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BEFORE THE ARIZONA CORPORATION COMMISSION

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

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

QWEST RESPONSE BRIEF

Qwest Corporation (“Qwest”) hereby submits its Response 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 proceeding involves an interconnection agreement (“ICA”) between Pac-West and Qwest, providing for the exchange of local traffic, and specifically concerns calls that are ultimately routed to Internet Service Providers (“ISP[s]”) customers of

Pac-West, under terms and conditions that reflect the “*ISP Remand Order*”¹ issued by the Federal Communications Commission (“FCC”). Pac-West utilizes a dialing scheme known in the industry as VNXX, by which dial-up access to its ISP customer located in locations distant from the caller may be achieved by the caller dialing a number assigned to the caller’s local calling area (LCA).² VNXX, as a federal district court in Oregon recently ruled, is a ploy by which Pac-West seeks to avoid the true long distance-toll nature of the call³ and thereby improperly use local interconnection facilities to route the VNXX traffic over Qwest’s network to Pac-West’s point of interconnection, avoid transportation and access charges, and claim compensation at the rate set by the FCC in the *ISP Remand Order* for what Pac-West calls “locally dialed ISP-bound” traffic. Pac-West is wrong in asserting that VNXX calls destined for ISPs are compensable for terminating compensation at \$.0007 per minute of use under the *ISP Remand Order*, when the party calling the ISP and the ISP are not both physically located in the same geographic LCA, for the reasons stated in Qwest’s opening brief.

¹ *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*”).

² VNXX is described in detail in Qwest’s Opening Brief, p. 2.

³ *Qwest Corp. v. Universal Telecommunications*, 2004 WL 2958421 (D. Ore. 2004) (cited in Qwest’s Opening Brief at pp. 24-25) is very similar to this case, addressing the question whether, under an existing ICA, Qwest had an obligation to pay terminating compensation to a CLEC (Universal) whose business plan was to serve ISPs exclusively. The Court entered a ruling last December granting Qwest’s motion on the VNXX issue and holding that Qwest owed no terminating compensation when the physical location of the calling party and the modem banks that answer the call on behalf of the ISP are not in the same LCA. In so ruling, the Court described a typical VNXX arrangement (where the parties to the call are in different LCAs), concluding that under such an arrangement, “the person making the call would be billed at the local rate for a call that was really long distance.” 2004 WL 2958421 at *9. (emphasis added).

Pac-West's contention that the "plain language" of the ICA and the *ISP Remand Order* support its view to the exclusion of all others, and that Qwest is unilaterally helping itself to an exemption from the ICA, is belied by an array of compelling considerations. The historical practice of distinguishing between local calling and long distance and the intercarrier compensation that has been associated with each, the longstanding positions of the Commission defining local calling areas (within which service is provided by Qwest on a flat-rated basis) and interexchange calls (which are toll), the language of the *ISP Remand Order* itself, and the opinions of the majority of courts and state regulatory agencies that have considered the *ISP Remand Order*, all militate against Pac-West's artificially engineered scheme for compensation.

In promulgating the *ISP Remand Order*, the FCC never intended to throw out, and indeed did not throw out the long-standing distinctions between local and long distance. While there are cases on both sides of the issue whether the *ISP Remand Order* compensation scheme applies only to locally originated and locally delivered traffic, the federal district court decision in Connecticut (the *SNET* case) relied upon by PacWest⁴, is demonstrably in error, because it disregards the controlling U. S. Court of Appeals decision and then confuses the FCC's finding that ISP-bound traffic is primarily interstate for jurisdictional purposes (not a local matter), with how that traffic is provisioned.

⁴ *Southern New England Telephone Co. v. MCI WorldCom*, 359 F.Supp.2d 229 (D. Conn. 2005).

Pac-West wrongly asserts that Qwest's position is a mere "new justification" for not paying compensation. In reality, Pac-West's business ploy is new. As soon as Qwest became aware of the magnitude of the practice, Qwest registered its insistence that Pac-West should not be permitted to use local numbers and call routing trickery that hides the true long distance nature of the call (VNXX), as a way of cramming its traffic into the local category for purposes of gaining compensation from Qwest and avoiding proper treatment of such calls as toll. Contrary to Pac-West's claim, the Commission is well aware that Qwest has long contested the VNXX scheme, as evidenced by the *AT&T Arbitration* before the Commission in 2003-4.⁵

In an attempt to confuse the issue of VNXX, by which Pac-West avoids payment of local access charges or transport of the call, Pac-West tries to equate VNXX with Qwest's FX service, and, in an obvious effort to confuse the nomenclature, resorts to calling its VNXX traffic "FX ISP-bound" traffic. Pac-West's analogy fails, however, because in the case of FX, the customer actually does buy local access and transport, unlike Pac-West with its VNXX service. While FX and VNXX may seem identical to an end user who calls a local number and reaches a called party in another calling area, from the carriers' and regulators' points of view the services are completely different.

⁵ 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 (Ariz. Corp. Comm'n., April 9, 2004). ("*AT&T Arbitration*").

The Commission addressed the issue of VNXX in the *AT&T Arbitration*, and found that AT&T's proposed dialing scheme—identical to that utilized by Pac-West—represented a departure from the establishment of local calling areas. The Commission held that VNXX could have unintended effects and be subject to abuse. The Commission's words were prescient, because Pac-West's scheme abuses Qwest and displays utter disregard to the Commission's established local calling areas, and the Commission's role in that regard. Pac-West implemented a calling scheme that ignores local calling area boundaries—just the kind of unilateral action the Commission rejected: “We do not believe that it would be good public policy to alter long-standing rules or practice without broader industry participation.”⁶ Pac-West attempts to distinguish the *AT&T Arbitration* by repeating its unproven claim that the *ISP Remand Order* swept away local exchange and interexchange distinctions for that type of traffic. Pac-West is mistaken. The *ISP Remand Order* did not diminish or preempt the Commission's authority to define local calling areas, and to ban the use of VNXX, whether it is used for ISP traffic or otherwise.

II. ARGUMENT

A. Pac-West's Theory Would Deprive This Commission of Its Lawful Authority to Define Local Calling Areas

Implicit in Pac-West's faulty view of the *ISP Remand Order*, which is the foundation of its complaint, is the proposition that the Commission is preempted from its lawful and traditional role in defining local calling areas. That view is incorrect.

⁶ *Id.* p. 13, lines 16-17.

