Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of Verizon California Inc. (U-10021-C) Petition for Arbitration with Pac-West Telecomm, Inc. (U5266-C) Pursuant to Section 252(b) of the Telecommunications Act of 1996.	Application 02-06-024 (Filed June 12, 2002)

DECISION GRANTING VERIZON CALIFORNIA INC.'S MOTION TO ADOPT THE CONFORMED INTERCONNECTION AGREEMENT AS SUBMITTED BY VERIZON

Summary

In this decision we grant Verizon California Inc's (Verizon's) motion to adopt the conformed interconnection agreement as submitted by Verizon.

Application (A.) 02-06-024 is closed.

Background and Procedural History

Pursuant to our authority under Subsection 252(e)(1) of the Telecommunications Act of 1996 (the Act), in Decision (D.) 03-05-075 we approved the proposed interconnection agreement (ICA) between Verizon and Pac-West Telecomm, Inc. (Pac-West), following arbitration of certain issues the parties could not resolve through negotiation.

The history of the dispute, and a complete discussion of the parties and disputed issues, are set forth in detail in the Final Arbitrator's Report (FAR), which was filed on February 10, 2003.

Ordering Paragraph (OP) 4 in D.03-05-075 ordered the parties to modify the ICA in conformance with the Commission's order and to file it in this docket within 7 days. The signed ICA was to become effective on the date filed.

The conformed ICA was timely filed on May 29, 2003. The parties agreed that the ICA should become effective on that date subject to the dispute highlighted in Interconnection Attachment Section 7.2. At the same time, Verizon filed a motion on June 6, 2003 to adopt the ICA as submitted by Verizon. The conformed ICA disposed of all disputed language, with the exception of language in Interconnection Attachment, Section 7.2.

Pac-West filed a response to Verizon's motion on June 23, 2003, and, with the concurrence of the assigned Administrative Law Judge, Verizon filed a Reply on July 9, 2003.

Disputed Language in Interconnection Attachment, Section 7.2

In D.03-05-075, we found that Verizon should receive transport charges from Pac-West on calls destined to Pac-West customers with disparate rating and routing point, also known as "Virtual NXX" (VNXX) traffic, pending FCC resolution of the issue in the *Intercarrier Compensation NPRM*.[1]

The parties disagree as to how the ICA should reflect that outcome. Verizon proposes the following language for Interconnection Attachment, § 7.2:

> Effective January 1, 2004, Verizon is entitled to receive UNE transport compensation for its facilities used in the carriage of VNXX Traffic from <u>origination to their point of interconnection</u>.[2]

Pac-West proposes the following language for §7.2:

> Effective January 1, 2004, Verizon is entitled to receive UNE transport compensation for its facilities used in the carriage of

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[1] *Notice of Proposed Rulemaking*, In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, FCC 01-032 (Rel. April 27, 2001).

[2] Verizon's proposed language in § 7.2 is underscored, while Pac-West's is bold.

> **intrastate** VNXX Traffic from **the originating Central Office to the POI associated with where Pac-West delivers traffic to its customer, less 16 miles.**

Verizon asks the Commission to accept Verizon's conformed language in Interconnection Attachment § 7.2 because it is taken directly from the Commission's order. According to Verizon, Pac-West proposes to reduce the transport it would pay in the event it chooses not to establish Points of Interconnection (POIs) at network tandems. First, Pac-West proposes to limit compensation for Verizon's transport of VNXX traffic to only Pac-West's "intrastate VNXX Traffic." Second, Pac-West proposes to deduct 16 miles of transport on all VNXX calls Verizon transports for Pac-West.

Verizon asserts that it is not clear what Pac-West means by "intrastate VNXX traffic." The term is not defined anywhere in the ICA, and neither Pac-West nor Verizon ever referred to "intrastate VNXX traffic" in the proceeding. This is contrary to the order, which explicitly prescribes transport payments on all VNXX calls, regardless of whether they are voice or Internet-bound calls.

