

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



February 23, 1999

TO: PARTIES OF RECORD IN CASE 98-04-046
DECISION 99-02-096, Mailed 2/23/99

On January 21, 1999, a Presiding Officer's Decision in this proceeding was mailed to all parties. Public Utilities Code Section 1701.2 and Rule 8.2 of the Commission's Rules of Practice and Procedures provide that the Presiding Officer's Decision becomes the decision of the Commission 30 days after its mailing unless an appeal to the Commission or a request for review has been filed.

No timely appeals to the Commission or requests for review have been filed. Therefore, the Presiding Officer's Decision is now the decision of the Commission.

The decision number is shown above.

A handwritten signature in cursive script, reading "Lynn T. Carew", is positioned above the typed name.

Lynn T. Carew, Chief
Administrative Law Judge

LTC:mrj

Attachment

Decision 99-02-096

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Pac-West Telecomm, Inc.,

Complainant,

vs.

Evans Telephone Company and
Volcano Telephone Company,

Defendants.

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

Goodin, MacBride, Squeri, Schlotz & Ritchie by
John Clark, Attorney at Law, for Pac-West
Telecomm, Inc., complainant
Jillisa Bronfman, Beck & Ackerman by Jeffrey F. Beck,
Attorney at Law, for Evans Telephone and Volcano
Telephone Co., defendants
E. Garth Black, for Calaveras Telephone Company,
interested party
Robert J. Mazique, Attorney at Law, for Pacific Bell

O P I N I O N

Procedural Background

On April 20, 1998, Pac-West Telecomm, Inc. (Pac-West) filed the instant complaint against Evans Telephone Company (Evans) and Volcano Telephone Company (Volcano) (the Defendants). In its complaint, Pac-West alleged that the Defendants were unlawfully charging toll rates for allegedly local calls in violation of Commission Decision (D.) 90-11-058 and D.97-12-094. Defendants denied all allegations in their answer filed on June 8, 1998.

On May 7, 1998, the Commission served Evans and Volcano with the Instructions to Answer. This document notified the parties that (1) Commissioner Neeper and Administrative Law Judge Pulsifer (ALJ) are assigned to this matter; and (2) the complaint is categorized as "Adjudicatory."¹ No party appealed the category of this proceeding within the allotted time pursuant to Rule 6.4 or petitioned for the automatic reassignment of the ALJ pursuant to Rule 63.2.

In accordance with the direction of the assigned Commissioner, a Prehearing Conference (PHC) was convened on July 17, 1998, to identify issues and address the need for evidentiary hearings.

A PHC was held on July 17, 1998, to hear arguments concerning the need for evidentiary hearings to dispose of the case, and related procedural matters. An Assigned Commissioner's Ruling was issued on July 28, 1998, setting a schedule for the case.

Evidentiary hearings were conducted on November 16-17, 1998. One witness was presented by the complainant. Two witnesses were presented by the defendants, and one witness was presented by Pacific Bell (Pacific). Pacific's Petition to Intervene was granted by bench ruling on November 16, 1998. Opening briefs were filed on December 3, 1998, and reply briefs were filed on December 17, 1998.

¹ Rule 5(b) defines an "Adjudicatory" proceeding as (1) enforcement investigations into possible violations of any provision of statutory law or order or rule of the Commission; and (2) complaints against regulated entities, including complaints that challenge the accuracy of a bill, but excluding complaints that challenge the reasonableness of rates or charges.

Parties to the Complaint

Pac-West, the complainant, is a telecommunications company certificated, among other things, as a competitive local carrier (CLC) headquartered in Stockton. Defendant Evans is a small incumbent local exchange carrier (ILEC) serving customers in Merced, Santa Clara, Stanislaus, and Yolo Counties. The Co-defendant, Volcano, is also a small ILEC serving customers located in Amador, Calaveras, and El Dorado Counties. Pacific, an intervenor in the proceeding, is the largest ILEC in California, and has an interest in the proceeding by virtue of its interconnection agreement with Pac-West.

Background

The series of events which led to the instant complaint began in 1996 when Pac-West sought to obtain new NXX codes in anticipation of offering facilities-based local exchange service to business subscribers. Before being able to offer dial-tone local service, a carrier must obtain and open the necessary NXX codes in accordance with the provisions of the North American Numbering Plan (NANP) which prescribes the numbering conventions to be used for telephone number assignments and call rating purposes.

