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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission
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8 IN THE MATTER OF THE FORMAL
9 COMPLAINT AND REQUEST FOR
10 DECLARATORY JUDGMENT OF PAC-
11 WEST TELECOMM, INC. AGAINST
12 QWEST CORPORATION

DOCKET NO. T-03693A-05-0875
T-01051B-05-0875

**QWEST CORPORATION'S MOTION
TO COMPEL RESPONSE TO DATA
REQUESTS; MOTION TO EXTEND
DEADLINE FOR FILING QWEST
DIRECT TESTIMONY**

[Expedited Conference Requested]

14 Pursuant to Rule 37(a) of the Arizona Rules of Civil Procedure, and Arizona
15 Administrative Code R14-3-106(k), Qwest Corporation ("Qwest") moves the Arizona
16 Corporation Commission ("Commission") for an order compelling Pac-West Telecomm,
17 Inc. ("Pac-West") to produce certain documents on an expedited basis for the reasons
18 described herein. The motion is supported by the following Memorandum of Points and
19 Authorities and the Certification of Counsel pursuant to Ariz. R. Civ. Proc. 37(a)(2)(C),
20 attached hereto as Exhibit A.

21 **MEMORANDUM OF POINTS AND AUTHORITIES**

22 **I. Factual Background**

23 On March 22, 2006, Qwest served Pac-West with its first set of data requests
24 which were specifically tailored to obtain information concerning the type of traffic Pac-
25 West customers originate and terminate over Qwest's network. Pac-West responded to
26 Qwest Data Request Nos. 1.1 through 1.28 on April 3, 2006. In a gesture of good faith,

1 Qwest consented to Pac-West's request to submit any objections simultaneous with its
2 response, rather than on March 29, 2006. Unfortunately, Pac-West did not utilize the
3 extra time to provide any meaningful response to Qwest's first set of data requests, and
4 instead crafted numerous objections designed to frustrate discovery in this proceeding.
5 After receiving Pac-West's numerous objections, Qwest counsel attempted to resolve the
6 impasse.

7 On April 11, 2004, Qwest file a Motion to Compel. The Administrative Law
8 Judge ("ALJ") denied Qwest's motion during a procedural conference on April 27, 2006,
9 on grounds that the parties should attempt to cooperate and work through discovery
10 issues as set forth in Ariz. R. Civ. P. 37(a)(2)(C). Since that time, Qwest propounded
11 four more sets of data requests to Pac-West, all with the same results; non-responsive
12 answers and objections. Despite Pac-West's attempt to further frustrate the discovery
13 process, Qwest narrowed the scope of its discovery and requested responses to fifteen
14 (15) specific data requests on August 16, 2006, more specifically attached hereto as
15 **Exhibit B**. In the course of the request, Qwest counsel provided reasons why the
16 information and/or documentation sought should be produced. Unfortunately, Pac-West
17 is still refusing to respond to thirteen (13) outstanding data requests identified by Qwest
18 as necessary to its defense and counterclaims in the above-captioned proceeding.

19 **II. Brief Overview of Discovery Process**

20 Rule 26 provides that parties may obtain discovery "regarding any matter, not
21 privileged, which is relevant to the subject matter involved." Ariz. R. Civ. P. 26(b)(1).
22 Relevancy of evidence is found if it has "any tendency to make the existence of any fact
23 that is of consequence to the determination of the action more probable or less probable
24 than it would be without the evidence." Ariz. R. Evid. 401. Evidence need not be
25 admissible in order to be discovered – it need only be "reasonably calculated to lead to
26 the discovery of admissible evidence." Ariz. R. Civ. P. 26(b)(1). Rule 37 states that

1 where a party fails to respond to an interrogatory or request for production, the party
2 serving such discovery may move for an order compelling the non-responsive party to
3 answer. Ariz. R. Civ. P. 37(a).

4 The Arizona Rules of Civil Procedure advocate a policy of full disclosure between
5 parties. The purpose of discovery is to “provide a vehicle by which one party may be
6 fairly apprised of the other’s case and be prepared to meet it if he can.” *Kott v. City of*
7 *Phoenix*, 158 Ariz. 415, 418, 763 P.2d 235, 238 (1988), *citing Watts v. Superior Court*,
8 87 Ariz. 1, 347 P.2d 565 (1959). Discovery promotes the efficient and speedy disposition
9 of an action, minimizes surprise, and prevents a hearing or trial from becoming a
10 guessing game. *See Cornet Stores v. Superior Court*, 108 Ariz. 85, 86, 492 P.2d 1191,
11 1193 (1972).

