

ALJ/TRP/tcg

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Decision 98-07-095 July 23, 1998

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

Pac-West Telecomm, Inc. (U-5266-C),

Complainant,

vs.

Evans Telephone Company (U-1008-C) and The  
Volcano Telephone Company (U-1019-C),

Defendants.

**ORIGINAL**

Case 98-04-046  
(Filed April 20, 1998)

**OPINION**

On April 20, 1998, pursuant to Rule 45 of the Commission's Rules of Practice and Procedure, Pac-West Telecomm, Inc. (Pac-West or complainant), filed a motion seeking a temporary restraining order (TRO) enjoining Evans Telephone Company (Evans) and The Volcano Telephone Company (Volcano) (collectively referred to herein as "defendants") from charging toll rates for allegedly local calls placed by their customers to Pac-West's customers.

A response in opposition to the motion was filed by defendants on May 19, 1998. Oral arguments on the motion were heard before Commissioner Josiah Neeper and Administrative Law Judge (ALJ) Thomas Pulsifer on May 29, 1998. We find that, while Pac-West asks for a TRO, the form of relief which is more applicable to the present circumstances is an order granting a preliminary injunction. We find that preliminary injunction is warranted here, as explained below.

### **Background**

The present complaint and motion have their origin in a prior complaint (Case (C.) 96-10-018/Investigation 97-03-025) which addressed whether Evans and Volcano were required to complete calls to Pac-West despite a dispute over the proper routing and rating of such calls. In order to understand the significance of the present complaint and motion, it is useful to review key background regarding rating and routing principles and the manner in which these principles were applied by Pac-West which led to the prior complaint.

The rating and routing of telephone calls is governed under the North American Numbering Plan (NANP) which denotes a 10-digit telephone number format that allows direct-dialing capabilities for users of the telephone network. Every telephone number is assigned a "rate center," (i.e., a physical location designated by vertical and horizontal (V&H) coordinates analogous to longitude and latitude lines used in navigation). These V&H coordinates are used to calculate airline mileage between rate centers for rating and billing purposes.

As previously determined in Decision (D.) 90-11-058, the Commission has established a local calling area of up to 12 miles between rate centers. Calls are customarily rated based upon the distance between the V&H coordinates of the corresponding rate centers. Where the distance between the associated rate centers exceeds 12 miles, calls normally are rated as toll calls.

As noted in D.97-12-094, Pac-West sought to obtain telephone numbers linked with a rate center with V&H coordinates that did not coincide with the geographic location of the end user. Pac-West intended to use these numbers for its own customers that provide Internet access to end users. In particular, Pac-West assigned Internet Service Providers (ISPs) located in Stockton with telephone numbers that had prefixes for rate centers physically located in the Crows Landing and Jackson Exchanges, both located significantly more than

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12 miles away from Stockton. In this way, Pac-West intended that end-users of Volcano or Evans could access the Stockton ISP through a local telephone number even though they resided more than 12 miles away from Stockton. Evans and Volcano argued in C.96-10-018 that they were not obligated to route such calls as requested by Pac-West, alleging that the calls were in reality intraLATA toll calls, and that it was improper to route such calls as if they were local to the Crows Landing and Jackson exchanges. As a result of the actions of Evans and Volcano, calls from their end users to Pac-West's ISP customers in Stockton were not being properly completed.

D.97-12-094 ordered that the disputed calls must be completed irrespective of the disagreements among the parties over how the calls should be rated and routed. While defendants have subsequently complied with the directive in D.97-12-094 requiring the completion of the disputed calls, they each rate such calls as toll, rather than local, and claim that in doing so they are in conformance with D.97-12-094.

Complainant alleges that the calls in dispute should not be rated as toll, but rather as local, since the rate centers associated with the calling and called numbers are 12-or-fewer miles apart in conformance with the call rating conventions prescribed in D.90-11-058. Complainant alleges that by charging toll rates, defendants have violated the authorized method of dealing with the dispute over call rating as prescribed in D.97-12-094, which called for the use of a memorandum account to track the disputed billings pending further disposition.

Complainant seeks a TRO, arguing that defendants' conduct in misrating of calls continues to cause irreparable harm to Pac-West, the public, and the competitive market by interfering with Pac-West's relationships with its customers, and damaging Pac-West's business reputation and good will. Complainant alleges that Pac-West and the public have no adequate remedy at

law to compensate them for the injuries presently being suffered or that are likely to be suffered in the future if defendants' unprecedented actions are not restrained.