As Qwest notes in its Opening Brief (*see* Qwest's Opening Brief, pp 27-29), Arizona statutes and the rules and prior decisions of the Arizona Corporation Commission expressly recognize Local Calling Areas ("LCAs"), and distinguish local exchange service from interexchange service. Pac-West's view, however, requires this Commission to conclude that the FCC intended to throw overboard the distinctions between local and long distance (and the intercarrier compensation methods that follow from those different services), when it comes to traffic destined for ISPs subscribing to Pac-West's VNXX service. There is no evidence to support that proposition. In fact, at least one federal court that considered the question held squarely that nothing in the *ISP Remand Order* required a state commission to relinquish its authority to define local calling areas for VNXX service to ISPs.⁷ That case was an appeal of an interconnection arbitration decision by the Vermont Commission prohibiting a CLEC from using VNXX for ISP traffic. The Court upheld the Commission and with regard to the issue of LCAs stated:

*The historical practice of allowing state commissions to define local service area 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.*⁸

⁷ *Global NAPS, Inc. v. Verizon New England, Inc.*, 327 F.Supp.2d 290, 299 (D. Vt. 2004)(Amended Slip Opinion attached to Qwest Opening Brief as Exhibit F) ("*Global NAPS*").

⁸ *Global NAPS*, (Amended Slip Opinion and Order, p 16). (Emphasis added).

If the FCC were to decide to preempt the states in this area, it certainly would not be circumspect in its intentions. Rather, the FCC has consistently ruled that state commissions continue to have the authority to define LCAs and determine whether reciprocal compensation or access charges apply to particular traffic.⁹ This Commission's authority to define local service areas for all types of traffic, including that which is ultimately routed to ISPs, remains in full force.

B. Pac-West's VNX Service Contravenes Arizona Laws Defining Local Exchange Service and Toll Service

This Commission not only possesses the authority to define local service and toll service based on defined LCAs—it has explicitly promulgated rules regarding these matters.¹⁰ Qwest quoted at least nine separate Commission Rules in its Opening Brief (*see* Qwest's Opening Brief, pp. 27-28) that describe the dichotomy between

⁹ With the exception of wireless traffic, "state commissions have the authority to determine what geographic areas should be considered 'local areas' for the purposes of applying reciprocal compensation obligations under section 251(b)(5), consistent with the commissions' historical practice of defining local service areas for wireline LECs. (First Report and Order, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 1035 (1996) ("*Local Competition Order*"); *Traffic originating or terminating outside the applicable local area would be subject to interstate and intrastate access charges.*") (emphasis added); accord Memorandum Opinion and Order, *In the Matter of the Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and for Expedited Arbitration*, 17 FCC Rcd 27,039, ¶ 549 (Wireline Competition Bureau, July 17, 2002) ("*Virginia Arbitration Order*") (specifically relying on paragraph 1035 of the *Local Competition Order* for the proposition that the FCC "previously held that state commissions have authority to determine whether calls passing between LECs should be subject to access charges or reciprocal compensation . . .").

¹⁰ Statutes cited in Qwest's Opening Brief also pay recognition to the difference between local and long distance services. In ARS 40-282(c)(2), the legislature contemplates separate certification for "local exchange" carriers and "interexchange" carriers, a clear indication of the legislature's recognition of the innate differences between the two services, and the Commission's treatment of them.

geographically-based local calling areas and interexchange calling. This overwhelming body of regulatory code amply establishes that geographically defined LCAs are a fundamental structural unit of telecommunications services, and that calls within the geographically defined LCA are treated differently than calls between LCAs. “*Local Exchange Service*” is defined by the Commission Rule as “[the] 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(7) (emphasis added). On the other hand, the Commission’s Rule defines “*toll service*” as service “*between stations in different exchange areas for which a long distance charge is applicable.*”¹¹

These LCA-based local service / interexchange service concepts are not some outdated vestiges of the pre-competitive era. The Commission expressly uses the concept of the LCA in its regulations enacted in furtherance of competition in telecommunications. 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 compensation.*” A.A.C. §R14-2-1305(A) (emphasis added). Pursuant to the LCA / interexchange calling concepts, Qwest and numerous competitive LECs have now been exchanging local traffic for the last decade, and paying intercarrier compensation. There is no room for doubt that under the Commission’s rules a local call must originate and terminate in the same LCA, and

¹¹ Qwest’s local service tariffs likewise clearly express the distinctions between local services vs. interexchange services. *See*, discussion of Qwest’s Exchange and Network Services Price Cap Tariff, section II.H., *infra*.

that local and toll traffic are defined in terms of the geographic location of the parties to the call. The VNXX dialing scheme is completely out of compliance with these rules.¹²

Pac-West attempts to turn the entire structure of local vs. toll on its head by saying, essentially, that if the number the caller dials is a number assigned to that caller's LCA, must be rated as a local call, regardless of the location of the called party. That is simply bad logic. It's like saying, "If a car has an Arizona license plate it must be in Arizona." Regardless of whether the number called is a number that is assigned to the same LCA as the caller, the critical fact Pac-West omits is that the call is not locally terminated. Repeated use of the term "locally dialed" cannot overcome the fact that the VNXX service is, functionally, long distance.

The terminology Pac-West prefers, "locally dialed," is really just a way of glossing over a violation of the Commission's rules. The Commission's rule 1305 "Local and Toll Rating Centers," requires all LECs to use the ILEC's local calling areas and existing EAS boundaries for purpose of classifying traffic as local, EAS, or

¹² To the extent Pac-West suggests that the concept of local service no longer exists in the federal Act, such a claim is simply not true. 47 U.S.C. § 153(47) defines 'telephone exchange service' means 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.*" (Emphasis added). *North Carolina Util. Comm'n v. FCC*, 552 F.2d 1036, 1044 (4th Cir. 1976) ("The term 'telephone exchange service' is a statutory term of art, and means service *within* a discrete local exchange system"). (Emphasis added). The federal act likewise contains a definition of "Telephone Toll Service." 47 U.S.C. § 153(48).

toll for purposes of intercompany compensation. (See, A.A.C. R 14-2-1305). When a call originates in one LCA, but terminates in another, it can only be a toll call.

Pac-West scoffs at Qwest's Counterclaim that Pac-West is knowingly misassigning local telephone numbers to ISPs which are physically located outside the local area to which the telephone number is assigned, in violation of the ICA. Yet, Pac-West overlooks Commission rules compelling compliance with the industry numbering guidelines. As noted above, Rule 1305 (B) requires all LECs to use central office codes with rate centers matching the incumbent LEC's rate centers. The Commission defines "central office codes" as "the first three digits of a 7-digit telephone number . . . assigned by the central office code administrator *in accordance with the industry's central office code assignment guidelines.*" (See, A.A.C. R14-2-1302.4; emphasis added). As Qwest described in its Opening Brief, the industry's guidelines are the "Central Office Code (NXX) Assignment Guidelines (COCAG), which were attached as Exhibit B to Qwest's Answer in this proceeding. (See Qwest Opening Brief, pp. 35-36). COCAG is clear: "CO 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."¹³ (Emphasis added.) By utilizing a VNNX number to serve an ISP that is not physically located in that geographic NPA, Pac-West violates the industry's guidelines, and thus violates this Commission's Rule 1305.

¹³ COCAG provides that there are exceptions for tariffed services like foreign exchange ("FX") services. Pac-West attempts wrongly to equate VNXX with true FX service, a matter which is discussed at section II.F., *infra*.

