

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Core Communications, Inc.	:	
Complainant	:	
v.	:	Docket No. C-2009-2133609
	:	
XO Communications Services, Inc.	:	
Respondent	:	
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	:	
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EXCEPTIONS TO THE RECOMMENDED DECISION

Pursuant to 52 Pa. Code § 5.533, XO Communications Services, Inc. (“XO”) files these Exceptions (“Exceptions”) to portions of the Recommended Decision (“RD”) of Administrative Law Judge Kandace F. Melillo (“ALJ”), dated May 11, 2012 and issued May 18, 2012, in the subject Complaint.

XO files these Exceptions and seeks modification to the RD on several bases. First, the Recommended Decision erroneously concludes that non-local intrastate ISP-bound traffic is subject to intrastate access charges. In the *ISP Remand Order* the FCC held that ISP-bound traffic was jurisdictionally interstate traffic. Intrastate access rates cannot lawfully apply to traffic that is jurisdictionally interstate. Thus, the finding that Core’s intrastate switched access tariffs are applicable to this traffic must be modified. Moreover, the RD conclusion that intrastate switched access rates apply to ISP bound traffic thwarts the FCC’s primary goal of eliminating the regulatory arbitrage opportunity created by carriers that only terminate traffic. In fact, the RD would actually encourage a new kind of regulatory arbitrage for ISP bound traffic, in which CLECs assign toll-free numbers to ISP customers (or encourage ISPs to focus

on customers with flat rate long distance plans) so as to charge intrastate access rates of the ILEC, including the much higher rates of rural carriers; thereby, creating an enormous incentive for Core to engage in the very behavior that the FCC was seeking to stop in the *ISP Remand Order*.

The potential for regulatory arbitrage opportunities are even greater, because the RD does not specify the applicable rates for the traffic for which XO is ordered to pay. Instead, the RD simply refers to Core's switched access tariffs. Furthermore, this relief is not consistent with the relief that Core sought in its Complaint and its testimony and, therefore, should not be granted. In addition, the RD should be amended to clearly state that XO does not owe any late payment or interest charges on the amounts it has been ordered to pay. Finally, the RD must adjust two Findings of Fact that do not accurately capture the undisputed evidence in the record in this matter.

It is critical that the RD address these issues. These should not be left ambiguous or open, which could leave these subject to further dispute between the parties and would not correctly reflect the record in this proceeding.

A. A State Commission may not Exercise its Authority in a Manner that Thwarts Federal Goals. The RD Encourages the Very Arbitrage Opportunity that the FCC Sought to Eliminate in the *ISP Remand Order* and, therefore, Must be Modified.

In determining whether the FCC exercised its jurisdiction to preempt a state ruling that would impose intrastate terminating switched access charges on toll ISP-bound traffic, the state commission must consider the intent of FCC rule and the harm the FCC sought to remedy, and cannot adopt a rule that undermines that goal. In other words, state authority can only be exercised where it does not frustrate the enumerated federal goals.

The ISP Remand Order sought to remedy the arbitrage opportunities created by ISP bound traffic. In *PacWest*, the Ninth Circuit found:

In sum, in adopting an interim compensation regime for ISP-bound traffic, the FCC was primarily concerned with arbitrage opportunities created by traffic of a particular nature; we therefore measure the scope of the FCC's intent with regard to the reach of the ISP Remand Order on the same basis.¹

The RD recognizes this fact, stating that:

[c]ritical to the Court's conclusion was that the harm sought to be remedied in the ISP Remand Order concerned arbitrage opportunities for both LECs and CLECs created through operation of the reciprocal compensation regime as to ISP-bound calls.²

The RD also states:

[t]he Court correctly focused on the intent of the FCC, as evidenced in the ISP Remand Order, to address arbitrage opportunities for both CLECs and ILECs that were creating market distortions.³

Yet, the RD does not remedy these arbitrage opportunities. On the contrary, the RD exacerbates the arbitrage by subjecting some types of ISP bound traffic to rates much higher than those that were applicable to ISP bound traffic at the time that the FCC issued its *ISP Remand Order*.

It is indisputable that the imbalance of ISP bound traffic creates opportunities for the terminating carrier, such as Core, to find any way possible to take advantage of asymmetrical payment obligations under the reciprocal compensation rules for ISP bound traffic, which require that the originating carrier compensate the terminating carrier. In its *ISP Remand Order*, the FCC described the problems that this can create:

As the current controversy about ISP-bound traffic demonstrates, reciprocal compensation encourages carriers to overuse competing

¹ *AT&T Commc'ns of California, Inc. et al. v. PacWest Telecomm, Inc. et al.*, 651 F.3d 980, 996 (9th Cir. 2011) ("*PacWest*").

² RD at 28.