Defendants argue that Pac-West fails to demonstrate the necessity of issuing a temporary restraining order. Pac-West cites the case of IT Corp. v. County of Imperial (1983) 35 Cal.3d 63, 69-70 for the proposition that there is a "two-pronged" test for preliminary injunctive relief: (1) the likelihood of success at trial and (2) a balancing of harms between the plaintiff and defendant. Evans and Volcano argue that Pac-West's motion should be evaluated based on the Commission's test for preliminary injunctive relief, which involves four elements, as elaborated in D.95-05-020, 59 CPUC2d 665, 674:

"four conditions must be satisfied to establish the right to a preliminary injunction: (1) the likelihood of prevailing on the merits, (2) irreparable injury, (3) no substantial harm to other interested persons, and (4) not contrary to the public interest."

Defendants claim that complainant has failed to satisfy any of the four elements justifying the granting of injunctive relief. Moreover, defendants argue that the underlying complaint should be summarily dismissed because Pac-West lacks proper standing as a complainant under Commission Rule 9, and because the prior complaint has already decided the issues in dispute in the present complaint.

## Discussion

### Framework for Evaluating the Motion

As a basis for evaluating the merits of Pac-West's motion, we must first determine the relevant procedural form of relief at issue. While Pac-West characterizes its motion as a request for a TRO, it makes reference to the test for "preliminary injunctive relief" in identifying the applicable criteria which it seeks

to apply. For the sake of clarity, it is useful to distinguish between a TRO versus relief in the form of a preliminary injunction. A TRO is generally used to provide a very immediate and short-term remedy which may be granted without prior notice to opposing parties. The TRO is generally used as a temporary restraint on a defendant only until a hearing has been concluded on the propriety of granting preliminary or final injunctive relief. A preliminary or final injunction is a court order utilized to forbid and prevent irreparable injury to a party.

In this instance, a hearing was held prior to any ruling on the motion for the TRO. Both sides in the complaint presented oral argument regarding the merits of the motion. Therefore, at this stage in the proceeding, the relief at issue is more properly characterized as a request for a preliminary injunction, rather than a TRO. For the reasons discussed below, we conclude that a preliminary injunction is warranted and shall be granted. The injunctive relief granted is preliminary pending final disposition of the underlying complaint. Depending on our final disposition of the underlying complaint, we shall subsequently either make the injunction permanent, or shall terminate the injunction. We discuss below each of the considerations supporting our granting of a preliminary injunction, based upon the tests established in D.95-05-020.

#### **Standing to Complain**

Defendants argue that the instant complaint should be dismissed for lack of standing of Pac-West as complainant, since Pac-West is not a customer of Evans or Volcanô. Public Utilities (PU) Code § 1702 requires that any complaint as to the reasonableness of rates must be signed by:

**"the mayor or the president or chairman of the board of trustees or a majority of the council, commission, or other legislative body of the city or city and county within which the alleged violation occurred, or by not less than 25 actual or prospective consumers or purchasers of such gas, electricity, water, or telephone service."**

Defendants claim that complainant lacks standing to bring the complaint. In making this claim, defendants focus on the provisions of PU Code § 1702 (also contained in Rule 9) which state that a complaint concerning the reasonableness of rates or charges of the utility must be brought by either a customer of the utility, or by a local governmental body within the city or county where the alleged violation occurred.

The provision of Rule 9 cited by defendants relates to consumer complaints regarding the reasonableness of rates. Yet, Pac West is not complaining that the tariff rates of the defendants are unreasonable and does not seek any change in adopted tariff rates. Instead, Pac West complains that defendants have not complied with terms of their tariffs with respect to the proper rating and billing of calls. Moreover, Pac West's standing as a complainant is not based on any claimed harm it has sustained as a customer of Evans or Volcano, but rather, its standing is based on its status as a competitor. Pac West is alleging it is suffering competitive harm as a result of defendants' improper rating of calls as toll which should be treated as local.

Accordingly, in its capacity as a competitor, we find that Pac-West does have standing to bring the complaint under the provisions of the first paragraph of Rule 9. The right to file a complaint under paragraph 1 of Rule 9 is not limited to customers, but includes "any corporation or person.....setting forth any act or thing done or omitted to be done by any public utility, in violation, or claimed to be in violation, of any provision of law or any order of the Commission." Within this broader provision of Rule 9, we find that Pac-West has standing to complain in its capacity as a competitor.

#### **Significance of Prior Complaint**

Defendants claim that the motion should not be granted because the complainant is not likely to prevail on the merits of its arguments in its motion.

Defendants claim that the prior complaint, by D.97-12-094, has already decided the issues raised in this new complaint in favor of defendants. Specifically, defendants claim that D.97-12-094 authorized Evans and Volcano to apply toll charges for calls made to the 209/231 and 209/856 prefixes. In support of this claim, defendants quote from page 16 of D.97-12-094 which states:

"If the applicable tariffs rate these calls as toll, as Evans Telephone and Volcano Telephone contend, then these LECs [local exchange companies] can charge toll rates for calls made by their customers to the 209/231 and 209/856 prefixes."