Under the NANP, telephone numbers nationwide are identified by a 10 digit format that permits direct dialing capabilities by users of the public switched telecommunications network. Each telephone number is composed of a three-digit numbering plan area (NPA) code, a three-digit central office (or NXX) code, and a four-digit line number. Carriers are assigned telephone numbers by the Code Administrator in blocks of 10,000, with each block coded by the 3-digit NXX central office prefix. Each NXX central office prefix is, in turn, assigned to a unique "rate center" which is 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 measure the distance between rate centers for the rating and billing of telephone calls.

Each carrier seeking to serve a prescribed local exchange must obtain the requisite NPA/NXX codes from which individual telephone numbers may be assigned. Each NPA/NXX code is identified with a unique local exchange and rate center. The Commission has previously approved the location of rate centers within local exchanges served by Pacific by approving the tariffs that include the location of rate centers. The Commission has also approved the tariff filings of Evans and Volcano that have concurred in Pacific's tariffs.

This complaint involves a dispute over how NXX codes were used by Pac-West to assign telephone numbers to Internet Service Providers (ISPs) located in Stockton, and as a result, how calls to those ISPs should be rated. Pac-West designed a service offering targeted to ISPs, tariffed as "Type 6 Service." This service provided ISPs with a "local presence" in remotely located exchanges without having to install physical terminal equipment in the remote exchange. In order to offer this service, Pac-West obtained NXX codes associated with the rate centers of local exchanges in which a "local presence" was sought by the ISP. Pac-West then assigned telephone numbers to the ISP with NXX code prefixes for the rate centers where the ISP desired a local presence.

The calls which are the subject of the instant complaint involve calls that were originated and terminated between certain exchanges located in Local Access Transport Area (LATA) 9. The map attached as Appendix A illustrates the local exchanges which are included within LATA 9, and shows the various exchanges involved in this complaint.

Pac-West signed up a number of ISPs for Type 6 tariff whose terminal equipment was physically located in the Stockton exchange, but which desired to

have a local presence in other exchanges. Accordingly, Pac-West obtained NXX codes which had the same assigned rate center as an existing NXX code of Pacific in Crows Landing, and a second NXX code with the same rate center as an existing Pacific rate center in Jackson. Pacific, as California Code Administrator, assigned Pac-West the 209/231 NXX prefix, rated out of the Jackson rate center, and the 209/856 prefix, rated out of the Crows Landing rate center. Thus, while the ISPs were physically located in Stockton, they were assigned telephone numbers by Pac-West with prefixes for the rate centers in the Jackson and Crows Landing exchange.

In assigning these prefixes to ISPs in this manner, Pac-West intended that customers of Evans and Volcano residing within the Patterson and Volcano exchanges, respectively, could make a local call to a Stockton ISP using a Crows Landing, or Jackson number without incurring toll charges. By D. 90-11-058, the Commission established an extended local calling area (ELCA) of up to 12 miles between rate centers. Since the Jackson and Volcano rate centers are within this 12-mile requirement, a call from a Volcano customer in Volcano to a Jackson NXX is rated as a local call. Similarly, a call from an Evans customer in Patterson to a Crows Landing NXX is rated as a local call.

By contrast, the distance of a call from the Patterson to the Stockton exchange, based on V and H coordinates of the rate centers for each of these exchanges, is 33 miles. The corresponding distance of a telephone call from the Volcano to the Stockton exchange is 47 miles. (Exh. 6/Casper/pg. 2) Based upon these measurements, Evans and Volcano deemed the calls from their customers to Stockton ISPs to exceed the 12-mile local calling limit, and treated them as toll calls to be charged on a usage basis.

Pac-West customers originate only a de minimis level of traffic using the 209/231 and 209/856 prefixes. For every one minute of originating traffic, there

are 224 minutes of terminating traffic to the 209/231 prefix involving the Volcano exchange. For every one minute of originating traffic, there are 408 minutes of terminating traffic to the 209/856 prefix involving the Patterson exchange.

