

Decision 02-01-062 January 23, 2002

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

Verizon California, Inc. (U 1002 C)

Complainant,

vs.

Pac-West Telecomm, Inc.,

Defendant.

(ECP)

Case 01-10-036

(Filed October 15, 2001)

**ORDER DENYING THE COMPLAINT OF VERIZON CALIFORNIA INC.  
AGAINST PAC-WEST TELECOMM, INC.**

**Summary**

In this decision, we deny the complaint of Verizon California Inc. (Verizon) against Pac-West Telecomm, Inc. (Pac-West). The complaint challenged an Administrative Law Judge's (ALJ) Ruling prohibiting Verizon from unilaterally implementing new rates established by the Federal Communications Commission (FCC) for delivery of Internet-bound telephone traffic. Verizon is directed to pay Pac-West all amounts improperly withheld within three business days of this decision.

**Procedural Background**

This matter comes before the Commission pursuant to the dispute resolution procedures set forth in Article 13 of the Verizon/Pac-West Interconnection Agreement, dated June 21, 1996 (Agreement). Article 13

provides that if Verizon and Pac-West are unable to resolve a dispute arising under the Agreement, either party may invoke the dispute resolution procedure set forth in Commission Decision (D.) 95-12-056. Under the procedure, in the event of a dispute over terms of an interconnection agreement, the parties must first try to resolve the matter informally at the executive level. If that is unsuccessful, a party may file a motion seeking mediation before an ALJ. If mediation fails, the ALJ then directs the parties to file pleadings and rules on the dispute. If either party disagrees with that ruling, the party may contest the ruling by filing a formal complaint<sup>1</sup> with the Commission. *See* D.95-12-056, Ordering Paragraph 11; 63 CPUC2d 700, 749-50.

In accord with the process, on August 1, 2001, Pac-West filed<sup>2</sup> a motion for dispute resolution. On September 27, 2001, the assigned ALJ issued a ruling in favor of Pac-West. On October 15, 2001, Verizon filed this complaint. Pac-West responded on November 9, 2001. Identifying the question at issue to be one of law rather than that of fact, the parties waived evidentiary hearings. The presiding ALJ in this proceeding held oral argument on November 26, 2001.

### **The Federal Communications Commission Order and the ALJ Ruling**

On April 27, 2001, the FCC released its *Order on Remand*<sup>3</sup> establishing a new intercarrier rate structure for Internet service provider (ISP) traffic. The

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<sup>1</sup> The complaint is processed in accordance with the expedited complaint procedures of Rule 13.2 of the Commission's Rules of Practice and Procedure (Rules), as modified by D.95-12-056.

<sup>2</sup> The motion was filed in the docket of D.95-12-056, Rulemaking (R.) 95-04-043 and Investigation 95-04-044 as well as in R.00-02-005.

<sup>3</sup> In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 and Intercarrier Compensation

*Footnote continued on next page*

order was published in the Federal Register on May 15, 2001, and became effective on June 14, 2001. In its Order, 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 Communications Act<sup>4</sup> (the Act). The FCC concluded that it has the authority under Section 201 of the Act to regulate ISP-bound calls and to set the intercarrier 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 structure 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 held:

"The interim compensation regime we establish here applies as carriers renegotiate 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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for ISP-Bound Traffic, CC Docket No. 99-68, Order on Remand and Report and Order (released April 27, 2001) (*Order on Remand*).