12 In addition, a claim that information is confidential or competitively sensitive does
13 not provide any basis on which to deny discovery. *Id.* at 88, 492 P.2d at 1195. Instead,
14 in those circumstances, discovery is permitted pursuant to the terms of a properly drafted
15 protective order. As the Arizona Supreme Court has persuasively noted in addressing
16 this issue:

17 Defendants further object to this interrogatory on the ground
18 that it calls for “confidential information.” We know of no
19 case holding that this is a proper ground for objection to an
20 otherwise proper interrogatory. Assuming that the
21 information called for by this interrogatory is of a confidential
22 nature which defendants do not want to have included in a
public record, they presumably could have applied for a
protective order.

23 *Id.*, quoting *Columbia Broadcasting System, Inc. v. Superior Court*, 263 Cal.App.2d 12,
24 69 Cal.Rptr. 348 (1968). In light of Arizona’s policy of full disclosure, a party must
25 respond to a data request “unless it appears affirmatively that the evidence sought is
26 patently objectionable and inadmissible.” *Id.* at 87, 492 P.2d at 1194 (citations omitted).

1 With these well-established principles in mind, the Commission should order Pac-
2 west to produce the information sought in Qwest Data Request.

3 **III. Pac-West Has Failed to Adequately Respond to Qwest's Data Requests.**

4 Pac-West's objections generally fall into five broad categories¹: 1) that the request
5 is vague, ambiguous and overly broad; 2) that the information is not relevant to the
6 subject matter or reasonably calculated to lead to admissible evidence; 3) that Pac-West
7 does not "peer into the content" of its customer's traffic because it is not lawfully
8 authorized to do so; 4) that contract documents "speak for themselves"; and 5) that the
9 information sought is available to Qwest through customer data records, bills and
10 invoices. Qwest is prepared to stipulate with Pac-West that any information sought by
11 Qwest, which is available to Qwest through its own customer data records, be admissible
12 as correct. Otherwise, Pac-West's remaining objections are without merit. Each of the
13 remaining data requests are summarized as follows:

14 1. **DR 1.5:** What percent/ratio of rate reduction does Pac-West
15 claim in this case and how was that figure arrived? Please describe how Pac-West
16 measures the MOU for calls originated by Pac-West customers?

17 Qwest Position: Pac-West is claiming a reduction based on the ICA
18 contract. However, there is no specific "relative use" language in the ICA to allow for
19 such a reduction. In addition, because the ACC has ruled that ISP bound traffic is
20 excluded from such calculations; Qwest is entitled to know what types of MOU are
21 included/excluded from the calculation. Qwest is entitled to know how Pac-West claims
22 to have arrived at this figure, including the MOUs for calls originated by Pac-West
23 customers. Otherwise, Qwest is prohibited from challenging not only the amount, but the
24

25 ¹ The following list of broad objections is not intended to be a complete catalog of Pac-
26 West's numerous objections, and Qwest does not concede the validity of any or all of
Pac-West objections.

1 basis for the claim as well.

2 2. **DR 1.8:** Please provide the section of the Interconnection
3 Agreement that specifies a relative use factor to be used.

4 Qwest Position: Same as position concerning DR 1.5.

5 3. **DR 2.7:** Qwest's Counsel provided Pac-West's Counsel with a
6 spreadsheet on February 8, 2006. For each facility listed on the spreadsheet. In Pac-
7 West's Complaint filed at the Arizona Corporation Commission in 2005, Docket No. T-
8 03693A-05-0495, Pac-West stated that the Commission should order Qwest to
9 compensate Pac-West for the termination of all ISP-bound traffic. See, paragraph 14,
10 pages 7-8 of the Pac-West Complaint filed July 13, 2006. For the twelve calendar
11 months of 2001, 2002, 2003, 2004, and 2005, please state how many minutes terminated
12 on Pac-West's network Pac-West claims are ISP-bound traffic both in the aggregate, and
13 on a per circuit basis, for each of the facilities listed on the spreadsheet.