Pac-West provides service to one business customer and one paging customer physically located in the Jackson exchange, and to one business customer physically located in the Crows Landing exchange. These customers are being served over facilities leased from Pacific to link them to the Pac-West facilities in Stockton. Otherwise, Pac-West only uses these prefixes for service to ISPs with no physical presence in either of those exchanges, but with terminal equipment in Stockton. There are 32 Pac-West ISP customers receiving this service in Stockton. (Exh. 8/Harder/pg. 8-9)

In order for calls to the Stockton-based ISPs to be properly completed, Pac-West specified instructions in the Bellcore database known as the "Local Exchange Routing Guide" (LERG) that calls to the Crows Landing and Jackson NXX prefixes were to be routed to Pacific's tandem switch in Stockton. Pac-West's switch is also located in Stockton, and connects to Pacific's access tandem.

Evans and Volcano initially refused to follow the LERG routing instructions specified by Pac-West to route calls to Stockton for ISP calls since the numbers were rated out of Crows Landing and Jackson. Evans and Volcano viewed Pac-West's rating and routing practices as inconsistent and improper manipulations of industry databases. The dispute over failure to properly complete calls led to the complaint (C. 96-10-018) which was resolved by D. 97-12-094. In that decision, we directed Evans and Volcano to complete calls even though they disagreed with the rating and routing protocols of Pac-West. We also concluded that Pac-West was not violating any current Commission rules or orders by its actions. We acknowledged, however, that the intercarrier

compensation issues related to Pac-West's practices still needed to be resolved. Moreover, we placed Pac-West on notice that its ability to assign telephone numbers rated out of Jackson and Crows Landing to its Stockton customers was subject to change, pending the outcome of our deliberations on our generic review of NXX rating and routing practices in R.95-04-043.

While Evans and Volcano complied with the order in D.97-12-094, routing the ISP calls to Stockton, they continued to rate such calls as toll calls on the basis that the physical distance of the call exceeded 12 miles, the limit for local calls. Pac-West disputed such rating practices by filing the instant complaint. On April 20, 1998, Pac-West concurrently with its complaint, filed a motion seeking a temporary restraining order (TRO) enjoining Evans and Volcano from charging toll rates for the disputed 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 ALJ Thomas Pulsifer on May 29, 1998. We found that, while Pac-West asked for a TRO, the form of relief which was more applicable to the present circumstances was an order granting a preliminary injunction. In D.98-07-095, we granted a preliminary injunction enjoining Evans and Volcano from further rating of calls routed to the 209/231 and 209/856 prefixes as toll, pending final disposition of this complaint. The dispute in this complaint, therefore, is what is the proper rating of calls where there is a divergence between the destination where the call is actually terminated, and the call's rate center designation embodied in the NXX code of the telephone number. Based on how this issue is resolved, we must determine whether Evans and Volcano should be permitted to apply their toll tariff in determining charges for calls originated by their customers in the Patterson and Volcano exchanges to the ISPs

located in Stockton, but assigned telephone numbers with the rate centers in the Crows Landing and Jackson exchanges, respectively.

Positions of Parties

The Defendants argue that the disputed calls made by local customers of Evans and Volcano to Stockton ISPs are properly rated as toll calls, based on the distance between the calling and called parties' telephone terminal equipment. Since the distance between the calling and called parties' terminal equipment exceeded the 12-mile local calling limit, Evans and Volcano argue that such calls should be rated as toll calls. The defendants claim that their toll tariffs, as well as accepted industry practice, require that all direct-dial calls from their local customers to Stockton be billed at tariffed toll rates. The defendants claim that complainant's entire case is based on false call destination labeling and database manipulations intended to avoid paying for its fair share of costs involved in switching and transport of the calls to ISPs, and to shift the cost burden onto Evans, Volcano, and Pacific.

If the Commission permits Pac-West to continue to utilize the objectionable call destination labeling for calls to Stockton, the defendants argue that Pac-West should be required to pay the access charges of the carriers originating the calls, as is the case with toll-free wide area inward bound calling using 800-number service. Defendants argue that the payment of tariffed switched access charges for such calls is consistent with standard industry practice.

Defendants offered testimony by two witness: (1) James Carper, Manager of Plant and Engineering for Evans, and (2) William Harder, Revenue Requirements Coordinator for Volcano. Pacific joins in supporting the position of defendants, offering the testimony of one witness, Ronald E. Sawyer, Executive Director of Pacific's Regulatory Department.