C. The ICA Should Not Be Interpreted In a Way That Results In a Violation of Arizona Rules

Pac-West would have the Commission believe that the parties to the ICA voluntarily agreed to a scheme in which Pac-West provides a service (VNXX), whereby a Qwest subscriber in one LCA reaches Pac-West's subscriber in a different LCA, and the call is treated as a local call. As discussed above, the Commission has rules about that sort of thing, and Qwest, for its part, wishes to advise the Commission that it did not collaborate with Pac-West for Pac-West to violate those rules. Nor does Qwest believe that the Commission, when it approved the ISP Amendment to the ICA, sanctioned Pac-West to depart from the Commission's rules in favor of an unlimited local calling area for itself.¹⁴ In fact, this Commission earlier held, in considering VNXX in the *AT&T Arbitration*, that "[I]t would not be good public policy to alter long-standing rules or practice without broader industry participation."¹⁵ Having earlier expressly considered the appropriateness and legality of VNXX, and concluding that it was unwise to alter "long-standing rules," it is inconceivable that the Commission intended to bless the VNXX practice through the approval of a single ISP Amendment, which became effective without a hearing.

In any event, Pac-West's claim about what the *ISP Remand Order* means when it comes to VNXX, and by extension what the parties agreed to in the ICA, is

¹⁴ As the Commission is aware, all interconnection agreements entered into between Qwest and CLECs relating to obligations under Section 251 (b) and (c) of the Act must be filed for approval by the Commission under Section 252. The Commission shall reject any such agreement or amendment for "lack of consistency with the public interest, convenience, and necessity, or lack of consistency with applicable estate laws and requirements." See A.A.C. R14-2-1508(1).

¹⁵ *AT&T Arbitration*, p. 13, lines 16-17.

erroneous. The ICA clearly did not and could not legally sanction VNXX, and there is not any ambiguity. However, for the sake of argument, where an agreement is susceptible to more than one interpretation, one of which, as VNXX does here, tacitly overturns decades of industry understanding and flies in the face of state regulation, it only makes sense to reject that interpretation.

D. The *ISP Remand Order* Requires Compensation for Local ISP Traffic Only

Pac-West fundamentally argues that in the *ISP Remand Order* the FCC preemptively required that terminating intercarrier compensation must be paid on all ISP traffic, including VNXX ISP traffic.

1. Pac-West Ignores or Misconstrues FCC Statements in the *ISP Remand Order*

Notwithstanding Pac-West's repeated assertions to the contrary, the compensation plan devised by the FCC in the *ISP Remand Order* applies only to cases where the ISP modems and the caller are physically located in the same LCA, as demonstrated by the references to local calling areas throughout the *ISP Remand Order*.¹⁶ These references directly refute Pac-West's claim that there is no language in the *ISP Remand Order* which supports this argument.¹⁷ The recent *Oregon ALJ Decision*,¹⁸ which agrees that the *ISP Remand Order* applies only to local ISP traffic,

¹⁶ See, Qwest Opening Brief, pp. 15-17.

¹⁷ See, Pac-West Opening Brief, pp. 6, 7.

¹⁸ Ruling, *In the Matter of Qwest Corporation vs. Level 3 Communications, LLC, Complaint for Enforcement of Interconnection Agreement*, IC 12 (Oreg. PUC, ALJ Petrillo, August 16, 2005) ("*Oregon ALJ Decision*")

noted the many occasions in the *ISP Declaratory Order*¹⁹ and the *ISP Remand Order* where the FCC made reference to the fact that it was addressing ISP calls within the same LCA. Judge Petrillo, the author of the Oregon decision, cited five paragraphs from the *ISP Declaratory Order* and three from the *ISP Remand Order*, all of which characterize the ISP-bound traffic at issue as traffic originating and terminating in the same LCA.²⁰ (The *Oregon ALJ Decision* is attached to Qwest's Opening Brief as Exhibit E.)

In its Opening Brief Pac-West attempts to refute *only one* of the references Qwest adduced from the *ISP Remand Order*. The FCC stated:

“As we noted in the Declaratory Ruling, an ISP's end-user customers typically access the Internet through an ISP server *located in the same local calling area.*”²¹

Pac-West seizes upon the word “typically” and attempts to mount an argument that the FCC specifically had in mind atypical ways of *local access* as well. Pac-West states, “The FCC understood that *local* traffic did not always travel through a switch located in the same local calling area.”²² However, Pac-West does not point to any part of the *ISP Remand Order* supporting that hypothesis, or describing what atypical types of *local access* to which the FCC might have had in mind. Certainly the FCC did not at any place in the *ISP Remand Order* discuss VNXX dialing schemes—

¹⁹ Declaratory Ruling in CC Docket No. 96-98 and NPRM in CC Docket No. 99-68, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 and Intercarrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689 (1999) (“*ISP Declaratory Order*”)

²⁰ *Oregon ALJ Decision*, at p. 10, n. 36, citing paragraphs 4, 7, 8, 12, 24 (n. 77) and 27 from the *ISP Declaratory Order*, and paragraphs 10, 13, and 24 of the *ISP Remand Order*.

²¹ *ISP Remand Order* ¶10 (emphasis added), cited in Qwest Answer at ¶5, and in Qwest's Opening Brief at p. 16.

²² Pac-West Opening Brief, p. 8. (Emphasis added).

VNXX was never mentioned in the *ISP Remand Order*. Qwest submits that more likely what the FCC had in mind, and indeed specifically recognized in another portion of the *ISP Remand Order*, is a separate category of *non-local* ISP traffic, which has existed for years, and which was, and will remain, subject to access charges.²³ That mode of ISP access is toll, either by an 8XX number or a 1+ call, which Pac-West admits is subject to payment of terminating access charges and originating access charges by the IXC.²⁴ Pac-West's attempt to derogate the many references to local ISP access in the *ISP Remand Order* fails.

The references to "local" in the *ISP Remand Order* are telling.²⁵ However, there is even more persuasive authority on the scope of the *ISP Remand Order*. For

²³ See, Qwest Opening Brief, p. 17.

²⁴ Contrary to Pac-West's assertion (*see* Pac-West's Opening Brief at p. 7), Qwest accepts Pac-West's admission that a 1+ call made by a Qwest customer to an ISP served by Pac-West is treated as a toll call, with Qwest entitled to originating access charges. *See*, Qwest Opening Brief, p. 10. Qwest raised the treatment of such calls to demonstrate that not all traffic destined for an ISP is "ISP-bound traffic" under the *ISP Remand Order*. Logically, if tolls calls are not "ISP-bound traffic," then disguised toll calls should not be "ISP-bound traffic" either.