14 Qwest Position: Transport differs from terminating compensation, it is
15 based on mileage and facility type. The above case (Decision No. 68820) dealt only with
16 terminating compensation based on MOU and the specific language of the ISP
17 amendment, not the issue of transport. Since ISP traffic is excluded from relative use
18 calculations, Qwest is entitled to know the amount of ISP bound traffic for each facility.
19 In addition, ISP bound traffic is not considered local for purposes of transport and Qwest
20 needs to understand the basis of Pac-West's complaint by circuit and issue in order to
21 determine the appropriate pricing schemes.

22 4. **[Interrelated Request for Admissions and Data Requests]**

23 Request for Admission 1.3: Admit that Pac-West does not know the
24 type of traffic (i.e. ISP, voice, data) traversing its network.

25 Admit ___ Deny ___

26

1 **DR 3.3:** If your answer to this request was anything other than an
2 unqualified admission, state in detail and with particularity all of the reasons and factual
3 bases for your denial or failure to admit. Please provide copies of any and all documents
4 that support your denial.

5 **Request for Admission 1.4:** Admit that Pac-West does not know the
6 MOU for voice traffic or ISP bound traffic, or MOU for administrative purposes that
7 originates from Pac-West's network.

8 Admit ___ Deny ___

9 **DR 3.4:** If your answer to this request was anything other than an
10 unqualified admission, state in detail and with particularity all of the reasons and factual
11 bases for your denial or failure to admit. Please provide copies of any and all documents
12 that support your denial.

13 **DR 3.5:** How does Pac-West categorize traffic traversing its network
14 (i.e. voice, data or by specific product)? For each category, please provide the MOUs
15 used in tracking customer traffic.

16 **DR 3.6:** Describe in detail how Pac-West measures usage for calls to
17 and from Qwest's network on its own network, including the type of equipment used and
18 how it is used. How does Pac-West classify traffic for billing purposes, or calculate a
19 Pac-West customer's bill based on the type of traffic? Please provide a response that
20 details how Pac-West calculates charges for a given customer.

21 **Qwest Position:** Pac-West claims it does not know what type of traffic
22 its customers are sending/receiving. However, Pac-West cannot simply classify its traffic
23 as local or non-local based on its interpretation without letting Qwest know how it does
24 this. In fact, Pac-West has acknowledged in the previous matter that ISP bound traffic
25 exists. In addition, Qwest must be able to distinguish between local and non-local service
26 in determining transport services. The Requests for Admission are based on Pac-West's

1 original answers to Qwest's discovery requests. Finally, Pac-West is bound by the ICA
2 to identify MOU and ISP traffic, wherein:

3 The Parties agree that traffic originated by either Party and
4 delivered to the other Party, which in turn delivers the traffic
5 to an enhanced service provider is not covered by this
6 Agreement, since such traffic is interstate in nature and this
7 Agreement, including the reciprocal compensation
8 provisions, only apply to local traffic. *Pac-West is*
9 *responsible for identifying enhanced service providers and*
10 *associated usage.* [emphasis added] ICA at 79, subsection
11 (iii) after the signature block.

12 5. **DR 4-1g**: For each such product or service, please provide a
13 detailed description, including but not limited to a discussion of the following matters: (g)
14 Are any of the calls made under these products or services toll calls? Describe the reason
15 why some calls under these products or services may be toll calls and why others may not
16 be, if such distinctions exist. Do calls over the product or service, either inbound or
17 outbound, require the calling party to dial 1+? Please answer for each category, inbound
18 and outbound.

19 Qwest Position: Local calls are those that originate and terminate in the
20 same local calling area. The ICA governs local calls only. ISP bound calls have been
21 classified by the FCC as non local. Qwest needs to know what products and services
22 Pac-West offers for toll calls as well as local calls. Based on its claims, Pac-West is
23 asserting Qwest needs to compensate them for transport of all calls under the ICA and
24 Qwest needs to attempt to determine which are local.

25 6. **DR 4-1h**: For each such product or service, please provide a
26 detailed description, including but not limited to a discussion of the following matters: (h)
Please state the number of minutes of use (MOU) that Pac-West claims are compensable
as ISP-bound under the ISP Amendment that are transmitted over each of these products

1 and services. Please state how much of current ISP bound monthly termination charges
2 Pac-West seeks to recover from Qwest are for calls transmitted over each of these
3 products and services, expressed as a percentage of the total monthly ISP bound
4 termination charges.