Pac-West claims the disputed calls should be rated as local calls. Pac-West believes that the physical distance of customers' terminal equipment is not controlling, but rather, the distance between rate centers associated with the originating and terminating telephone numbers determine the rating of the call. Since Pac-West has assigned its Stockton ISP customers with NXX codes associated with the Crows Landing and Jackson rate centers, Pac-West claims that the calls should be rated by reference to the rate centers in those exchanges. Pac-West denies that the physical location of the ISPs in Stockton is a proper basis for determining the rating of calls. Based upon the distance between the rate centers associated with the telephone numbers of the calling and called parties, the calls fall within the 12-mile local calling limit. Thus, Pac-West believes that the calls should be rated as local calls, and no toll charges should apply. In support of its position, Pac-West presented one witness, John LaRue, Pac-West's executive vice president.

Discussion

The question in this complaint is how the calls to ISP customers of Pac-West located in Stockton should be rated under the Evans and Volcano tariffs, given the call rating and routing practices employed by Pac-West. Underlying this question is a dispute as to the proper definition of a local call, and how telephone numbers may be assigned in reference to local exchange boundaries and rate center designations.

The Defendants and Pacific argue that their toll tariffs require that the disputed calls must be rated as toll calls. Evans and Volcano have adopted tariff language contained in the tariffs of Pacific through their concurrence in Pacific's toll tariff. Defendants and Pacific claim that under the applicable toll tariffs, calls are rated based on the physical location of the calling and called parties. In

support of this claim, they cite the definition for a toll call contained in defendants' toll tariffs where a "toll message" is defined as:

"A completed call or telephonic communication between two exchange stations located in different local service areas, between toll stations, or between a toll station and an exchange station to which rates are applicable in accordance with the provisions of the toll rate tariff."

Based on this definition, for a call to qualify as a "toll message," the "exchange stations" or telephone equipment of the calling and called parties must be physically located in geographically separate local exchanges. In order to determine whether a particular call between exchange stations located in separate exchanges qualifies as a toll call, we refer to the rating provisions of the toll rate tariff, as directed in the above-referenced tariff language. The applicable provisions for the rating of toll calls appear in Pacific's Tariff Section A6, "Message Telecommunications Service." Under Subsection 6.2.1.A.4a(1), entitled Method of Applying Rates, the tariff prescribes that: "Toll rates between points (cities, towns, or localities) are based on the airline distance between *rate centers*." (emphasis added).

Therefore, based on this provision of the toll tariffs, we conclude that the tariffs do in fact prescribe call rating based on the distance between the applicable rate centers of the calling and called parties. The toll tariff thus specifies that it is the *rate center*, not the physical location of the parties' terminal equipment, that is used to measure the distance for call rating purposes.

The dispute over rate center versus physical location as a basis for call rating only became an issue in this complaint because the ISP's telephone number is from a rate center located in a different exchange than where its actual terminal equipment is located. The essential question, then, is not whether the call should be rated based upon rate centers or terminal equipment location. (As

the above-referenced tariff language states, calls are in fact rated based upon rate centers.) Rather, the issue is *which* rate center to use for rating calls: the rate center from which the telephone number is assigned, or the rate center for the exchange in which the customer is physically located.

Each rate center is identified in the tariff by reference to a unique LATA, area code, and local exchange NXX prefix. This designation is set forth in Section 6.2.7.B of Pacific's Network and Exchange Services tariff in the section entitled: "Toll Rate Guide for the State of California." In this case, the assigned NXX prefix of the ISPs served under the Type 6 tariff are linked with the rate centers located in the Jackson and Crows Landing local exchanges. The underlying question, however, is whether it is proper for a customer located in one exchange to be assigned a telephone number prefix which is rated from a different exchange to avoid toll charges. The designation of rate centers is predicated upon geographically defined local calling areas.

A customer is customarily assigned a telephone number prefix which corresponds to the rate center located in the same local exchange in which the customer's terminal equipment resides. In such cases, toll calls between exchanges would be measured based on rate centers more than 12 miles apart. The prescribed tariffs, however, simply do not address the situation where there is a disparity between the rate center as defined by the called party's NXX prefix versus the rate center as defined by physical location of the called party's terminal equipment. In the case where there are two conflicting rate centers, one corresponding to the geographical routing, the other to the NXX prefix designation, the tariff does not address or differentiate as to which of the rate centers is to apply for purposes of call rating.