²⁵ Discussion by the FCC in the *ISP Remand Order* in paragraphs immediately following the paragraph discussed above underscore that the FCC's focus remains on ISP connections to local serving areas. The FCC notes that ISPs qualify for the Enhanced Services Provider ("ESP") exemption, which allows them to be "treated as end-users for the purposes of applying access charges and are, therefore, entitled to pay local business rates for *their connection to LEC central offices* and the public switched telephone network (PSTN)." (*See, ISP Remand Order*, ¶11, *emphasis added*). The importance of this language cannot be overstated because it demonstrates that the FCC's attention was fixed solely on local ISP traffic. This is demonstrated in the next paragraph, where the FCC once again focuses on "local competition," and the role that reciprocal compensation plays in its development. (*See, Id.*, ¶12, *emphasis added*). Having articulated the foregoing background, the FCC identified its reason for opening the ISP traffic docket: "[T]he question arose 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 the competing LEC.*" (*See, Id.*, ¶13, *emphasis added*). Thus, nothing in the FCC's analysis of the nature of the traffic or its implementation of the interim regime suggests that the FCC intended to broaden the scope of its inquiry beyond ISP local connections to local customers.

purposes of the issue before this 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 Order* in *WorldCom, Inc. v. FCC*.²⁶ Qwest discussed the *WorldCom* decision at some length in its Opening Brief (see Qwest Opening Brief pp. 22-24), but that case is so central to the matter that it deserves further mention. The *WorldCom* court is the Hobbs Act²⁷ reviewing court with regard to the *ISP Remand Order*, and the Commission and all parties to this case are bound by the *WorldCom* court's characterization of the breadth of the *ISP Remand Order*. In its decision, the *WorldCom* court was crystal clear on its characterization of the issue that was addressed in the *IP 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*.²⁸

The plain and unambiguous scope of the *ISP Remand Order* is thus nailed down by the *WorldCom* court—it applies solely to calls made to ISPs located within the caller's local calling area. It is true, as both Qwest and Pac-West discuss in their Opening Briefs, that the *WorldCom* court remanded the *ISP Remand Order* to the FCC, with the finding 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 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*

²⁶ 288 F.3d 429 (D.C. Circuit 2002) ("*WorldCom*").

²⁷ *See*, discussion of Hobbs Act, Qwest's Opening Brief, pp. 23-24.

²⁸ *Id.* at 430. (Emphasis added.)

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—remains in effect, and is binding on all other courts and commissions. The *WorldCom* court's finding that section 251(g) does not provide the FCC with a basis for its scheme of intercarrier compensation for ISP traffic does not alter the scope of ISP traffic the FCC addresses—calls made to ISPs located within the caller's local calling area.

2. The *SNET* Court Decision and the WUTC Administrative Decisions Relied on by Pac-West Represent a Demonstrably Erroneous Reading of the *ISP Remand Order* and the *WorldCom* Decision

In Qwest's Opening Brief, pages 18-25, and Exhibit D "Summary of Other State Commission Decisions," Qwest demonstrated that regulatory agencies and courts have overwhelmingly found that VNXX traffic is *not local* and not subject to reciprocal compensation. To be sure, as noted in both parties' opening briefs, there are two Washington state administrative decisions (*WUTC Level 3*²⁹ and *WUTC ALJ Pac-West*³⁰) and a federal court decision (*SNET*³¹) that have nevertheless found that the *ISP Remand Order* causes them to rule against the majority when it comes to ISP VNXX traffic. However, those cases are clearly erroneous.

a. *SNET* Ignores the Binding Ruling of the Court in *WorldCom*

²⁹ *Level 3 Arbitration*, Fifth Supplemental Order, Arbitrator's Report and Decision, Docket No. UT-023043 (WUTC Jan. 2, 2003).

³⁰ *Pac-West v. Qwest Corporation*, ALJ Recommended Decision, Docket No. UT-053036 (WUTC Aug. 23, 2005), discussed in Qwest's Opening Brief at pp. 21-22 and in Pac-West's Opening Brief at p. 20

³¹ *Southern New England Telephone v. MCI WorldCom Communication* ("SNET"), 359 F. Supp. 3d 229 (D.C. Conn., 2005).

The *SNET* decision, which is cited as authority by the Washington State Utilities and Transportation Commission, concluded that even though the FCC started with the question whether *local* ISP traffic is subject to reciprocal compensation, it answered the question “no” on the ground that all ISP-bound traffic is in a category by itself.³²

The question of the breadth of the *ISP Remand Order* is actually easily answered because the *WorldCom* decision, wherein the D. C. Circuit reviewed the *ISP Remand Order*, could not have been more clear in stating the *holding* of the *ISP Remand Order*: “In the order before us the [FCC] *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.*” (288 F.3d at 430; emphasis added).

Yet, in the face of this definitive statement by the Hobbs Act reviewing court,³³ the *SNET* decision, while cavalierly paying lip service to this language, proceeds to ignore it and substitute its own judgment for that of the D. C. Circuit. In *SNET*, the ILEC argued that the above-quoted language defines the breadth of the *ISP Remand Order*. In response, the *SNET* court, while quoting the language and purporting to follow it, reached a conclusion directly contradicting the *WorldCom* court’s description of the issue decided in the *ISP Remand Order*.

The *SNET* court’s alternative analysis is a classic result-driven analysis. The court begins its analysis by looking at the past history of litigation on the ISP traffic

³² Id.

³³ Under the Hobbs Act, this characterization of the *ISP Remand Order* is binding on the Commission. See *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 396-97 (9th Cir. 1996); *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984); *U S West Communications, Inc. v. Jennings*, No. 99-16247, 2002 U.S. App. LEXIS 19798 at *16 (9th Cir. Sept. 23, 2002).

issue, stating that the FCC “began by addressing” the question whether ISP-bound traffic that would typically be referred to as “local” was subject to reciprocal compensation.³⁴ But the court concluded that “these statements, taken by themselves, do not reveal how the FCC proceeded to answer the question.”³⁵ The *SNET* court states that the FCC did the following in the *ISP Remand Order* to answer the question: “(a) disclaimed the use of the term “local,” (b) held that all traffic was subject to reciprocal compensation unless exempted, (c) held that all ISP-bound traffic is exempted from reciprocal compensation because it is ‘information access,’ (d) held that all ISP-bound traffic was subject to FCC jurisdiction under section 201, and (e) proceeded to set the compensation rates for all ISP-bound traffic.”³⁶ Thus, the *SNET* court concluded that the FCC answered the question “no” on the ground that all ISP-bound traffic is in a category by itself.³⁷ While the *SNET* court correctly summarizes other actions of the FCC in the *ISP Remand Order*, it errs in concluding that *ISP Remand Order* compensation applies to “all ISP traffic” rather than the traffic identified in the *WorldCom* decision (“calls made to internet service providers (“ISPs”) located within the caller’s local calling area.”) (288 F.3d at 430; emphasis added). To claim that the *ISP Remand Order* compensation applies to “all ISP traffic” cannot withstand the explicit *WorldCom* language.

The *SNET* court attempts to justify its conclusion by first quoting statements from the *ISP Remand Order* and even quotes the critical language from the

³⁴ 359 F.Supp.3d at 231.