According to D.03-05-075, "[t]o avoid paying the costs associated with transport from origination to their point of interconnection, Pac-West shall disclose to Verizon the percentage of disparately rated and routed traffic that was returned and terminated within the rate area where the local call originated." (Decision at 12.) Verizon asserts that the Commission directed the parties to "modify the agreement in conformance with" the Commission's Order. Verizon's conforming language, which uses the actual words of the order is unquestionably consistent with this directive.

Verizon views Pac-West's proposal to deduct 16 miles for purposes of calculating the amount of transport compensation due on each VNXX call as a

substantive deviation from the language of the order. None of the Commission's previous arbitration decisions on compensation for VNXX traffic, create the 16-mile's exemption Pac-West proposes.

Pac-West responds that Pac-West's proposed language to expressly limit call origination charges to VNXX traffic that is intrastate in nature is necessary because this Commission does not have jurisdiction over compensation for interstate traffic. According to Pac-West, if Verizon has adequately implemented the Federal Communications Commission's (FCC) rate cap plan for traffic presumptively bound to Internet Service Providers (ISPs) over which the FCC has taken exclusive jurisdiction, then any call origination charges imposed by Verizon on Pac-West may not apply to presumptively ISP-bound traffic which is jurisdictionally interstate and subject to the FCC's plan.

Pac-West questions whether Verizon has implemented the FCC Plan from the *ISP Remand Order* in California. According to Pac-West, it is logically inconsistent for Verizon to contend that the Commission lacks jurisdiction to impose a different reciprocal compensation rate applicable to ISP-bound traffic, but it has jurisdiction to impose call origination charges on the same traffic. Pac-West asserts that the Commission should clarify that it did not intend to impose rates or charges on that portion of Pac-West's VNXX traffic that is subject to the FCC's exclusive jurisdiction.

Pac-West also asserts that Verizon should not receive transport charges for local VNXX traffic within the 16-mile radius of the originating local calling area. According to Pac-West this would amount to double recovery by Verizon because the transport of local calls within the local exchange are covered in the charges Verizon receives from its local exchange subscribers. Pac-West asserts that its approach is consistent with the decision's view regarding

compensation for the long-haul nature of the VNXX traffic. Furthermore, it is consistent with SBC California's (SBC's) view on the same subject. Pac-West notes that in the conformed ICA that resulted from the arbitration between SBC and Pac-West, SBC proposed language that imposed transport and switching charges on VNXX traffic "less 16 miles" to acknowledge that it is only the "extra" transport, beyond the local calling area, for which they sought compensation.

Pac-West asserts that Verizon's reliance on language in prior Commission decisions for its insistence that Verizon may charge for the 16 miles of transport within the rate center area is misplaced. Pac-West's cites key language in the AT&T arbitration decision:

> PACIFIC is entitled to receive tandem switching and transport compensation at TELRIC prices, for its facilities used in the carriage of traffic from the rate center where the calling party physically resides to the point of interconnection closest to the switch used for terminating calls to the NXX rate center where the call terminates.[3]
>
> Further: the term "Rate Center" is defined in the ICA as follows:
>
> "Rate Center" identifies the specific geographic point and corresponding geographic area which are associated with one or more particular NPA-NXX codes which have been assigned to a LEC (or CLEC) for its provision of Exchange Services.[4]

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[3] *Application by AT&T Communications of California, Inc. et al. (U 5002 C) for Arbitration of an Interconnection Agreement with Pacific Bell Telephone Company (U 1001 C)Pursuant to Section 252(b) of the Telecommunications Act of 1996,* D.00-08-011 at 14.

[4] Interconnection Agreement between Pacific Bell Telephone Company and AT&T Communications of California, Inc. (June 27, 2000).

Pac-West concludes that any transport and switching charges that SBC could charge AT&T was from the outer point of the rate center area, *i.e.*, from the originating central office to the POI, "less 16 miles." Pac-West asserts that Verizon is incorrect to state that the decision "requires payment of UNE transport from origination to their point of interconnection" because that is not stated anywhere in the decision, nor is "origination" defined in the decision as equating to the originating Central Office, or originating Verizon switch.