³ RD at 29

carriers' origination facilities by seeking customers that receive high volumes of traffic.⁴

The FCC's *ISP Remand Order* sought to eliminate the regulatory arbitrage opportunities created by large volumes of one-way traffic and payments from the originating LEC to the LEC serving the ISP.

The opportunities for regulatory arbitrage and distortions of economic signals occur under a reciprocal compensation system regardless of the identity of the originating carrier as an ILEC or a CLEC. *Interpreting the compensation rules to apply only to ILEC-to-CLEC ISP-bound traffic would create a loophole in the FCC's regulatory regime for CLEC-originated ISP-bound calls.* As to that traffic, it would thwart full achievement of the regulatory purpose by leaving unabated the very regulatory arbitrage opportunities and economic distortions that the FCC sought to alleviate by the adoption of its intercarrier compensation rules.⁵

The RD is not consistent with federal law because it creates a loophole for Core to escape the FCC regime by working in league with its ISP customers to establish VNXX numbers, assign toll-free numbers, and to market to end users with bundled services that offer customers unlimited long distance calling so customers do not pay per-minute toll charges, and thus are not deterred from making these calls because they will not incur additional long distance charges.⁶

The RD affirms the finding of the Ninth Circuit that creating a loophole in the FCC's regulatory regime "would thwart the full achievement of the regulatory purpose by leaving

⁴ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket 99-68, Order on Remand and Report and Order, 16 FCC Red 9151 ¶ 73 (2001) ("*ISP Remand Order*").

⁵ See *AT&T Commc'ns of Ca., Inc. et al. v. PacWest Telecomm, Inc. et al.*, No. 08-17030, Amicus Brief for the Federal Communications Commission in Partial Support of Plaintiff-Appellant Urging Reversal at 21 (9th Cir. Feb. 2, 2011) ("*FCC Amicus Brief*") (emphasis supplied) (available at < http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-304430A1.pdf>). This is a public document pursuant to 52 PA Code § 5.406(a), copies of which will be furnished upon request pursuant to 52 PA Code § 5.406(b).

⁶ It is important to note that the recently adopted FCC traffic pumping rules will not fully correct this arbitrage opportunity. *Connect America Fund*, WC Docket Nos. 10-90, 07- 135, 05-337, 03-109; CC Docket Nos. 01-92, 96-45; GN Docket No. 09-51; WT Docket No. 10-208, FCC 11-161 (rel. Nov. 18, 2011) ("*USF/ICC Transformation Order*").

unabated the very regulatory arbitrage opportunities and economic distortions that the FCC sought to alleviate by the adoption of its intercarrier compensation rules.”⁷ The RD decision also held that the Ninth Circuit “in *PacWest* did not find any reason to substitute a different judgment for the FCCs, particularly since the FCC’s reasoning mirrored its own and concluded that the FCC was in the best position to describe the scope of its own orders.”⁸ The RD should not do that which the Ninth Circuit declined to do by creating a loophole that undermines the regulatory regime that the FCC put in place to end the arbitrage opportunities and economic distortions created by ISP bound traffic.

B. The FCC’s *ISP Remand Order* Determined that All ISP Bound Traffic was Jurisdictionally Interstate, so Intrastate Access Rates Cannot Apply.

Intrastate access charges cannot apply to ISP-bound traffic, regardless of its endpoints, because it is jurisdictionally interstate. In *PacWest*, the Ninth Circuit stated:

We begin with a few well-settled principles. First, there is no question that, for jurisdictional purposes, ISP-bound traffic is interstate in nature. ISP-bound traffic is therefore subject to the FCC’s congressionally-delegated jurisdiction. Within this ambit, the FCC’s actions can preempt state regulation to the contrary.⁹

Even if the FCC did not exercise jurisdiction over all manifestations of ISP-bound traffic, it did declare all ISP-bound traffic as jurisdictionally interstate and it preempted any contrary state regulation. The Ninth Circuit recognized this fact, stating that:

[i]n issuing the *ISP Remand Order*, the FCC clearly understood that it was displacing at least some state laws. *See ISP Remand Order*, 16 F.C.C.R. at 9189 ¶ 82 (“Because we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic, however, state commissions will no longer have the authority to address this issue.”)¹⁰

⁷ *PacWest*, 651 F.3d at 998.

⁸ RD at 29

⁹ *PacWest*, 651 F.3d at 990 (internal citations omitted).

¹⁰ *PacWest*, 651 F.3d at 991.

Therefore, a state commission may not find that intrastate access charges are applicable to ISP bound traffic and may not apply an intrastate terminating switched access rate.