<sup>4</sup> 47 U.S.C. § 251(b)(5), as amended by the Telecommunications Act of 1996.

compensation for ISP-bound traffic for the period prior to the effective date of the interim regime we adopt here."<sup>5</sup>

Verizon notified Pac-West by letter dated May 14, 2001 that the FCC Order constituted a material change of law, and advised it would "not pay any amounts invoiced by [Pac-West] that exceed the applicable rate caps or payment limits" prescribed by the Order, effective June 14, 2001. Before the ALJ presiding over the dispute resolution, Verizon argued that the FCC plan "is self-effect[ua]ting by operation of the provisions of Pac-West's interconnection agreement, including its change-of-law provisions."<sup>6</sup> Verizon identified the relevant change-of-law provision in the Agreement to be:

"This Agreement shall at all times be subject to such changes or modifications by the California Public Utilities Commission (CPUC or Commission) or Federal Communication [sic] Commission as either may, from time to time, direct [sic] the exercise its jurisdiction. If any such modifications render the Agreement inoperable or create any ambiguity or requirement for further amendment to the Agreement, the Parties will negotiate in good faith to agree upon any necessary amendments to the Agreement."<sup>7</sup>

The ALJ Ruling distilled the essence of the Verizon/Pac-West dispute to be whether the Agreement contains a "change of law provision" that would authorize Verizon, without any other triggering event, to impose on Pac-West the intercarrier rate structure set out in the FCC Order. It found the language in

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<sup>5</sup> Order on Remand, ¶ 82.

<sup>6</sup> *Response to Pac-West Motion*, R.00-02-005 (June 27, 2001). *See also*, Verizon Complaint, Exhibit F: Verizon Letter to Pac-West, dated June 21, 2001.

<sup>7</sup> *Telecommunications Facility Interconnection Agreement*, dated as of June 21, 1996.

question, which appears in the preamble to the Agreement, to suggest " a statement of jurisdiction more than it does a change of law."<sup>8</sup> More importantly, the Ruling noted, the preamble paragraph looks to a change or modification of the interconnection agreement when the FCC directs it. Regarding the existing pact, the FCC's "direction" is to make the change in ISP-bound rates when the two carriers renegotiate their agreement. The ALJ Ruling held that by the express terms of the Agreement, Verizon is not free on its own to amend the terms of its agreement with Pac-West until notice of cancellation and renegotiation. The FCC Order is not self-executing for existing interconnection agreements.

### **Verizon's Complaint and Pac-West's Response**

Contesting the ALJ Ruling, Verizon insists that the language in the second introductory paragraph of the Agreement is "the first substantive provision" and a "classic change-of-law provision" within the meaning of the FCC's Order. Verizon Complaint, ¶ 39 at 18. It argues that Pac-West may have distracted and confused the ALJ with selective quotes from the Order and last-minute comparisons between the general change-of-law provisions in the Agreement and more specific ones drafted years later. Verizon further maintains that Pac-West's refusal to agree to Verizon's wording of amendments incorporating the Order, and countering with submission of its own preferred language, is evidence of Pac-West's failure to negotiate in good faith and determination to delay the Order's implementation. Verizon emphasizes the good public policy objective of the FCC's action, and urges the Commission to look to the plain meaning of the Order and the Agreement.

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<sup>8</sup> *Administrative Law Judge's Ruling Granting Motion of Pac-West Telecomm, Inc.* at 5.

Pac-West responds that the "[p]reamble paragraph is not a change of law provision," and Verizon may not unilaterally impose the rate structure set forth in the FCC Order upon it until such time as the Agreement expires or is replaced with a new interconnection agreement. Citing California case law, Pac-West asserts that language in a preamble "cannot create any right beyond those arising from the operative terms of the document".<sup>9</sup> It notes that the Agreement contains a specific operative provision (Section 9.02), which includes language very similar to that in the preamble, but expressly excludes any reference to FCC decisions, and applies to Commission decisions only. Pac-West contends that the language in the preamble paragraph is merely a general jurisdictional statement, while Section 9.02 is a substantive contractual provision binding both parties with respect to changes ordered by the Commission, but not the FCC.

It submits that nothing in the FCC Order authorizes any party to impose the Order unilaterally if the effective interconnection agreement provides to the contrary, or requires written amendments. Article 16 of the Verizon/Pac-West Agreement requires "[a]ny amendment, modification, or supplement" be in writing. Pac-West argues that under the instant dispute resolution process, Verizon bears a heavy burden of proof in this proceeding that it has not met. Finally, Pac-West asks the Commission to adopt and approve the ALJ Ruling in its entirety, and explicitly order Verizon to make immediate payment of all amounts owed; notwithstanding any intentions to further appeal or seek rehearing of this matter.