We disagree with defendants' reading of the prior decision in C.96-10-018. D.97-12-094 required Volcano and Evans to complete calls to the customers of Pac-West by routing them in the manner specified by Pac-West in the Local Exchange Routing Guide (LERG). Yet, the cited decision provides no directives mandating how the calls must be rated for billing purposes, nor requiring the charging of toll rates for these calls. The sentence quoted by defendants from the text of the decision makes no finding as to whether the disputed calls are properly rated as toll calls, nor does it authorize Evans and Volcano to rate such calls as toll. Rather, the sentence merely infers a logical implication of the defendants' own argument, assuming the validity of premise which was alleged by the defendants. The decision does not, however, affirm that the defendants' premise is valid, but inserts the conditional qualifier "*if* the applicable tariffs rate these calls as toll..."<sup>1</sup> Since no definitive conclusions were made in that complaint case regarding the factual veracity of defendants' alleged premise, nor of the propriety of the rating protocols employed by the defendants, we conclude

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<sup>1</sup> Emphasis added.

that D.97-12-094 has not decided the call-rating issues raised in the instant complaint.

Pac-West has presented citations from D.90-11-058 to support its claim that the disputed calls should be rated based upon the air mile distance between rate centers rather than on the physical distance between customers. Pac-West also cites D.97-12-094 in support of its claim. While the generic issue of rating and routing of calls is pending before the Commission in the Local Competition Docket, an interim provision was made for handling of calls in the Pac-West dispute in D.97-12-094. In that decision, Evans and Volcano were each directed to:

"[E]stablish a Memorandum Account to track all calls made by their customers to the 209/856 and 209/231 prefixes [Pac-West's Crows Landing and Jackson prefixes, respectively] for a period of not less than six months from the effective date of this decision. The Memorandum Account shall include appropriate call detail and applicable charges."

The establishment of the memorandum account is intended to provide a vehicle to compensate Evans and Volcano for lost intercarrier compensation should the Commission ultimately decide that such compensation is appropriate. Logically, the only way that such revenues would be lost is for Evans and Volcano, in the interim, to treat such calls as local, rather than toll. Therefore, it appears consistent with interim arrangement authorized in D.97-12-094 for Evans and Volcano to bill the disputed calls as local, pending further Commission determination. On the basis of this analysis, we conclude that Pac-West has met the first prong of the test for preliminary injunctive relief, with respect to the likelihood of prevailing on the merits.



### **Irreparable Injury**

Pac-West alleges that if Evans and Volcano are permitted to continue rating their calls to the Jackson and Crows Landing exchanges as toll, then Pac-West will suffer irreparable harm, impairing its ability to retain its existing customers and to market its services to potential customers. The particular category of customers of concern to Pac-West is that of ISPs which are assigned telephone numbers associated with the rate center for the geographic region in which a local presence is desired. For example, Pac-West assigned ISPs located in Stockton with telephone numbers that had Jackson 209/231 and Crows Landing 209/856 prefixes. In this way, Pac-West intended that Evans and Volcano customers could make a local call to access the Stockton ISP. These customers would access the Stockton ISP through telephone numbers in the Crows Landing and Jackson rate centers.

If the calls in question are not rated as local calls, then Evans and Volcano customers have to pay toll charges to use the services of ISPs physically located in Crows Landing or Jackson. It is reasonable to conclude that such customers would likely be inclined to discontinue service from such ISPs to avoid such toll charges and choose an alternative ISP provider that could offer internet service through a local call. The ISPs, which are customers of Pac-West, in turn, would not want to use Pac-West for their telephone service if they could not obtain a local number through which their own end-users could reach the ISPs. Defendants provide no convincing arguments to refute Pac-West's claims of the harm resulting from the rating of such calls as toll, rather than local.

We conclude that the temporary solution adopted in D.97-12-094 was intended to preserve, at least on an interim basis, the ability of Pac-West to sign up and retain customers for Type 6 ISP service pending generic review in Rulemaking (R.) 95-04-043. As we stated on page 13 of that decision: "Changes

[in the authorization for Pac-West to assign NXXs rated out of Jackson and Crows Landing to its Stockton customers] would be applied on a prospective basis, however, so that Pac-West's customers signing up for Type 6 Service between now and our final decision on the generic issues would be assured of such service for the duration of the service contract." (Decision at 13.) If the rating is changed from local to toll for such calls, the terms of the underlying service are fundamentally changed, and, there would be no assurance of service continuity. ISPs taking Type 6 service from Pac-West would consequently be likely to cancel their service from Pac-West. Moreover, since the conclusion of the prior complaint, Pac-West reports that it now serves customers who are physically located in the Crows Landing and Jackson telephone exchanges. Therefore, to the extent such customers exist, defendants' arguments in favor of rating these calls as toll would not apply.