³⁵ *Id.* at 231-32. It is certainly ironic that the *SNET* court would go through its tortuous analysis when the answer to the breadth of the order had been as clearly and as explicitly defined as it possibly could be by the *WorldCom* court.

³⁶ *Id.* at 232.

³⁷ *Id.*

WorldCom decision that describes the holding of the *ISP Remand Order*.³⁸ But, having quoted this language, it dismisses it with its conclusion that “these statements indicate that the FCC *began by addressing*” whether local ISP traffic is subject to compensation. In other words, it relegates the *WorldCom* court’s statement of the holding of the *ISP Remand Order* to mere background information describing the beginning of the process. In the *SNET* court’s view, the FCC later expanded its decision to cover all ISP traffic.

The *SNET* court’s dismissal of the express language of the *WorldCom* court suffers an obvious fatal flaw. The *SNET* court suggests that the *WorldCom* language describes the *beginning* of the process before the FCC. But this conclusion cannot be true under any reading of the language.. The *WorldCom* court *was not* describing the *beginning* of the FCC’s decision process. Its language describes the *end* of the process. The *WorldCom* court specifically describes the *holding* of the *ISP Remand Order*. There is simply no way to reconcile the *SNET* court’s attempt to relegate the *WorldCom* language to the background.

Under the Hobbs Act, it is the Court of Appeals of the D. C. Circuit, and not a district court in Connecticut, that was granted “exclusive jurisdiction” to review and interpret the *ISP Remand Order*. Thus, the Connecticut court’s contrary interpretation of the breadth of the *ISP Remand Order* violates the Hobbs Act. As between the two interpretations, this Commission and the parties to this complaint are bound by the *WorldCom* court’s characterization of the breadth of the holding of the *ISP Remand Order*.

In the recent Oregon *ALJ Decision*, the identical issue was addressed. In that case, Level 3 argued that the statements from the *ISP Declaratory Order*, the *Bell Atlantic* decision,³⁹ the

³⁸ *Id.* 231.

³⁹ *Bell Atlantic Telephone Cos. v. FCC*, 205 F.3d 1 (D.C.Cir. 2000).

ISP Remand Order, and the *WorldCom* decision that described the issue as relating to only local ISP traffic, were merely “background statements.” The ALJ rejected that argument:

First, it presumes that both the FCC and the Court chose to describe ISP-bound traffic in a particular manner without intending that it have any specific meaning. Second, it ignores the fact that there are repeated references in both the *Declaratory Order* and the *ISP Remand Order* that make it clear that the FCC intended that an ISP server or modem bank be located in the same LCA as the end-user customer initiating the call. 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.” 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-users initiating the call.⁴⁰

The difference between the Oregon decision and the *SNET* decision is that the Oregon decision gives meaning to the FCC’s repeated and straightforward descriptions of the traffic at issue. By failing to do likewise, the *SNET* decision is clearly in error.

In effect, the *SNET* court and Pac-West are suggesting that the *WorldCom* court did not really mean what it said when it defined the holding of the *ISP Remand Order* in terms “of calls made to internet service providers (“ISPs”) *located within the caller’s local calling area.*” (288 F.3d at 430; emphasis added). Such a conclusion is both presumptuous and wrong. Had the *WorldCom* court believed the issue was as broad as Pac-West claims, surely it would have defined the issue more broadly. All the Court would have had to do was drop that last seven words (“*located within the caller’s local calling area*”) from the quoted language and Pac-West and the *SNET* court’s analysis would be correct. That the *WorldCom* court did not eliminate those critical words speaks far more loudly than the convoluted arguments advanced by

⁴⁰*Oregon ALJ Decision* at 9-10 (footnotes omitted).

PacWest that attempt to distract the Commission from the binding language of the *WorldCom* decision.⁴¹

b. *SNET* Misunderstands the FCC's Decision Not to Rely on the Word "Local" in its Analysis

Another distracting and erroneous argument advanced by PacWest is based on the *SNET* court's obvious misunderstanding of the FCC's decision to use terms other than "local" in its *ISP Remand Order* analysis. The *SNET* court characterized this as the FCC's "express disavow[al of] the term 'local.'"⁴² But that is not what the FCC did in the *ISP Remand Order*. Rather, the FCC was responding to the *Bell Atlantic* decision,⁴³ which had criticized the FCC's use of the local/long distance distinction in the *ISP Declaratory Order*. Thus, in paragraph 34, the FCC stated that it would "refrain from generically describing traffic as 'local' traffic because the term 'local,' not being a statutorily defined category, is particularly susceptible to varying meanings and, significantly, is not a term used in section 251(b)(5) or section 251(g)."⁴⁴ The FCC's decision to focus on statutorily defined terms is a far cry from a complete disavowal of the historical significance of the traditional differences between local and interexchange calling. The *SNET* court's characterization of the FCC's action ignores the fact that the statutorily defined terms in the federal statutes retain the local/interexchange traffic distinction.

⁴¹ It is certainly curious that Pac-West includes a page-long section in its brief addressing the *WorldCom* case, wherein it argues what that court ruled, yet never once bothered to address the language in which the *WorldCom* court described the holding of the FCC as relating only to local ISP traffic. (Pac-West Opening Brief at pp. 12-13). Both the *SNET* court's analysis and the arguments advanced by Pac-West, assume that the D. C. Circuit, having defined the issue narrowly, then proceeded to make a decision far broader than the issue the court stated was before it for decision.

⁴² 359 F.Supp.2d at 231.

⁴³ *Bell Atlantic Telephone Cos. v. FCC*, 205 F.3d 1 (D.C.Cir. 2000).

⁴⁴ *ISP Remand Order* ¶ 34.

The heart of the *SNET* court's error is its leap from the FCC's statement to the conclusion that, in not using the term "local," the FCC had completely abandoned the historical distinction between local calling and interexchange calling. Far from it, the FCC was simply shifting its analysis from the word "local," a term not statutorily defined, to statutory terms, in this case the phrase "information access" in section 251(g). Thus, the *SNET* court erroneously transforms the FCC's shift to defined terms into a complete abandonment of all distinctions between local and interexchange calling. Furthermore, the federal Act does not eliminate the concept of local traffic. For example, the term "telephone exchange service," another defined term,⁴⁵ and one that is not in section 251(g), clearly refers to what is commonly called local service. The point, of course, is that there is nothing to suggest that the FCC completely abandoned the concept of local service, nor does the Act. Instead, as it clearly stated, the FCC based the *ISP Remand Order* on statutorily defined terms, in this case focusing on the "information access" category as the rationale for its decision to develop a separate compensation regime for local ISP traffic.