We are therefore asked to judge whether Pac-West's unconventional practices conflict with at least the spirit, if not also the letter, of the applicable

tariff rating provisions. The question of whether the calls in question should be rated as local or toll is closely related to the question of whether Pac-West acted properly in assigning NXX prefixes from a rate center in one exchange to customers located in a separate exchange. Yet the resolution of this latter question is beyond the scope of this complaint, but is to be addressed generically in the Local Competition Docket (R.95-04-043/I.95-04-044).

As noted in D.97-12-094, we intend to examine on a generic basis the issues raised by Pac-West's novel NXX rating and routing practices, including intercarrier compensation, in the Local Competition Docket (R.95-04-043). We observed in D.97-12-094 that Pac-West was the first service provider to obtain NXXs in exchanges in which it was not serving customers and to assign those NXXs to customers that reside outside of those exchanges. In that decision, however, we did not find that this practice violated any Commission rules or tariff provisions. We simply stated that our existing rules do not address this particular type of service provisioning. As previously stated in D. 97-12-094:

"We put Pac-West on notice, however, that its ability to assign NXXs rated out of Jackson and Crows Landing to its Stockton customers is subject to change, pending the outcome of our deliberations in the generic phase."

We thus conclude that the ultimate determination of whether the calls to ISPs located in Stockton should be rated as local or toll calls depends upon the outcome of our generic review of call rating and routing practices which is to occur in the Local Competition Rulemaking.

Pending the completion of that review, we believe that at least as an interim arrangement, the calls should not be rated as toll. This interim treatment is consistent with the intent of D.97-12-094. As we previously concluded in D.98-07-094: "Changes [in Pac-West's ability 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, emphasis added). Consistent with the intent of D.97-12-094 to apply the effects of changes on a *prospective basis only* subsequent to our generic deliberations, we conclude the Type 6 service arrangement should not be disturbed during the interim period covered by this complaint. Continuity of Type 6 service could not be assured in the interim by treating the calls as toll. The rating of Evans and Volcano customers' calls to ISPs as toll would in fact change a fundamental feature of the service contemplated under the Type 6 tariff.

Pac-West also argues that its use of Crows Landing and Jackson-based NXX codes for assigning telephone numbers to Stockton-based ISPs for Type 6 service is merely another form of foreign exchange service(FEX).

The Commission has previously defined FEX as follows:

"[FEX] permits a customer in Exchange "A" (home exchange) to have a telephone number associated with Exchange "B" (foreign or dial tone exchange). FEX allows a customer to have a telephone number presence in a community other than the one where the customer equipment is physically located. The customer receives dial tone from the foreign exchange so that calls to and from other customers in Exchange B are local calls instead of toll calls."
(D.94-04-065, p. 71)

FEX thus is intended to permit a calling customer to avoid paying toll or message charges for calls to another party physically located in a distant exchange. This sort of service can be especially valuable to ISPs who seek to reach customers in outlying exchanges without having to incur the cost of installing telephone facilities in every such local exchange in order to offer local calling.

All parties agree that where a customer is served under a FEX arrangement, calls to that customer from the foreign exchange would not be

rated as toll calls. Pac-West claims its Type 6 service is a valid foreign exchange service arrangement, and on this basis claims that Evan's and Volcano's rating of calls from the foreign exchange as toll calls is improper.

Defendants and Pacific claim that Pac-West's Type 6 service is not a valid FEX because it fails to provide dedicated facilities linked between the customer's "home exchange" location and the foreign exchange. Defendants claim that such a provision is required by the Commission for FEX service, citing the description of FEX as set forth in D.94-04-065, the Implementation Rate Design (IRD) Decision as the mandatory requirements for Commission-approved FEX. The IRD Decision states:

"FEX may be provided in three ways. The predominant form is "line haul foreign exchange, where the customer is connected by an ordinary access line to its serving wire center and is then connected by a dedicated facility to the foreign exchange wire center which generates the dial tone. For "cross boundary FEX," an access line is extended from a contiguous foreign exchange to the customer's location (which is generally close to the exchange boundary). Under a "dedicated prefix" arrangement, the customer's ordinary access line is assigned a prefix which is dedicated to functioning as a prefix in a foreign exchange."

"With each of the three methods by which foreign exchange is provided, there is a link by specific facilities that connect the customer to the "foreign" exchange. There are also cost-based rate elements for FEX service."