5 7. **DR 4-4:** For calls received from Qwest at the Pac-West switch
6 in Arizona, please describe how Pac-West transports the call to a local calling area
7 different from the local calling area than where the Pac-West switch is located. Please
8 include: 1) the type of facility used, 2) whether it is owned by Pac-West or leased by
9 Pac-West and from whom is it leased, 3) if not owned or leased by Pac-West, describe
10 the relationship between Pac-West and the putative owner of the facility, and 4) where
11 the facility terminates (e.g. Pac-West end user, X company's switch, Pac-West owned
12 facility, etc.).

13 Qwest Position: A local call originated by a Qwest customer in
14 Flagstaff is delivered by Qwest to the Pac-West switch in Phoenix. Because a local call
15 is one that originates and terminates in the same local calling area, Pac-West must deliver
16 it to the Flagstaff local calling area for termination, or the call is not local and does not
17 fall under the ICA. Qwest needs to know what facilities Pac-West uses to do so. On
18 information and belief, Qwest believes no such facilities exist.

19 8. **DR 5-9:** Please provide all copies of orders under the ICA that
20 Pac-West claims Qwest implemented incorrectly, and all facts that support the claim.

21 Qwest Position: Pac-West alleges that Qwest has improperly serviced
22 orders made pursuant to the ICA. Pac-West should be required to produce evidence
23 and/or documents to support its claims. The claim that Qwest possesses these documents
24 puts the burden on Qwest to guess which orders Pac-West is challenging. This is patently
25 unfair, as Qwest believes it has processed the orders correctly. Without guidance to the
26 alleged improper orders, Qwest cannot defend against this claim

1 9. **DR 5-11:** Provide copies of all Firm Order Confirmations
2 (FOCs) sent to Pac-West for each Order Pac-West is disputing under this complaint. If
3 an FOC is not available, state the basis for its unavailability.

4 Qwest Position: Pac-West claims it did not develop its claim until
5 approximately 2005. However, Pac-West received FOC's on every order that detail what
6 was ordered. Whether Pac-West received, ignored or accepted the FOCs is probative and
7 essential to Qwest's defenses. The FOC's will illustrate the type of service/facility
8 ordered by Pac-West.

9 Despite Qwest's offer to discuss any specific data request that Pac-West claims to
10 be vague, ambiguous or overbroad in an attempt to resolve the discovery dispute, Pac-
11 West has failed to respond. Pac-West's refusal at this time to discuss with Qwest the
12 narrower issues, or to better define terms that will facilitate discovery, requires this
13 Motion.

14 Pac-West claims that the information Qwest seeks is neither relevant to the subject
15 matter, nor reasonably calculated to lead to admissible evidence. This general objection
16 holds no merit. The type and amount of traffic sent, and the relative volume of traffic
17 exchanged between Qwest and Pac-West, are facts directly at issue or go to prove those
18 facts. Pac-West has failed to state with specificity why the information sought is not
19 relevant.

20 Pac-West claims that information concerning the nature of the traffic that its
21 customers originate and terminate would require it to "peer into the content of customer
22 traffic to ascertain what type of traffic is sent or received..." At the outset, Pac-West
23 claims that it is unlawful to peer into the content of its customer's traffic, but cites no
24 legal authority in support of the objection. Furthermore, upon information and belief,
25 Qwest understands that Pac-West provides certain types of services to its customers, and
26 that Pac-West should therefore be able to identify these types of services *and nature of*

1 the usage. Alternatively, Pac-West should admit that it is incapable of determining the
2 type of traffic originated or terminated by a Pac-West customer, and is therefore unable
3 to identify whether the traffic is local, interLATA, intraLATA, ISP bound, VNXX or any
4 other type of traffic.

5 Pac-West objects to certain data requests on the theory that the applicable contract
6 documents "speak for themselves." This objection is specious in light of Pac-West's
7 complaint, which raises specific issues of contract interpretation. Pac-West's timely
8 response is important for Qwest in understanding the concerns raised at this time.
9 Alternatively, Pac-West should admit or stipulate to Qwest's interpretation of the contract
10 at issue.