Verizon responds to Pac-West stating that this Commission is clear that Pac-West should pay transport for Internet-bound VNXX calls. In so ruling, the Commission expressly recognized that Pac-West's VNXX traffic would likely be Internet-bound and found it "irrelevant whether the traffic Pac-West terminates to its customer is a voice call, or is handed off to the Internet or a private network." According to Verizon, those findings defeat Pac-West's argument that the Commission's order recognized a distinction, for compensation purposes, between interstate and intrastate VNXX calls.

Verizon points out that at the same time the Commission ordered compensation for VNXX traffic—including Internet-bound VNXX traffic—the Commission approved arbitrated contract language implementing the arbitrator's finding that "Verizon may implement the reciprocal compensation rate caps for presumptively ISP-bound traffic set forth in the FCC's *ISP Remand Order*." Thus, the Commission's order unequivocally ordered Pac-West to pay transport charges for VNXX traffic even if it is destined to the Internet and even though Verizon has implemented the FCC's interim rate regime. Verizon asserts that Pac-West's proposed language shows its effort to alter the Commission's order by asking the Commission to approve new contract language prohibiting Verizon from charging transport on Internet-bound VNXX traffic. Verizon sees

Pac-West's request as a thinly veiled demand that the Commission reconsider its order finding it "irrelevant whether the traffic Pac-West terminates to its customer is a voice call, or is handed off to the Internet or a private network." Verizon concludes that the Commission's order plainly required Pac-West to pay transport for Internet-bound VNXX calls and the conformed arbitration agreement must reflect that requirement.

Verizon asserts that its decision to implement the FCC's interim rate regime does not prevent the Commission from ordering Pac-West to pay transport charges for Internet-bound VNXX traffic. Nor is the Commission's order contrary to the *ISP Remand Order*, as Pac-West argues. Pac-West mistakenly claims that Verizon's decision to implement the FCC's interim rate regime deprives the Commission of jurisdiction to establish rates applicable to interstate traffic. According to Verizon, this argument confuses the concepts of jurisdiction and preemption.

As the Ninth Circuit Court of Appeals recently explained in *Pacific Bell v. Pac-West Telecomm,*[5] the Act changed the division of labor between the FCC and state commissions, granting the FCC certain authority over intrastate matters governed by the states but also granting state commissions "limited defined authority over interstate traffic" under §§ 251 and 252 of the Act. The *ISP Remand Order* preempts what compensation an originating carrier can be required to pay a carrier to which it sends certain Internet-bound traffic. However, the FCC has not exercised exclusive, preemptive jurisdiction over what compensation the CLEC must pay the ILEC for use of its network in

[5] 325 F.3d. 1114, 1119-1120 (9th Cir. 2003).

providing VNXX service to ISPs. Federal law does not, as Pac-West argues, prevent the Commission from ordering Pac-West to pay transport charges for Internet-bound VNXX traffic.

Verizon also asserts that the Commission should reject Pac-West's attempt to create a 16-mile exception in its order requiring transport compensation. The Commission's order requires transport compensation "from origination to their point of interconnection." Pac-West claims to have discerned that the Commission's intent was to provide transport only for the long haul portion of the VNXX traffic, but that is not what the Commission said in its order.

Pac-West suggests that the Commission reconsider ordering Pac-West to pay transport from origination because Pacific Bell voluntarily agreed to the 16-mile exception. Verizon states that Pacific' voluntary agreement to a contract provision in a separate arbitration provides no legitimate basis for the reconsideration Pac-West now seeks.

In addition, Verizon finds Pac-West's complaint that the term "origination" is not defined in the order to be without merit, saying that Pac-West does not contend that the term is ambiguous. The use of the term is consistent with that in the GNAPs/Verizon/Pacific arbitration, namely the end office switch or central office serving the originating caller.

Discussion

First we will examine the issue of jurisdiction. We look to the Ninth Circuit's opinion in *Pacific Bell v. Pac-west Telecomm* as the definitive source on that issue. The court found that the CPUC did not exceed its statutory authority by approving the payment of reciprocal compensation for ISP calls, saying:

> Indeed, following the D.C. Circuit's *vacatur* of its Declaratory Ruling, the FCC itself abandoned the distinction between local

> and interstate traffic as the basis for determining whether reciprocal compensation provisions in interconnection agreements apply to ISP-bound traffic.