For similar reasons, the RD's reliance on *Global NAPS I* is misplaced. In Conclusion of Law No. 7, the RD states that "[t]he FCC has not acted to preempt the Commission's authority to resolve intercarrier compensation disputes as to intraLATA toll ISP-bound traffic exchanged between two CLECs." In support of this statement, the RD referred to a similar finding in the PacWest decision, explaining that:

[t]he [PacWest] Court also noted that the FCC had not, in that ISP Remand Order and related pronouncements, exercised its authority over all manifestations of ISP-bound traffic as state authority was not displaced with respect to interexchange (i.e., non-local) ISP-bound traffic. For this reason, I conclude that the Commission's authority has not been preempted, to the extent the ISP-bound traffic herein is intrastate but non-local."¹¹

No doubt in PacWest the Ninth Circuit was persuaded by one part of the reasoning in *Global NAPS I* in which that court emphasized how the FCC had "reaffirmed the distinction between reciprocal compensation and access charges:"

[t]he FCC has consistently maintained a distinction between local and "interexchange" calling and the intercarrier compensation regimes that apply to them, and reaffirmed that states have authority over intrastate access charge regimes. Against the FCC's policy of recognizing such a distinction, a clearer showing is required that the FCC preempted state regulation of both access charges and reciprocal compensation for ISP-bound traffic.¹²

However, in this one aspect, the analysis in the PacWest decision falls short. The *PacWest* court, and in turn the RD, have overlooked one of the "related pronouncements," as the RD describes them. Two years after *Global NAPS I*, the FCC contradicted the court in *Global*

¹¹ RD at 27-28.

¹² *Global NAPS, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 73 (1st Cir. 2006) ("*Global NAPS I*").

NAPS I and clarified that *all* ISP-bound traffic is reciprocal compensation traffic subject to its rate cap rules. In the *ISP Mandamus Order*, the FCC clearly stated that:

the transport and termination of all telecommunications exchanged with LECs is subject to the reciprocal compensation regime in sections 251(b)(5) and 252(d)(2). . . . Section 251(g) preserved the pre-1996 Act regulatory regime that applies to access traffic, including rules governing “receipt of compensation.” Here, however, the D.C. Circuit has held that ISP-bound traffic did not fall within the section 251(g) carve out from section 251(b)(5) as “there had been no pre-Act obligation relating to intercarrier compensation for ISP-bound traffic.” *As a result, we find that ISP-bound traffic falls within the scope of section 251(b)(5).*¹³

Now that the FCC’s position is fully evolved, it is clear that access charges, be they intrastate or interstate, are not applicable to ISP bound traffic. The only rates that can be applied are the reciprocal compensation rates that the FCC has deemed applicable. In the case of ISP bound traffic, this is \$.0007 and no more. The state commission may not undermine the fundamental objective of the FCC in the *ISP Remand Order* of eliminating the regulatory arbitrage opportunities created by the asymmetrical traffic pattern of and payment obligations for ISP bound traffic.

C. The RD Should be Modified to Specify the Applicable Rate to the Traffic for which Payment is Due and Should State that XO Does not Owe any Late Payment or Interest Charges.

For the reasons set forth above, the RD should be modified to hold that switched access charges do not apply to any of the ISP-bound traffic at issue in this case. If the RD is not revised in this manner, it should nevertheless be modified to state that XO is required to pay a rate of \$0.014, Verizon Pennsylvania Inc.’s (“Verizon”) switched access rate, on the 180,558 minutes of use (“MOUs”) of non-local ISP-bound traffic for which the RD finds XO liable. In its original

¹³ *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Order on Remand and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475 ¶¶ 15-16 (2008) (emphasis added) (affirmed, *Core Commc’ns Inc. v. FCC*, 592 F.3d 139 (D.C. Cir. 2009)).

Complaint, Core alleged that “[a]t all times relevant to this Complaint, Core has charged XO at switched access rates established the Commission for the *territory of Verizon Pennsylvania, Inc.*”¹⁴ and this claim has never been amended. In its testimony, Core further claimed that a rate of \$0.014 should be applied to the XO traffic. Mr. Mingo testified:

Core’s Pa. P.U.C. Tariff No. 4 requires compensation for the XO Indirect Traffic at the filed intrastate state switched access rate, which is \$0.014 for calls terminated to Verizon Pennsylvania’s rate centers.¹⁵

All the traffic in this case terminates to Core in Verizon’s rate centers. As the RD correctly concluded, all the traffic at issue in the case is sent from XO to Core through Verizon’s tandems.¹⁶ In addition, the RD appropriately found that all of Core’s billing is based on the Verizon calling records that Verizon provides.¹⁷ There is no evidence in the record that any other incumbent local exchange carrier in Pennsylvania, other than Verizon, provides any transiting services or any call records to Core with respect to the XO traffic. Thus, the only rates centers where this traffic is terminating are Verizon’s. Consequently, should the ALJ determine, notwithstanding the arguments above, that switched access rates are applicable to the non-local ISP-bound traffic at issue in this case, the only applicable rates to the traffic at issue are Verizon’s switched access rates. This is consistent with Pa.C.S. § 3017. Indeed, the application of any other rate would violate 66 Pa. C.S. § 3017. Accordingly, should that ALJ conclude that switched access charges apply to non-local ISP-bound traffic, the RD should be modified to state that the applicable rate for the intrastate “toll” traffic for which payment is owed is \$0.014.