11 CONCLUSION

12 Discovery promotes the efficient and speedy disposition of an action, and Pac-
13 West should not be allowed to lengthen this proceeding so that it can continue to avoid
14 paying monies owed to Qwest that are not at dispute herein. Pac-West's continued delay
15 tactics should not be rewarded. For the reasons set forth above, Qwest respectfully
16 requests that the Commission grant this motion and compel Pac-West to provide answers
17 responsive to the specific data requests identified herein. In addition, Qwest requests that
18 the ALJ grant it leave to file direct testimony, currently scheduled for September 12,
19 2006, pending Pac-West's responses so that Qwest is in a position to fully address the
20 allegations contained in Pac-West's complaint and Qwest's counterclaims.

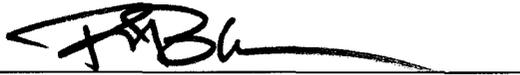
21 RESPECTFULLY SUBMITTED this 30th day of August, 2006.

22 Norman Curtright
23 QWEST CORPORATION
24 4041 N. Central Avenue
25 Phoenix, AZ 85012
26 (602) 630-2187

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FENNEMORE CRAIG, P.C.

By 

Timothy Berg
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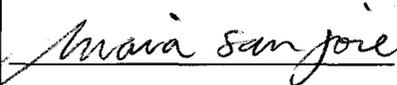
ORIGINAL of the foregoing hand-delivered
for filing this 30th day of August, 2006, to:

Docket Control
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, Arizona 85007

COPY of the foregoing hand-delivered
this 30th day of August, 2006 to:

Amy Bjelland, Administrative Law Judge
HEARING DIVISION
Arizona Corporation Commission
1200 W. Washington St.
Phoenix, Arizona 85007

Joan S. Burke
OSBORN MALEDON
2929 North Central, Ste. 2100
Phoenix, AZ 85012
Attorneys for Pac-West Telecomm, Inc.



1829809.2/67817.401

Exhibit A

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

- 2 JEFF HATCH-MILLER
 Chairman
3 WILLIAM MUNDELL
 Commissioner
4 MARC SPITZER
 Commissioner
5 MIKE GLEASON
 Commissioner
6 KRISTIN K. MAYES
 Commissioner

8 IN THE MATTER OF THE FORMAL
9 COMPLAINT AND REQUEST FOR
10 DECLARATORY JUDGMENT OF
11 PAC-WEST TELECOMM, INC.
12 AGAINST QWEST CORPORATION

DOCKET NO. T-03693A-05-0875
 T-01051B-05-0875

**CERTIFICATION OF COUNSEL
PURSUANT TO ARIZ. CIV. PROC.
RULE 37(a)(2)(C)**

13 I, Patrick J. Black, declare that:

14 1. I am an attorney associated with Fennemore Craig, P.C. counsel for
15 Qwest Corporation.

16 2. Pursuant to Ariz. Civ. Proc. R. 37(a)(2)(C), on August 16, 2006,
17 I wrote counsel for Pac-West Telecomm, Inc. ("Pac-West") an e-mail asking that
18 Pac-West supply written responses to any outstanding data request responses. A copy of
19 that e-mail is attached as Exhibit 1. I also spoke with opposing counsel about Qwest's
20 offer to limit discovery to the data requests in the e-mail.

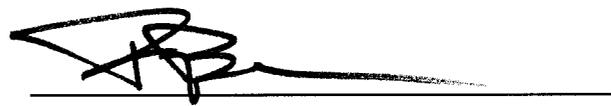
21 3. On August 28, 2006, I again spoke with opposing counsel, who
22 indicated that Pac-West continues to refuse to respond to all but two of the data requests
23 contained in my August 16th e-mail.

24 4. As of today, August 30, 2006, counsel for Pac-West has not
25 responded to the August 16, 2006 e-mail by providing responses to the outstanding data
26 requests.

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I, Patrick J. Black, declare under penalty of perjury that the foregoing is true and correct.

DATED this 30th day of August, 2006.