E. The Qwest / Pac-West ISP Amendment Does Not Clearly and Unambiguously Support Pac-West's Position

As shown above, for VNXX ISP traffic, the *ISP Remand Order* fails to support Pac-West's claim that Qwest must pay intercarrier compensation. By extension, what the parties agreed to in the ISP Amendment to the ICA, cannot be not free of doubt as Pac-West would have

⁴⁵*Id.* § 153(47). "The term 'telephone exchange service' means (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." (Emphasis added). *North Carolina Util. Comm'n v. FCC*, 552 F.2d 1036, 1044 (4th Cir. 1976) ("The term 'telephone exchange service' is a statutory term of art, and means service *within* a discrete local exchange system"). (Emphasis added).

the Commission believe. In fact, The ISP Amendment to the ICA clearly did not and could not legally sanction VNXX. Pac-West's references to Arizona case law regarding rules of contract interpretation in situations where the language is clear and unambiguous⁴⁶ are therefore misplaced and inapplicable in these circumstances.

F. VNXX Traffic is Not FX

Pac-West contends its VNXX "calls are, for all practical purposes, identical to a foreign exchange ("FX") service call placed by a Qwest customer."⁴⁷ 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 do not. Second, FX customers are required to pay for the dedicated transport from the distant central office to their physical location in the home local calling area; VNXX customers do not. Third, the number of customers and volume of traffic associated with each service are widely disparate. Of the over two million access lines Qwest serves in Arizona, less than less than one-tenth of one percent are FX. That these distinctions are relevant was aptly noted by the federal district court in *Global NAPS*, where the state 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:

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

⁴⁶ See, Pac-West Opening Brief, p. 6.

⁴⁷ Id., Pac-West Opening Brief, p. 8.

transport the calls, in accordance with Verizon's obligation to provide interconnecting services.⁴⁸

1. Qwest's FX Service if Different from VNXX

Qwest's FX service is very different from VNXX. VNXX uses the PSTN to route and terminate calls to end user customers connected to the public network in another local calling area. In all respects except the number assignment, the call is routed and terminated as a toll call. Qwest's FX product, on the other hand, delivers the FX-bound calls to the local calling area where the number is actually associated. A Qwest FX customer purchases a dedicated local service connection in the local calling area 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 local calling area. The calls are then transported on a private line, paid for by the FX subscriber, to another location.⁴⁹ Thus, after purchasing the local connection in the local calling area, the FX customer bears full financial responsibility to transport calls from the originating local calling area to the location where the call is actually answered, much as a customer would if the customer purchased 8XX service

Pac-West's approach is fundamentally distinct from FX service. Under FX, the customer who desires a presence in another local calling area is fully responsible to transport the traffic to the location where it wants the call answered. Pac-West wants the call routed over the PSTN, but wants no responsibility for providing or paying for the transport to the distant location, enabling toll calls to ride free over Qwest's transport facilities. In calling its product an FX-like

⁴⁸*Global NAPs, Inc. v. Verizon New England, Inc.*, 327 F.Supp.2d 290, 299 (D. Vt. 2004).

⁴⁹ See, Pac-Qwest Opening Brief, Exhibit A, Qwest Responses to Pac-West Data Request No. 01-20.

product, Pac-West attempts to confuse this critical distinction. Calls over the public network 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 local calling area and transported over private networks are more than a mere technical distinction. It is consistent with the way Commissions have been distinguishing between toll and local calls since access charges were established.

Two recent decisions by the Iowa Board addressed the VNXX/FX distinction. In both cases, the Board held, contrary to the CLEC's claims, that VNXX and FX are not the same. In the *Sprint/Level 3 Board Decision*,⁵⁰ the Board firmly rejected the CLECs' claim that that VNXX and FX are the same: "Sprint and Level 3 are proposing to provide a service that is generically described as virtual NXX service (VNXX), which is not the same as FX or DID, and does not compensate the LECs for the use of their networks." (*Sprint/Level 3 Board Decision* at 7; emphasis added). More recently, in the AT&T Arbitration in Iowa, the Board, hearkening back to the *Sprint/Level 3 Board Decision* noted that the Board had "determined . . . that virtual NXX (VNXX) calls (which appear to be included in the 'FX-like' calls at issue here) are not local services but interexchange in nature."⁵¹

⁵⁰ Final Decision and Order, *In re Sprint Communications Company, L.P., and Level 3 Communications, LLC*, Dkt. Nos. SPU-02-11 and SPU-02-13 (Iowa Utilities Board, June 6, 2003) ("*Sprint/Level 3 Board Decision*")

⁵¹ Arbitration Order, *In Re Arbitration of Qwest Corporation and AT&T Communications of the Midwest, Inc. and TCG Omaha*, Docket No. ARB-04-01 (IA Util. Bd. June 17, 2004) at 7 ("*Iowa AT&T Arbitration Order*"). See also Order, *Petition of Global NAPS, Inc. . . . For Arbitration to Establish an Interconnection Agreement with Verizon New England*, D.T.E. 02-45, 2002 Mass PUC LEXIS 65, at 52 (Mass. Dep't Telecom & Energy, December 12, 2002) (After evaluating the CLEC's argument that VNXX and FX are indistinguishable, the Massachusetts commission found the argument "unpersuasive. Verizon's FX service uses dedicated facilities to transport FX traffic to the FX customer's location, and the FX customer pays Verizon for the cost of transporting that traffic.").

If Pac-West were to offer a true FX service, in which its customer was responsible for establishing a physical presence in each local calling area and the traffic was transported out of the local calling area over facilities that are dedicated to the customer, Qwest would have no objection to that type of service.⁵² However, Pac-West does not provide this service for the VNXX calls to ISPs – 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.

2. Pac-West Charges Its ISP Customers Nothing For its VNXX Service.

Pac-West has admitted that VNXX service is not separately identified in its price list.⁵³ Thus, it is clear that Pac-West does not charge its ISP customers for this service, nor do they obtain or pay for a separate dedicated connection to the PSTN, nor do they pay for interexchange transport, all of which are hallmarks of FX service.

Thus, VNXX is simply an arbitrage 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 server, 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

⁵² While this would address the issue of mis-assignment 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 below – ISP-bound traffic is only compensable if it is true local traffic, originating and terminating to the ISP’s server in the same local calling area. Even true FX traffic does not meet that definition and the *ISP Remand Order* does not apply to that type of traffic.