Pac-West claims that just because the IRD decision described three prevalent types of FEX offered by the ILECs, no prohibition was imposed limiting FEX only to those three types for all future purposes or for all future carriers, including CLCs. Defendants' witness Carper was unaware of any Commission rule that limited FEX to the method described in the IRD decision, or prohibited other variants from being offered. (RT 158). Other means of

providing FEX besides those mentioned in the IRD Decision have been offered by ILECs in past instances. For example, in D. 90-02-050, the Commission adopted a rate design to conform to FEX offered by GTE California, Inc. (GTEC) by housing applicable foreign exchange prefixes in the ratepayer's serving (home) central office instead of using long-haul interoffice facilities to provide foreign dial tone.

Under the forms of FEX described in the IRD decision, calls to Pac-West's ISP customers in Stockton would connect to a Pac-West facility physically located within the Jackson and Crows Landing exchanges. From this physical connection, Pac-West would then transport the call on a private-line type connection to the ISP located in Stockton. In this manner, Pac-West would bear the cost of transporting the call over the private-line connection.

Defendants and Pacific argue that Pac-West's Type 6 service is not provided in the manner prescribed by the Commission for FEX nor in the manner by which ILECs typically provide FEX. Pac-West's tariff does not include any service specifically identified by name as FEX.

Defendants and Pacific claim that Pac-West is abusing the public switched network by not providing its own private dedicated line to Stockton ISPs, and failing to reimburse other carriers for the joint services they provide in connection with Type 6 service offered to ISPs. When a Volcano or Evans customer calls the Pac-West number assigned to the ISP, Evans and Volcano incur costs to switch the call in their end office and to transport the call to Pacific. Pacific likewise incurs the costs to transport the call through its tandem switch to the Pac-West switch. Finally, Pac-West incurs costs to terminate the call to the ISP customer. Pacific claims that the rating of calls as local unfairly permits Pac-West to avoid paying the switching and transport for the toll-free calling service which Pac-West sells to the ISPs.

Pacific claims that Pac-West's Type 6 tariff offering is a "toll-free" 800-line service, but is not FEX. Pacific argues that under standard industry practice, the carrier that offers toll free service to its customers pays compensation to the carrier whose end users originate the calls. Yet, Pac-West does not pay compensation to Pacific for transport of the calls provided by Pacific as compensation for a toll-free service.

Pacific denies that the rates paid by Evans and Volcano customers under local service tariffs provide compensation to the Defendants, or to Pacific, for their costs in switching and transporting calls from Patterson and Volcano to Stockton ISPs. Pacific claims that local service tariffs, at most, merely compensate for calls made within the serving area of a single central office which require no transport to a different central office.

Pacific warns that if the Commission relies on local tariff prices to recover the costs that carriers incur for the toll-free incoming call ISP service, then the consequence will be increases in local tariff prices to recover the shortfall.

FEX traditionally involves the use of a dedicated facility linking the home exchange and the foreign exchange. Pac-West does not own a separate dedicated facility between the Stockton exchange and the Crows Landing and Jackson exchanges. Instead, calls to the Stockton-based ISPs are transported from the Crows Landing and Jackson exchanges by Pacific and delivered to Pac-West's Stockton switch pursuant to the interconnection agreement between Pac-West and Pacific. We believe that the question of whether Pac-West's Type 6 tariff constitutes a valid form of FEX is closely related to the question of whether the underlying validity of the generic rating and routing practices and the obligations to pay intercarrier compensation to Evans, Volcano, and Pacific. Since these latter questions have previously been designated for resolution in other forums, we do not resolve them here. We must likewise defer final

judgment regarding the validity of Type 6 service as a valid form of FEX pending the resolution of those questions. At the same time, we reach no conclusions regarding what intercarrier compensation may be appropriate with respect to the provision of Type 6 service to ISPs. The resolution of parties' disputes over intercarrier compensation is beyond the scope of this complaint. Our decision enjoining the defendants from charging toll rates for the ISP calls is not intended to give Pac-West a "free ride", and in no way prejudices the question as to what amounts or forms of intercarrier compensation, if any, should be paid to Evans, Volcano, or Pacific related to the switching and transport of calls to ISPs served by Pac-West.

We have already prescribed the procedural vehicle through which the Defendants may seek recourse for any intercarrier compensation due them under the Pac-West serving arrangement, in D. 97-12-094. We noted therein that there remained unresolved questions concerning the rights of Evans and Volcano to intercarrier compensation from Pac-West as a result of the routing of calls to ISPs in Stockton. We provided a vehicle to resolve these issues by permitting Evans and Volcano to file separate applications to seek recovery of whatever intercarrier compensation may be warranted. As we noted in D.97-12-094, Evans and Volcano were permitted to request compensation from Pac-West for the alleged loss of revenues associated with Pac-West's provisioning of foreign exchange service to ISPs between the date service under the Type 6 tariff commenced and the resolution of these issue generically in R.95-04-043.