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<sup>9</sup> Pac-West Response at 12, footnote 23: "*See Westland Water District v. United States*, 850 F. Supp. 1388, 1406 (E.D. Ca.1994), citing *Abraham Zion Corp. v. Leblow*, 761 F.2d 93, 103 (2d Cir. 1985); *see also Patmont Motor Werks v. Gateway Marine Inc.*, 1997 U.S. Dist. LEXIS 20877 at \*16 (N.D. Ca. 1997)."

## Discussion

The language of the preamble paragraph in the Verizon/Pac-West agreement does not constitute a change-of-law provision within the meaning of the FCC's Order. As the ALJ Ruling spelled out, the question is not *whether* the agreement here is subject to the FCC rates – clearly it is. The question is *when* this interconnection agreement will be subject to those rates.

We note, as Pac-West points out, that Section 9.02 of the Agreement includes specific language that binds both parties regarding changes ordered by this Commission, but excludes any reference to FCC decisions. We disagree with Verizon's argument that California law requires the preamble paragraph to be given effect over Section 9.02 of the Agreement. Such an interpretation would nullify the explicit language of not only Section 9.02, which expressly excludes FCC orders from its scope, but also Section 16, which requires that amendments to the agreement be in writing.<sup>10</sup>

The FCC Order provides that the Agreement will be subject to its restructured rates at the time “carriers renegotiate expired or expiring interconnection agreements.” To find otherwise, requires the Commission to adopt an interpretation of the Agreement that is unreasonable and strained at best. Instead, we adopt and approve the ALJ Ruling in its entirety.

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<sup>10</sup> Still, Verizon is not without options. It is free to terminate the Agreement pursuant to Section 9.02 and renegotiate a satisfactory replacement interconnection agreement within 125 days from the date of termination. Or, it can trigger 47 U.S.C. § 252, as amended by the Federal Telecommunications Act of 1996, and obtain a Commission-adopted arbitrated replacement agreement within nine months.

**Comments on Draft Decision**

While not required by Public Utilities Code Section 311(g) and Rule 77.7 of the Rules, the draft decision of ALJ Reed in this matter was mailed to the parties in order to provide a complete record. Comments were filed on December 27, 2001, and reply comments were filed on January 2, 2002. We have reviewed the comments, and taken them into account, as appropriate, in finalizing this order.

**IT IS ORDERED** that:

1. Verizon California Inc. (Verizon) shall not be entitled without agreement by Pac-West Telecomm, Inc. (Pac-West) or appropriate order by this Commission or by the Federal Communications Commission (FCC) to apply the FCC rate caps to Internet service provider (ISP)-bound traffic in lieu of reciprocal compensation rates specified under Section 8.01(2) of the *Telecommunications Facility Interconnection Agreement*, dated as of June 21, 1996 (interconnection agreement).
2. Verizon shall pay in full the reciprocal compensation charges specified under Section 8.01(2) of the interconnection agreement for all ISP-bound traffic for as long as the interconnection agreement is in effect and is not modified by written amendment or by appropriate direction of the FCC or this Commission.



3. Within three business days following the issuance of this order, Verizon shall pay Pac-West all amounts as required by the interconnection agreement it has withheld from Pac-West based upon its position that it has implemented the FCC's Order on Remand and Report and Order in Common Carrier Docket Nos. 96-98 and 99-68, together with interest thereon at the three-month commercial paper rate.

4. This proceeding is closed.

This order is effective today.

Dated January 23, 2002, at San Francisco, California.

LORETTA M. LYNCH

President

HENRY M. DUQUE

RICHARD A. BILAS

CARL W. WOOD

GEOFFREY F. BROWN

Commissioners