⁵³ See, Pac-West’s responses to Qwest’s Data Request number 14, from the Washington Complaint, attached hereto as Exhibit A.

appropriate NXX of the calling area in which the ISP server is physically located, 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 has argued that VNXX calls and FX calls are identical from the perspective of the party who is calling the VNXX or FX subscriber. While it is true that the caller perceives a “local” call in both cases, the fact is that the caller’s perception of the call is irrelevant to determining the appropriate intercarrier compensation mechanism. Furthermore, if the calling party knew that the ISP was located outside of the local calling area, the calling party would certainly perceive that toll charges were avoided by use of the VNXX number. Once again, the important distinction between FX and VNXX is that with FX, the FX subscriber must purchase local service in the distant area (the LCA where the number is assigned.) Also, the FX subscriber has already paid for the seemingly local calls to be transported to a distant local calling area 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.⁵⁴

⁵⁴ Pac-West provides a lengthy illustration of how FX works, using the Sheraton White Horse Pass Resort & Spa as the example. The Resort is located south of Phoenix, in the 520 area code, while Phoenix is in the 602 area code. The Resort and Phoenix thus are not in the same local calling area. Pac-West omits from its illustration of FX service in that example that the Sheraton would be required to have a physical presence in Phoenix which it could satisfy by purchasing dial tone in the Phoenix local calling area. In contrast, a similarly situated Pac-West VNXX customer is not required to have a physical presence in Phoenix of any type. As an FX customer, the Resort would have to purchase facilities to transport calls back to their location in the 520 area code, by private line or special access from Qwest or

4. The Commission Previously Declined to Equate Qwest's FX and AT&T's VNXX

In the Arizona *AT&T Arbitration*, AT&T argued that its VNXX service and Qwest's FX were functionally equivalent, and claimed that Qwest's position on VNXX would result in discriminatory treatment between the two services with regard to assessment of access charges. Qwest responded, as it has done in this case, that AT&T or its customer should pay access charges, and that Qwest directly assesses interexchange charges on its FX customers, thus satisfying any imputation requirement.⁵⁵ The Commission ruled in favor of Qwest's definition of "Exchange Service and found, "*There is nothing in the definition of Exchange Service as proposed by Qwest which on its face discriminates in favor of Qwest.*"⁵⁶

G. The Arizona AT&T / Qwest Arbitration Decision is Precisely On Point and Represents the Commission's Policy With Regard to All Types of VNXX Traffic

Pac-West incorrectly argues that the *AT&T Arbitration*, in which the Commission ruled that the definition of local exchange service would remain traffic that originates and terminates within the same Commission-determined LCA, and rejected AT&T's request for a definition based on the calling and called NPA/NXXs (i.e., VNXX), is not controlling with respect to the issues in this Proceeding. Pac-West does not properly understand the scope of the *AT&T Arbitration*.

In the *AT&T Arbitration*, the Commission determined that "it would [not] be good public

some other carrier. Therefore, the cost of delivering the FX calls back to the Resort is not born by all Qwest customers. In contrast, a Pac-West VNXX customer similarly situated would have the calls from the Phoenix LCA delivered to the customer's location in the 520 area code for free. VNXX is very different from FX, since the VNXX customer has no presence in the local calling area where it seeks a number, and because the customer seeks to have traffic delivered to it in distant locations sometimes hundreds of miles away, at no charge, under the guise that it is a local call.

⁵⁵ *AT&T Arbitration* Opinion and Order, p. 10, lines 2-4, 18-22.

⁵⁶ *AT&T Arbitration* Opinion and Order, p. 13. (Emphasis added).

policy to alter long-standing rules or practice without broader industry and public participation,” and thus refused to adopt the definition of “local exchange service” urged by AT&T, which would have accommodated AT&T’s VNXX.⁵⁷ Pac-West argues that, since (according to Pac-West’s view) the Pac-West / Qwest ICA already contains provisions that effectively permit VNXX, the Commission is powerless to do anything except enforce it..⁵⁸ Of course, that argument collapses once it is understood that Pac-West’s assertion about what the ICA does is merely a repetition of its unproven hypothesis about what the parties intended. Further, Pac-West is sailing into the wind of public policy. The Commission should not interpret an ICA in a manner that runs contrary to the Commission’s policy views if there is a plausible alternative interpretation that complies with the Commission’s policy views, as is the case here.

The second reason Pac-West advances for disregarding the AT&T Decision also fails. Pac-West states that in the AT&T arbitration the parties sought clarification regarding the definition of “Exchange Service” but did not seek to arbitrate an ICA provision that addressed intercarrier compensation for FX or VNXX services.⁵⁹ Of course, that is just wrong. The effect of VNXX services on intercarrier compensation was an essential reason for the dispute. In addressing the VNXX issue, which turned on the definition of “Exchange Service,” the Commission said,

The definition [Exchange Service] is important for determining whether a call will be routed and rated as a local call, and subject to reciprocal compensation, or as a toll call subject to

⁵⁷ Opinion and Order, *AT&T Arbitration*, p. 13.

⁵⁸ Pac-West asserts, “The terms and conditions contained in the Pac-West ICA may be enforceable against Qwest even if they are judged ineligible for insertion in a new ICA.” See, Pac-West Opening Brief, p. 14. However, it was clear in the AT&T Arbitration that the definition AT&T proposed for “Local Exchange Service” was meant to accommodate AT&T’s desire for what it called “status quo” treatment for AT&T’s VNXX services. See, Opinion and Order, *AT&T Arbitration*, p. 10, line 13, p. 13., lines 7-10.

⁵⁹ Opinion and Order, *AT&T Arbitration*., p. 15.

access charges.

Pac-West's statement that the parties were not arbitrating the appropriate intercarrier compensation rate for ISP-bound traffic is disingenuous if the intent is to leave the impression that the issue of VNXX-delivered ISP traffic was not contemplated in the AT&T arbitration. AT&T advanced the argument that under the *ISP Remand Order*, the FCC has established a separate compensation scheme for ISP-bound traffic as one of the reasons why the Commission should not allow Qwest to require payment of access charges for such traffic.⁶⁰ Pac-West asserts that the *ISP Remand Order* was not applied or even discussed. However, it is clear that AT&T raised the *ISP Remand Order*. By ruling in favor of Qwest's definition of Exchange Service, and thus against VNXX, the Commission implicitly decided that the *ISP Remand Order* is beside the point.

Lastly, after having argued that the AT&T arbitration decision does not provide any guidance in this proceeding, Pac-West attempts to show that it does indeed—but only by torturing the Commission's words beyond recognition. Pac-West states, "The AT&T Order . . . highlights that the Arizona Commission predicted that there would be a need for future enforcement actions to restrain discriminatory conduct by Qwest."⁶¹ The Commission stated no such thing. Rather the Commission stated that it should not anticipate a future dispute between the parties, and that if AT&T believes Qwest is acting discriminatorily, AT&T can file a complaint.⁶²

H. *Starpower v. Verizon South* (Virginia), Was Limited to a Determination of Verizon South's Intention When it Entered Its ICA With Starpower—And Is Therefore Irrelevant to This Proceeding.

Pac-West likely will argue that the Commission should embrace the holding in a matter

⁶⁰ *Id.* p. 12, lines 9-23.

⁶¹ Pac-West Opening Brief, p. 15.