Clearly, the Ninth Circuit's opinion supports our conclusion that this Commission has the authority under § 252 of the Act to approve an interconnection agreement that includes provisions for reciprocal compensation for calls to ISPs. It is immaterial whether that traffic is intrastate or interstate. Charges apply to all VNXX traffic regardless of whether the traffic is compensated at rates determined by the FCC or by the Commission. Therefore, we deny Pac-West's proposal to add the qualifier that only intrastate VNXX traffic is included.

Pac-West questions whether Verizon has implemented the FCC's *ISP Remand Order*, but the ICA (Interconnection Attachment § 11 "Reciprocal Compensation for Local and ISP-Bound Traffic) tells a different story. The rates shown in § 11.3 are identical to the rate caps shown in ¶ 78 of the FCC's order. Therefore, we find that the reciprocal compensation provisions in the ICA are in conformance with the rate caps set by the FCC in its *ISP Remand Order*

Next we look at Pac-West's request that the first 16 miles be excluded from the transport charges. Pac-West points to other arbitration decisions in support of its position, but Pac-West's interpretation of those decisions is a stretch. For example, Pac-West cites language in the AT&T arbitration decision:

> PACIFIC is entitled to receive tandem switching and transport compensation at TELRIC prices, for its facilities used in the carriage of traffic from the rate center where the calling party physically resides to the point of interconnection closest to the switch used for terminating calls to the NXX rate center where the call terminates.

Further: the term "Rate Center" is defined in the ICA as follows:

> "Rate Center" identifies the specific geographic point and corresponding geographic area which are associated with one or more particular NPA-NXX codes which have been assigned to a LEC (or CLEC) for its provision of Exchange Services.[6]

Nowhere in that language is there any indication that Pac-West should pay transport charges from the originating central office to the POI, "less 16 miles." Ordering Paragraph 2 in D.03-05-075 orders that Pac-West pay costs associated with "transport from origination to their point of interconnection" for VNXX traffic. This is the same language that Verizon proposes in the ICA.

The plain language of those decisions does not support Pac-West's position that 16 miles should be excluded from the payment of transport charges. As Verizon states, it is immaterial that Pacific agreed to that provision in its ICA with Pac-West. The issue was not proffered by Pac-West as an issue to be resolved in this proceeding and surfaced in this context only in Pac-West's comments on Verizon's motion.

Waiver of Public Review and Comment

Pursuant to Rule 77.7(f)(5) of our Rules and Practice and Procedure, the otherwise applicable 30-day period for public review and comment is being waived.

Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Karen A. Jones is the assigned Administrative Law Judge in this proceeding.

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[6] Interconnection Agreement between Pacific Bell Telephone Company and AT&T Communications of California, Inc. (June 27, 2000).

Findings of Fact

1. The reciprocal compensation provisions in the ICA are in conformance with the rate caps set by the FCC in its *ISP Remand Order*.

2. The Interconnection Agreement between Verizon California Inc. and Pac-West Telecomm, Inc. (ICA), filed by the parties on May 29, 2003, with the language proposed by Verizon for Interconnection Attachment § 7.2, satisfies the requirements of Section 251 of the Act and the FCC's implementing rules, and thereby satisfies Section 252(e)(2)(B).

Conclusions of Law

1. The language Verizon proposes for Interconnection Attachment Section 7.2 is consistent with D.03-05-075.

2. This Commission has the authority under § 252 of the Act to approve an ICA that includes provisions for reciprocal compensation for calls to ISPs.

O R D E R

IT IS ORDERED that:

1. The motion of Verizon California Inc. to adopt its proposed language in Interconnection Attachment Section 7.2, is hereby granted.

2. Parties shall modify the agreement in conformance with this order and shall file it in this docket within 7 days. A copy shall be provided to the Director of the Telecommunications Division. The signed ICA shall become effective retroactive to May 29, 2003, the date the interconnection agreement with the disputed language was submitted to the Commission.

3. Application 02-06-024 is closed.

This order is effective today.

Dated _____, at San Francisco, California.