The RD should also be modified to state that XO does not owe Core any late payments or interest charges. The RD appropriately concludes XO should not be liable for civil penalties or

¹⁴ Core Complaint at n. 9 (emphasis supplied).

¹⁵ Mingo Direct at 19.

¹⁶ RD Finding of Fact No. 7.

¹⁷ RD Finding of Fact No. 8.

costs on the basis that “XO was acting in good faith and within its right in disputing the application of switched access charges.”¹⁸ However, the RD orders that XO “pay Core Communications, Inc. for termination of 180,858 minutes of intraLATA toll traffic, at tariffed switched access rates.”¹⁹ While Core has not invoiced XO for any late payment or interest charges, through its testimony and exhibits offered in this proceeding, Core attempted to have those imposed. XO was acting act in good faith in disputing Core’s charges and should not be responsible for any late payment or interest charges, even if those are provided for in the tariff. Consistent with the ALJ’s previous holding regarding late charges, that “[t]o allow for new claims in updated information, at this late date, would constitute unfair prejudice to XO and will not be permitted,”²⁰ the RD should be modified to make the explicit finding that late payment and interest charges are not due.

In addition, Finding of Fact 12 must be amended as it does not reflect the evidence in this proceeding. Finding of Fact 12 states: “The bills that Core has sent and continues to send to XO are based upon Core’s tariffed rate for switched access traffic. XO Exs. 11-169.” The invoices that Core sent XO, as reflected in Exs.11-160, were produced at the direction of the ALJ at the conclusion of the hearing in this proceeding and were produced in order to establish the number of billed MOUs as well as the jurisdiction of those MOUs. These invoices were not produced in order to verify the accuracy of Core’s rates or to establish that Core was billing in accordance with its tariffs. Indeed, XO testified that Core’s tariff rates were “irrelevant, unlawful and artificially high.”²¹ Moreover, XO noted that while Core’s complaint and subsequent testimony

¹⁸ RD at 34.

¹⁹ RD Ordering Paragraph No. 3.

²⁰ Order Granting, in Part, and Denying, in Part, Motion of Core Communications, Inc. for Admission of Exhibits and Striking Motion of Core Communications, Inc. to Strike at 5 (Jul. 13, 2011).

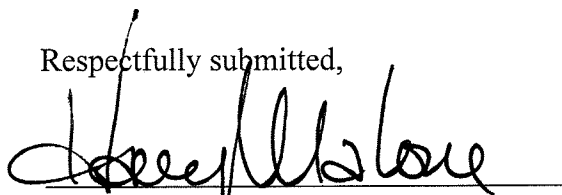
²¹ XO Direct Testimony at p. 23 lines 2-3.

stated that it was seeking a switched access rate of \$0.014. XO pointed out that Core had assessed much higher rates for VNXXs associated with ILEC territories outside of Verizon's. XO does not agree and never has, in the record or otherwise, that Core's bills are consistent with Core's tariffs.. On the contrary, XO maintains that Core is assessing rates that are irrelevant, unjustified and unlawfully high and do not comply with the requirements of 66 Pa. C.S. § 3017 because Core is billing for service territories in which Core does not provide service and as such, those rates are not in accordance with Core's tariffs. Therefore, Finding of Fact 12 does not comport with the established facts in this proceeding and should be modified.

Finally, Finding of Fact 15 should be revised. Core never proved, and XO never agreed, that CIC 5607 traffic comes in to Core's network without CPN. Throughout this proceeding, Core has maintained that it uses Verizon's calling records to generate its invoices. Core never testified that it generates its own switch records or even that has its own records to bill or to verify its bills. In fact, the only call records that are ever mentioned in this proceeding are Verizon's. As XO's witness Case testified, "[i]f we transmitted SS7, then it would be up to Verizon to capture that and put in the billing record to send to you," and "so to the extent that we send it and you don't see it that could be a Verizon issue."²² Therefore, the only factual conclusions that can be made based on the record in this proceeding is that the CPN is absent from the Verizon calling records that Core uses to prepare its bills. The RD should be modified accordingly. XO respectfully requests modification of the RD as described above.

²² Tr. at 95, lines 5-10.

Respectfully submitted,



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