Patrick J. Black
3003 N. Central Ave, Suite 2600
Phoenix, Arizona 85012
(602) 916-5421

Attorneys for Qwest Corporation

1829934

Exhibit B

BLACK, PATRICK

From: BLACK, PATRICK
Sent: Wednesday, August 16, 2006 12:13 AM
To: 'Burke, Joan'
Subject: RE: Pac-West v. Qwest - Outstanding Discovery

Joan -

Pursuant to our conference call this afternoon, I am providing a list of outstanding data request responses from Pac-West which Qwest believes that, if provided, should resolve the current impasse regarding discovery.

DR 1.5 What percent/ratio of rate reduction does Pac-West claim in this case and how was that figure arrived? Please describe how Pac-West measures the MOU for calls originated by Pac-West customers?

Pac-West is claiming a reduction based on the ICA contract. Qwest is entitled to know how Pac-West arrived at this figure, including MOUs for calls originated by P-W customers.

DR 1.8 Please provide the section of the Interconnection Agreement that specifies a relative use factor to be used.

Same argument as above.

DR 1.17 Please provide all non-privileged internal correspondence, e-mails, or other written communications generated by Pac-West or any Pac-West employee or agent that relates or refers to the issues in dispute in this petition or in Qwest's counterclaim.

DR 2.7 Qwest's Counsel provided Pac-West's Counsel with a spreadsheet on February 8, 2006. For each facility listed on the spreadsheet. In Pac-West's Complaint filed at the Arizona Corporation Commission in 2005, Docket No. T-03693A-05-0495, Pac-West stated that the Commission should order Qwest to compensate Pac-West for the termination of all ISP-bound traffic. *See*, paragraph 14, pages 7-8 of the Pac-West Complaint filed July 13, 2006. For the twelve calendar months of 2001, 2002, 2003, 2004, and 2005, please state how many minutes terminated on Pac-West's network Pac-West claims are ISP-bound traffic both in the aggregate, and on a per circuit basis, for each of the facilities listed on the spreadsheet.

Qwest needs to understand specifics concerning Pac-West's claims by circuit and issue.

RFA 1.3 / DR 3.3 through 3.6

Pac-West should be able to distinguish between local and non-local service in determining transport service.

DR 4-1g For each such product or service, please provide a detailed description, including but not limited to a discussion of the following matters: (g) Are any of the calls made under these

8/30/2006

products or services toll calls? Describe the reason why some calls under these products or services may be toll calls and why others may not be, if such distinctions exist. Do calls over the product or service, either inbound or outbound, require the calling party to dial 1+? Please answer for each category, inbound and outbound.

DR 4-1h: For each such product or service, please provide a detailed description, including but not limited to a discussion of the following matters: (h) Please state the number of minutes of use (MOU) that Pac-West claims are compensable as ISP-bound under the ISP Amendment that are transmitted over each of these products and services. Please state how much of current ISP bound monthly termination charges Pac-West seeks to recover from Qwest are for calls transmitted over each of these products and services, expressed as a percentage of the total monthly ISP bound termination charges.

DR 4-4: For calls received from Qwest at the Pac-West switch in Arizona, please describe how Pac-West transports the call to a local calling area different from the local calling area than where the Pac-West switch is located. Please include: 1) the type of facility used, 2) whether it is owned by Pac-West or leased by Pac-West and from whom is it leased, 3) if not owned or leased by Pac-West, describe the relationship between Pac-West and the putative owner of the facility, and 4) where the facility terminates (e.g. Pac-West end user, X company's switch, Pac-West owned facility, etc.).

DR 5-6: Please identify by CCNA/PON, ASR number, REQ type and Order Number each Order Pac-West is disputing under this complaint and the basis of the dispute.

Please update on when information can be supplemented, as requested by Pac-West.

DR 5-9: Please provide all copies of orders under the ICA that Pac-West claims Qwest implemented incorrectly, and all facts that support the claim.

What is the basis of Pac-West's complaint regarding orders made under the SPOP?

DR 5-11: Provide copies of all Firm Order Confirmations (FOCs) sent to Pac-West for each Order Pac-West is disputing under this complaint. If an FOC is not available, state the basis for its unavailability.

FOC's will illustrate the type of service/facility ordered.

Please let me know if Pac-West will be able to comply with this reduced requests for data. I understand that you will be gone for the next 10 days, and can likely extend filing a Motion to Compel (if needed) another week. Hopefully, we can resolve the current impasse.

Have a safe and enjoyable trip.

Regards,

Patrick