopted a rebuttable presumption "that traffic delivered to a carrier, pursuant to a particular contract, that exceeds a 3:1 ratio of terminating to originating traffic is ISP-bound traffic subject to the compensation mechanism" set forth in the FCC Order. The FCC further ruled that an individual carrier may rebut the presumption "by demonstrating to the appropriate state commission that traffic above the 3:1 ratio is in fact local traffic delivered to non-ISP customers." For traffic below the 3:1 ratio, the originating carrier likewise can rebut the presumption that the traffic is not ISP-bound "by demonstrat[ing] to the state commission that traffic it delivers to another carrier is ISP-bound traffic, even though it does not exceed the 3:1 ratio.

In its motion, Pac-West has asked for an expedited dispute resolution process for addressing challenges to the FCC's rebuttable presumption regarding the nature of any out-of-balance traffic. Pacific argues that any such process should apply equally if an ILEC wants to challenge the FCC's rebuttable presumption that traffic below a 3:1 ratio is not Internet-bound traffic.

Discussion

Pac-West provided no specific details in its motion as to how it would propose that an expedited dispute resolution process regarding the 3:1 ratio be implemented. Therefore, further study will be necessary before a final determination can be made concerning the details of any expedited process that may be appropriate to resolve disputes over the 3:1 ration presumption of traffic imbalance under the FCC Order. There is no basis, however, to delay carriers' implementation of the FCC Order merely because no specific dispute resolution process has been established to permit carriers to rebut the 3:1 presumption.

IV. Comments on Draft Decision

The draft decision of the Administrative Law Judge in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on November 19, 2001, and reply comments were filed on November 26, 2001. We have reviewed the comments, and taken them into account, as appropriate in finalizing this order.

Findings of Fact

1. FCC by its Order released on April 27, 2001 established rules under which carriers could implement a rate structure for intercarrier compensation in handling calls to ISPs.

2. The FCC declared that ISP-bound traffic constitutes "information access" and thus is not subject to the reciprocal compensation requirement of Section 251(b)(5) of the Telecommunications Act of 1996.

3. The FCC concluded that it has the authority under Section 201 of the Act to regulate ISP-bound calls and to establish inter-carrier compensation rules for such calls.

4. Before receiving the benefit of the reduced capped rates payable to CLECs for terminating ISP traffic, an electing ILEC must satisfy the condition under the FCC Order that it offers to terminate all Section 251(b)(5) traffic originated by other carriers at the same rate applicable to ISP-bound traffic.

5. Verizon sent a letter on May 15, 2001 to CLEC and CMRS providers with which Verizon has an interconnection agreement, notifying the carriers of Verizon's offer to mirror the capped rates prescribed in the FCC Order for Internet-bound traffic, and to apply them to reciprocal compensation rates for local traffic.

6. Focal exchanged correspondence with Verizon subsequent to May 15, 2001, in which Verizon ultimately clarified that it does seek to invoke the FCC rate cap plan in California.

7. The FCC Order states that reciprocal compensation provisions of existing interconnection agreements remain in effect until the expiration date of the contract, "except to the extent that parties are entitled to invoke contractual change-of-law provisions."

8. There is no need for imposing memorandum accounting requirements on carriers to track out-of-balance traffic and intercarrier compensation payments since the information needed to derive the amount of intercarrier compensation is already available to carriers.

9. Pac-West provided no specific details in its motion as to how it would propose that an expedited dispute resolution process regarding the 3:1 ratio be implemented.

Conclusions of Law

1. To the extent that any carrier seeks to implement the FCC rate structure for a particular interconnection agreement before the contract expiration date (and where no change-of-law provision applies), this Commission retains jurisdiction to enforce the provisions of the existing contract, consistent with the FCC Order.

2. The question of whether a change-of-law provision exists that permits implementation of the FCC rate caps prior to expiration of the contract is a question that depends on the language in a particular interconnection agreement, and is not the proper subject of a generic rulemaking such as this.

3. Any disputes as to whether an ILEC has properly implemented the FCC capped rates consistent with FCC requirements should be addressed in the context of a specific interconnection agreement as an enforcement action, rather than by adopting additional rules in this generic proceeding.

4. Pac-West has not justified the administrative burden that would result from adopting its proposals for comprehensive submissions of detailed implementation plans and identification of California carriers with which the ILEC does not propose to implement the rate order.

5. Further study will be necessary before a final determination can be made concerning the details of any expedited process that may be appropriate to resolve disputes over the 3:1 ration presumption of traffic imbalance under the FCC Order.

6. There is no basis to delay carriers' implementation of the FCC Order merely because no specific dispute resolution process has been established to permit carriers to rebut the 3:1 presumption.

O R D E R

IT IS ORDERED that:

1. Pac-West Telecomm, Inc.'s (Pac-West) motion is granted in part and denied in part.

2. The motion is denied to the extent that it seeks to establish generic review and preapproval procedures as a condition of carriers' implementing the provisions of the Federal Communications Commission Order.

3. The motion is granted to the extent that it seeks confirmation that this Commission retains jurisdiction to adjudicate and enforce the terms of existing contracts relating to payment of reciprocal compensation (where change-of-law provisions do not provide for the immediate implementation of capped rates under the FCC Order).

4. Any contract amendments to an interconnection agreement to invoke the rate cap provisions of the FCC Order shall be filed by advice letter as provided for under Rule 6.2 of Resolution ALJ-181. In such advice letters, carriers shall verify compliance with the FCC Order, confirming that they have offered statewide to all carriers to exchange all traffic both originating and terminating, and including Internet-bound traffic, at the FCC's capped rates.

5. To the extent Pac-West seeks a Commission order requiring ILECs to file detailed implementation plans and identification of carriers with which it is not implementing the rate caps, and to require memorandum accounting, the motion is denied.

6. Pac-West's request for an expedited dispute resolution process for addressing challenges to the FCC's rebuttable presumption regarding the nature of any out-of-balance traffic shall be deferred for further study.

This order is effective today.

Dated November 29, 2001, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners