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IN THE MATTER OF THE FORMAL
COMPLAINT OF PAC-WEST TELECOMM
SEEKING ENFORCEMENT OF THE
INTERCONNECTION AGREEMENT
BETWEEN PAC-WEST TELECOMM AND
QWEST CORPORATION

DOCKET NO. T-01051B-05-0495
T-03693A-05-0495

QWEST'S OPENING BRIEF

Qwest Corporation ("Qwest") hereby files its opening brief. Qwest requests that the Administrative Law Judge ("ALJ") issue a ruling that recommends the Arizona Corporation Commission ("Commission") deny the relief requested by Pac-West Telecomm, Inc. ("Pac-West"), declare Pac-West's bills to Qwest invalid, and order Pac-West to cease using virtual NXX ("VNXX") numbers. Alternatively, if the ALJ concludes that VNXX numbers are permissible, the ALJ should find that no terminating intercarrier compensation is due for calls to those numbers.

I. INTRODUCTION

This case presents several intertwined issues. First, there is the general issue of VNXX traffic and the extent to which the use of VNXX numbering schemes is permissible. Second, there is the issue of whether intercarrier compensation is due for this type of non-local Internet

Service Provider (“ISP”)¹ traffic. Finally, there is the question of whether Pac-West may use local interconnection facilities to route VNXX traffic over Qwest’s network to its own point of interconnection with Qwest.

VNXX numbers are telephone numbers that have the same NXX (prefix) as the local calling area (“LCA”)² of an ISP’s end-user customers. The term “virtual” (“V”) is used to describe the fact that calls to the VNXX number are not local calls, even though the dialing pattern makes them appear to be local. This is because each VNXX number is associated with a routing number that will route the seemingly local calls to the often distant location of the CLEC serving the ISP and then from the CLEC to the ISP’s modems, servers, and routers (which are also often located in distant locations from the LCA from which the call originates). This allows the CLEC and the ISP to force Qwest to transport calls from multiple LCAs to a single distant physical location.

Pac-West seeks intercarrier compensation from Qwest for calls originated by Internet end-user customers who obtain dial-up Internet access by calling ISP customers of Pac-West. These ISP customers have obtained VNXX numbers (from Pac-West) in order to make these calls look (to the ISP customer) like local calls. In fact, as previously indicated, they are not local calls at all. The use of VNXX numbers establishes that the ISP’s equipment (e.g., modems, servers, and routers) is *not* located in the same LCA as the ISP customer who places the call, thereby making the call a non-local call, and not “ISP-bound” for purposes of intercarrier

¹ For dial-up Internet service, an ISP provides end user customers with local access numbers (which they obtain from telecommunications carriers who have the authority to obtain telephone numbers from NANPA) that the customer’s computer calls. Such calls are answered by modems provided by the ISP that convert the analog signals from the end user’s computer into Internet Protocol (IP) before sending the communication into the Internet. Through the use of modems, servers, and routers, the ISP gives the customer access to the Internet, including the ability to browse the Web, engage in transactions, and access other Internet functionalities and services. In addition to this basic Internet functionality, ISPs may also provide other services, such as email and web hosting.

² As used herein, a local calling area (“LCA”) is a geographical area approved by the Commission in which calls originating within the LCA and terminating to other customers within the LCA are deemed to be local calls and within which LCA local service is provided on a flat-rated basis. An EAS area is a synonym for a LCA, as used herein.

compensation.

The fact that the calls may be destined for an ISP server does not magically convert them into "ISP-bound traffic" compensable under the *ISP Remand Order*.³ That order addressed only traffic to an ISP server or modem located in the same LCA as the ISP's customer. The VNXX scheme, as discussed in more detail below, is utterly contrary to long-standing tradition and rule in Arizona governing the recognition and establishment of flat-rated service within LCAs, as distinguished from usage-based-rates (toll) for long distance (interexchange) calling. The ALJ, and the Commission, should send a clear message to carriers that, as in the past, attempts to change the century old fundamental distinction between local and long distance calls, in a way that threatens the viability of flat-rated local calling within recognized communities of interest, will not be permitted.

Nor should the Commission accept Pac-West's pronouncement that VNXX is indistinguishable from the foreign exchange service that Qwest offers to its customers. This argument is the classic red herring – a diversion intended to distract attention from the main issue. In this case, the main issue is Pac-West's misuse of the public switched telephone network ("PSTN") and the telephone numbering conventions in an attempt to receive compensation to which it is not entitled, to receive free transport from multiple LCAs in Arizona, and to avoid paying PSTN access charges. Furthermore, Pac-West is wrong about Qwest's FX service. It is distinguishable from VNXX in several important ways, as will be explained more fully herein.

Qwest's position in this case is set forth in some detail in its answer, filed with the Commission on August 22, 2005.

³ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCCR 9151 (2001) ("*ISP Remand Order*").

II. BACKGROUND

Qwest believes that Pac-West customers are either entirely or in large part Internet Service Providers (“ISPs”) (*i.e.*, companies like AOL and EarthLink) that seek to generate one-way inbound traffic as opposed to two-way local exchange traffic. Traffic between Qwest and Pac-West is significantly out of balance as the result of the one-way flow of ISP traffic to Pac West’s ISP customers.⁴ This method of operation is well-explained in a recent description by the Ninth Circuit in a case involving Pac-West, where the Court characterized a group of companies seeking “to take advantage of the new competitive environment.”

When Congress drafted the Act, it did not foresee the dramatic increase in Internet usage and the subsequent increase in telecommunications traffic directed to Internet Service Providers (‘ISPs’) like America OnLine and EarthLink. Not long after Congress adopted the Act, newly formed CLECs began targeting ISPs to benefit from the reciprocal compensation provisions in interconnection agreements and the compensation they would receive from the one-way traffic that flows into ISP customers but does not flow in the opposite direction.⁵

That is an accurate description of Pac-West’s method of operation. Through the facilities provided by Qwest, in combination with telephone numbers that are assigned by the North American Numbering Plan Administration (“NANPA”), Pac-West is able to obtain local telephone numbers throughout Arizona. This allows Pac-West to assign these local numbers to

⁴ The relative Minutes of Use from Pac-West to Qwest compared to Qwest to Pac-West are in a ratio of 1:3,401, as shown by Confidential Exhibit A. A redacted copy of Confidential Exhibit A is attached hereto, marked as Exhibit A to this Opening Brief. Confidential data has not been produced because as of the date of this filing, there has not been a protective order or protective agreement entered in this case.

⁵ *Pacific Bell v. Pac West Telecomm, Inc*, 325 F3d 1114, 1118-19 (9th Cir 2003) (“*Pacific Bell*”).

its single point ISP customers. But the calls to these numbers do not terminate in the LCA where the calls originate. Instead, at no additional charge to any of the customers involved, the calls are carried by Qwest from points throughout Arizona to Pac-West's location in each LATA.⁶ These calls should be treated as what they clearly are: toll calls.

The dispute in this case as framed by Pac-West's Petition relates to whether intercarrier compensation principles should apply to the ISP VNXX traffic. The threshold question, however, is whether VNXX traffic should be permitted at all. To understand the issues presented by VNXX, it is first necessary to understand (1) how the telephone numbering system works; (2) what VNXX is and how it works; (3) the historical treatment of intercarrier compensation; and (4) issues concerning intercarrier compensation for ISP-bound traffic. In addition, because the parties to this case are both telecommunications companies and operate under an interconnection agreement ("ICA"), it is necessary to have an understanding of whether their ICA offers any guidance on these issues.

A. LCAs vs. Long Distance

Historically, the Arizona Commission has treated local calls (i.e., where the parties to the call are located within the same LCA) differently from non-local calls (i.e., where the parties to the call are not located within the same LCA). Consistent with that distinction, in Arizona, pricing has always been different as well. Local calls have traditionally been flat-rated. However, the non-local calls, which are also known as interexchange or long distance calls, have historically been priced on a per minute of use basis.

Pac-West's argument ignores a fundamental building block of telecommunications in Arizona and in every other state—the concept of the LCA. The Arizona Commission has

⁶ Under the current law, a CLEC needs to have at least one point of interconnection ("POI") per local access and transportation area ("LATA").

consistently taken an active role in the definition of LCAs based primarily on the existence or non-existence of a community of interest among the residents and businesses of specific geographical locations. A good example of this was the Commission's decision in Qwest's (then U S WEST's) 1995 rate case, where the Commission ordered broad expansion of Extended Area Service ("EAS") in many areas.⁷ As part of that order, the Commission adopted as its criteria for expansions of EAS "calling volumes, socio-economic linkages, *contiguity*, and public input to determine whether a community of interest exists."⁸ Thus, over time, under the Commission's treatment and practice, areas that may have been separate LCAs may be combined into a single LCA if the Commission concludes that a community of interest exists. Upon such a finding, all calling within the geographical area is re-classified as "local" and not as "long distance." Thus, geography (contiguity) and the location of called and calling parties in relation to each other have been and continue to be concepts inherent in the establishment of LCAs in Arizona.

B. Intercarrier Compensation/Numbering

There are two general traffic types to which intercarrier compensation applies. Interexchange (toll or long distance) traffic is compensated according to switched access service tariffs. Local traffic is generally compensated according to ICAs prescribing either "bill and keep" or "reciprocal compensation" arrangements.

Whether a call is local or long distance is determined by the geographic location of the end points of the call. Based on these physical end points, the telecommunications industry has developed a method of determining the location (*i.e.*, the LCA) for intercarrier compensation purposes using the telephone numbers of the originating and terminating end user customers.

⁷ Opinion and Order, *In the Matter of the Application of U S WEST Communications, Inc., a Colorado Corporation, for a Hearing to Determine the Earnings of the Company, the Fair Value of the Company for Ratemaking Purposes, to Fix a Just and Reasonable Rate of Return Thereon and to Approve Rate Schedules Designed to Develop Such a Return*, Docket No. E-1051-93-183, Decision no. 58927, at 111-115 (ACC January 3, 1995).

⁸ *Id.* at 115 (emphasis added).

Telephone numbers are displayed in the NPA/NXX format (in which the NPA is the area code and the NXX is the central office code). These three digits (NXX) are assigned to and indicate a specific central office from which a particular customer is physically served. In other words, in the number (602) 630-XXXX, the "630" prefix is assigned to a specific rate center in the (602) area code and thus identifies that the geographic area where the customer is located is Phoenix.

The central office code is followed by a four-digit number which together with the NXX constitutes the telephone number of the end-user customer's telephone line. Based on this format and the known geographic LCA/EAS boundaries, a call is determined to be either local or long distance. The numbering guidelines are quite clear in terms of requiring a synchronization between the numbers assigned and the geographic territory associated with those numbers. To freely disregard this expected synchronization would completely gut the current system, which distinguishes between local and long distance calling based on customer location.

Local traffic is telecommunications traffic that originates and terminates within a geographically-defined area. These areas are called LCAs or extended area service ("EAS") areas.⁹ These geographically-defined areas allow an end-user customer to have unlimited calling within these areas for a flat rate. Qwest's LCAs are defined by its exchange boundary maps and contained in its tariffs and price lists on file with the Commission.

The Telecommunications Act of 1996 ("Act") mandated some form of intercarrier compensation for the exchange of local traffic between carriers. 47 U.S.C. §251(b)(5). The FCC promulgated rules and state commissions arbitrated issues around the mandate for intercarrier compensation for the exchange of this local traffic. Reciprocal compensation for local traffic provides both incumbent local exchange carriers ("ILECs") and competitive local exchange

⁹ This description of "local traffic" is consistent with the definitions of relevant related terms contained in the Arizona Statutes, Commission rules, Qwest's tariffs, and the parties' ICA (*see* Section III, pages 26-29, 33-34, and 37-39, *infra*).

carriers (“CLECs”) the opportunity to recover the costs associated with interconnection for the exchange of local traffic. Reciprocal compensation requires that the carrier whose retail customer originates a local call must pay the terminating carrier. “Bill and keep” is a form of reciprocal compensation that allows each carrier to bill their end-user customer and keep the revenue but not to bill each other for terminating traffic that originates on the other carrier’s network, reducing the need to create a record of and bill for local traffic.

Local traffic bound for the Internet (ISP-bound traffic) is not subject to reciprocal compensation under 47 U.S.C. §251(b)(5), but is subject to a different intercarrier compensation mechanism, under section 251(g), as set forth in the FCC’s *ISP Remand Order* – details of this order are discussed below.

Interexchange (long distance, or toll) traffic is traffic that originates and terminates between exchanges located in *different LCAs*. Toll traffic is measured in minutes of use and is charged to the end-user customer by the end user customer’s selected interexchange carrier (“IXC”). The IXC must pay originating access charges to the originating LEC for the use of its network to start the call, and terminating access charges to the terminating LEC for the use of its network to complete the call. Section 251(g) of the Act preserves this regime.

C. VNXX Service

Virtual NXX or VNXX refers to a situation where a CLEC, such as Pac-West, has obtained an assigned block of local telephone numbers for a LCA, but the CLEC does not have end-user customers located in that LCA. The CLEC uses its numbers for its ISP customers, who also have no physical presence in the LCAs associated with those telephone numbers.¹⁰ The

¹⁰ Although VNXX issues often arise in the context of ISP traffic, the concept is not solely related to ISP traffic alone. A VNXX arrangement also can exist for voice traffic (such as an inbound call center, a voice messaging system or a reservation center). However, reciprocal compensation principles only apply when these calls are routed to a CLEC retail customer who is located in the same LCA where the call originated.

traffic directed to those numbers is routed to one of the CLEC's points of interconnection with Qwest and is then delivered to the CLEC's ISP customer (at the ISP's "server" or, more accurately, its "modem bank") at a physical location in another LCA (or even in another state).

VNXX undercuts the principle of geographic synchronization between telephone numbers and customer location because it results in a carrier-assigned NXX associated with a particular central office, but where the carrier has no customers physically located. Instead, these telephone numbers are assigned to a customer physically located outside the LCA associated with the particular NXX.

With VNXX, the physical location of the CLEC's customer is, for the most part, in a LCA that would require a toll call from the LCA which the telephone number is associated. This scheme requires the assignment of a "virtual" NXX. The NXX is labeled "virtual" because it is an assigned number that tells callers that it is in the *calling party's* LCA, rather than the *called party's* LCA. In reality, a call to the "virtual" NXX does not result in a local call within the LCA to which the VNXX number appears to be assigned. The call is terminated in a different LCA, and perhaps even in a different state. Exhibit B, attached hereto, illustrates how VNXX circumvents the proper numbering plan.

D. ISP Traffic

ISP traffic is traffic sent to an ISP over a dial-up connection. If the caller and the ISP are in the same LCA, then the intercarrier compensation provisions of the FCC's *ISP Remand Order* apply. That Order currently establishes a default compensation rate of \$0.0007 per minute for ISP-bound traffic (defined to be traffic that originates and terminates in the same LCA), payable to the carrier who terminates the call unless the carriers are operating under a bill and keep arrangement.

Prior to the use of VNXX codes, the ISP had a modem bank or server located in the same

LCA as its customers. The ISP would obtain local numbers, and the customers seeking access to the Internet would dial a local call – one that originated at the customer’s home and terminated, for purposes of intercarrier compensation, at the ISP’s local server.

However, all ISP traffic is not necessarily local traffic. An ISP may offer its subscribers an 8XX number for dial up access, or a subscriber may dial a toll number to obtain such access. In the first case, the ISP would, in setting up an 8XX number, pay toll charges for the traffic that it draws from distant calling areas. Further, the IXC providing the 8XX service would pay access charges to the originating carrier. In the second case, the customers would generally pay on a per-minute basis for the long distance call. In the case of a long distance call, access charges would be due to the originating and terminating LECs from the IXC who carried the call.

Pac-West’s Petition suggests that *all* ISP traffic is compensable at the ISP-Remand Order rate.¹¹ However, in response to discovery questions in the Washington complaint, Pac-West has now agreed that not all ISP traffic is compensable at the \$0.0007 rate established by the FCC for local ISP traffic. Pac-West’s responses confirm that Pac-West recognizes that not all traffic destined for an ISP is “ISP-bound traffic” under the *ISP Remand Order*. For example, Qwest asked Pac-West what intercarrier compensation mechanism should apply, in Pac-West’s view, if a Qwest customer were to place a 1+ call to an ISP served by Pac-West. Pac-West responded that it should be paid terminating access charges by the IXC and Qwest should be paid originating access charges. Pac-West did *not* assert that Qwest would be liable to pay Pac-West under the ISP Remand Order.¹² As will be seen below in the discussion of the *ISP Remand Order*, Pac-West’s position that the access regime still applies to toll calls is consistent with the FCC’s statements that it did not intend to alter that regime. However, it undercuts Pac-West’s

¹¹ See Pac-West’s Petition at ¶¶ 7, 11.

¹² See Exhibit C – Pac-West’s responses to Qwest’s Data Requests 20 and 22 in the Washington Complaint, Docket No. UT053036. By stipulation of the parties in the instant proceeding, the data requests admitted on the record and/or relied on by the parties in briefs in the Washington Complaint may be relied upon and entered as evidence in this matter.

assertion that a VNXX ISP call must be compensated under the *ISP Remand Order*, since VNXX calls are nothing more than toll calls.

E. Applicable Legal Principles

There are a number of previously decided cases that provide guidance on this issue. Some of these will be discussed in more detail below, but are set forth here to provide context for the discussion to follow.

1. FCC Decisions

a) The ESP "Exemption"

The FCC has a long history of determining the appropriate treatment of traffic bound for enhanced service providers ("ESPs" – providers of communications that modify content). In 1983, the FCC issued an order creating the so-called ESP Exemption.¹³ While referred to as the "ESP Exemption," it is really a policy determination that enhanced service providers should be allowed to connect their points of presence through tariffed local retail services (rather than through tariffed Feature Group access services that other carriers were required to purchase), even though the facilities were really being used for services classified as interstate.¹⁴ The FCC assigned the same status to private systems (e.g., PBX systems) that accessed local exchange systems for connecting interstate calls.¹⁵ In other words, the FCC treats the point of presence of an enhanced service provider as if that point of presence is the location of a retail customer.

¹³ See Third Report and Order, *In the Matter of MTS and WATS Market Structure*, 93 FCC 2d 241, 254-55 ¶ 39, and n. 15, 320, ¶ 269 (1983); *modified on recon.*, 97 FCC 2d 682 (1984) ("*First Order on Reconsideration*"), *further modified on recon.*, 97 FCC 2d 834 (1984) ("*Order on Further Reconsideration*"), *aff'd in principal part and remanded in part sub nom.*, *NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

¹⁴ See, e.g., First Report and Order, *In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, 12 FCC Rcd 15982, 16131-34 ¶¶ 341-48 (1997); see also, generally, Order, *In the Matter of Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631 (1988).

¹⁵ See Memorandum Opinion and Order, *In the Matter of WATS-Related and Other Amendments of Part 69 of the Commission's Rules*, 2 FCC Rcd 7424, 7425, ¶¶ 13-15 (1987).

The FCC applied the same approach under the Act when it dealt with traffic routed to the Internet. The FCC determined that ISPs, one of the heirs to the old “enhanced service provider” designation, were entitled to the same treatment for compensation purposes. Thus, when an ISP is served by a CLEC, the same analysis applies under § 251(g) of the Act. The ISP Server is treated as an end-user customer location for the purposes of compensation.

Pac-West’s position is directly contrary to FCC precedent, which requires that an ISP be treated exactly the same as other end-user customers in determining whether a call to the ISP is a toll call or a local call. In other words, a call from one LCA to an ISP Server located in another LCA is treated as a toll call. Implicit in Pac-West’s position is that in the *ISP Remand Order*, the FCC, without analysis or even intent, has accidentally changed the entire landscape of access charges and issued a blanket exemption for all calls to and from all ISP servers, no matter where located (as long as they send the call to the Internet). However, there is no support for the proposition that the FCC has made such a major policy shift.

b) The ISP Remand Order

On April 19, 2001, the FCC issued what has come to be known as the *ISP Remand Order*.¹⁶ In the *ISP Remand Order*, the FCC affirmed its earlier decision¹⁷ that “ISP-bound traffic is not subject to the reciprocal compensation obligations of section 251(b)(5).”¹⁸ In reaching this conclusion for the second time, the FCC based its ruling on entirely different reasoning than it had in its 1999 Declaratory Order.¹⁹ Despite this alternative reasoning, the

¹⁶ See fn. 3, *supra*.

¹⁷ See *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-carrier Compensation for ISP-Bound Traffic*, 14 FCCR 3689, 3690 (1999) (“*ISP Declaratory Ruling*”). In *Bell Atlantic Telephone Companies v. F.C.C.*, 206 F3d 1 (DC Cir. 2000), the DC Circuit had vacated the *ISP Declaratory Ruling* and remanded the issue of ISP-bound traffic to the FCC for further consideration.

¹⁸ *ISP Remand Order*, ¶ 3.

¹⁹ *Id.* ¶ 1.

issue was subsequently appealed to the D.C. Circuit for a second time, and the D.C. Circuit again questioned the FCC's reasoning and remanded the issue to the FCC.²⁰ However, on this second appeal, the D.C. Circuit only remanded the issue of ISP-bound traffic to the FCC, but did not vacate the FCC's order or its interim implementation scheme.²¹ Instead, the Court expressly left the *ISP Remand Order* in effect, along with its conclusion that ISP-bound traffic is not subject to reciprocal compensation under § 251(b)(5) of the Act.²²

(1) The underlying policy basis of the ISP Remand Order.

In concluding that ISP-bound traffic should not be subject to reciprocal compensation and initiating a phase-out of compensation for Internet traffic, the FCC not only focused on the language of the Act and the FCC's rules, but also on the underlying policy and fairness of requiring the payment of reciprocal compensation for such traffic. The FCC found that the payment of reciprocal compensation for Internet traffic creates uneconomical subsidies and improper incentives for CLECs to specialize in serving ISPs to the exclusion of other customers.²³ The FCC concluded that these uneconomical incentives arise because reciprocal compensation permits carriers to recover their costs "not only from their end-user customers, but

²⁰ See *WorldCom, Inc. v. F.C.C.*, 288 F3d 429 (DC Cir 2002).

²¹ Rather than immediately order all local exchange carriers to immediately exclude ISP-bound traffic from reciprocal-computation calculations, the FCC instituted an interim recovery scheme to gradually implement the *ISP Remand Order*. See *ISP Remand Order*, ¶ 7 ("Because the record indicates a need for immediate action with respect to ISP-bound traffic, * * * in this Order we will implement an interim recovery scheme that * * * initiates a 36-month transition towards a complete bill and keep recovery mechanism * * * [and] adopt a gradually declining cap on the amount that carriers may recover from other carriers for delivering ISP-bound traffic."). See also, *WorldCom*, 288 F3d at 430 ("Because there may well be other legal bases for adopting the rules chosen by the Commission for compensation between the originating and the terminating LECs in calls to ISPs, we neither vacate the order nor address petitioners' attacks on various interim provisions devised by the Commission.").

²² See *Pacific Bell*, 325 F3d at 1122-23 ("[S]ignificantly, the court did not vacate the *Remand Order*, reasoning that 'many of the petitioners themselves favor bill-and-keep, and there is plainly a nontrivial likelihood that the Commission has authority to elect such a system.' As a result, the *FCC Remand Order* remains in effect pending the FCC's proceedings on remand.") (Emphasis in original; citation omitted.).

²³ *ISP Remand Order*, ¶¶ 67-76.

also from *other carriers*.”²⁴ The FCC explained:

Because intercarrier compensation rates do not reflect the degree to which the carrier can recover costs from its end-users, payments from other carriers may enable a carrier to offer service to its customers at rates that bear little relationship to its actual costs, thereby gaining an advantage over its competitors. Carriers thus have the incentive to seek out customers, including but not limited to ISPs, with high volumes of incoming traffic that will generate high reciprocal compensation payments.²⁵

The FCC further found that the market distortions caused by reciprocal compensation payments “are most apparent in the case of ISP-bound traffic due primarily to the one-way nature of this traffic, and to the tremendous growth in dial-up Internet access since passage of the 1996 Act”.²⁶ Thus, by targeting ISP customers with large volumes of exclusively incoming traffic, the FCC found, CLECs reap a “reciprocal compensation windfall.”²⁷ The FCC recognized in the *ISP Remand Order* that business plans like Pac-West’s shift all the costs of interconnection to other carriers instead of to the CLEC’s own customers:

Finally, and most important, the fundamental problem with application of reciprocal compensation to ISP-bound traffic is that the intercarrier payments fail altogether to account for a carrier’s opportunity to recover costs from its ISP customers.²⁸

²⁴ *Id.*, ¶ 68. (Emphasis in original).

²⁵ *Id.*

²⁶ *Id.*, ¶ 69

²⁷ *Id.*, ¶ 70

²⁸ *Id.*, ¶ 76. In fact, this problem is manifest in this case, where Pac-West charges its customers nothing to obtain VNXX services. See discussion below at p. 32.

Based on this concern, the FCC criticized CLEC proposals relating to compensation for Internet traffic, because they “do not address carriers’ ability to shift costs from their own customers onto other carriers and their customers.”²⁹

(2) The *ISP Remand Order* requires compensation only for certain ISP traffic.

Pac-West’s fundamental argument is that the FCC, in the *ISP Remand Order*, read in combination with the *Core Forbearance Order*,³⁰ has preemptively required that terminating intercarrier compensation must be paid on *all* ISP traffic, including VNXX ISP traffic. However, these orders address compensation only for local ISP traffic,³¹ where the ISP is physically located in the same LCA as the customer placing the call. There was no discussion in either order of the treatment of VNXX traffic.

In order to understand these issues, and the FCC’s ruling, it is important to place the *ISP Remand Order* in its proper context. In the late 1990s, when the FCC’s ISP traffic docket was initiated, ISP traffic was generally handled in one of two ways. If the ISP was located outside the caller’s LCA, the caller would need to dial a 1+ toll call or an 8XX number to access the modem of the ISP. Such traffic was appropriately characterized as interexchange traffic subject to access or long distance charges. The other situation involved two LECs competing in the same LCA. In this second situation, an end-user customer of one LEC dialed a local number that allowed it to access an ISP customer of the second LEC, where both customers were physically located in the same LCA. The FCC addressed this second situation in both its 1999 *ISP*

²⁹ *Id.*

³⁰ Order, *Petition of Core Communications for Forbearance Under 47 USC § 160(c) from the Application of the ISP Remand Order*, Order FCC 04-241 WC Docket No. 03-171 (rel. October 18, 2004) (“*Core Forbearance Order*”).

³¹ The FCC has repeatedly ruled that ISP-bound traffic is interstate in nature because the ultimate end points of the calls are at websites across the country or in many cases in other parts of the world. *ISP Declaratory Order*, ¶¶ 1, 10-20; *ISP Remand Order*, ¶¶ 14, 58-62. Nonetheless, for intercarrier compensation purposes, the relevant end points are the physical location of the calling party and the physical location of the ISP’s servers or modem banks.

Declaratory Order and its 2001 *ISP Remand Order*. The FCC concluded that because of the one-way nature of such traffic, requiring reciprocal compensation payments on local ISP traffic was distorting the development of competition in the local markets.³²

In defining ISP-bound traffic in the *ISP Remand Order*, the FCC stated that “an ISP’s end-user customers typically access the Internet through an ISP Server *located in the same local calling area*, and that the end user customers pay the local exchange carrier for connections to the local ISP.”³³ The FCC specifically identified the issue it was addressing as “whether reciprocal compensation obligations apply to the delivery of calls from one LEC’s end-user customer to an ISP in the same local calling area that is served by a competing LEC.”³⁴

That the FCC recognized that it was dealing only with “local” traffic is also clear from Paragraph 12:

The 1996 Act set standards for the introduction of competition into the market *for local telephone service*, including requirements for interconnection of competing telecommunications carriers. As a result of interconnection and *growing local competition*, more than one LEC may be involved in the delivery of telecommunications *within a local service area*. Section 251(b)(5) of the Act addresses the need for LECs to agree to terms for the mutual exchange of traffic over their interconnecting networks. It specifically provides that LECs have the duty to “establish reciprocal compensation arrangement for the transport and termination of telecommunications.” The FCC also determined, in the *Local Competition Order*, that section 251(b)(5) reciprocal compensation

³² *ISP Remand Order*, ¶¶ 67-76.

³³ *ISP Remand Order*, ¶10. (Emphasis added.)

³⁴ *Id.*, ¶ 13. (Emphasis added.)

obligations “apply only to traffic that originates and terminates *within a local area*,” as defined by the state commissions.³⁵

Thus, the *ISP Remand Order* did not address the situation where a CLEC’s ISP-customer servers or modems are located outside of the LCA of the calling party.

In another portion of the *ISP Remand Order*, the FCC specifically recognized that a separate category of ISP traffic continued to exist, which was, and would remain, subject to access charges:

*Congress preserved the pre-Act regulatory treatment of all the access services enumerated under Section 251(g). These services thus remain subject to Commission jurisdiction under Section 201 (or, to the extent they are intrastate services, they remain subject to the jurisdiction of state commissions), whether those obligations implicate pricing policies as in Comptel or reciprocal compensation. This analysis properly applies to the access services that incumbent LECs provide (either individually or jointly with other local carriers) to connect subscribers with ISPs for Internet-bound traffic.*³⁶

In recognizing the existence of such non-local ISP traffic, and providing that it did not fall under its interim regime, it is clear that the FCC did not intend to address anything other than local ISP traffic. As noted above, Pac-West agrees that access charges apply to toll calls to an ISP. The Commission here should not allow Pac-West to avoid proper treatment of VNXX calls as toll simply by virtue of a false dialing pattern that hides the true nature of the call.

³⁵ *ISP Remand Order*, ¶ 12. (Emphasis added.)

³⁶ *ISP Remand Order*, ¶39. (Emphasis added; footnote omitted.)

2. AT&T Arbitration

Less than two years ago, Qwest and AT&T conducted a series of contested arbitrations in several states, including Arizona. Those dockets addressed a fundamental issue related to VNXX. Qwest proposed that “local exchange traffic” be defined as “traffic that is originated and terminated in the same local calling area as determined for Qwest by the Commission.” AT&T proposed language by which local calling would be determined by “the calling and called NPA-NXXs,” regardless of the actual origination and termination points. AT&T’s proposed language was rejected in each of those arbitrations.

In the AT&T/Qwest arbitration proceeding in Arizona dealing with the definition of a “local” call, the Commission ruled that the definition of local exchange service would remain traffic that originates and terminates within the *same* Commission-determined LCA. The Commission rejected AT&T’s request for a definition based on “the calling and called NPA/NXXs” (*i.e.*, VNXX), and found:

Qwest’s proposed definition of ‘Exchange Service’ comports with the existing laws and rules, and should be adopted. AT&T’s proposed definition represents a departure from the establishment of local calling areas and may have unintended affect beyond the issues discussed herein and be subject to abuse. . . . We do not believe that it would be good public policy to alter long-standing rules or practice without broader industry participation.³⁷

Arbitrations in Oregon, Colorado, Washington, and Utah, among others, produced similar results. For example, the Oregon Commission rejected AT&T’s proposal in favor of Qwest’s proposed definition because Qwest’s definition “mirrors the definition in its Statement of

³⁷ Opinion and Order, *In the Matter of the Petition of AT&T Communications of the Mountain States, Inc. and TCG Phoenix, Inc. for Arbitration with Qwest Corporation, Inc. Pursuant to 47 U.S.C. § 252(b)*, Docket Nos. T-02428A-03-0553, T-01051B-03-0553, Decision No. 66888 at 13 (Ariz. Corp. Comm’n, December 17, 2003).

Generally Available Terms (SGAT)...[which] are persuasive because in the SGAT process, the Commission...thoroughly reviewed Qwest's language for meeting its burden of proof in compliance with FCC rules."³⁸ The Commission also decided that "[u]sing Qwest's definition maintains the status quo until the Commission can reach a carefully considered decision" in a separate and on-going proceeding regarding the treatment of VNXX traffic and that any resulting changes to the law could be integrated into the agreement using the change of law provision.³⁹ The Oregon Commission later suggested that any carrier engaging in VNXX schemes would clearly be in violation of certain conditions in their certificates of authority, including adherence to the Commission's local exchange boundaries and EAS routes, and the limitation of a carrier's NXX codes to a single local exchange or rate center.⁴⁰

The Colorado Commission found that "*any service . . . regardless of what the service is called, that does not meet our approved definition of exchange service is an interexchange toll service. The calling party and the called party must both be physically located in the same LCA for the call to be a local call for reciprocal compensation purposes. Calls originating from and terminating to customers that are physically located in different calling areas are interexchange.*"⁴¹

Likewise, in Washington, the WUTC noted with approval the Arbitrator's concern that AT&T's definition "is too sweeping in its potential effect and has potentially unacceptable consequences in terms of intercarrier compensation."⁴² The Washington Arbitrator had also

³⁸ See Order No. 04-262, Docket ARB 527 (May 17, 2004) and Appendix A (Arbitrator's Decision) at 6.

³⁹ *Id.*, Appendix A at 7.

⁴⁰ *In the Matter of Oregon Telecommunications Association Investigation into Virtual NPA/NXX Calling Patterns*, OPUC Order No. 04-504 (September 7, 2004), Docket UM 1058 at 5.

⁴¹ Initial Commission Decision, *In the Matter of Petition of Qwest Corporation for Arbitration of an Interconnection Agreement with AT&T Communications of the Mountain States, Inc. and TCG-Colorado*, Docket No. 03B-287T, Decision No. C03-1189, ¶ 52 (Colo. PUC, October 17, 2003). (Emphasis added.)

⁴² *In the Matter of the Petition for Arbitration of AT&T Communications of the Pacific Northwest and TCG Seattle with Qwest Corporation Pursuant to 47 U.S.C. Section 252(b)*, Docket No UT 0330305, Order No. 05.

ruled that reciprocal compensation for calls that terminate outside the LCA in which they originate was inappropriate, and therefore such traffic would be compensated on a bill and keep basis. The WUTC adopted the Arbitrator's Report.⁴³

The Utah Commission likewise rejected the AT&T position, concluding that "AT&T's proposal is untried and presents substantial risk of unintended consequences. In addition, it is contrary our determination that the local calling area, for reciprocal compensation purposes, should be the same as the traditional local calling area *associated with the physical location of the customer*. For a call to be treated as a local call, to be local exchange traffic as opposed to interexchange traffic, the call *must originate and terminate with customers who are physically located in the same local calling area.*"⁴⁴

Like the rejected AT&T proposal, Pac-West's proposal in this docket would abandon the distinction between local and interexchange traffic for intercarrier compensation and would profoundly change the methods used to determine such compensation.

⁴³ Pac-West's interconnection agreement has a definition of "Exchange Service" similar to the AT&T agreement. Specifically, the definition in the AT&T agreement (§ 4.0) is as follows: "'Exchange Service' or 'Extended Area Service (EAS)/Local Traffic' means traffic that is originated and terminated within the same LCA as determined for Qwest by the Commission." The definition in Pac-West's agreement (§ (A)2.19) is as follows: "'Extended Area Service (EAS)/Local Traffic' (Exchange Service) means traffic that is originated by an end user of one Party and terminates to an end user of the other Party as defined in accordance with USW's [Qwest's] then current EAS/local serving areas, as determined by the Commission."

⁴⁴ Arbitration Report and Order, *In the Matter of the Petition of Qwest Corporation for Arbitration of Interconnection Rates, Terms, and Conditions, and Related Arrangements with AT&T Communications of the Mountain States, Inc. and TCG Utah*, Docket No. 04-049-09, at 13 (Ut. PSC May 4, 2004) (Emphasis added).

3. Other State Commissions

Many state commissions and boards have addressed the VNXX issue, and have almost uniformly held that VNXX traffic is not local and is not subject to reciprocal compensation or intercarrier compensation. A summary of these decisions can be found in Exhibit D to this brief.

4. The Level 3 Complaint in Oregon

As the Commission is aware, this Complaint is part of a wave of complaints across Qwest's region focusing on questions of compensation for CLEC-provided services to ISPs for VNXX-routed-ISP traffic. In one such proceeding in Oregon,⁴⁵ the parties framed the issue as whether the FCC's use of the term "ISP-bound traffic" in the *ISP Remand Order* encompasses VNXX traffic. In that Oregon proceeding, the ALJ ruled that the term "ISP-bound traffic," as used in the *ISP Remand Order*, does not include VNXX-routed ISP-bound traffic, and that accordingly, the Qwest ICA at issue did not require the exchange of compensation for this traffic.⁴⁶ A complete copy of the ALJ's ruling is attached as Exhibit E. In his Ruling, the Oregon ALJ correctly refutes Level 3's attempts to constrain the clear language of the *ISP Remand Order* and the decision of the U.S. Court of Appeals for the District of Columbia in *WorldCom, Inc. v. FCC*⁴⁷ ("*WorldCom*"). Qwest's discussion of WorldCom appears below in Section II.E.6.a, at page 22.

5. The Pac-West and Level 3 Complaints in Washington State

In Washington, both Pac-West and Level 3 filed enforcement proceedings regarding compensation for VNXX traffic that is destined for an ISP. In both cases, the presiding ALJs have entered orders, but the procedural posture of each case is quite different. In both cases,

⁴⁵ Ruling, *In the Matter of Qwest Corporation vs. Level 3 Communications, LLC, Complaint for Enforcement for Interconnection Agreement*, Docket IC 12 (Or PUC, August 16, 2005).

⁴⁶ *Id.*, p. 13.

⁴⁷ *WorldCom Inc. v. FCC*, 288 F. 3d 429 (D.C. Circuit 2002).

following a prior Commission ruling concerning VNXX ISP traffic, the ALJs proposed that the Commission should interpret the ISP Remand Order to include VNXX traffic.

In the Pac-West Washington Complaint⁴⁸, the ALJ entered a Recommended Decision in Pac-West's favor on the reciprocal compensation issue, as well as the issue of the amount in dispute. However, the Recommended Decision did not rule on three of Qwest's counterclaims regarding whether VNXX is permissible in the first instance, and whether it should be carried on LIS trunks. On September 9, 2005, Qwest filed exceptions to that decision. Qwest has requested Commission review of this decision, and has asked that it be consolidated with the Level 3 case for hearing and further decision by the ALJ on the undecided issues. Qwest has also asked the Commission to reverse the ruling with regard to the compensability of ISP VNXX traffic.

In the Level 3⁴⁹ case, the ALJ held in Qwest's favor on the change of law issues, and decided that a more complete record should be developed at hearing in order to rule on the issue of whether VNXX is permissible at all. The ALJ held that that question had not been decided by the Commission. The schedule in that case is currently under discussion. On September 6, 2005 Level 3 filed with the Commission a Petition for Interlocutory Review of the ALJ's ruling with regard to the permissibility of VNXX traffic.

Both rulings are merely recommendations to the full Commission, and have no binding effect until the Commission rules on the issues.

6. Federal Court Decisions

a) *WorldCom* Decision—U.S. Court of Appeals for the District of Columbia

For purposes of the issue before the Commission, the most critical decision on the question of the breadth of the *ISP Remand Order* is the D.C. Circuit's review of the *ISP Remand*

⁴⁸ *Pac-West Telecom, Inc., v. Qwest Corporation, Recommended Decision to Grant Petition*, Docket No. UT-053036 (WUTC, August 23, 2005)

⁴⁹ *Level 3 Communications, LLC, v. Qwest Corporation, Order Denying in Part and Granting in Part Motions for Summary Determination*, Docket No. UT-053039 (WUTC, August 26, 2005).

*Order in WorldCom, Inc. v. FCC.*⁵⁰ In this *decision*, the D. C. Circuit was crystal clear on its characterization of the issue that was addressed in the *ISP Remand Order*: “In the order before us *the Federal Communications Commission* held that under § 251(g) of the Act it was authorized to ‘carve out’ from § 251(b)(5) *calls made to internet service providers (“ISPs”) located within the caller’s local calling area.*”⁵¹ This is not a casual background statement; instead, this plain and unequivocal language is the reviewing court’s express statement of the *holding* of the *ISP Remand Order*. The holding of the *ISP Remand Order* relates *solely* to local ISP traffic.

The *WorldCom* court found that section 251(g) did not provide the FCC with a basis for its action, but, at the same time, the court made it clear that it was not deciding other issues that may be determinative and which would justify the FCC’s decision, including (1) whether ISP calls are “telephone exchange service” or “exchange access,” or neither; (2) the scope of “telecommunications” under section 251(b)(5); or (3) whether the FCC could adopt a bill and keep regime.⁵² Furthermore, because there was a “non-trivial likelihood that the Commission has authority to elect such a system,” the court remanded, *but did not vacate*, the *ISP Remand Order*. The *ISP Remand Order* remains the applicable law for the treatment of local ISP traffic.

Just as the *ISP Remand Order* remains in effect, the *WorldCom* court’s characterization of the holding (that it applies only to local ISP traffic) is binding on all other courts and commissions because the *WorldCom* court is the Hobbs Act reviewing court for the *ISP Remand Order*. Under the Hobbs Act, the federal courts of appeal have “exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or determine the validity of (a) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47.”⁵³ Thus,

⁵⁰ 288 F.3d 429 (D. C. Circuit 2002).

⁵¹ 288 F.3d at 430.

⁵² *Id.* at 434.

⁵³ 28 U.S.C. § 2342(1) (emphasis added). 47 U.S.C. § 402(b) sets forth a few specific exceptions to 47 U.S.C. §

the Hobbs Act grants exclusive jurisdiction over appeals of FCC decisions to the federal appellate courts and, absent reversal of an FCC determination by a federal appellate court, federal district courts and state commissions are obligated under the Hobbs Act to apply and abide by FCC rules and orders. Further, state commissions, the state entities implementing portions of the federal act pursuant to delegated authority, must follow decisions of federal courts interpreting the Act and interpreting FCC decisions that implement the Act.⁵⁴ Thus, the Commission and all parties in this case are bound by the *WorldCom* court's characterization of the breadth of the *ISP Remand Order*.

b) SNET Decision—U.S. District Court, Connecticut

In the Recommended Decision in the Pac-West Washington Complaint, the ALJ relied on a decision of the Connecticut federal district court in *Southern New England Telephone v. MCI WorldCom Communication* (“SNET”).⁵⁵ However, the SNET decision is demonstrably erroneous because it ignores the conclusions of the ISP Remand Order and the D.C. Circuit's review of the *ISP Remand Order* in *WorldCom*. Indeed, it cavalierly relegates the language of the D.C. Circuit in *WorldCom* to the status of a mere background statement. One need only read the sentence quoted above from *WorldCom* to quickly conclude that this is a gross mischaracterization.

c) Universal Telecom Case—U.S. District Court, Oregon

The VNXX issue was also addressed in a recent decision by the United States District Court for the District of Oregon. In that case, Universal Telecom argued that Qwest should pay

402(a), none of which applies here.

⁵⁴ See 47 U.S.C. § 408 (Orders of the FCC “shall continue in force for the period of time specified in the order or until the Commission or a court of competent jurisdiction issues a superseding order.”); see also *Hawaiian Tel. Co. v. Hawaii Pub. Util. Comm'n*, 827 F.2d 1264, 1266 (9th Cir. 1987); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 738 F.2d 901, 907 (8th Cir. 1984) *vacated on other grounds*, 476 U.S. 1167 (1986); *Southwestern Bell Tel. Co. v. Texas Pub. Util. Comm'n*, 812 F. Supp. 706, 708 (W.D. Tex. 1993).

⁵⁵ 359 F. Supp 3d 229 (March 16, 2005).

reciprocal compensation on VNXX traffic. The Court first discussed the definition of “local traffic” as contained in Qwest’s Oregon tariff and the parties’ ICA, which is consistent with the definition of local traffic in this case. The Court then stated:

[F]or a call to be local and subject to reciprocal compensation, it must originate at some physical location within a LCA [local calling area] or EAS and terminated [sic] at a physical location within the same LCA or EAS. Specifically here, for an ISP bound call to be subject to reciprocal compensation it must originate in a LCA or EAS and terminate in that same LCA or EAS by delivery of the call to the SAP. VNXX traffic does not meet the definition of local traffic because it does not originate and terminate in the same LCA or EAS; it instead crosses LCAs and EASs. Therefore, VNXX traffic, whether ISP bound or not, is not subject to reciprocal compensation.⁵⁶

d) Global NAPS Decision—U.S. District Court, District of Vermont

Global NAPS, Inc. v. Verizon New England Inc., 327 F.Supp.2d 290 (D.Vt. 2004), (“*Global NAPS*”) is a case involving a CLEC Global NAPS (“Global”), which provided services to ISPs, using VNXX services. The Vermont Public Service Board required Global to pay access charges to Verizon for its long distance calls, and to cease using VNXX service. The Board based its determination of whether traffic is “local” or “toll” upon the physical termination points of the calls. The court upheld the Board, ruling that the FCC’s ISP Remand ruling did not diminish the state commissions’ authority to define local calling areas, and upholding the Board’s power to ban the use of VNXX. *Id.*, 298, 301. A complete copy of the Slip Amended Opinion issued by the court is attached hereto as Exhibit F.

⁵⁶ Opinion and Order, *Qwest Corporation v. Universal Telecom, Inc.* USDC for the District Court of Oregon at Eugene, Civil Case No. 04-6047-AA (December 15, 2004), page 24.

III. ARGUMENT

VNXX is an arrangement that disregards the well established concept of local calling areas and provides the functionality of toll or 8XX at no extra charge to either party to the call, and shifts the cost to the ILEC (Qwest) for transporting this “disguised” toll call. VNXX has become an issue because CLECs, like Pac-West in Washington, obtain local numbers that are actually assigned to its ISP customers with no physical presence in the LCA from which the numbers were allocated.

Thus, the traffic directed to those numbers is, instead of being routed to a customer in the same LCA as the calling party, routed to a central point of interconnection of the CLEC and is then delivered to the CLEC’s ISP customer at a physical location in another LCA or even in another state.

These calls are non-local calls, really nothing more than toll calls and they are not compensable as “ISP-bound traffic,” as the terminating intercarrier compensation mechanism in place for ISP-bound traffic is limited to local ISP traffic. No reciprocal compensation is due to the CLEC for terminating these calls. Pac-West’s arguments to the contrary are not well taken.

A. Arizona Statutes, Commission Rules, and Relevant Commission Rulings Regarding Local Exchange Service Do Not Permit VNXX

The underlying logic of creating geographically-based LCAs and the different pricing regimes that followed, are expressly recognized in statute, Commission rules, and prior Commission decisions. Pac-West’s arguments require all that history and law be thrown overboard.

1. ARS §40-329

The legislature recognizes that there is an innate difference between local calls and interexchange calls. In ARS §40-329, a statute that long preceded the 1996 Act, the legislature provided that the Commission could require that two telephone corporations connect to each other. The exception to that power is “*except where the purpose of the connection is primarily to secure transmission of local messages or conversations between points within the same city, or town.*” The importance of this section to this issue is not that Qwest could refuse to interconnect for local messages (that issue having been resolved by the 1996 Act), but the fact that Arizona statutes define local messages as taking place “between points within the same city, or town.” In other words, this statute defines local calling in terms of the geographical proximity of the parties to the call, contrary to Pac-West’s views.⁵⁷

2. Commission Rules

Qwest’s characterization of calls based on location of the calling party and the called party is consistent with the Arizona Commission’s Rules, while Pac-West’s dialing scheme completely disregards these Rules.

The Commission’s “Competitive Telecommunications Services” rule ties local exchange traffic to traffic *within* exchange areas. The rule defines “Local Exchange Service” as “[t]he telecommunications service that provides a *local dial tone*, access line, and *local usage within an exchange or local calling area.*” AAC § R14-2-1102(7) (emphasis added). On the other hand, the Commission’s “Telephone Utilities” rule defines “toll service” as service “*between stations in different exchange areas* for which a long distance charge is applicable.” *Id.* § R14-2-501(23) (emphasis added). The Commission’s “Telecommunications Interconnection and Unbundling” rule states: “The incumbent LEC’s *local calling areas and existing EAS boundaries will be used for the purpose of classifying traffic as local, EAS, or toll for purposes of intercompany*

⁵⁷ Similar support for the dichotomy between local calling and interexchange calling appears in ARS 40-282(c)(2), which contemplates separate certification for “local exchange” carriers and “interexchange” carriers.

compensation. Id. § R14-2-1305(A) (emphasis added). There are a number of other pertinent rules and definitions in the Arizona Administrative Code:

'Central Office Code' means the first three digits of a seven-digit telephone number. Central office codes are assigned to telecommunications providers by the central office code administrator in accordance with the industry's central office assignment guidelines.

A.A.C. R14-2-1302(4). (Emphasis added).⁵⁸

'Extended Area Service' or "EAS" means local (toll-free) calling provided between local exchange carrier exchanges (service areas).

A.A.C. R14-2-1302(9). (Emphasis added).

'Local Exchange Service.' Telecommunications service that provides a local dial tone, access line, and local usage *within an exchange or local calling area*.

A.A.C. R14-2-1102(8). (Emphasis added).

'Local and Toll Rating Centers.'

The incumbent LEC's local calling areas and existing EAS boundaries will be utilized for the purpose of intercompany compensation.

All LECs will use central office codes with rate centers matching the incumbent LEC's rate centers.

A.A.C. R14-2-1305. (Emphasis added).

'Rate Center' means specific *geographic locations* from which airline mileage measurements are determined for the purposes of *rating local, Extended Area Service (EAS), and toll traffic*.

A.A.C. R14-2-1302(19). (Emphasis added).

'Reciprocal Compensation' means the arrangement by which local exchange carriers compensate each other for like services used in the *termination of local calls* between the customers of the two carriers.

A.A.C. R14-2-1302(20). (Emphasis added).

Read together, these provisions provide overwhelming authority for the proposition that in Arizona local and toll traffic are defined in terms of the geographical location of the parties to

⁵⁸ See Page 35, *infra*, for a discussion of the telecommunications industry's central office assignment guidelines.

the call. The VNXX dialing scheme is completely out of compliance with these rules.

B. VNXX May be Prohibited

As discussed above, Courts and regulatory agencies in other jurisdictions have come to grips with the same issues presented here. In *Global NAPS*, the U.S. District Court for the District of Vermont unambiguously upheld the Vermont Public Service Board's ruling that Verizon need not pay reciprocal compensation for traffic that only appeared to be local by virtue of the VNXX, but was actually interexchange traffic. The Board ruled that the determination of whether traffic is "local" or "toll" is based upon the physical termination points of the calls. The Board ordered Global to cease using VNXX. *Global NAPS, Inc. v. Verizon New England Inc.* 327 Fed Supp 2d 290, 298-301. (D. Vt., 2004). Global argued that the Public Service Board lacked the authority to ban the use of VNXX service. The Court disagreed, holding that the Board's prohibition of NVXX service did not violate federal law or the filed rate doctrine (*Id.* 299-301).

C. VNXX Traffic is not FX

Pac-West contends in its Petition that Qwest's FX service is "indistinguishable" from VNXX.⁵⁹ This is untrue for a number of reasons. The services are distinguishable on at least three different bases. First, FX customers are required to purchase a local connection in the distant central office; VNXX customers are not. Second, FX customers are required to pay for the dedicated transport from the distant central office to their physical location in the home LCA; VNXX customers are not. Third, the number of customers and volume of traffic associated with

⁵⁹ Petition at ¶ 12, 13.

each service are widely disparate. Of the over 2 million access lines Qwest serves in Arizona, less than 18,000 of them are FX lines – less than one half of one percent. Pac-West serves all of Arizona, and has obtained local telephone numbers in VNXX LCA. [If an ISP's modem bank is located out of state, which is entirely conceivable, then even numbers in Phoenix and Tucson could be VNXX numbers]. FX is clearly a minor exception to the way calls are routed and rated, yet Pac-West seeks to take the exception and turn it into the rule.

1. Qwest's FX service is different from VNXX.

Qwest's FX service is fundamentally different from VNXX. VNXX uses the PSTN to route and terminate calls to end user customers connected to the PSTN in another LCA. In all respects except the number assignment, the call is routed and terminated as any other toll call would be routed and terminated. Qwest's FX product, on the other hand, delivers the FX-bound calls to the LCA where the number is actually associated. A Qwest FX customer purchases a dedicated local service connection in the LCA associated with the telephone number. That local service connection is purchased by the FX customer out of the local exchange tariffs that apply to that LCA. The calls are then transported on a private line, paid for by the FX subscriber, to another location. In other words, after purchasing the local connection in the LCA, the FX customer bears full financial responsibility to transport calls from the originating LCA to the location where the call is actually answered. It does this at tariffed private network rates. Qwest and other telephone companies have been selling such private line services to PBX owners and other customers for decades. Calls are delivered to the customer's PBX and any call delivery behind the PBX is, for purposes of transport to the customer's actual location, carried on the owner's private network.

Pac-West's approach is fundamentally distinct from FX service. Under FX, the customer who desires a presence in another LCA bears full financial responsibility for transporting the traffic to the location where it wants the call answered. Under Pac-West's proposal, Pac-West

wants the call routed over the PSTN, but wants no responsibility for paying to transport the traffic to the distant location – instead, it wants Qwest to bear that cost. Pac-West wants to enable toll calls to ride free over Qwest’s transport facilities. In calling its product an “FX-like” product, Pac-West attempts to confuse this critical distinction. Calls over the PSTN between communities that use the toll network are toll calls no matter how the numbers are assigned. Calls delivered to end user customers within a LCA and transported over private networks are more than a mere technical distinction. It is consistent with the way utility commissions have been distinguishing between toll and local calls since access charges were established.

If Pac-West were to offer a true FX service, in which its customer was responsible for establishing a physical presence in each LCA and the traffic was transported to the ISP’s server in that manner, Qwest would have no objection to that type of service.⁶⁰ However, Pac-West does not provide this service for the VNXX calls to ISPs. Rather it routes the traffic over Qwest’s local interconnection network using LIS (local interconnection service) trunks. This is improper both because the calls are not local and because the parties have not agreed to exchange this type of traffic over LIS trunks.

That these distinctions are relevant was aptly noted by the federal district court in the *Global NAPS* decision (*see*, Exhibit F hereto), where the Vermont Public Service Board banned VNXX. The CLEC in that case appealed, claiming that the Board’s decision unlawfully discriminates against VNXX vis a vis FX. The court upheld the board’s decision and concluded that a ban on VNXX did not discriminate against the CLEC. The court agreed that FX and VNXX are the same from the perspective of the retail customer, but went on to state that:

⁶⁰ Even though this would address the issue of misassignment of numbers, it would not entitle Pac-West to receive intercarrier compensation for these calls. Intercarrier compensation would not be due on these calls for the same reason as discussed above – ISP-bound traffic is only compensable if it is true local traffic, originating and terminating to the ISP’s server in the same LCA. Even true FX traffic does not meet that definition and the *ISP Remand Order* does not apply to that type of traffic.

From the carriers' and regulators' point of view, however, the services operate quite differently. When VNXX numbers are assigned, neither Global [the CLEC] nor its customers purchase any equipment, nor do they pay for the costs of transporting the call. Instead, Global relies on Verizon, the ILEC, to transport the calls, in accordance with Verizon's obligation to provide interconnecting services. (*Global NAPS*, at 299).

The Court concluded that FX and VNXX are not equivalent services. (*Id.*).

2. Pac-West charges its ISP customers nothing for its VNXX service.

In order to determine if Pac-West's VNXX offering is really the same service as Qwest's FX service, as Pac-West claims, one need only to take note that VNXX service is not separately identified in Pac-West's price list.⁶¹ Therefore, it is clear that Pac-West does not charge its ISP customers for this service. These customers do not obtain or pay for a separate dedicated connection to the PSTN and they do not pay for interexchange transport, all of which are hallmarks of FX service.

Thus, VNXX is simply an arbitrage scheme to shift the cost recovery from the ISP to Qwest. Originally, consumers had to dial 1+ if they were outside the calling area of the ISP modem banks or servers, or the ISP had to offer an 8XX or true FX service. Under those circumstances, either the ISP or the consumer paid for the transport between calling areas, either via private line transport, access charges, or toll charges. Pac-West, and other CLECs, have now attempted to alter this cost recovery by using VNXX. Their ISP customers enjoy the benefit of not having to pay for 8XX or FX service. At the same time, by not providing Qwest calling records of the appropriate NXX of the calling area in which the ISP server is physically located,

⁶¹ See Exhibit G (Pac-West's Responses to Qwest's Data Request Nos. 13 and 14).

Qwest is denied the opportunity to recover transport costs. Worse still, Pac-West is also demanding intercarrier compensation from Qwest, as if the traffic were local.

3. End-User Perception of the Call Does Not Alter the Nature of Intercarrier Compensation.

Pac-West may argue that VNXX calls and FX calls are identical from the perspective of the party who is calling the VNXX or FX subscriber. Although it is true the ISP's end-user customer perceives a "local" call in both cases, the fact is that the end-user's perception of the call is irrelevant in determining the appropriate intercarrier compensation mechanism. Furthermore, if the calling party knew that the ISP was located outside of the LCA, the calling party would certainly perceive that toll charges would apply. Once again, the important distinction between FX and VNXX is that the FX subscriber has already paid for the seemingly local calls to be transported to a distant LCA by virtue of paying private line transport charges. This is clearly not the case with VNXX, which inappropriately loads the transport costs on Qwest with no opportunity for recovery of them.

As described above, VNXX is certainly distinguishable from FX from the point of view of both the subscriber to the service and Qwest. With VNXX, the subscriber avoids charges it would pay with FX, and Qwest is forced to transport what would otherwise be toll traffic over its local trunks and is not only not compensated for transporting the call, but also is expected to pay Pac-West for terminating the toll call.

D. Pac-West's Position on VNXX is Contrary to its Own Price List

Although Pac-West claims it is entitled to compensation on VNXX calls as if they were local calls, its own price-list properly recognizes the definition of local calls, and sets forth end-user customer charges for both local and toll calls. Pac-West's price list sets forth the definition

of “local calling area” as the extended service areas in which the Customer’s premises is located, as shown in the current and effective tariffs of Qwest (formerly US WEST Communications).⁶² It further defines “local exchange service” as the telephone service that entitles the customer to originate local calls, without toll charges, to all local exchange access lines connected to a Central Office (CO) of the exchange, or to all exchange access lines served by COs of the extended local service area where comprised of more than one exchange. Service will be provided where facilities area available from the Local Exchange Company (LEC). Pac West offers Qwest Local Exchange Services under resale. All terms and conditions, rates and charges for Qwest Local Exchange Services are hereby incorporated in this tariff.⁶³ Thus, under its own price list, Pac-West concedes that the nature of the call is determined by its physical end points.

In addition, Pac-West’s price list concurs in and incorporates Qwest’s local exchange boundary maps, thereby adopting the exchange boundaries and LCAs that are the same as in Qwest’s tariffs and price lists. Qwest’s tariff is clear: “local exchange service” is service that is furnished to the Company’s customers within an exchange for local calling.⁶⁴ A “local service area” or “extended local service area: is that area throughout which an exchange service customer, at a given rate, may make calls without the payment of a toll charge.⁶⁵ “Premises” is defined as the physical location of the customer, *i.e.*, the space in the same building occupied by the customer.⁶⁶ These requirements make it clear that the customers’ physical locations control whether a call is a local call or a toll call, not whatever artificial dialing convention a creative carrier has been able to employ to avoid toll charges.

E. VNXX Traffic is Improper Under Industry Guidelines

⁶² Pac West’s Price List, effective November 1, 2000, Sheet 7.

⁶³ *Id.* at Sheet 31.

⁶⁴ *See*, Qwest’s Exchange and Network Services Tariff, Section 2, Subsection 2.1.

⁶⁵ *Id.*

⁶⁶ *Id.*

Pac-West's assignment of telephone numbers in the manner sought in its Petition is not consistent with the telecommunications industry's numbering resource guidelines.

- 1. Industry guidelines exist to govern the proper use of numbering resources, and Pac-West is required to adhere to those guidelines.**

In 1995, prior to the passage of the Act, the FCC created the North American Numbering Council ("NANC") to make recommendations to the FCC on numbering issues and oversee the North American Numbering Plan ("NANP"). At the same time, the FCC also created the North American Numbering Plan Administrator ("NANPA"), an impartial entity responsible for assigning and administering telecommunications numbering resources in an efficient and non-discriminatory manner. NANPA is thus responsible for allocating NPA and NXX codes. Under FCC rules, NANPA is directed to administer numbering resources in an efficient and non-discriminatory manner, *and* in accordance with the guidelines developed by INC (the North American Industry Numbering Committee). 47 C.F.R. § 52.13(b) and (d).

Thus, to the extent INC "guidelines" exist, they are more than just guidelines – adherence to them is an FCC mandate. And INC guidelines do exist. The Alliance for Telecommunications Industry Solutions (ATIS) has published a set of INC guidelines entitled "Central Office Code (NXX) Assignment Guidelines (COCAG)." A copy of the INC COCAG guidelines was attached as Exhibit B to Qwest's Answer in this proceeding.

- 2. Pac-West's use of VNXX is in violation of industry guidelines which designate NPA-NXX codes as geographically-specific.**

Section 2.14 of the COCAG states that "CO [central office] codes/blocks allocated to a wireline service provider are to be utilized to provide service to a customer's premise *physically*

located in the same rate center that the CO codes/blocks are assigned. Exceptions exist, such as for tariffed services like foreign exchange services.” (Emphasis added.) VNXX is not identified as an exception, and is certainly not an “exception” as used by Pac-West.

In addition, Section 4.2.6 of the COCAG provides that “[t]he numbers assigned to the facilities identified must serve subscribers in the *geographic area corresponding with the rate center requested.*” (Emphasis added.)

Finally, “Geographic NPAs” are the “NPAs which correspond to discrete geographic areas within the NANP” while “Non-geographic NPAs” are “NPAs that do not correspond to discrete geographic areas, but which are instead assigned for services with attributes, functionalities, or requirements that transcend specific geographic boundaries, the common examples [of which] are NPAs in the N00 format, e.g., 800.” COCAG, § 13.0.

The numbers that Pac-West uses in Arizona are all Geographic NPA numbers. In other words, they are numbers that should, according to COCAG guidelines, correspond to discrete geographic areas. Under Pac-West’s misassignment of these numbers, however, these numbers no longer bear any relationship to a specific geographic location. This use of numbers is in violation of the industry guidelines.

F. Intercarrier Compensation is not Appropriate for VNXX Traffic Under the ISP Remand Order

The discussion above about the *ISP Remand Order* (¶¶ 30-40) establishes that the compensation scheme established by that Order is limited to local ISP traffic, where the calling party and the ISP’s server are located in the same LCA.

Furthermore, sound public policy counsels against permitting Pac-West to recover intercarrier compensation on VNXX traffic. The customer who places a call to an ISP is a

customer of the ISP on Pac-West's network. If Pac-West is allowed to collect intercarrier compensation for traffic that is properly thought of as Pac-West's own toll traffic, the end result is regulatory arbitrage in which Pac-West profits at Qwest's expense. Pac-West will collect revenue primarily from other carriers rather than its own customers. Such a result creates incentives for the inefficient entry of CLECs that will seek to serve ISPs exclusively, and not offer viable local telephone competition as Congress intended in the Act. Moreover, the large one-way flows of cash make it possible for CLECs to refrain from charging ISPs for services. This practice affects competition for ISP business, and drives ISP rates to consumers to uneconomical levels. In short, intercarrier payments for ISP traffic create severe market distortions.⁶⁷

Further, Pac-West's argument that the *ISP Remand Order* applies to *all* ISP traffic is inconsistent with the position it has taken in discovery responses, as discussed above. Having agreed that the access regime still applies to toll calls to the Internet, Pac-West cannot now be heard to say that VNXX calls are not toll. They are toll calls under Pac-West's price list, Qwest's tariffs, and prior Commission orders regarding LCAs and EAS.

G. The Parties' ICA does not Contemplate Exchange of VNXX Traffic

Further still, Pac-West's conduct violates the parties' ICA. The ISP Amendment that Pac-West and Qwest executed and that Pac-West refers to in its Petition provides that "ISP-Bound is as described by the FCC in its Order on Remand and Report and Order (Intercarrier Compensation for ISP-Bound Traffic) CC Docket 99-68." (ISP Amendment, § 1.4.)⁶⁸ As discussed above, the *ISP Remand Order* did not intentionally or accidentally include traffic

⁶⁷ *ISP Remand Order*, ¶¶ 70-71, 74-76.

⁶⁸ The parties entered into the ISP Amendment on February 6, 2003, and it was filed with the Commission on February 18, 2003. The Amendment was approved by operation of law on May 19, 2003. Docket No. T-01051B-03-0107, T-03693A-03-0107. A copy of the ISP Amendment is attached hereto as Exhibit H.

destined for an ISP server physically located in a different LCA than the originating caller as part of the “ISP-Bound traffic” addressed in the Order. Thus, VNXX traffic is not “ISP-Bound” as discussed or defined in the ISP Amendment.

Pac-West, however, seeks to sweep aside these definitions by assuming that all traffic destined for the Internet automatically falls within the definition of “ISP-bound traffic,” regardless of where the traffic physically originates and terminates. Indeed, Pac-West ignores the FCC history of defining traffic destined for an ISP as traffic that travels solely *within* a LCA prior to being delivered to the ISP’s server and subsequently the Internet. Pac-West also ignores long-standing industry practice of treating calls dialed as 1+ calls to the Internet as being toll calls.

As noted, Pac-West’s argument contradicts the definitions in the interconnection agreement. Pac-West’s interconnection agreement has a definition of “Exchange Service” similar to the AT&T agreement. As noted above (see page 18), the Arizona Commission found that the definition of “Exchange Service” in the AT&T interconnection agreement was dispositive of the VNXX issue. Specifically, the definition in the AT&T agreement (§ 4.0) is as follows: “‘Exchange Service’ or ‘Extended Area Service (EAS)/Local Traffic’ means traffic that is originated and terminated within the same LCA as determined for Qwest by the Commission.” The definition in Pac-West’s agreement (§ (A)2.19) is as follows: “‘Extended Area Service (EAS)/Local Traffic’ (Exchange Service) means traffic that is originated by an end user of one Party and terminates to an end user of the other Party as defined in accordance with USW’s [Qwest’s] then current EAS/local serving areas, as determined by the Commission.”

H. Pac-West’s Arguments Concerning Course of Dealing, Estoppel, and Res Judicata are Without Merit

Pac-West, in Paragraphs 12 and 14 of its Petition, alleges that because the parties have been exchanging traffic since 2001, that Qwest is estopped from now asserting that the VNXX traffic is not compensable, that the parties have a course of dealing under which VNXX traffic has been compensable, and that the matter is res judicata. All of these allegations are incorrect.

1. Estoppel

The doctrine of equitable estoppel precludes a party from exercising a right which might otherwise have existed.⁶⁹ Apparently, Pac-West seeks to apply the doctrine here to preclude Qwest from asserting its legitimate defenses and claims with regard to VNXX traffic. Equitable estoppel applies when (1) the party against whom the doctrine is being asserted makes a statement or admission or does an act inconsistent with a claim subsequently asserted; (2) the party asserting the doctrine acts or changes position in reliance on the statement, admission, or act; and (3) an injustice would result to the party asserting the doctrine if the other party were allowed to contradict or repudiate the statement, admission, or act.⁷⁰ Moreover, Arizona courts have regularly held that equitable estoppel cannot be applied to the detriment of the public interest or in a manner that conflicts with public policy.⁷¹

Equitable estoppel is clearly inapplicable in this case. Qwest has never made any statements or admissions with regard to the compensability of VNXX traffic. Indeed, as discussed below, VNXX traffic was not an issue prior to 2004 because all of that traffic was effectively excluded from compensation under the minutes-of-use cap.⁷² Nor is there any

⁶⁹ *John C. Lincoln Hospital and Health Corp. v. Maricopa County*, 208 Ariz. 532, 537, ¶¶ 10, 96 P.3d 530, 535 (App. 2004).

⁷⁰ *Id.*

⁷¹ *Id.* See also, *Western Corrections Group, Inc. v. Tierney*, 208 Ariz. 583, 589, ¶ 24, 96 P.3d 1070, 1076 (App. 2004) and cases cited therein.

⁷² Prior to January 1, 2004, a minute-of-use cap was in place whereby ISP traffic that Qwest terminated to Pac-West in excess of a calculated amount was excluded from the compensation requirements. The amount of the cap was calculated by taking the number of ISP minutes for the first quarter of 2001 multiplied by four to produce an

statement in Pac-West's Petition that would support a conclusion that Pac-West changed its position in any way in purported reliance on Qwest's silence or inaction with regard to VNXX traffic. Finally, given that Pac-West and Qwest have this opportunity before the Commission to resolve their dispute, there is no injustice to Pac-West – Pac-West will either receive the relief it requests or it will not, but Pac-West is in no different a position than it would have been had Qwest disputed the VNXX issue earlier than it did.

In any event, for the reasons discussed previously, the result requested by Pac-West would be void against public policy and therefore equitable estoppel does not apply.

2. Course of Dealing

A course of dealing is a sequence of previous conduct between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct, and may supplement or qualify terms of an agreement.⁷³ “Course of dealing” is a law of contracts doctrine, not a telephone regulatory concept. But the concept is inapposite in any event. As noted both above and below, Qwest has not paid compensation on VNXX traffic, and has not agreed, either explicitly or implicitly, that such traffic is compensable. Thus, the parties have no course of dealing that supports Pac-West's contention about compensation for VNXX traffic.

At least since 2003, Qwest has publicly asserted that VNXX traffic is not local and not compensable as “ISP-bound” traffic. Thus, it is clear that Qwest has not just taken the position on VNXX as a scheme to avoid paying compensation for that traffic. However, from a compensation perspective, the impact of VNXX traffic under the growth cap provisions of the

annual amount, and then adding a 10% growth rate for both 2001 and 2002. No additional growth rate was allowed for 2003.

⁷³ See *Keith Equipment Co. v. Casa Grande Cotton Finance Co.*, 187 Ariz. 259, 262-63, 928 P.2d 683, 686-87 (App. 1996); *AROK Constr. Co. v. Indian Constr. Serv.*, 174 Ariz. 291, 299, 848 P.2d 870, 878 (App. 1993).

ISP Remand Order and the parties' ICA was insignificant, and was effectively irrelevant to the billing by PacWest to Qwest. Qwest became more acutely aware that Pac-West was engaging in such VNXX schemes by PacWest's attempts to increase billing to Qwest for such schemes after the removal of the cap provisions brought about by the December 2, 2004 Arbitrator's decision and the *Core Forbearance Order*.

3. Res Judicata

Arizona courts recognize the doctrine of res judicata (claim preclusion) as applicable only in a subsequent proceeding if the parties, subject matter and cause of action are identical.⁷⁴ The Commission should find that this case involves a different subject matter, a different cause of action, and different issues than the private arbitration that Pac-West references in paragraphs 8 and 14 of its Petition. The issue in the arbitration was whether the caps previously imposed by the *ISP Remand Order* expired at the end of 2003 or continued in place thereafter. That case did not address the definition of ISP-bound traffic, did not address the issue of VNXX traffic, and did not address the question of the proper calculation of uncapped minutes. The issue in this case is whether VNXX traffic is permitted, and whether it is included in the definition of "ISP-bound traffic". Clearly, this issue was never raised by either party to the arbitration and therefore cannot be barred by res judicata.

IV. QWEST'S COUNTERCLAIMS

Qwest has presented four counterclaims in this matter. Based on the information and arguments made herein, the Commission should grant Qwest's counterclaims and find that Pac-West is in violation of the *ISP Remand Order* by charging intercarrier compensation for non-local ISP-VNXX traffic (Count 1); that Pac-West is in violation of state law regarding the proper

⁷⁴ See *Webber v. Grindle Audio Productions, Inc.*, 204 Ariz. 84, 88, ¶ 21 n.8, 60 P.3d 224, 228 n.8 (App. 2002); *Smith v. CIGNA Healthplan of Ariz.*, 203 Ariz. 173, 179, ¶ 21, 52 P.3d 205, 211 (App. 2002).

definitions of local service by virtue of its use of VNXX numbering (Count 2); and, that Pac-West is in violation of the ICA by virtue of its use of VNXX numbering (Count 3).

With regard to Count 4, the Commission should also find in Qwest's favor and order Pac-West to cease using LIS trunks to route VNXX traffic. Pac-West has argued that the parties have agreed to exchange VNXX traffic over LIS trunks. Qwest disagrees. Section (C)2.1.2 of the parties' ICA specifically delineates the types of traffic to be exchanged under the ICA. With respect to the traffic and disputes at issue in this matter, there are three relevant types of traffic that are appropriately exchanged under the ICA and under the parties' SPOP Amendment to the ICA: (1) Exchange Access (intraLATA Toll non IXC) traffic, (2) Jointly Provided Switched Access (interLATA and intraLATA IXC) traffic (also known as "Meet-Point Billing" or "MPB") and (3) Exchange Service or EAS/Local Traffic. (*See* SPOP Amendment, Attachment 1, § 1.)⁷⁵

The ICA defines those categories of traffic as follows:

- "IntraLATA Toll (Exchange Access)" is defined in accordance with USW's [Qwest's] current intraLATA toll serving areas, as determined by the Federal Communications Commission." (ICA, § (A)2.25.)
- "Meet-Point Billing" or "MPB" [also known as Provided Switched Access] refers to an arrangement whereby two LECs (including a LEC and Co-Provider) jointly provide Switched Access Service to an Interexchange Carrier, with each LEC (or Co-Provider) receiving an appropriate share of the revenues as defined by their effective access Tariffs. (*Id.*, § (A)2.32.)
- "Extended Area Service (EAS)/Local Traffic" (Exchange Service) means traffic that is originated by an end user of one Party and terminates to an end user of the other Party as defined in accordance with USW's [Qwest's] then current EAS/local serving areas, as determined by the

⁷⁵ The SPOP Amendment was filed on April 27, 2001, and approved in Order No. 63736 on June 6, 2001. Docket No. T-01051B-01-0357; T-03693A-01-0357.

Commission. (*Id.*, § (A)2.19.)

“ISP-bound traffic” is therefore defined by the ISP Amendment (§ 1.4) as described by the FCC in the *ISP Remand Order*. As already discussed above, Pac-West’s contention that the traffic at issue is entitled to treatment and compensation according to the *ISP Remand Order* is incorrect and not an appropriate reading of that Order, and conflicts with the Commission definition of local traffic in Arizona.

It is possible that Pac-West may argue (as some other carriers have attempted to claim), that this traffic is “Exchange Service” traffic, commonly referred to as “EAS/Local traffic.” “EAS/Local traffic”, however, is defined in Section (A)2.19 of the ICA as “traffic that is originated by an end user of one Party and terminates to an end user of the other Party as defined in accordance with USW’s [Qwest’s] then current EAS/*local serving areas*, as determined by the Commission.” (Emphasis added.) Even a cursory examination of the traffic in dispute here demonstrates that it does not meet this definition. Even though VNXX is not terminated at an ISP server that is in the same LCA as the originating caller, Pac-West has nevertheless claimed that it is “ISP-bound” traffic. Thus, there should be no contention as to whether the VNXX traffic at issue is “Exchange Service” traffic.

A traffic type that may *superficially appear* to apply to the VNXX traffic at issue is under the definition of “Exchange Access” traffic, which is defined in Section (A)2.25 of Pac-West’s ICA as being “in accordance with USW’s current intraLATA toll serving areas, as determined by the Federal Communications Commission.” Although this may appear functionally appropriate, upon closer examination the traffic does not meet this definition either.

As a threshold matter, only Pac-West knows the exact location of the ISP. Thus, Qwest cannot completely determine for any given call whether the call is destined for a location within the LCA or in a different LCA. Qwest only knows how far it has carried the call before handoff

to the interconnected carrier, where that carrier's serving switch is located, and whether traffic is one-way or two-way. In addition, even for traffic that may functionally appear to match the LCA definition, Pac-West's use of VNXX telephone numbers makes it difficult to track such traffic. Pac-West clearly does not intend for the traffic to be treated as "Exchange Access" traffic under the ICA, as evidenced by its misuse of telephone numbers. Thus, it is apparent this definition also does not match the traffic.

Finally, the last possible traffic type, "Meet-Point Billing" or "Jointly Provided Switched Access," does not match up to the VNXX traffic at issue either. This is so because no IXC is involved, as only Pac-West and Qwest are involved in the carriage of the traffic, which is contrary to the definition of the traffic in Section (A)2.32 of the ICA.

Therefore, in reviewing the ICA's plain language and the VNXX traffic that Pac-West causes Qwest to exchange, none of the traffic types that the parties specifically agreed to exchange match this VNXX traffic. Since Pac-West can easily remedy the situation by properly assigning telephone numbers based on the actual location of its end-user customers, it is incumbent upon Pac-West to ensure that the exchange of traffic under the ICA follows the terms and conditions of that Agreement. In the end, Pac-West is simply attempting to exchange traffic that the parties never agreed to exchange under the terms of the ICA.

V. CONCLUSION

For the reasons stated herein, the Commission should deny Pac-West's complaint. The amount in dispute in this proceeding represents only the amounts Qwest has disputed as improperly billed intercarrier compensation. That amount does not include the revenues Qwest has lost by virtue of avoided toll and access charges. The Commission should not condone a scheme that exploits the telephone numbering system to enable customers to avoid toll charges and Pac-West to avoid responsibility for the costs it imposes on the PSTN. Pac-West clearly has

no right under the ICA or applicable law to bill Qwest for VNXX calls to Pac-West's ISP customers. In addition, the Commission should grant Qwest's counterclaims and require Pac-West to enter into an ICA amendment to implement terms consistent with the Commission's findings herein, including an amendment that prohibits the use of LIS trunks for routing VNXX traffic.

VI. RELIEF REQUESTED

Qwest respectfully requests the Commission grant the following relief:

- A. Deny all of the relief requested by Pac-West in its Petition;
- B. Issue an order (1) prohibiting Pac-West from assigning NPA/NXXs in LCAs other than the LCA where Pac-West's customer has a physical presence, (2) requiring that Pac-West cease its misuse of such telephone numbering resources, and (3) requiring that Pac-West properly assign telephone numbers based on the location where its customer has a physical presence;
- C. Issue an order that the parties' ICA does not require any compensation for Pac-West's VNXX traffic;
- D. Direct Pac-West to follow the change of law procedures contained in its interconnection agreement with Qwest to implement the *Core Forbearance Order*;
- E. Invalidate all Pac-West bills to Qwest seeking or charging reciprocal compensation or the *ISP Remand Order* rate of \$0.0007 per minute for any of the VNXX traffic described above;
- F. Issue an order prohibiting Qwest from routing VNXX traffic to Pac-West utilizing LIS facilities; and
- G. Any and all other relief that the Commission deems appropriate.

RESPECTFULLY SUBMITTED this 14th day of September, 2005.

By 
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EXHIBIT A

REDACTED Confidential Exhibit A

2004

Pac-West sent to Qwest _____ minutes of use (MOU)

Pac-West's ISP customers caused Qwest to send Pac-West _____ minutes of use (MOU)

_____ MOU were VNXX and were not compensated;
_____ MOU were compensated – _____ MOU at the rate for voice traffic (Pac-West elected the FCC ISP rate for voice traffic) and the remaining _____ MOU were paid at the ISP rate of \$.0007 per minute.

EXHIBIT B

VNXX Routing

..... Local Call to ISP – Qwest Pays Recip Comp

- - - - - VNXX Call to ISP – Calls not local and Recip Comp does not apply

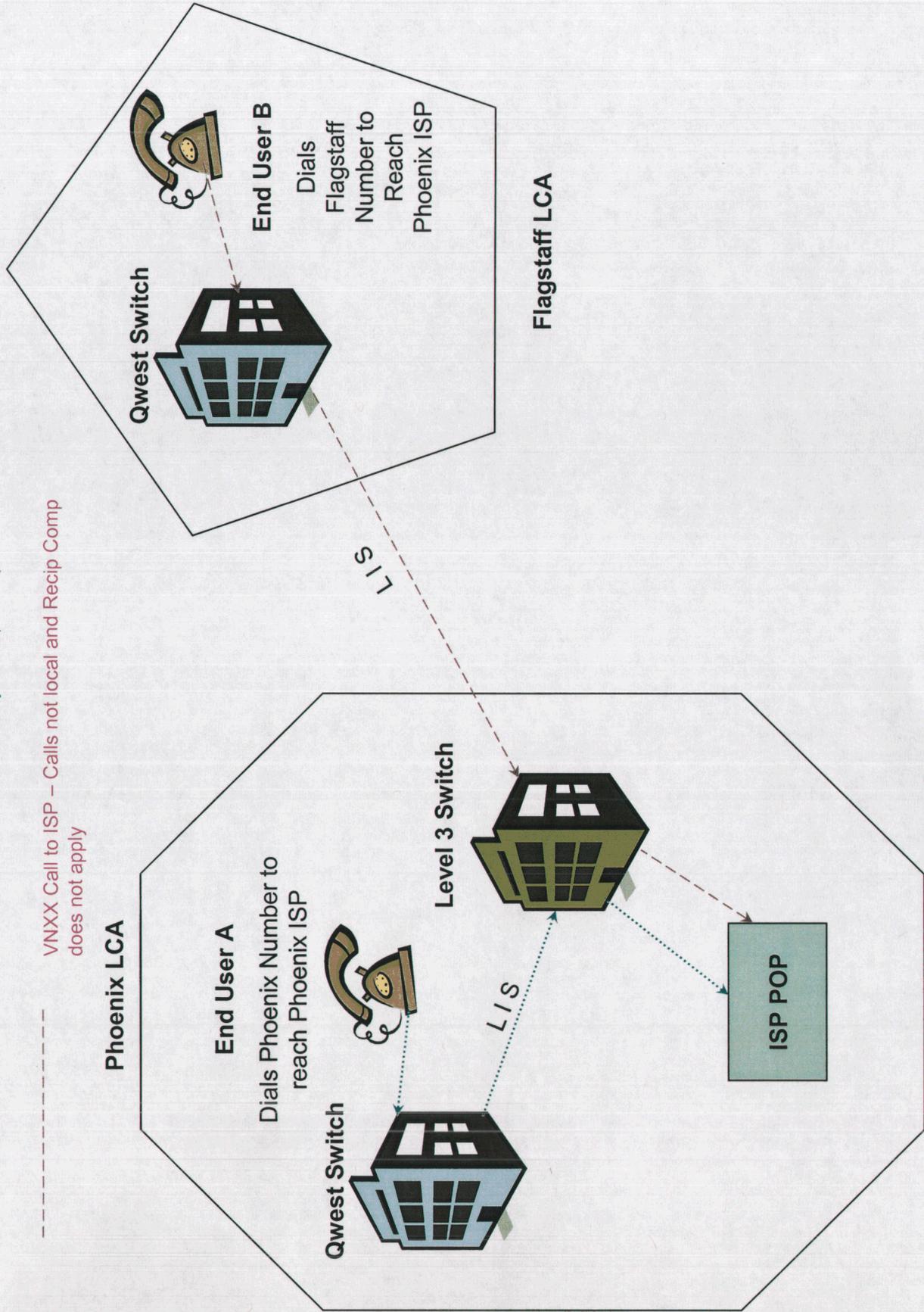


EXHIBIT C

**WUTC Docket No. UT-053036
Pac-West Responses to Qwest Data Requests
July 15, 2005**

Data Request No. 20:

If a Qwest customer were to place a 1+ call to an ISP served by Pac-West, what intercarrier compensation mechanism should apply, in Pac-West's view?

Response:

Assuming Qwest properly routed the call to the customer's pre-subscribed long distance carrier (which may be Qwest), then the appropriate compensation mechanism would be terminating access charges paid to Pac-West by the long distance carrier, and originating access charges paid to Qwest by the long distance carrier unless Qwest is acting as the long distance carrier.

Prepared by: Ethan Sprague
Telephone: 209-926-3416
Date: July 15, 2005

WUTC Docket No. UT-053036
Pac-West Responses to Qwest Data Requests
July 15, 2005

Data Request No. 22:

If a Qwest customer in Washington were to place a 1+ call to an ISP in Chicago, with a Chicago phone number, is it Pac-West's position that toll and access charges should apply to that call, or that Qwest should pay compensation to the terminating carrier?

Response:

Assuming Qwest properly routed the call to the customer's pre-subscribed long distance carrier (which may be Qwest), then the proper compensation mechanism would be terminating access charges paid to the ISP's local exchange carrier by the long distance carrier, and originating access charges paid to Qwest by the long distance carrier unless Qwest is acting as the long distance carrier.

Prepared by: Ethan Sprague
Telephone: 209-926-3416
Date: July 15, 2005

EXHIBIT D

**Summary of Other State
Commission Decisions**

The Vast Majority of State Commissions That Have Addressed Whether VNXX Traffic Is Local Have Firmly Concluded That It Is Not Local and Not Subject to Reciprocal Compensation.

1 The vast majority of state commissions analyzing this issue have concluded that VNXX traffic is not subject to reciprocal compensation. A summary of those decisions is set forth herein.¹

2 The New Hampshire Public Utilities Commission recently drew a clear distinction between “local ISP-bound traffic” and ISP-bound traffic that is not local for reciprocal compensation purposes.² The New Hampshire tariff defined “local traffic” as “a call that is originated and terminated within a local exchange area.” The commission ruled that reciprocal compensation could not be imposed on this traffic:

Under the interconnection agreement, reciprocal compensation applies only to local traffic, which is defined in the tariff as calls originating and terminating within a specified geographic area, established for purposes of defining the zone within which in-state toll charges will not apply. *This leads ineluctably to a determination here that the parties did not intend reciprocal compensation to apply to calls that were terminated to an ISP physically located outside the originating callers local service area.*³

¹ In addition to the cases discussed below, see also: Opinion, *All Providers of Local and Interexchange Telecommunications Services in the State of Alabama Declaratory Ruling Concerning the Usage of Local Interconnection Services for the Provision of Virtual NXX Service*. Docket No. 28906, Alabama Public Service Commission (2004 Ala. PUC Lexis 144) holding that ISP VNXX calls are exclusively under the jurisdiction of the FCC, but that other VNXX and FX calls should be compensated on a bill and keep basis; and *Arbitrator's Order 10, In the matter of arbitration between Level 3 Communications, LLC and SBC Communications, Inc., Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996 for Rates, Terms and Conditions of Interconnection*, Docket No. 04-L3CT-1046-ARB, Kansas Corporation Commission (2005 Kan. PUC Lexis 166) adopting SBC's proposed language which reflected traffic classifications the parties should use to define traffic for intercarrier compensation purposes. The Commission stated that SBC's proposed language appropriately classified traffic and issued an order that VNXX ISP-bound traffic is not subject to reciprocal compensation.

² Order, *Re New England Fiber Communications, LLC*, Nos. DT 99-081 & DT 99-085, 2003 N.H. PUC LEXIS 128 (NH PUC Nov. 12, 2003).

³ *Id.* at *32-33.

3 The Nebraska Public Service Commission issued an order in a Qwest/AT&T arbitration that, like the recent Arizona decision between the same parties, adopted the Qwest proposal that “local exchange traffic” be defined as “traffic that is originated and terminated in the same local calling area as determined for Qwest by the Commission.” The commission rejected AT&T-proposed language that would have excepted VNXX traffic from this definition.⁴ The AT&T approach, the commission stated, would have “far reaching implications and unintended consequences by reclassifying a large number of interexchange calls as local calls in violation of state statutes and Commission rules.”⁵ Further, AT&T’s definition “could result in abuses in the process of assigning NPA-NXX codes,” including assigning “NPA-NXX codes to customers irrespective of their physical location and collect[ing] reciprocal compensation from Qwest.”⁶

4 Two decisions by the Vermont Public Service Board ruled that VNXX calls are not local calls. In the first case, the board concluded that VNXX is a means to use NXX number assignments to convert toll calls into local calls: “Physically, the call is indistinguishable from other calls that the Board has classified as toll.”⁷ The Board concluded that it was the Board, not the CLEC, that determines the distinction between interexchange and local traffic: “In this Order, we make clear that the determination of whether traffic is local or toll is based upon the physical termination points, not the rate center assigned to the VNXX number.”⁸ In the second decision, the Vermont Board concluded that “VNXX calls do not actually physically terminate within the local calling area”; thus, even though “they may be rated as

⁴ Arbitrator’s Recommended Decision, *In the Matter of the Petition of Qwest Corporation for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with AT&T of the Midwest and TCG Omaha*, Docket No. C-3095 (Neb PSC May 4, 2004).

⁵ *Id.* at 18.

⁶ *Id.* at 19.

⁷ Order, *Petition of Global NAPs, Inc., for Arbitration Pursuant to § 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon New England Inc., d/b/a Verizon Vermont*, Docket No. 6742, 2002 Vt. PUC LEXIS 272 (Vt. PSB Dec. 26, 2002) (pinpoint citation not available).

⁸ *Id.* (emphasis added).

local calls due to the assignment of an NXX code to a switch, the physical characteristics of the calls suggest they are *not local* * * * .”⁹ Therefore, “Reciprocal Compensation does not apply to VNXX traffic that physically terminates outside the local calling area.”¹⁰

5 The Massachusetts Department of Telecommunication and Energy found that “VNXX calls will be rated as local or toll based on the *geographic end points* of the call”¹¹ and that the Verizon tariff in Massachusetts “defines local calling areas in terms of municipalities and geographic areas, not in terms on NXXs.”¹²

6 The Pennsylvania Public Utility Commission concluded that “calls to VNXX telephone numbers that are not in the same local calling area as the caller should not be subject to reciprocal compensation.” Opinion and Order, *Petition of Global NAPs South, Inc. for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms, and Conditions with Verizon Pennsylvania Inc.*, Docket No. A-310771F7000 (Pa PUC Apr. 21, 2003) at 45 (available at <http://puc.paonline.com/PcDocs/392849.doc>).

7 In Ohio, a CLEC argued that it should be allowed to assign to its customers “NXX codes that are ‘homed’ in a central office switch outside of the local calling area in which the customers resides * * *.” *Re Global NAPs, Inc.*, No. 02-879-TP-ARB, 2002 OhioPUC Lexis 644, *22-*23 (Ohio PUC July 22, 2002) The CLEC also argued that “the classification of a call is determined by comparing the rate centers associated with the called and calling party’s NPA/NXXs, not the physical location of the customers.” *Id.* at *23. The Ohio Public Utilities

⁹ Order, *Re Adelpia Business Solutions, Inc.*, Docket No. 6566, 2003 Vt PUC LEXIS 181, *76 (Vt PSB July 16, 2003) (emphasis added).

¹⁰ *Id.*

¹¹ Order, *Petition of Global NAPs, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration to Establish an Interconnection Agreement with Verizon New England, Inc. d/b/a Verizon Massachusetts f/k/a New England Telephone & Telegraph Co. d/b/a Bell Atlantic-Massachusetts*, D.T.E. 02-45, 2002 Mass PUC LEXIS 65 at *50 (Mass Dep’t of Tel & Energy Dec. 12, 2002) (emphasis added).

¹² *Id.* at *51.

Commission rejected that argument, concluding that “[a]ny end-user call originating and terminating within the boundary of such a local calling area, regardless of the LEC at the originating and terminating end shall be treated as a local call” and that Verizon’s local calling areas, as revised for EAS purposes, would “determine whether a call is local for the purpose of intercarrier local traffic compensation.” *Id.* at *25.

8 In Iowa, the issue arose in the context of a petition to limit certain CLECs from depleting numbering resources. In a case addressing whether the use of 10,000 number blocks of numbers for VNXX, the Iowa Utilities Board concluded that VNXX calls are interexchange in nature. Final Decision and Order, *In Re Sprint Communications Company, L.P., and Level 3 Communications, LLC*, Docket Nos. SPU-02-11, SPU-02-13, 2003, Iowa PUC LEXIS 229, *10-*12 (Iowa Utils. Bd. June 6, 2003).

9 In California, the issue was addressed when the commission addressed whether an ILEC could charge a CLEC the costs of carrying VNXX traffic to the POI. The California Public Utilities Commission (the “CPUC”) ruled that it could, noting that the CLEC knows where it terminates traffic to its customers and is thus capable of identifying that traffic which is local and which traffic is interexchange. Decision Approving Arbitrated Agreement Pursuant to Section 252, Subsection (e), of the Telecommunications Act of 1996 (Act), *In the Matter of Application of Pacific Bell Telephone Company (U-1001-C) for Arbitration with Pac-West Telecomm, Inc. (U5266-C) Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Application 02-03-059, Decision 03-05-031, 2002 Cal CPUC Lexis 1047, *6-*7 (Cal CPUC May 8, 2003). The commission concluded that VNXX “is a valuable service that subscribers are willing to pay a premium for. Such service rates should bear the costs associated with provisioning the service.” *Id.* at *14.

10 Another recent PUC decision also supports Qwest’s position. Previously, the PUC had

allowed the ILEC to collect a call-origination charge to compensate it for “long haul” VNXX calls to the [CLEC’s] POI * * * that is located outside the given calling area.” *Re Verizon California, Inc.*, Application 02-06-024, Decision 03-12-021, 2002 Cal PUC LEXIS 1047, *8 (CPUC Dec. 4, 2003). On rehearing, the CPUC reaffirmed its conclusion that “VNXX traffic is interexchange traffic, by nature of its termination outside of the originating calling area, that is not subject to the FCC’s reciprocal compensation rules, even though it is rated as a local call to the calling party.” *Id.* The CPUC, however, did not stop there—it also reaffirmed its conclusion that the CLEC must compensate the ILEC “for use of its network to provide VNXX service.” *Id.* at *11. It thus upheld the call-origination charge.

11 Only a small minority of opinions run to the contrary. *In the Matter of Starpower Communications, LLC v. Verizon South Inc.*, 18 FCCR 23,625 (2003), is one of the very few cases that is contrary to the long list of cases holding that VNXX traffic is not subject to reciprocal compensation.¹³ The case is unusual because it involved the FCC sitting in place of the Virginia Corporation Commission, which refuses to decide cases that have been delegated to it under the Act, including cost dockets and arbitrations.

12 In that case, the FCC required the payment of reciprocal compensation on VNXX traffic, focusing on the fact that Verizon rates calls to Starpower’s customers on the basis of the telephone number of the Starpower customer, as opposed to the physical location of the Starpower customer,¹⁴ noting that “the Tariff does not expressly address whether the ‘location’ of a customer station turns on physical presence or number assignment * * *.”¹⁵

¹³ See also, Opinion and Order, *In the matter of the application of Telnet Worldwide, Inc., for arbitration of interconnection rates, terms, and conditions and related arrangements with Verizon North, Inc. and Contel of the South, Inc., d/b/a Verizon North Systems*, Case No. U-13931 (2005 Mich. PSC Lexis 39), refusing to alter longstanding precedent in Michigan that treats VNXX as local. *The Southern New England Telephone Company v. MCI Worldcom Communications, Inc. et al*, United States District Court, D. Connecticut, Case No. 3:02cv274 (SRU)(March 16, 2005)

¹⁴ *Id.* at 23,629, ¶ 9. The FCC agreed that, in the absence of the VNXX arrangement, Verizon’s customers would have incurred toll charges.

¹⁵ *Id.* at 23,632, ¶ 15.

However, because there is no such ambiguity in Arizona, *Starpower* is easily distinguishable from this case. The Qwest Arizona tariff directly focuses on calls between customers' premises that are "located within the same local service area."

13 Thus, under the ICA, it is the tariff language that defines local traffic—and local traffic under the tariff is explicitly tied to physical location. The language of the Arizona tariff, in conjunction with the recent arbitrator's decision in the AT&T case adopting Qwest's definition of "local exchange service," could not be more different from the situation in *Starpower*.¹⁶ Although the underlying logic of the *Starpower* decision is highly questionable, the proper application of Arizona law compels a different result even if one accepted its underlying analysis.

¹⁶ Lest the Commission grant undue deference to *Starpower* because the decision was rendered by the FCC, the Vermont board recently ruled that the *Starpower* decision is not binding upon it, because the FCC was applying Virginia law and "acting in the place of the Virginia State Corporation Commission." *Re Adelpia Business Solutions of Vermont, Inc.*, Docket No. 6566, 2003 Vt PUC LEXIS 181, *61 (Vt PSB July 16, 2003).

EXHIBIT E

ISSUED: August 16, 2005

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

IC 12

In the Matter of)
)
QWEST CORPORATION vs. LEVEL 3)
COMMUNICATIONS, LLC,) **RULING**
)
Complaint for Enforcement of Interconnection)
Agreement.)

**DISPOSITION: COMPENSATION FOR VNXX-ROUTED
ISP-BOUND TRAFFIC NOT AUTHORIZED
UNDER INTERCONNECTION AGREEMENT**

Procedural History

On June 6, 2005, Qwest Corporation (Qwest) filed a complaint against Level 3 Communications, LLC (Level 3), asserting that Level 3 is violating federal law, state law, and terms of the Interconnection Agreement (ICA) executed by the parties. Qwest alleges that Level 3 is assigning local telephone numbers to Internet Service Provider (ISP) customers, even though the ISP's modem banks (or servers) are not located within the local calling area to which those numbers have been assigned. Qwest asserts that Level 3 improperly seeks payment of reciprocal compensation for such 'Virtual NXX' (VNXX) traffic. Qwest further alleges that Level 3 is violating the ICA by obligating Qwest to send non-local ISP traffic over Local Interconnection Service (LIS) trunks.

Level 3 responded to Qwest's complaint on June 20, 2005. It denies the allegations in the complaint and counterclaims that Qwest is violating the ICA by refusing to compensate Level 3 for the transport and termination of Qwest-originated ISP-bound traffic. Level 3 also counterclaims that Qwest violated the ICA by failing to negotiate an amendment to the agreement reflecting the Federal Communications Commission's (FCC's) *Core Communications Order*.¹

¹ *Petition of Core Communications, Inc., for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, FCC 04-241, WC Docket No. 03-171 (rel. Oct. 18, 2004) ("*Core Communications Order*").

A prehearing conference was held in this matter on June 30, 2005. On July 5, 2005, the ALJ issued a Memorandum requesting that the parties file briefs addressing whether the ICA requires compensation for the exchange of VNXX-routed ISP-bound traffic. Because Section 7.3.4.3 of the ICA provides that the parties shall exchange "ISP-bound traffic (as that term is used in the FCC ISP Order),"² a central issue in this complaint proceeding is whether the FCC's use of the term "ISP-bound traffic" in that order encompasses VNXX traffic.³ The parties filed briefs addressing that issue on July 18, 2005.

VNXX

In Order No. 04-504, the Commission described VNXX as follows:

The incumbent local telephone company does not have the exclusive right to assign specific phone numbers to specific customers. Competitive local exchange carriers (CLECs) are, by law, entitled to be assigned blocks of numbers in sequence, including entire NXXs. A 'Virtual NXX' (VNXX) occurs when a CLEC assigns a 'local' rate center code to a customer physically located in a 'foreign' rate center. For example, a customer physically located in Portland might order a phone number from a CLEC with a Salem NXX rate center code. Calls between that Portland customer's phone and other Salem area customers would be treated as if they were local calls, even though the calls between Salem and the customer's physical location in Portland is a distance of some 50 miles. Thus, under a CLEC's VNXX arrangement, all Salem customers would be paying a flat, monthly, local rate, even though they are calling the CLEC's Portland customer. When those same customers call the ILEC's Portland customers, served out of the same central office as the CLEC's Portland customer, they are charged intraLATA toll charges.

This type of service was not unknown to the telephone industry prior to the arrival of CLECs. For many years, incumbent carriers offered foreign exchange (FX) services, which, for an additional monthly fee, also provided

² The 'FCC ISP Order' is more commonly known as the 'ISP Remand Order.' I use the latter reference throughout this ruling. See, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151, para. 81, CC Docket No. 01-92, FCC 01-131, rel. April 27, 2000, *remanded sub nom*, *WorldCom Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *reh'g en banc denied*, (D.C. Cir. Sept. 24, 2002), *cert. denied*, 538 U.S. 1012 (May 5, 2003). ("ISP Remand Order.")

³ ALJ Memorandum, July 5, 2005, at 2.

business customers served out of one central office with numbers from an NXX assigned to another central office, usually so that their customers could call them without incurring intraLATA toll charges. By Order No. 83-869, issued almost 21 years ago, the Commission prohibited incumbent carriers from offering FX services to any new customers or adding additional FX lines for existing customers.⁴

For purposes of this case, “VNXX-routed ISP-Bound traffic” describes a situation wherein a CLEC, such as Level 3, obtains numbers for various locations within a state. Those numbers are assigned by the CLEC to its ISP customers even though the ISP has no physical presence (*i.e.*, does not locate its modem banks or server) within the local calling area (“LCA”) associated with those telephone numbers. ISP-bound traffic directed to those numbers is routed to the CLEC’s Point of Interconnection (POI) and then delivered to the ISP’s modem bank/server at a physical location in another LCA.⁵

Qwest takes the position that the FCC’s definition of ISP-bound traffic in the *ISP Remand Order*, and therefore Section 7.3.4.3 of the ICA, encompasses only those circumstances where an ISP modem bank/server is physically located in the same LCA as the end-user customer initiating an Internet call.⁶ Level 3, on the other hand, maintains that the *ISP Remand Order*, read in conjunction with the *Core Communications Order*, requires that reciprocal compensation must be paid on *all* ISP-bound traffic, including VNXX-routed ISP-bound traffic.

Applicable Law

Section 251(b)(5) of the Telecommunications Act of 1996 requires all local exchange carriers (LECs) to establish reciprocal compensation arrangements for the transport and termination of telecommunications. In its 1996 *Local Competition Order*,⁷ the FCC found that Section 251(b)(5) reciprocal compensation obligations “apply only

⁴ Order No. 04-504 at 2. (Footnotes omitted.)

⁵ Qwest notes that the ISP server or modem banks may be located in another state. VNXX arrangements can also exist for voice traffic. Qwest Brief at 1-2. See also, *In the Matter of the Investigation into the Use of Virtual NPA/NXX Calling Patterns*, OPUC Docket UM 1058, Order No. 04-504 (Sept. 7, 2004).

⁶ Thus, for intercarrier compensation purposes, Qwest states that the relevant endpoints are the physical location of the calling party and the physical location of the ISP’s servers or modem banks. Qwest describes this arrangement as “local ISP traffic,” to distinguish it from “VNXX-routed ISP-bound traffic.”

⁷ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, FCC 96-325, First Report and Order, 11 FCC Rcd 15499 (1996), *aff’d in part and vacated in part sub nom. Competitive Telecommunications Ass’n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 744 (8th Cir. 1997), *aff’d in part and remanded, AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), on remand, *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *reversed in part sub nom. Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002). (“*Local Competition Order*.”)

to traffic that originates and terminates *within a local area* as defined by the state commissions.”⁸

In its 1999 *Declaratory Ruling*, the FCC concluded that ISP-bound traffic was interstate traffic, and therefore not subject to the reciprocal compensation provisions of §251(b)(5).⁹ The FCC “reached this conclusion by applying its end-to-end analysis, traditionally employed in determining whether a call was jurisdictionally interstate or not, stressing that ISP-bound traffic ultimately reaches websites that are typically located out-of-state.”¹⁰

On review in *Bell Atlantic Tel. Cos. v. FCC*,¹¹ the United States Court of Appeals for the District of Columbia (D.C. Circuit) vacated and remanded the *Declaratory Ruling*. The Court held “that the [FCC’s] order had failed to adequately explain why the traditional ‘end-to-end’ jurisdictional analysis was relevant to deciding whether ISP calls fitted the local call or the long-distance call model.”¹²

On remand, the FCC again concluded that the reciprocal compensation provisions of §251(b)(5) should not govern the compensation between two LECs involved in delivering ISP-bound traffic.¹³ This time, however, the FCC abandoned the “local v. long distance” dichotomy used in the end-to-end analysis in the *Declaratory Ruling*.¹⁴ Instead, the FCC held that “under §251(g) of the Act it was authorized to

⁸ Local Competition Order at ¶1034, *ISP Remand Order* at ¶12. (Emphasis added.)

⁹ *ISP Remand Order* at ¶1.

¹⁰ *WorldCom Inc. v. FCC*, 288 F.3d 429, 431 (D.C. Circuit 2002) (*WorldCom*).

¹¹ *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 5, 8 (D.C. Cir. 2000) (*Bell Atlantic*).

¹² *WorldCom*, 288 F.3d at 431.

¹³ *Id.*

¹⁴ *ISP Remand Order* at ¶¶46-47, 54, 56; *See also, Pacific Bell v. Pac-West Telecom, Inc.*, 325 F.3d 1114, 1131 (9th Cir. 2003), *ISP Remand Order* at: In the *ISP Remand Order*, the FCC explained that it had erred by attempting to characterize ISP-bound traffic as “local” or “long distance.” It held, in part:

45....By indicating that all ‘local calls,’ however defined, would be subject to reciprocal compensation obligations under the Act, we overlooked the interplay between these two inter-related provisions of section 251 -- subsections (b) and (g). Further, we created unnecessary ambiguity for ourselves, and the court, because the statute does not define the term ‘local call,’ and thus that term could be interpreted as meaning either traffic subject to local *rates* or traffic that is *jurisdictionally* intrastate. In the context of ISP-bound traffic, as the court observed, our use of the term ‘local’ created a tension that undermined the prior order because the ESP exemption permitted ISPs to purchase access through local business tariffs, yet the jurisdictional nature of this traffic has long been recognized as interstate.

46. For similar reasons, we modify our analysis and conclusion in the *Local Competition Order*. There we held that ‘[t]ransport and termination of *local* traffic for purposes of reciprocal compensation are governed by sections 251(b)(5) and 251(d)(2).’ We now hold

'carve out' from §251(b)(5) calls made to ISPs located within the caller's local calling area."¹⁵ Specifically, the FCC concluded that ISP-bound traffic is "information access" under §251(g), and therefore "excepted from the scope of 'telecommunications' subject to reciprocal compensation under §251(b)(5)."¹⁶

On review in *Worldcom v. FCC*, the D.C. Circuit again remanded the *ISP Remand Order* to the FCC. The Court concluded that the FCC erred in relying upon §251(g) "to 'carve out' from §251(b)(5) calls made to internet service providers ('ISPs') located within the caller's local calling area."¹⁷ Emphasizing that its decision was limited to 251(g), the Court stated:

Having found that §251(g) does not provide a basis for the Commission's action, we make no further determinations. For example, as in *Bell Atlantic*, we do not decide whether handling calls to ISPs constitutes 'telephone exchange service' or 'exchange access' (as those terms are defined in the Act, 47 U.S.C. §§153(16), 153(47)) or neither, or whether those terms cover the universe to which such calls might belong. Nor do we decide the scope of the 'telecommunications' covered by §251(b)(5). Nor do we decide whether the Commission may adopt bill-and-keep for ISP-bound calls pursuant to §251(b)(5); see §252(d)(B)(i) (referring to bill-and-keep). Indeed, these are only samples of the issues we do not decide, which are in fact all issues other than whether §251(g) provided the

that the telecommunications subject to those provisions are all such telecommunications not excluded by section 251(g). In the *Local Competition Order*, as in the subsequent *Declaratory Ruling*, use of the phrase 'local traffic' created unnecessary ambiguities, and we correct that mistake here. *ISP Remand Order* at ¶¶45-46, see also, ¶¶23-31, 54. (Footnotes omitted.)

¹⁵ *WorldCom*, 288 F.3d at 430.

¹⁶ *Id.* at 431. Having removed ISP-bound calls from the scope of §251(b)(5), the FCC established an interim compensation regime including a transition to 'bill and keep,' whereby each carrier recovers its costs from its own end-users. In arriving at this solution, the FCC pointed to a number of flaws in the prevailing intercarrier compensation mechanism for ISP calls, under which the originating LEC paid the LEC that served the ISP. Because ISPs typically generate large volumes of one-way traffic in their direction, the old system attracted LECs that entered the business simply to serve ISPs, making enough money from reciprocal compensation to pay their ISP customers for the privilege of completing the calls.... To smooth the transition to bill-and-keep (but without fully committing itself to it), the FCC adopted several interim cost-recovery rules that sought to limit arbitrage opportunities by lowering the amounts and capping the growth of ISP-related intercarrier payments. These tend to force ISP-serving LECs to recover an increasing portion of their costs from their own subscribers rather than from other LECs. *Id.* at 431-432. See also, *ISP Remand Order* at ¶1.

¹⁷ *Id.* at 430. (Emphasis added.)

authority claimed by the Commission for not applying §251(b)(5).

Moreover, we do not decide petitioners' claims that the interim pricing limits imposed by the Commission are inadequately reasoned. Because we can't yet know the legal basis for the Commission's ultimate rules, or even what those rules may prove to be, we have no meaningful context in which to assess these explicitly transitional measures.

Finally, we do not vacate the order. Many of the petitioners themselves favor bill-and-keep, and there is plainly a non-trivial likelihood that the Commission has authority to elect such a system (perhaps under §§251(b)(5) and 252(d)(B)(i)).¹⁸

Discussion.

I. As noted above, the Level 3/Qwest ICA provides that the parties shall exchange ISP-bound traffic as that term is used in the FCC's *ISP Remand Order*, pursuant to the rates specified in the *ISP Remand Order*.¹⁹ The parties appear to agree that, until October 18, 2004, at least, no compensation was due for ISP-bound traffic in accordance with Section 7.3.6.3 of the ICA. That provision basically mirrors the "New Markets Rule" adopted in the *ISP Remand Order*.²⁰

On October 18, 2004, the FCC released its *Core Communications Order*, granting forbearance from the New Markets Rule. Level 3 asserts that the practical effect of that Order is to require intercarrier compensation for all ISP-bound traffic, including VNXX-routed ISP-bound traffic, after October 18, 2004, under Section 7.3.6.2.3.4 of the ICA. That provision contemplates payment at \$.0007 per minute of use (MOU).

Qwest apparently concedes that the *Core Communications Order* requires it to pay Level 3 for "local" ISP-bound traffic originated by Qwest customers

¹⁸ *Id.* at 434.

¹⁹ Section 7.3.4.3 provides: "The Parties agree to exchange all EAS/Local (§251(b)(5)) and ISP-bound traffic (as that term is used in the FCC ISP Order) at the FCC ordered rate, pursuant to the FCC ISP Order. The FCC ordered rate for ISP-bound traffic will apply to EAS/Local and ISP-bound traffic in lieu of End Office call termination and Tandem Switched Transport. See Section 7.3.6 of this Agreement for FCC-ordered rates."

Section 7.3.6 of the ICA is entitled 'ISP-Bound Traffic.' Section 7.3.6.1 specifies that 'the Parties shall exchange ISP-bound traffic pursuant to the compensation mechanism set forth in the FCC ISP Order.' Accordingly, the rates set forth in the ICA mirror the interim compensation rates specified in the *ISP Remand Order*.

²⁰ *ISP Remand Order* at ¶81; *Core Communications Order* at ¶24.

and terminated by Level 3 at the \$.0007/MOU compensation rate.²¹ Qwest's objection, and indeed the principal dispute in this proceeding, concerns whether the ICA requires the parties to exchange compensation for VNXX-routed ISP-bound traffic. In accordance with Section 7.3.4.3, the Commission must determine whether the FCC's definition of "ISP-bound traffic" in the *ISP Remand Order* includes VNXX-routed ISP-bound traffic.²²

II. Qwest argues that prior and subsequent history confirm that the *ISP Remand Order* defines ISP-bound traffic to encompass only those situations in which the customer initiating an Internet call, and the ISP equipment to which that call is directed, are located in the same local calling area. It points out that:

- The FCC's description of ISP traffic in the *Declaratory Ruling* states that "[u]nder one typical arrangement, an ISP customer dials a seven-digit number to reach the ISP server in the same local calling area."²³
- The *ISP Remand Order* contains essentially the same description of ISP traffic, observing that "an ISP's end-user customers typically access the Internet through an ISP server located in the same local calling area."²⁴
- In the *Bell Atlantic* decision, remanding the *Declaratory Ruling* back to the FCC, the D.C. Circuit stated that the issue before the FCC in the *Declaratory Ruling* was "whether calls to internet service providers ('ISPs') within the caller's local calling area are themselves 'local.'"²⁵
- In the *WorldCom* decision, remanding the *ISP Remand Order*, the D.C. Circuit stated that "[i]n the order before us the Federal Communications Commission held that under §251(g) of the Act it was authorized to 'carve out' from §251(b)(5) calls made to internet service providers ('ISPs') located within the caller's local calling area."²⁶

²¹ Qwest Complaint at ¶28; see fn. 6.

²² ALJ Memorandum at 2; Level 3 Brief at 2.

²³ *Declaratory Ruling* at ¶4. (Emphasis added.)

²⁴ *ISP Remand Order* at ¶10. (Emphasis added.) The FCC does not discuss 'atypical' methods of accessing the Internet. Qwest states that the other methods involve making either a 1+ toll call or an "800" service call to access ISP modem banks located outside an end-user's LCA. Qwest Brief at 2.

²⁵ *Bell Atlantic*, 206 F.3d at 2. (Emphasis added.)

²⁶ *Worldcom*, 288 F.3d at 430. (Emphasis added.) The Court also held "[t]he reciprocal compensation requirement of §251(b)(5) . . . is aimed at assuring compensation for the LEC that completes a call originating within the same area.'). *Id.*

III. Level 3 argues that nothing in the *ISP Remand Order* limits reciprocal compensation payments to traffic exchanged within the same local calling area. It contends that:

[w]hile Qwest relies on background statements in the *ISP Remand Order* that discuss ISPs 'typically' establishing points of presence in the same local calling area, the FCC's decision was in no way dependent upon the geographic location of the ISP. To the contrary, the FCC concluded that ISP-bound traffic was interstate based on its end-to-end analysis of the entire media stream, all the way to the server on which the actual content was located.²⁷

Level 3 also emphasizes that the *ISP Remand Order* expressly repudiates the FCC's earlier rulings limiting §251(b)(5) to local telecommunications. In that Order, the FCC stated that it had erred in focusing on the nature of the service (i.e., local or long distance) in interpreting the relevant scope of §251(b)(5). Moreover, it specifically found that "[o]n its face, local exchange carriers are required to establish reciprocal compensation arrangements for the transport and termination of *all* 'telecommunications' they exchange with another telecommunications carrier, without exception."²⁸ In addition, the FCC stated that "[u]nless subject to further limitation, Section 251(b)(5) would require reciprocal compensation for transport and termination of *all* telecommunications traffic, – i.e., whenever a local exchange carrier exchanges telecommunications traffic with another carrier."²⁹

Level 3 further maintains that *WorldCom* expressly rejects the FCC's conclusion in the *ISP Remand Order* that §251(b)(5) was "subject to further limitation" because certain types of traffic, including ISP-bound traffic were 'carved out' by §251(g). It observes that the Court found that "ISP-bound traffic exchanged between LECs did not constitute 'information access' subject to §251(g), as the FCC had asserted."³⁰ It also stressed that the Court did not "cast any doubt on the [FCC's] express finding that §251(b)(5) applies, 'on its face,' to *all* telecommunications traffic, whether local or otherwise."³¹ In addition, Level 3 observes that the FCC amended its reciprocal compensation rules to eliminate the word "local" and to apply §251(b)(5) to all telecommunications.

²⁷ Level 3 Brief at 6.

²⁸ *ISP Remand Order* at ¶31. (Emphasis in original.)

²⁹ *Id.* at ¶32. (Emphasis in original.)

³⁰ Level 3 Brief at 5.

³¹ *Id.*

IV. For the reasons set forth below, I find that ISP-bound traffic, as defined in the *ISP Remand Order*, does not include VNXX-routed ISP-bound traffic:

(a) Level 3 appears to argue that the FCC's decision to reject the "local v. long distance" dichotomy in the *ISP Remand Order* somehow compels the conclusion that the FCC's definition of ISP-bound traffic includes VNXX-routed ISP-bound traffic. The problem with that argument is that it confuses the FCC's description of how ISP-bound traffic is provisioned with the agency's conclusions regarding how that traffic should be treated for reciprocal compensation and jurisdictional purposes.³² Put another way, the FCC's decision to abandon its attempt to categorize ISP-bound traffic as local or long distance for purposes of determining whether reciprocal compensation is due under §251(b)(5), is unrelated to its longstanding definition of ISP-bound traffic.³³ Beginning with the *Declaratory Ruling* and extending to the *ISP Remand Order*, the FCC has consistently described ISP-bound traffic as "the delivery of calls from one LEC's end-user customer to an ISP in the same local calling area that is served by the competing LEC."³⁴ That definition was adopted by the D.C. Circuit in both the *Bell Atlantic* and *Worldcom* decisions. None of these decisions provide any indication that ISP-bound traffic encompasses VNXX-routed traffic.

(b) Level 3 argues that the descriptions of ISP-bound traffic used by the FCC and the D.C. Circuit are really only "background statements" and were not intended to place a geographical limitation on the placement of ISP servers or modem banks. On the contrary, Level 3 stresses that "the FCC concluded that ISP-bound traffic was interstate based on its end-to-end analysis of the entire media stream..."³⁵ This argument is unconvincing. First, it presumes that both the FCC and the Court chose to describe ISP-bound traffic in a particular manner without intending it to have any specific meaning. Second, it ignores the fact that there are repeated references in both the *Declaratory Ruling* and the *ISP Remand Order* that make clear that the FCC intended that an ISP server or modem bank be located in the same LCA as the end-user customer

³² The Ninth Circuit recognized the distinction "between the jurisdictional analysis of what constitutes 'interstate' or 'intrastate' traffic, and the analysis of what constitutes 'local' or 'interexchange' traffic for the purposes of reciprocal compensation." *Pacific Bell*, 325 F.3d at 1126.

³³ As discussed herein, the FCC has consistently recognized that ISP-bound traffic is initiated by an end-user customer making a seven-digit local call to an ISP server/modem bank located in the same local calling area. Once the call reaches the server/modem bank, the ISP utilizes a variety of computer processing and other functions to enable the caller to access the Internet. It is this understanding of ISP-bound traffic that the FCC had in mind as it endeavored to determine whether ISP-bound traffic is eligible for reciprocal compensation. It is also important to note that, in the proceedings that led to the *Declaratory Ruling*, many CLECs argued that ISP-bound traffic actually involved two calls: the first terminating at the ISP's local server, where a second, packet-switched "call" then commenced. That theory was rejected by the FCC in the *Declaratory Ruling* by applying the end-to-end analysis. The decision to abandon the end-to-end analysis in the *ISP Remand Order* did not, however, alter the FCC's understanding of how ISP-bound traffic is provisioned. See e.g., *ISP Remand Order* at ¶¶ 9-16.

³⁴ *ISP Remand Order* at ¶13.

³⁵ Level 3 Brief at 6.

initiating the call.³⁶ Third, Level 3's argument continues to confuse the FCC's jurisdictional analysis of ISP-bound traffic with the definition of how that traffic is provisioned. The FCC has consistently held that ISP-bound traffic is "predominately interstate for jurisdictional purposes."³⁷ The *ISP Remand Order* did nothing to change that determination. Likewise, the *ISP Remand Order* preserved the FCC's holding in the *Declaratory Ruling*, which defined ISP-bound traffic to require ISP servers or modems to be located in the same LCA as the end-user customer initiating the call.

(c) As noted above, Level 3 reads the *ISP Remand Order* and the *Worldcom* decision to mandate that: (a) the reciprocal compensation requirements of §251(b)(5) apply to *all* telecommunications, and (b) that ISP-bound traffic qualifies as telecommunications. These assertions remain open to question.³⁸ Even if Level 3's interpretation of these decisions is correct, it does not advance its position regarding VNXX traffic. Because VNXX-routed ISP-bound traffic does not fall within the

³⁶ See, e.g., *Declaratory Ruling* at ¶¶4, 7-8, 12, 24 (fn. 77), 27; *ISP Remand Order* at ¶¶10, 13, 24.

³⁷ The FCC emphasized that it has been consistent in its jurisdictional treatment of ISPs. It further emphasized that "[i]nternet service providers are a class of ESPs [Enhanced Service Providers]. Accordingly, the LEC-provided link between an end-user and an ISP is properly characterized as interstate access." *ISP Remand Order* at ¶57. (Emphasis in original.) See e.g., ¶¶52-58 for discussion of the ESP exemption.

³⁸ In *WorldCom*, the D.C. Circuit held:

The reciprocal compensation requirement of §251(b)(5), quoted above, is aimed at assuring compensation for the LEC that completes a call originating within the same area. Although its literal language purports to extend reciprocal compensation to all 'telecommunications,' the [FCC] has construed it as limited to 'local' traffic only. For long distance calls, by contrast, the long-distance carrier collects from the user and pays both LECs – the one originating and the one terminating the call. 288 F.3d at 429. (Citations omitted.)

The D.C. Circuit went on to emphasize that it did not decide "whether handling calls to ISPs constitutes 'telephone exchange service' or 'exchange access'...." Nor did the Court "decide the scope of the 'telecommunications' covered by §251(b)(5)." *Id.* at 434.

Likewise, in *Pacific Bell* (issued subsequent to *WorldCom*), the Ninth Circuit held "[b]ecause the FCC has yet to resolve whether ISP-bound traffic is 'local' within the scope of §251, the CPUC's decision to enforce an arbitration agreement that subjects ISP-bound traffic to reciprocal compensation was not inconsistent with §251." 325 F.3d at 1130.

More recently, in *Qwest Corporation v. Universal Telecom, Inc., et al.*, Civil No. 04-6047-AA (2004), the U.S. District Court for the District of Oregon held that "VNXX traffic does not meet the definition of local traffic because it does not originate and terminate in the same LCA or EAS; it instead crosses LCAs and EASs." It further held that VNXX traffic was not local "whether it was ISP-bound or not." *Universal*, mimeo at 24.

The *Worldcom*, *Pacific Bell*, and *Universal* decisions disclose that there remains considerable uncertainty regarding the future application of "local v. interstate" analysis, as well as the scope of "telecommunications" under §251(b)(5) of the Act.

FCC's definition of ISP-bound traffic, it is irrelevant whether ISP-bound traffic is telecommunications subject to reciprocal compensation.

(d) Level 3 suggests that paragraph 84 of the *ISP Remand Order* supports its position because the FCC made reference to agreements negotiated between CLECs and RBOCs that provided compensation for VNXX traffic. In that paragraph, the FCC explained the reasons why its interim compensation regime included rate caps "to limit carriers' ability to draw revenue from other carriers, rather than from their own customers." The third reason cited by the FCC was "that negotiated reciprocal compensation rates continue to decline as ILECs and CLECs negotiate new interconnection agreements."³⁹ The FCC's discussion, however, makes no mention of VNXX-routed ISP-bound traffic. To argue that a passing reference to "negotiated agreements" somehow expands the FCC's definition of ISP-bound traffic is unreasonable.

(e) Level 3 suggests that the fact that VNXX calls are "locally dialed" is sufficient to bring those calls within the FCC's definition of ISP-bound traffic. Thus, as long as an end-user customer makes a seven-digit call to access an ISP, it is unnecessary to impose a geographical limitation on the location of the ISP's server/modem bank. This is a convenient theory, but it is inconsistent with the characterization of ISP-bound traffic that has been consistently used by the FCC and the D.C. Circuit.

(f) Level 3 next argues that the *Core Communications Order* requires that the definition of ISP-bound traffic include VNXX-routed traffic. It states that "[t]he FCC's retention of the Rate Cap and Mirroring rules and forbearance from the New Markets and Growth Cap rules has made it clear that ISP-bound traffic encompasses traffic that is terminated to an ISP by means of VNXX routing."⁴⁰ It also points out, among other things, that the FCC recognized that the ISP dial-up market has changed, and that it is necessary to promote efficient investment in telecommunications services and facilities.⁴¹ Level 3 stresses that precluding VNXX-routed traffic from ISP-bound traffic will result in unnecessary investment expense, create the need for a separate compensation system, and encourage regulatory arbitrage.⁴²

Despite Level 3's claim, there is nothing in the *Core Communications Order* that even remotely suggests that the FCC intended to expand its definition of ISP-bound traffic to include VNXX-routed traffic.⁴³ Moreover, as Qwest points out, it would

³⁹ See also, *ISP Remand Order* at ¶85.

⁴⁰ Level 3 Brief at 11.

⁴¹ *Id.* at 12.

⁴² *Id.*

⁴³ At most, the FCC decision in *Core Communications* to forbear from the New Market's rule signalled its intention to permit the continued payment of reciprocal compensation for ISP-bound traffic. But, as

be highly unusual for the FCC to invoke a policy that would impact state authority (*i.e.*, regulation of intrastate access charges) without making some mention of that fact.

Level 3's VNXX-related policy arguments are irrelevant to the issue before the Commission. The Commission's task is to interpret the Level 3/Qwest ICA; specifically, whether the term "ISP-bound traffic," as used in the *ISP Remand Order*, encompasses VNXX-routed traffic. That inquiry does not include an evaluation of the parties' competing policy arguments.

(g) Level 3 argues that the legal and factual issues in this case are intertwined and that an ALJ ruling interpreting Section 7.3.4.3 of the ICA is inappropriate at this time. I disagree with that assessment. In my opinion, the relevant FCC and judicial interpretations of ISP-bound traffic are dispositive of this issue.

(h) Because this ruling has a substantial impact upon the interests of the parties, I am automatically certifying it to the Commission. In the final analysis, the interests of both parties are better served by having the agency resolve this matter as soon as possible. That is especially true given the parties have already indicated that the Commission's decision will be appealed no matter who prevails. The sooner the parties obtain final resolution regarding the treatment of VNXX-routed ISP-bound traffic, the sooner they will be able to devote their energies and resources to more productive pursuits.

RULING

For the reasons set forth above, I find that the term "ISP-bound traffic," as used in the *ISP Remand Order*, does not include VNXX-routed ISP-bound traffic. Accordingly, Section 7.3.4.3 of the Level 3/Qwest ICA does not require the exchange of compensation for this traffic.

Objections to this ruling shall be filed with the Commission no later than August 30, 2005. Replies to objections shall be filed with the Commission no later than September 9, 2005.

Dated at Salem, Oregon, this 16th day of August, 2005.

Samuel J. Petrillo
Administrative Law Judge

emphasized in this ruling, that decision has no bearing on this matter because VNXX-routed traffic does not fall within the FCC's definition of ISP-bound traffic, as that term is used in the *ISP Remand Order*.

EXHIBIT F

42.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED

2004 AUG 5 PM 1 10

GLOBAL NAPS, INC.,
Petitioner-Appellant,

v.

VERIZON NEW ENGLAND INC. f/k/a
NEW ENGLAND TELEPHONE AND
TELEGRAPH COMPANY d/b/a BELL
ATLANTIC - VERMONT, INC., VERMONT
PUBLIC SERVICE BOARD, and MICHAEL
H. DWORKIN, DAVID C. COEN, and
JOHN D. BURKE in their capacity as
board members,

Respondents-Appellees.

CLERK
BY *cl*

Docket No. 2:03-CV-97

AMENDED OPINION AND ORDER

Global NAPS, Inc. ("Global") seeks review of a determination by the Vermont Public Service Board ("Public Service Board" or "Board") requiring Global to pay access charges to Verizon New England Inc. ("Verizon") for its long distance calls, and to cease using "virtual NXX service" ("VNXX"). All parties¹ have moved for summary judgment. For the reasons that follow, Global's motion (Doc. 12) is denied; Verizon's cross-motion (Doc. 17) is granted; and the individual board members' cross-motion (Doc. 20) is denied as moot.

¹ The Board has been dismissed from this action by stipulation of the parties. See Stipulation of Dismissal of Vermont Public Service Board (Doc. 19).

42.

I. Background

A. The Telecommunications Act of 1996

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("Act" or "1996 Act") amended the Communications Act of 1934. See 47 U.S.C.A. §§ 151 *et seq.* (West 2001). The legislation was enacted in an effort "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunication consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104. With the passing of the Act, Congress "ended the longstanding regime of state-sanctioned monopolies [of local telephone service]" by "fundamentally restructur[ing] local telephone markets." AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 371 (1999); accord New York & Pub. Serv. Comm'n v. FCC, 267 F.3d 91, 96 (2d Cir. 2001); see also Verizon Md. Inc. v. Pub. Serv. Comm'n, 535 U.S. 635, 638 (2002) (Act created new telecommunications regime designed to foster competition in local telephone markets). The Act requires providers of telecommunications services to interconnect directly or indirectly with the facilities and equipment of other providers. 47 U.S.C.A. §§ 153(44), 251(a).

In order to foster the development of competitive local telephone markets, the Act imposes certain duties on the

incumbent local exchange carrier ("ILEC"),² among them the duty to provide interconnection with its network and to negotiate in good faith the terms and conditions of interconnection agreements with other competitive local exchange carriers ("CLECs"). Id. §§ 251(c)(1), (2). If parties cannot agree on the terms of their interconnection agreement, either party may petition the state commission that regulates the intrastate operations of carriers to arbitrate any unresolved issues. See id. § 252(b)(1). The state commission must limit its consideration to the issues presented in the petition and any response thereto. Id. § 252(b)(4)(A). Its resolution of any open issues must meet the requirements of § 251 and any regulations prescribed by the Federal Communications Commission ("FCC") pursuant to that

² A "local exchange carrier ("LEC") provides "telephone exchange service" or "exchange access." 47 U.S.C.A. § 153(26).

"Telephone exchange service is defined as

(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

Id. § 153(47). "Exchange access" is defined as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." Id. § 153(16).

section. Id. §§ 252(c)(1), (e)(2)(B). The state commission may also enforce other requirements of state law as long as they do not prohibit or have the effect of prohibiting the ability of an entity to provide interstate or intrastate telecommunications service. Id. §§ 252(e)(3); 253(a). Any party aggrieved by the state commission's determination may seek review of its action in federal district court. Id. § 252(e)(6).

1. *Reciprocal Compensation*

The 1996 Act requires interconnecting LECs to establish reciprocal compensation arrangements for the transport and termination of telecommunications. 47 U.S.C.A. § 251(b)(5). A reciprocal compensation arrangement is one in which a carrier receives compensation from another carrier for the transport and termination of telecommunications traffic on the first carrier's network facilities. See 47 C.F.R. § 51.701(e) (2003).

Reciprocal compensation does not apply, however, to telecommunications traffic "that is interstate or intrastate exchange access, information access, or exchange services for such access." Id. § 51.701(b)(1). Interstate and intrastate exchange service, commonly referred to as "long-distance" or "toll" calls, are subject to "access charges," whereby the inter- or intra- exchange carrier pays the LEC for the use of its local

network facilities. See, e.g., 47 C.F.R. § 69.124 (2003).³ The FCC has authority over access charges for interstate or foreign access services. See 47 C.F.R. pt. 69. States generally have authority over access charges for intrastate exchange access service. See, e.g., 47 U.S.C.A. § 261(c); § 923 (West 2001). The FCC is empowered to prescribe rules and regulations intended to implement the local competition provisions of the 1996 Act, however, even though the rules affect intra- as well as interstate matters. See 47 U.S.C. § 201(b); AT&T Corp. v. Iowa Utils., 525 U.S. at 377-78, 385; see also Pac. Bell v. Pac-West Telecomm, Inc., 325 F.3d 1114, 1126 & n.10 (9th Cir. 2003) (1996 Act granted FCC regulatory authority over those intrastate matters governed by the Act, and granted state commissions limited defined authority over interstate traffic under §§ 251 and 252 of the Act).

B. The Regulation of ISP-Bound Traffic

Over the last few years, the FCC has undertaken to determine

³ The traditional regulatory distinction between telephone exchange service, commonly referred to as local calling, and telephone toll service, commonly referred to as long distance, that originated when telecommunications was in its infancy, may no longer make much sense in the modern world of digital communications. See Jeffrey I. Ryen, The Battle over Reciprocal Compensation: The FCC's Ongoing Struggle to Regulate Intercarrier Compensation Fees for ISP-Bound Traffic, 8 B.U.J. Sci. & Tech. L. 614, 632 (2002) (1996 Act and attendant ISP reciprocal compensation dispute offer glaring example of technology outpacing regulation; traditional regulatory assumptions that rely on distinction between "local" and "long distance" create acute challenges for FCC).

whether Internet telecommunications traffic should be subject to reciprocal compensation rules. Typically, individuals gain access to the Internet by directing their computers to dial a local number provided by their Internet Service Provider ("ISP"). Once the ISP modem "answers" the call and connects the user, the user communicates over the Internet by transmitting commands via the computer. The communication may then range worldwide. At issue has been whether dial-up customers make one or more than one call when they communicate over the global computer network via an ISP.

Calls to ISPs produce one-way traffic, from the calling party to the ISP. Under reciprocal compensation rules, the originating carrier pays the terminating carrier; thus the calling party's carrier would pay the carrier that serves the ISP, if ISP-bound traffic were deemed local traffic. As the FCC noted, treating ISP-bound traffic as subject to reciprocal compensation "created opportunities for regulatory arbitrage and distorted the economic incentives related to competitive entry into the local exchange and exchange access markets" because "ISPs typically generate large volumes of traffic that is virtually all one-way--that is, delivered to the ISP."

Implementation of the Local Competition Provisions in the Telecomms. Act of 1996, Intercarrier Comp. for ISP-Bound Traffic,

16 F.C.R.R. 9151, 9153 ¶ 2 (Apr. 27, 2001) ("Remand Order").⁴

In 1999, the FCC issued a declaratory ruling that excluded ISP calls from the reciprocal compensation requirement on the theory that ISP calls were essentially non-local. See Implementation of the Local Competition Provisions in the Telecomms. Act of 1996, Inter-Carrier Comp. for ISP-Bound Traffic, 14 F.C.C.R. 3689, 3690 ¶ 1 (Feb. 26, 1999) ("Initial Order"). A panel of the D.C. Circuit Court of Appeals vacated the ruling in Bell Atlantic Telephone Cos. v. FCC, 206 F.3d 1, 9 (D.C. Cir. 2000), finding that the FCC had not adequately explained its reasoning.

On remand, the FCC again considered inter-carrier compensation for ISP-bound traffic, and again concluded that such traffic is predominantly interstate access traffic and is not subject to reciprocal compensation. Remand Order at 9153 ¶ 1. It proceeded to establish an interim compensation mechanism for the delivery of ISP-bound traffic that would "limit[] carriers' opportunit[ies] to recover costs from other carriers and

⁴ The FCC noted that "comments in the record indicate that competitive local exchange carriers (CLECs), on average, terminate eighteen times more traffic than they originate, resulting in annual CLEC reciprocal compensation billings of approximately two billion dollars, ninety percent of which is for ISP-bound traffic." Remand Order at 9154-55 ¶ 5; see also WorldCom, Inc. v. FCC, 288 F.3d 429, 431 ((D.C. Cir. 2002), cert. denied, 123 S. Ct. 1927 (2003) (system attracted LECs to enter business simply to serve ISPs, making enough money from reciprocal compensation to pay ISP customers for privilege of completing calls).

requir[e] them to recover a greater share of their costs from their ISP customers." Id. at 9181 ¶ 67. It adopted a gradually declining cap over a 36-month period on the amount that carriers could recover from other carriers for delivering ISP-bound traffic. Id. at 9156 ¶ 7; 9187 ¶ 78. For interconnection agreements entered into after the effective date of the order, carriers would have to exchange ISP-bound traffic on a bill-and-keep basis.⁵ Id. at 9188 ¶ 81.

Upon review of the Remand Order, the D.C. Circuit Court of Appeals panel again remanded the case, finding the FCC's rationale for its ruling untenable. See WorldCom, Inc. v. FCC, 288 F.3d 429, 434 (D.C. Cir. 2002), cert. denied, 123 S. Ct. 1927 (2003). The Court did not vacate the Remand Order, however, finding that "there is plainly a non-trivial likelihood that the Commission has authority to elect such a system [of compensation]." Id. It left in place the interim pricing limits, and declined to rule on the scope of the reciprocal compensation obligation, or whether handling calls to ISPs constituted "exchange access" or "telephone exchange service" as defined in 47 U.S.C. §§ 153(16) and (47). Id.

⁵ "'Bill and keep' refers to an arrangement in which neither of two interconnecting networks charges the other for terminating traffic that originates on the other network. Instead, each network recovers from its own end-users the cost of both originating traffic that it delivers to the other network and terminating traffic that it receives from the other network." Remand Order at 9153 n.6.

The Remand Order and the revised reciprocal compensation regulations thus remain in effect pending further proceedings before the FCC. Although the Remand Order specifically acknowledged that carriers exchanging ISP-bound traffic pursuant to interconnection agreements made before June 14, 2001 (the effective date of the Remand Order)⁶ may be subject to state commission-arbitrated reciprocal compensation rates, all ISP-bound traffic exchanged pursuant to interconnection agreements made after that date is subject to bill-and-keep compensation. See Remand Order at 9189 ¶ 82.

C. VNXX Service

Whether a telephone call is subject to access charges, i.e., is considered a "toll" call, is based on the location of the central office "switch" where a call originates and terminates. The middle three digits of a ten digit telephone number--the "NXX"--has historically been associated with a particular local calling area and with a particular switch. A call to a particular NXX therefore would identify the location where the call terminated.

It is possible, however, to assign customers "virtual NXXs," or "VNXXs," so that a call termination is identified not by its

⁶ The Remand Order and revisions to 47 C.F.R. pt. 51 became effective thirty days after publication in the Federal Register, or June 14, 2001. See Remand Order, 16 F.C.C.R. at 9204, 66 Fed. Reg. 26,800 (May 15, 2001).

physical location but by a location of the customer's choice. The customer thus does not pay toll charges if the VNXX is the same as the NXX of the call termination, and the call would not be subject to access charges for purposes of intercarrier compensation. Essentially, VNXX service converts what would otherwise be toll calls into local calls.

D. Proceedings Before the Vermont Public Service Board

Verizon is an ILEC in Vermont. Global is a CLEC with its principal place of business in Quincy, Massachusetts. Its principal customers are ISPs. Global offers co-location to its ISP customers, the majority of whom have located in Global's facility in Quincy. Global "aggregates" its telecommunications traffic, meaning it receives dial-up Internet calls from various locations in Vermont, transports the traffic on its network back to Quincy, and delivers the calls to the ISPs there. An ISP thus does not have to locate equipment to handle calls in each local calling area, and Vermont users of the Internet have local Internet access. Global offers its customers VNXX service.

In January 2001 Global and Verizon began negotiating the terms of an interconnection agreement in Vermont. On July 23, 2002 Global petitioned the Board for arbitration. On December 26, 2002 the Board issued its Order with respect to twelve issues identified by the parties. Global has challenged the Board's resolution of two of the issues. It contends first that the

Board's Order unlawfully imposes exchange access charges on what it defines as local telephone calls (Issue 3). Second, it contends that the Order unlawfully prohibits VNXX service (Issue 4).

II. Discussion

A. Standard of Review

The 1996 Act did not prescribe a standard of review for courts to apply in reviewing the action of a state commission under § 252(e)(6) of Title 47. When reviewing an action of a state agency for consistency with federal law, "Chevron⁷-style" deference to the agency determination is not appropriate, however, and interpretations of federal law are accorded de novo scrutiny. See Perry v. Dowling, 95 F.3d 231, 236 (2d Cir. 1996) (citing Turner v. Perales, 869 F.2d 140, 141 (2d Cir. 1989) (per curiam)). The Third, Fourth, Fifth, Sixth, Ninth and Tenth Circuits have applied de novo review to state commissions' interpretations of the Act and its regulations. See Mich. Bell Tel. Co. v. MFS Intelenet of Mich., Inc., 339 F.3d 428, 433 (6th Cir. 2003); Southwestern Bell Tel. Co. v. Apple, 309 F.3d 713, 718 (10th Cir. 2002); MCI Telecomm. Corp. v. Bell Atl.-Pa., 271 F.3d 491, 516 (3d Cir. 2001), cert. denied, 537 U.S. 941 (2002); Southwestern Bell Tel. Co. v. Pub. Util. Comm'n, 208 F.3d 475,

⁷ Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

482 (5th Cir. 2000); GTE South, Inc. v. Morrison, 199 F.3d 733, 745 (4th Cir. 1999); US West Communications v. MFS Intelenet, Inc., 193 F.3d 1112, 1117 (9th Cir. 1999).

A party is entitled to summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). "Where cross-motions for summary judgment are filed, a court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." Boy Scouts of Am. v. Wyman, 335 F.3d 80, 88 (2d Cir. 2003) (quoting Hotel Employees & Rest. Employees Union, Local 100 v. City of N.Y. Dep't of Parks & Recreation, 311 F.3d 534, 543 (2d Cir. 2002) (internal quotation marks omitted)).

B. Local Calling Areas (Issue 3)

In 1995 and 1997 the Public Service Board established the boundaries of local calling areas for the ILEC. See Petition of Global NAPS, Inc. for Arbitration, Docket No. 6742 (Vt. Pub. Serv. Bd. Dec. 26, 2002) at 12 & n.31 ("PSB Order") (Doc. 18, App. Tab 1). In a 1999 order, the Board ruled that CLECs are free to define their own local calling areas for purposes of

billing their retail customers, but the local calling areas established by the Board for the ILEC govern intercarrier compensation, i.e., whether the call is subject to reciprocal compensation or access charges. See Investigation into New England Tel. & Tel. Co.'s (NET's) Tariff Filing, Docket No. 5713 (Vt. Pub. Serv. Bd. Feb. 4, 1999) at 114 (rates for compensation among carriers will be based upon local calling areas set out in Docket 5670); see also PSB Order at 12 & n.32. In the arbitration proceedings, the parties sought a determination whether the Public Service Board ruling should be modified to provide that the distinction between toll and local traffic for purposes of intercarrier compensation would be defined by the local calling area of the company that originates the call. The Board declined to modify its 1999 ruling, concluding that "intercarrier compensation shall continue to be based on the local calling areas established in Docket 5670." PSB Order at 41.

Global contends that the Order violates 47 C.F.R. § 51.701(b)(1), which defines telecommunications traffic, for purposes of reciprocal compensation, as "telecommunications traffic exchanged between a LEC and a telecommunications carrier . . . , except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access." 47 C.F.R. § 51.701(b)(1). Global

reasons that if reciprocal compensation applies to all telecommunications traffic except exchange access, information access, and exchange services; and if exchange access is defined as the provision of access to facilities for the purpose of the origination or termination of telephone toll services; and if telephone toll service is defined as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service," 47 U.S.C.A. § 153(48); then traffic is only subject to access charges when the originating customer's carrier levies a separate toll charge. Therefore, it argues, the Public Service Board's Order contravenes federal regulations by imposing access charges on traffic originated by Global's customers that crosses Verizon's local calling area boundaries, regardless of whether Global regards the call as local or toll for purposes of billing its customers.

Under Global's interpretation, a call from a Global customer in Vermont to anywhere in the world would not be telephone toll service for purposes of intercarrier compensation if Global offered the customer unlimited worldwide calling for a flat fee. Setting aside the question whether Global does now or ever intends to offer local calling service in Vermont, the FCC in its Remand Order specifically stated that prior to the enactment of the 1996 Act, the FCC and the states had in place regimes

applicable to access services--services that provide connection to points beyond the local exchange--that Congress did not intend to disrupt when it created reciprocal compensation requirements. Remand Order at 9168 ¶ 37. According to the FCC, the reciprocal compensation requirements of the 1996 Act exclude traffic already subject to interstate and intrastate access regulations. Id. & n.66.

The FCC has also made clear that

state commissions have the authority to determine what geographic areas should be considered "local areas" for the purpose of applying reciprocal compensation obligations under section 251(b)(5), consistent with the state commissions' historical practice of defining local service areas for wireline LECs. . . . We expect the states to determine whether intrastate transport and termination of traffic between competing LECs, where a portion of their local service areas are not the same, should be governed by section 251(b)(5)'s reciprocal compensation obligations or whether intrastate access charges should apply to the portions of their local service areas that are different.

Implementation of the Local Competition Provisions in the Telecomms. Act of 1996, 11 F.C.C.R. 15,499, 16,013-14 ¶ 1035 (Aug. 8, 1996) ("First Report & Order"), aff'd in part, vacated in part, Competitive Telecomms. Ass'n v. FCC, 117 F.3d 1068 (8th Cir. 1997), and aff'd in part, vacated in part, Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), aff'd in part, rev'd in part, AT&T Corp. v. Iowa Utils. Bd., 525 U.S. at 397. In a recent arbitration in Virginia, the FCC reiterated that "state

commissions have authority to determine whether calls passing between LECs should be subject to access charges or reciprocal compensation for those areas where the LECs' service areas do not overlap," and it declined to disturb the existing distinction in that state. Petition of WorldCom, Inc., 17 F.C.C.R. 27,039, 27,307 ¶ 549 (July 17, 2002) (mem. op. & order).

The historical practice of allowing state commissions to define local service areas was not altered by the FCC's ruling in its Initial and Remand Orders that ISP-bound traffic was inherently interstate in character. Although carriers in Vermont as elsewhere who operate under interconnection agreements made after the effective date of the Remand Order must exchange ISP-bound traffic on a bill-and-keep basis, the Remand Order did not otherwise disrupt the state commissions' ability to define local service areas. Global's contention that the Remand Order and its attendant regulations require the Board to cede its authority to define local calling areas to Global is unfounded.

C. Prohibition of VNXX Service (Issue 4)

Before the Public Service Board Verizon sought a ruling that it need not pay reciprocal compensation for traffic that only appeared to be local by virtue of the VNXX, but was actually interexchange traffic. The Board ruled that the determination of whether traffic is "local" or "toll" is based upon the physical termination points of the calls, not the rate center designated

by the carrier, PSB Order at 42, and it banned Global's use of VNXX in Vermont. Id. at 45.

Global argues first that the Public Service Board lacked the authority to ban the use of VNXX service because neither party to the arbitration raised the issue of the right to use VNXX service. The 1996 Act requires a state commission that is arbitrating issues concerning an interconnection agreement to limit its consideration to the open or unresolved issues presented by the petition for arbitration and any response thereto. 47 U.S.C.A. § 252(b)(4)(A). Neither Global nor Verizon objected to the use of VNXX; Verizon wanted only to ensure that it need not pay reciprocal compensation for VNXX traffic. Global, however, squarely raised the issue of its right to use VNXX in its petition for arbitration. Global's caption describing Issue 4 to the Board stated: "Can Global assign to its customers NXX codes that are 'homed' in a central office switch outside of the local calling area in which the customer resides?" See PSB Order at 10; Cross-Mot. of Bd. Member Defs. at 3 (Doc. 20). Global proceeded to present arguments for the use of VNXX service. Global did in fact raise the issue of its right to use VNXX. That it and Verizon were amenable to different solutions than the one the Board adopted did not deprive the Board of the authority to address the issue, once Global raised it.

Global also contends that the Board's Order unlawfully discriminates against VNXX traffic. Verizon offers its customers Foreign Exchange ("FX") service, which Global argues is functionally identical to VNXX, and therefore must be treated identically. Customers using FX service purchase an FX line, a link between two central offices, or switches. They pay costs that cover the cost of the line and the transportation of traffic in bulk between the two points. Calls placed to the line are considered terminated at that end, even though the calls are transported to the other end of the line and ordinarily would incur toll charges. See PSB Order at 21. FX service thus allows what would be a toll call to be treated as a local call, even though the call actually terminates at a point outside the customer's local calling area. In that respect FX service functions the same as VNXX service from the point of view of the retail customer.

From the carriers' and regulators' points of view, however, the services operate quite differently. When VNXX numbers are assigned, neither Global nor its customers purchase any equipment, nor do they pay for the costs of transporting the call. Instead Global relies on Verizon, the ILEC, to transport the calls, in accordance with Verizon's obligation to provide interconnecting services. Global does not dispute the distinction, but considers it irrelevant.

The 1996 Act requires that Verizon and Global interconnect "on rates, terms, and conditions that are just, reasonable and nondiscriminatory." 47 U.S.C.A. § 251(c)(2). The Public Service Board must ensure that an arbitrated interconnection agreement meets the requirements of section 251. Id. § 252(c)(1). Because FX and VNXX are not equivalent services, the Board's order, which allows any LEC that so chooses to provide FX service, but does not permit VNXX service, does not discriminate against Global in violation of § 252(c)(1).

Global next argues that the Public Service Board does not have jurisdiction to ban Global's use of VNXX to provide information access services because ISP-bound traffic is interstate in character and therefore subject exclusively to FCC authority. See Remand Order at 9154 ¶ 4; 9189 ¶ 82. The Remand Order made no such sweeping preemptive claim. It expressly stated that access services remain subject to FCC jurisdiction "or, to the extent they are intrastate services, they remain subject to the jurisdiction of state commissions." Id. at 9169 ¶ 39. It also acknowledged that ISP-bound traffic has interstate and intrastate components that cannot be reliably separated. Id. at 9175 ¶ 52; see also La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 360 (1986) (in practice, dual federal and state regulation over telephone service does not divide neatly into separate interstate and intrastate domains). The FCC stated that the

Remand Order "does not preempt any state commission decision regarding compensation for ISP-bound traffic for the period prior to the effective date of the interim regime we adopt here."

Remand Order at 9189 ¶ 82. Moreover, state commissions' power to arbitrate interconnection agreements, including those that involve ISP-bound traffic, has not altered because the FCC has issued rulings that govern intercarrier compensation for ISP-bound traffic. See AT&T Corp. v. Iowa Utils. Bd., 525 U.S. at 385 (1996 Act entrusts state commissions with job of approving interconnection agreements, even though FCC promulgates rules to guide state commission judgments).

Although Global characterizes the Board's Order as "determin[ing] who can or cannot serve ISPs," Global's Mem. in Supp. at 13 (Doc. 13), the Board did not bar Global from providing service to ISPs. It merely ruled that Global could not obtain an unfair advantage in the market by offering VNXX service with Verizon footing the bill.

Global also argues that federal law prohibits the Board from imposing intrastate access charges on ISP-bound traffic. In its Remand Order, the FCC ruled that as of the Order's effective date carriers entering into new interconnection agreements "shall exchange ISP-bound traffic on a bill-and-keep basis during this interim period." Remand Order at 9188 ¶ 81. Explaining its reasoning, the FCC stated, "we believe that a standstill on any

expansion of the old compensation regime into new markets is the more appropriate interim answer." Id. at 9189 ¶ 81.

With the Remand Order the FCC preempted state commissions' authority to deal with intercarrier compensation for ISP-bound traffic. Id. at 9189 ¶ 82 ("Because we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic, . . . state commissions will no longer have authority to address this issue."). The FCC did not distinguish traffic between an ISP and its customer in different local calling areas from traffic between an ISP and its customer in the same local calling area. Intercarrier compensation for ISP-bound traffic is now governed by the FCC. For existing compensation regimes, intercarrier compensation is at most \$.0007/mou.⁸ For interconnection agreements entered into after June 14, 2001, such as the one at issue here, cost recovery is on a bill and keep basis. Id. at 9188 ¶ 81.

In the arbitration proceeding, the parties contested whether each party should be responsible for the costs associated with transporting telecommunications traffic to their point of interconnection ("POI"). The Public Service Board's Hearing Officer recommended that each party should be responsible for its

⁸ "mou" refers to "minute-of-use." See, e.g., Remand Order at 9156 ¶ 8.

own costs of delivery to the POI, and noted that according to the FCC there should be no payment made to Verizon to transport Global's ISP-bound traffic. PSB Order at 8-9. The Board accepted the Hearing Officer's recommendation, and ruled that each party would be required to transport traffic on its side of the POI at its own expense. Id. at 40. In the course of its discussion however, the Board opined that intrastate toll traffic, whatever its destination, was unaffected by the FCC's Remand Order, and that access charges would continue to apply to such traffic. Id. at 39.

To the extent that the Public Service Board ruled that access charges apply to ISP-bound traffic, its ruling could be challenged as at odds with the FCC's assertion of exclusive authority to determine appropriate intercarrier compensation for ISP-bound traffic. Global did not appeal the Board's ruling on this issue, however. Global's somewhat disjointed contention is that the Board's prohibition of VNXX violates the Remand Order by enabling it to impose access charges on ISP-bound traffic. Regardless of whether the Board is precluded from imposing access charges on ISP-bound traffic, it is not precluded from banning VNXX.

Finally, Global argues that the filed rate doctrine prohibits the Board from interfering with Global's federally tariffed service to its ISP customers by banning VNXX service.

Global did not argue to the Board that the filed rate doctrine prohibits it from barring VNXX service because the service is provided pursuant to a federal tariff; thus the argument is waived. See Zatz v. United States, 149 F.3d 144, 146 (2d Cir. 1998) (by failing to present jurisdictional argument to agency, petitioners waived right to present it to federal court; defect in agency's jurisdiction does not affect subject matter jurisdiction of district court). Even were the Court to consider Global's argument, however, the argument fails.

Section 203(a) of Title 47 requires every common carrier to file with the FCC "schedules showing all charges for itself and its connecting carriers . . . and showing the classifications, practices, and regulations affecting such charges." 47 U.S.C.A. § 203(a). No carrier may "extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule." Id. § 203(c). The purpose of the filed rate doctrine provisions is to prevent unreasonable and discriminatory charges. Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc., 524 U.S. 214, 221-22 (1998); see also Fax Telecomunicaciones Inc. v. AT&T, 138 F.3d 479, 488 (2d Cir. 1998) (filed rate doctrine is central to regulatory scheme for interstate telecommunications carriers). Rates filed with the FCC have the force of federal law, and completely set forth the

rights and liabilities between carrier and customer. ICOM Holding, Inc. v. MCI Worldcom, Inc., 238 F.3d 219, 221 (2d Cir. 2001); AT&T Co. v. Cent. Office, 524 U.S. at 227.

Two principles underlie the filed rate doctrine: "(1) preventing carriers from engaging in price discrimination as between ratepayers (the 'nondiscrimination strand') and (2) preserving the exclusive role of federal agencies in approving rates for telecommunications services that are 'reasonable' by keeping courts out of the rate-making process (the 'nonjusticiability strand'), a function that the federal regulatory agencies are more competent to perform." Marcus v. AT&T Corp., 138 F.3d 46, 58 (2d Cir. 1998) (citing Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 19 (2d Cir. 1994)); accord Fax Telecommunicaciones, 138 F.3d at 489. The filed rate doctrine applies not only to rates or charges, but also to non-price aspects of telecommunications services, such as special services or billing options. ICOM, 238 F.3d at 222; see also AT&T Co. v. Cent. Office, 524 U.S. at 224-25.

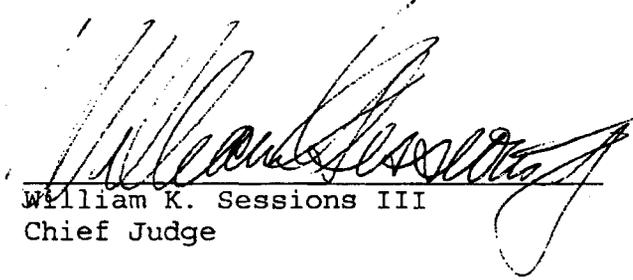
The Board's prohibition of VNXX service offends neither the "nondiscrimination strand" nor the "nonjusticiability strand" of the filed rate doctrine. The ban does not have the effect of discriminating, or requiring Global to discriminate, among Global's customers; it simply does not permit Global to offer the service to any of its customers. A ban on VNXX service likewise

does not involve the Board or this Court in any determination of whether the rates or terms of the service are reasonable. The Board's ban has not varied the rates or terms of Global's tariff, nor has it attempted to create or enforce obligations between Global and its customers that do not appear in the federal tariff. The filed rate doctrine does not prevent the Public Service Board from prohibiting the use of VNXX within Vermont.

III. Conclusion

The Public Service Board's determination that intercarrier compensation shall continue to be based on the local calling areas as established in previous Board proceedings does not violate federal law. The Board's ban on Global's use of VNXX likewise does not violate federal law. Global's motion for summary judgment is denied; Verizon's cross-motion for summary judgment is granted; the individual Board members' cross-motion is denied as moot.

Dated at Burlington, Vermont this 5th day of August, 2004.



William K. Sessions III
Chief Judge

Case Closed.

EXHIBIT G

WUTC Docket No. UT-053036
Pac-West Responses to Qwest Data Requests
July 15, 2005

Data Request No. 13:

Please state whether there is any difference in prices in Pac-West price lists for ISPs to obtain service in the same local calling area as the Pac-West switch versus any other local calling area. If so, please specifically identify the pages and sections of the price list that show the pricing differential.

Response:

Pac-West objects to this request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence. Subject to, and without waiver of, that objection, Pac-West's Washington price list is available on Pac-West's website.

Prepared by: Counsel (objections) and Ethan Sprague
Telephone: 209-926-3416
Date: July 15, 2005

**WUTC Docket No. UT-053036
Pac-West Supp. Response to Qwest Data Requests
July 25, 2005**

Data Request No. 14:

Please identify the price list or contract provisions under which Pac-West provides VNXX service to its ISP customers.

Response:

Pac-West objects to this request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence. Subject to, and without waiver of, that objection, see Response to Data Request No. 13.

Prepared by: Counsel (objections) and Ethan Sprague
Telephone: 209-926-3416
Date: July 15, 2005

Supplemental Response:

Pac-West has products or services in Washington that may incorporate foreign exchange ("FX") features or services, i.e., Type 3 and potentially PSTN On-Ramp. Pac-West, however, does not have any stand-alone FX products or services. Additionally, since the FX features are currently built into other products and services, Pac-West does not have a specific rate or charge for FX in Washington.

Prepared by: Josh Thieriot

EXHIBIT H

Conformed Copy

LAW OFFICES
FENNEMORE CRAIG
A PROFESSIONAL CORPORATION

RECEIVED

DARCY RENFRO

Direct Phone: (602) 916-5345
Direct Fax: (602) 916-5545
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OFFICES IN:
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PHONE: (602) 916-5000
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February 18, 2003

BY HAND DELIVERY

Docket Control
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

Re: In the Matter of the Application of Qwest Corporation for Approval of the Internet Service Provider Bound Traffic Amendment to the Interconnection Agreement with Pac-West Telecomm, Inc.

Dear Madam or Sir:

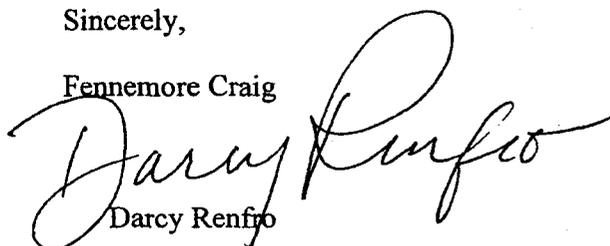
Please find enclosed the Internet Service Provider Bound Traffic Amendment ("Amendment") to the Interconnection Agreement between Qwest Corporation ("Qwest") and Pac-West Telecomm, Inc. ("Pac-West").

The Amendment is made in order to amend the terms and conditions for EAS/Local Traffic and ISP Bound Traffic as set forth in the Amendment. In addition, the Parties wish to amend the Agreement to add a Change of Law Provision. The Arizona Corporation Commission approved the underlying Agreement between Qwest and Pac-West on December 14, 1999 in Docket Nos. T-01051B-99-0550 and T-03693A-99-0550, Decision No. 62137. Enclosed is a service list for these dockets.

Please contact me at (602) 916-5345 if you have any questions concerning the enclosed. Thank you for your assistance in this matter.

Sincerely,

Fennemore Craig



Darcy Renfro

Enclosures

FENNEMORE CRAIG

Docket Control
February 18, 2003
Page 2

SERVICE LIST FOR: Qwest Communications
Docket Nos. T-01051B-99-0550 and T-03693A-99-0550

Mr. Timothy Berg
Fennemore Craig
3003 N. Central Avenue, Suite 2600
Phoenix, Arizona 85012

Ms. Mart McCann
Pac-West Telecomm, Inc.
4210 Coronado Avenue
Stockton, CA 95204-2340

Mr. Christopher C. Kempley
Chief Counsel
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

Mr. Ernest Johnson
Director, Utilities Division
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

**Internet Service Provider ("ISP") Bound Traffic Amendment
to the Interconnection Agreement between
Qwest Corporation and
Pac-West Telecomm, Inc.
for the State of Arizona**

This is an Amendment ("Amendment") to the Interconnection Agreement between Qwest Corporation ("Qwest"), formerly known as US WEST Communications, Inc., a Colorado corporation, and Pac-West Telecomm, Inc. ("CLEC"). CLEC and Qwest shall be known jointly as the "Parties".

RECITALS

WHEREAS, CLEC and Qwest entered into an Interconnection Agreement ("Agreement") which was approved by the Arizona Corporation Commission ("Commission") on December 14, 1999; and

WHEREAS, The FCC issued an Order on Remand and Report and Order in CC Docket 99-68 (Intercarrier Compensation for ISP-Bound Traffic); and

WHEREAS, the Parties wish to amend the Agreement to reflect the aforementioned Order under the terms and conditions contained herein.

WHEREAS, the Parties wish to amend the Agreement to add a Change of Law provision.

AGREEMENT

NOW THEREFORE, in consideration of the mutual terms, covenants and conditions contained in this Amendment and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree to the language as follows in lieu of existing contract language:

1. Definitions

For purposes of this Amendment the following definitions apply:

- 1.1 "Bill and Keep" is as defined in the FCC's Order on Remand and Report and Order in CC Docket 99-68 (Intercarrier Compensation for ISP-Bound Traffic). Bill and Keep is an arrangement where neither of two (2) interconnecting networks charges the other for terminating traffic that originates on the other network. Instead, each network recovers from its own end users the cost of both originating traffic that it delivers to the other network and terminating traffic that it receives from the other network. Bill and Keep does not, however, preclude intercarrier charges for transport of traffic between carriers' networks.

- 1.2 "Information Service" is as defined in the Telecommunications Act of 1996 and FCC Order on Remand and Report and Order in CC Docket 99-68 and includes ISP-bound traffic.
- 1.3 "Information Services Access" means the offering of access to Information Services Providers.
- 1.4 "ISP-Bound" is as described by the FCC in its Order on Remand and Report and Order (Intercarrier Compensation for ISP-Bound Traffic) CC Docket 99-68.

2. Exchange Service (EAS/Local) Traffic

Pursuant to the election in Section 5 of this Amendment, the Parties agree to exchange all EAS/Local (§251(b)(5)) traffic at the state ordered reciprocal compensation rate.

3. ISP-Bound Traffic

3.1 Qwest elects to exchange ISP-bound traffic at the FCC ordered rates pursuant to the FCC's Order on Remand and Report and Order (Intercarrier Compensation for ISP-Bound Traffic) CC Docket 99-68 (FCC ISP Order), effective June 14, 2001, and usage based intercarrier compensation will be applied as follows:

3.2 Compensation for presumed ISP-bound traffic exchanged pursuant to Interconnection agreements as of adoption of the FCC ISP Order, April 18, 2001:

3.2.1 Identification of ISP-Bound traffic -- Qwest will presume traffic delivered to CLEC that exceeds a 3:1 ratio of terminating (Qwest to CLEC) to originating (CLEC to Qwest) traffic is ISP-bound traffic. The Parties agree that the "3:1 ratio of terminating to originating traffic", as described in Paragraph 79 of the FCC ISP Order, will be implemented with no modifications.

3.2.2 Growth Ceilings for ISP-Bound Traffic -- Intercarrier compensation for ISP-bound traffic originated by Qwest end users and terminated by CLEC will be subject to growth ceilings. ISP-bound MOUs exceeding the growth ceiling will be subject to Bill and Keep compensation.

3.2.2.1 For the year 2001, CLEC may receive compensation, pursuant to a particular Interconnection Agreement for ISP bound minutes up to a ceiling equal to, on an annualized basis, the number of ISP bound minutes for which CLEC was entitled to compensation under that Agreement during the first quarter of 2001, plus a ten percent (10%) growth factor.

3.2.2.2 For 2002, CLEC may receive compensation, pursuant to a particular Interconnection Agreement, for ISP bound minutes up to a ceiling equal to the minutes for which it was entitled to compensation under that Agreement in 2001, plus another ten percent (10%) growth factor.

3.2.2.3 In 2003, CLEC may receive compensation, pursuant to a particular Interconnection Agreement, for ISP bound minutes up to a ceiling

equal to the 2002 ceiling applicable to that Agreement.

3.2.3 Rate Caps -- Intercarrier compensation for ISP-bound traffic exchanged between Qwest and CLEC will be billed in accordance with their existing Agreement or as follows, whichever rate is lower:

3.2.3.1 \$.0015 per MOU for six (6) months from June 14, 2001 through December 13, 2001.

3.2.3.2 \$.001 per MOU for eighteen (18) months from December 14, 2001 through June 13, 2003.

3.2.3.3 \$.0007 per MOU from June 14, 2003 until thirty six (36) months after the effective date or until further FCC action on intercarrier compensation, whichever is later.

3.2.3.4 Compensation for ISP bound traffic in Interconnection configurations not exchanging traffic pursuant to Interconnection agreements prior to adoption of the FCC ISP Order on April 18, 2001 will be on a Bill and Keep basis until further FCC action on Intercarrier compensation. This includes carrier expansion into a market it previously had not served.

4. Effective Date

This Amendment shall be deemed effective upon approval by the Commission; however, Qwest will adopt the rate-affecting provisions for both ISP bound traffic and (§251(b)(5)) of the Order as of June 14, 2001, the effective date of the Order.

5. Rate Election

The reciprocal compensation rate elected for (§251(b)(5)) traffic is (elect and sign one):

Current rate for voice traffic in the existing Interconnection Agreement:

Signature

Name Printed/Typed

OR

The rate applied to ISP traffic:



Signature
JOHN SUMPTER

Name Printed/Typed

6. Change of Law

The provisions in this Agreement are based, in large part, on the existing state of the law, rules, regulations and interpretations thereof, as of the date hereof (the Existing Rules). Among the Existing Rules are the results of arbitrated decisions by the Commission which are currently being challenged by Qwest or CLEC. Among the Existing Rules are certain FCC rules and orders that are the subject of, or affected by, the opinion issued by the Supreme Court of the United States in *AT&T Corp., et al. v. Iowa Utilities Board, et al.* on January 25, 1999. Many of the Existing Rules, including rules concerning which network elements are subject to unbundling requirements, may be changed or modified during legal proceedings that follow the Supreme Court opinion. Among the Existing Rules are the FCC's orders regarding BOCs' applications under Section 271 of the Act. Qwest is basing the offerings in this Agreement on the Existing Rules, including the FCC's orders on BOC 271 applications. Nothing in this Agreement shall be deemed an admission by Qwest concerning the interpretation or effect of the Existing Rules or an admission by Qwest that the Existing Rules should not be vacated, dismissed, stayed or modified. Nothing in this Agreement shall preclude or estop Qwest or CLEC from taking any position in any forum concerning the proper interpretation or effect of the Existing Rules or concerning whether the Existing Rules should be changed, dismissed, stayed or modified. To the extent that the Existing Rules are changed, vacated, dismissed, stayed or modified, then this Agreement and all contracts adopting all or part of this Agreement shall be amended to reflect such modification or change of the Existing Rules. Where the Parties fail to agree upon such an amendment within sixty (60) days from the effective date of the modification or change of the Existing Rules, it shall be resolved in accordance with the Dispute Resolution provision of this Agreement. It is expressly understood that this Agreement will be corrected to reflect the outcome of generic proceedings by the Commission for pricing, service standards, or other matters covered by this Agreement. This Section shall be considered part of the rates, terms and conditions of each Interconnection, service and network element arrangement contained in this Agreement, and this Section shall be considered legitimately related to the purchase of each Interconnection, service and network element arrangement contained in this Agreement.

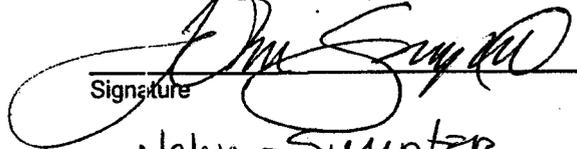
7. Further Amendments

Except as modified herein, the provisions of the Agreement shall remain in full force and effect. Neither the Agreement nor this Amendment may be further amended or altered except by written instrument executed by an authorized representative of both Parties. This Amendment shall constitute the entire Agreement between the Parties, and supercedes all previous Agreements and Amendments entered into between the Parties with respect to the subject matter of this Amendment.

The Parties understand and agree that this Amendment will be filed with the Commission for approval. In the event the Commission rejects any portion of this Amendment, renders it inoperable or creates an ambiguity that requires further amendment, the Parties agree to meet and negotiate in good faith to arrive at a mutually acceptable modification.

The Parties intending to be legally bound have executed this Amendment as of the dates set forth below, in multiple counterparts, each of which is deemed an original, but all of which shall constitute one and the same instrument.

Pac-West Telecomm, Inc.

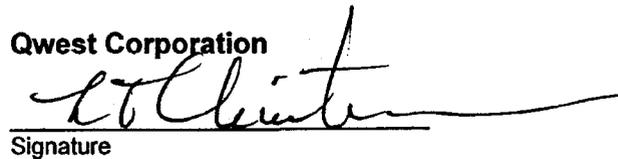

Signature

John Supter
Name Printed/Typed

Vice President, Regulatory
Title

8/12/2007
Date

Qwest Corporation


Signature

L. T. Christensen
Name Printed/Typed

Director - Business Policy
Title

2/6/03
Date