Accordingly, Evans and Volcano were authorized to track all calls made by their customers to the 209/231 and 209/856 prefixes for a period of not less than six months. Based on that information, Evans and Volcano were permitted to file applications requesting compensation from Pac-West, based on a quantification of the financial impacts associated with changes in cost allocation in terms of

dollar levels and impact on rate of return. Should the parties reach agreement on intercarrier compensation, they were to file that agreement as a new application. Should the Commission determine that Pac-West owes compensation to defendants, such compensation was to be calculated from the date that the defendants began to complete calls to 209/231 and 209/856 prefixes.

Pacific has filed a separate complaint (C.98-11-025) seeking recovery of intercarrier compensation for its transport of ISP traffic under its interconnection agreement with Pac-West. Nothing in the resolution of this complaint limits or predetermines what the disposition of that case should be.

By being prevented from charging toll rates for these calls, Evans and Volcano argue, they are losing revenues and are failing to be compensated for their costs incurred for originating such calls on their networks. We previously found this argument unpersuasive, as we noted in D.97-12-094, that it is unlikely that a customer located in Volcano or Patterson would pay toll rates for internet services, particularly when Evans and Volcano have affiliates that provide this service on a local call basis. (Decision at 17, footnote 5). Thus, we remain unconvinced that there would be appreciable lost toll revenues for calls to Stockton ISPs since, in view of the availability of cheaper alternatives, there would be no toll calls made.

Defendants further claim that failure to rate the calls under the toll tariff would constitute a violation of Section 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. We disagree with this claim. We have not found that the calls in question are "long distance" messages. Therefore, the provisions of 461, which address long distance messages, are not violated with respect to the calls at issue here.

In summary, we conclude that the calls from Volcano and Evans customers to the Stockton-based ISPs should not be rated as toll calls, pending our generic deliberations in R.95-04-043. Judgment is rendered in favor of the complainant. The preliminary injunction granted to Pac-West enjoining the defendants from charging toll rates for the calls in question is hereby made permanent pending the outcome of our generic deliberations. As we previously stated in D.97-12-094, the continuing ability of Pac-West to engage in this novel form of rating and routing practice is subject to our generic deliberations in the Local Competition Docket, and intercarrier compensation issues associated with these calls remain to be resolved through other forums as previously outlined.

Findings of Fact

1. Pac-West offers "Type 6" service to provide Internet Service Providers (ISPs) with a "local presence" in different exchanges without having to install terminal equipment in the each exchange.
2. Pac-West obtained a NXX code with an assigned rate center in Crows Landing, and a second NXX code with an assigned rate center in Jackson, for use in assigning telephone numbers to ISPs located in the Stockton exchange.
3. Pac-West assigned Stockton-based ISPs with Jackson and Crows Landing telephone numbers to enable customers of Evans and Volcano located more than 12 miles away to gain Internet access through dialing a local phone number without incurring toll charges.
4. The toll tariffs of Evans and Volcano prescribe that the distance between the applicable rate centers of the calling and called parties, not the physical location of the parties' terminal equipment, determines whether a call is rated as toll or local.
5. By D.90-11-058, the Commission established an extended local calling area (ELCA) of up to 12 miles between rate centers.

6. A call from a customer with a Volcano NXX prefix to a number with a Jackson NXX prefix is within a 12-mile proximity, and a call from a Patterson NXX to a Crows Landing NXX is likewise within a 12-mile proximity.

7. Although the calls to Stockton-based ISP customers of Pac-West are routed to a different exchange from where the rate center is located, call rating is still determined by the NXX associated with the assigned rate center, not the physical location of the call destination.

8. Although the tariffs of Evans and Volcano require that the terminal equipment of the calling and called parties be located in different exchanges for the rating of toll charges, the tariffs do not address how calls are to be rated when there is a disparity between the applicable rate centers associated with call routing versus NXX prefix assignment.

9. The provision of foreign exchange service (FEX) is one generally recognized means by which a party can receive calls from another exchange without triggering toll charges.