In light of the above facts, we find that Pac-West has satisfactorily shown that irreparable harm would result in the absence of Commission action sufficient to meet the test warranting a preliminary injunction.

#### **Harm to Other Interested Parties and Public Interest**

Defendants claim that granting the motion for the TRO will force Evans and Volcano to violate the terms of their tariffs, causing harm to both of the companies and to their customers. Since those tariffs have been approved by the Commission, the defendants argue, that approval reflects a finding that the tariffs are in the public interest. Following the defendants' argument, a violation of the tariffs would be a violation of the public interest.

We agree that the filed tariffs have been approved and are presumably in the public interest. There is no factual basis to conclude, however, that a preliminary injunction would cause Evans or Volcano to violate those tariffs, or that the rating of the calls as local rather than toll would be harmful to customers.

As noted in D.97-12-094, the generic issue of how calls of this nature should be rated is an open issue to be decided in R.95-04-043. Thus, there is nothing in the record of this proceeding to prove defendants' claim that the rating of the calls as local will cause them to violate any tariff. Moreover, to the extent that Evans or Volcano should suffer financial losses as a result of rating calls as local rather than toll, D.97-12-094 authorizes a remedy by permitting the defendants to file a subsequent application seeking compensation from Pac-West for such lost revenues (Ordering Paragraph 5 of D.97-12-094.) On the other hand, there is no remedy for Pac-West to recover its losses if the calls are not rated as local in the interim period.

Defendants further claim that granting the motion would cause Evans and Volcano to violate PU Code § 461 which prohibits charging or receiving any greater compensation for transmission of a long distance message over a shorter route than is charged for a call of a longer distance over the same route.

Defendants' citation of § 461 begs the question of whether the calls at issue are properly rated as local calls or not. Section 461 deals with calls which are, by definition, not local. Therefore, until or unless the Commission determines that such calls are not properly rated as local, it would be premature to apply the provisions of § 461.

### **Conclusion**

We believe that the public interest supports the granting of a preliminary injunction. While no significant harm will result from granting the preliminary injunction, the denial of motion would result in the potential for irreparable harm with respect to Pac-West's ability to retain existing customers and to market its services to prospective new customers. By preserving Pac-West's ability to market its services, the public interest in promoting a more competitive telecommunications market is respected.

Based upon an analysis of parties' arguments on the merits of the motion, we find that good cause has been shown for granting a preliminary injunction, as ordered below.

### **Findings of Fact**

1. In response to D.97-12-094, Evans and Volcano are now completing calls made by each of those companies' customers to Pac-West's customers, based upon the routing instructions requested by Pac-West.

2. D.97-12-094 issued no specific directives requiring Evans or Volcano to rate the calls routed to Pac-West customers either as local or as toll.

3. Evans and Volcano have been rating calls routed to Pac-West customers as toll based upon their interpretation of the applicable tariff provisions.

4. The rating of calls made by Volcano and Evans customers to Pac-West customers as toll calls results in irreparable harm to Pac-West.

5. A preliminary injunction enjoining Volcano and Evans from rating calls to Pac-West customers in the 209/231 and 209/856 prefixes, respectively, as toll would protect Pac-West from irreparable harm.

### **Conclusions of Law**

1. Pac-West has standing under Rule 9 to bring this complaint and related motion for a TRO.

2. A TRO is generally used as a temporary restraint on a defendant only until a hearing has been concluded on the propriety of granting preliminary or final injunctive relief.

3. At this stage in the proceeding, the relief at issue is more properly characterized as a request for a preliminary injunction, rather than a temporary restraining order.

4. Pac-West, has justified the need for a preliminary injunction on the basis of the likelihood of prevailing on the merits of the case, the prospects for irreparable

harm, and the showing that a preliminary injunction is in the public interest and will not substantially harm other interested persons.

5. A preliminary injunction as prescribed below should be approved.

### **ORDER**

**IT IS ORDERED** that:

1. The motion of Pac-West Telecomm, Inc. is granted to the extent set forth below.

2. Pending further order from the Commission, a preliminary injunction is granted, enjoining Evans Telephone Company and Volcano Telephone Company from further rating of calls routed to the 209/231 and 209/856 prefixes as toll.

This order is effective today.

Dated July 23, 1998, at San Francisco, California.

**RICHARD A. BILAS**  
President  
**P. GREGORY CONLON**  
**JESSIE J. KNIGHT, JR.**  
**HENRY M. DUQUE**  
**JOSIAH L. NEEPER**  
Commissioners