10. FEX traditionally involves the use of a dedicated facility linking the home exchange and the foreign exchange provided by the carrier serving the FEX customer.

11. Pac-West does not own separate dedicated facilities between Stockton and the Crows Landing and Jackson exchanges.

12. Calls to the Stockton-based ISPs are transported from the Crows Landing and Jackson exchanges by Pacific and delivered to Pac-West's Stockton switch pursuant to the interconnection agreement between Pac-West and Pacific.

13. Pac-West has not compensated Pacific or the defendants for their switching and transport services in connection with completing the calls from defendants customers to ISPs in Stockton.

14. Notwithstanding unresolved questions concerning the rights of the defendants and Pacific to intercarrier compensation for the transport and switching of the disputed calls, Pac-West's underlying arrangement still provides a form of FEX in terms of the end result achieved.

15. The ultimate validity of Pac-West's use of Type 6 service as a form of FEX through its rating and routing practices is subject to further deliberations in R.95-04-043.

16. In D.97-12-094, Pac-West was placed on notice that its ability to assign NXXs rated out of Jackson and Crows Landing to its Stockton customers is subject to change, pending the outcome of Commission deliberations in the Local Competition proceeding (R. 95-04-043).

Conclusions of Law

1. D.97-12-094 intended that any changes in Commission generic policy concerning rating and routing practices would be applied on a prospective basis only, so that Pac-West's customers signing up for Type 6 Service between now and a final decision on the generic issues in R.95-04-043 would be assured of such service for the duration of the service contract.

2. Consistent with the intent of D.97-12-094 to apply the effects of changes only on a prospective basis subsequent to the Commission's generic deliberations, the Type 6 service arrangement should not be disturbed during the interim period covered by this complaint.

3. It would create a disruption in Type 6 service expectations if the customers of Evans and Volcano were required to pay toll charges for calls to ISPs in Stockton.

4. Calls from the Patterson and Volcano exchanges to ISPs with Crows Landing and Jackson telephone numbers, respectively, should not be rated as

toll, pending the outcome of the Commission's generic deliberations on rating and routing practices.

5. Pac-West's particular way of provisioning FEX through its rating and routing of calls to different exchanges is unconventional.

6. The question of whether Pac-West's Type 6 tariff constitutes a valid form of FEX is closely related to the question of the underlying validity of the generic rating and routing practices and the obligations to pay intercarrier compensation to Evans, Volcano, and Pacific.

7. The determination of whether Type 6 service is a valid form of FEX should be deferred pending the resolution of the related questions concerning intercarrier compensation and generic rating and routing practices.

8. Nothing in this order prejudices the issue of intercarrier compensation with respect to the switching and transport functions performed by defendants and Pacific for calls to ISP customers of Pac-West.

9. Nothing in this order prejudices the Commission's further deliberations in the Local Competition Docket (R.95-04-043) regarding the reasonableness of the rating and routing configurations used by Pac-West.

10. Pac-West's continuing ability to assign NXXs rated out of Jackson and Crows Landing to its Stockton customers is subject to change, pending the outcome of the Commission's deliberations in the generic phase of this issue to be addressed in R.95-04-043.

11. Nothing in this order limits or changes defendants' rights to file separate applications requesting compensation from complainant for financial losses which they believe have been suffered associated with the completion of calls under the Type 6 tariff as provided in O.P. 5 of D.97-12-094.

12. The rating of calls subject to this complaint as local does not violate PU Code Section 461 since the calls in question are not "long distance" messages.

Since the provisions of 461 addresses "long distance" messages, its provisions do not apply to the local calls at issue here.

O R D E R

IT IS ORDERED that:

1. The preliminary injunction granted to Pac-West Telecomm, Inc. (Pac-West) enjoining the defendants from charging toll rates for the calls in question is hereby made permanent pending the outcome of generic proceedings in R.95-04-043.

2. Calls made to Internet Service Providers (ISPs), served under Pac-West's Type 6 tariff, with terminal equipment in Stockton but with Crows Landing or Jackson telephone numbers shall be rated based upon the Crows Landing and Jackson rate centers. This call rating treatment is interim, subject to the outcome of generic deliberations on rating and routing practices in R.95-04-043.

3. Judgment is rendered in favor of the complainant.

4. Case 98-04-046 is closed.

This order is effective today.

Dated February 23, 1999, at San Francisco, California.