⁶² See, Opinion and Order, AT&T Arbitration, p. 13.

before the Virginia State Corporation Commission, *In the matter of Starpower Communications, LLC v. Verizon South Inc.* 18 FCCR 23,625 (2003) (“*Starpower*”)⁶³ *Starpower* is one of the minority view decisions upholding VNXX calling schemes. There the complainant was awarded reciprocal compensation for VNXX-delivered ISP traffic. In the ultimate analysis, however, all *Starpower* stands for is whether Verizon intended at the time the ICA was entered that reciprocal compensation would be owed when the caller and the called party were not in the same geographical LCA:

Moreover, Verizon South offers no persuasive evidence that, at the time the parties entered into the Agreement, they intended that a customer’s physical location rather than number assignment would dictate compensation obligations under the Agreement. In fact, the record shows just the opposite.⁶⁴

In significant part, the *Starpower* decision focused on Verizon’s tariff definition of “local service,” and found that it was not geographically limiting as Verizon believed:

Even if we focus exclusively on the language of the Tariff, as Verizon South urges us to do, Verizon South’s argument that virtual NXX traffic is not compensable under the Agreement still fails. First and foremost the Tariff does not expressly address whether the “location” of a customer station turns on physical presence or number assignment [.]⁶⁵

...

The Tariff’s definition of “local calling area,” for example, refers to “a geographical area in which a *customer has access* for placing and receiving local calls at a fixed monthly rate[.]⁶⁶

That, of course, is not the case here. Qwest’s local service tariff, by comparison, very clearly applies only to traffic that is originated and terminated within the same local calling area

⁶³ *Starpower* was decided by the FCC, but is not entitled to undue deference and state commissions are not bound by it because the decision was rendered by the FCC applying Virginia law and acting “in the place of the Virginia State Corporation Commission.” *Re Adelpia Business Solutions of Vermont, Inc.*, Docket No. 65466, 2003 Vt PUC LEXIS 181, *61 (Vt PSB July 16, 2003).

⁶⁴ *In the matter of Starpower Communications, LLC v. Verizon South Inc.* 18 FCCR 23,625, 23633 (2003)

⁶⁵ *Id.*, 23632.

⁶⁶ *Id.* (Emphasis added.)

as determined for Qwest by the Commission. The Qwest tariffs in Arizona define “Local Exchange Service” as follows: “The furnishing of a telecommunications services to the Company’s customers *within an exchange for local calling*.⁶⁷ An “exchange” is defined as, “A *geographical unit, established by the Company, for the administration of telecommunications services in a specified area.*”⁶⁸ And, most definitive of all, the Qwest tariff provides:

A customer shall not provide switched voice or data communications between local exchange areas, including the bridging of Extended Area Service (EAS) zones, using underlying services from this Tariff or the Exchange and network Services Catalog. Providers of interexchange service, that furnish service between local calling areas, must purchase services from the Access Service Tariff for their use in furnishing their authorized intrastate telecommunications services to end user customers.⁶⁹

Furthermore, in the *Starpower* matter, the FCC found it significant that

“Verizon South had stipulated that, in determining whether traffic is local under the Tariff, it looks to the respective telephone numbers of the call’s parties, not the parties’ physical location. Verizon cannot distance itself from this stipulation [.]”⁷⁰

There is not any such stipulation in this case.

Ultimately, all *Starpower* stands for is one agency’s determination of what Verizon’s intent was when it entered a particular ICA based on indicia that are not present in this case. That determination is wholly irrelevant to the intention of the parties to this ICA and the Commission should ignore it.

I. The Payment History Proves Only Long-Standing Deceit by Pac-West, Not Consent by Qwest

⁶⁷ Qwest Corporation Exchange and network Services Price Cap Tariff, Section 2, Page 7, Section 2.1.

⁶⁸ *Id.*, Page 4.

⁶⁹ *Id.*, p. 16, Section 2.2.1.C.4.

⁷⁰ *Id.* 23631.

Pac-West argues that since Qwest and Pac-West have been exchanging traffic since February 2001, and Qwest did not notify Pac-West that Qwest objected to paying compensation on VNXX traffic until December 29, 2004, that Qwest had theretofore been paying compensation for such traffic, and such payment without objection is evidence that Qwest agreed to pay such compensation.⁷¹ Pac-West's logic is circular at best. The truth of the matter is that Pac-West secured local telephone numbers historically assigned only to customers physically located in the geographic NPA, assigned them to customers located outside of the geographic NPA in violation of this Commission's rules and the COCAG guidelines, engineered call paths that originate and terminate in different LCAs in violation of this Commission's rules, failed to inform Qwest of what it did, and now claims as justification that Qwest did not catch them sooner.

In any event, Pac-West's view of the facts is erroneous. Pac-West was not billing Qwest and Qwest was not paying Pac-West for VNXX traffic while there was a growth cap on compensation.

J. Proper Observance of the Distinctions Between Local Calling and Interexchange Calling Does Not Deny Pac-West the Opportunity to Provide Service to Customers Who Are Located in a Different Calling Area.

In Section III.B. 5 of its Opening Brief, Pac-West repeats its inaccurate claim that Qwest "provides exactly the same service to ISP customers that Pac-West provides." As demonstrated above, Qwest's FX service is not the same as VNXX. Qwest's FX service requires the FX customer to establish a local connection in the distant LCA, and to pay for transporting the call to FX customer's location, while Pac-West's rogue VNXX does not require either. (See, section

⁷¹ Pac-West Opening Brief, p. 15-16.

II.F., *supra*). Pac-West goes on to decry any thought that Pac-West should have to pay transport and access charges. In essence, Pac-West is arguing that it will be more expensive to follow the rules.

Pac-West goes on to speculate that the additional expense that would have to be borne would cause ISPs to likely forego serving in rural areas, and deprive the majority of consumers of access to Internet because they will not pay toll charges.⁷² These unsupported predictions overlook the alternative that instead of Pac-West using its VNXX as a way of evading regulatory obligations, it could, like Qwest does with its FX service, have the ISP customer pay for local service in the distant LCA, and pay for transport of the call to the ISP by private line to the ISP modem bank. This confers no competitive advantage on Qwest, because that is what Qwest's FX customer must do. ISPs will face expense, whereas now under the illicit VNXX scheme the ISPs pay nothing for the VNXX service. However, it is only appropriate that the ISP, the cost-causer and beneficiary, pay the bill. This result is much more equitable than the VNXX scheme, which shifts the cost of VNXX traffic to all Qwest customers in Arizona.

K. Pac-West's Argument that Qwest's Proposed Outcome Would Be Impossible to Administer Wrongly Assumes that It Can Continue Its Current Practice of Disguising Interexchange Calling

Pac-West points out that it is not possible to erect a system of access charges over Pac-West's VNXX practice, because the current system of rating and routing of calls based on the telephone number of the calling and called parties is not set up to do so. Pac-West installed the service to its ISP customer and knows where the customer is located. Curiously, Pac-West views the fact that this information is not available to Qwest as a reason why Pac-West should be permitted to continue to miss-assign numbers and improperly route calls in a way that was never

⁷² See, *Id.* pp. 18-19.

intended. Simply put, Pac-West's argument boils down to the notion that Pac-West should be permitted to continue its practice because it can't be detected. In any event, Pac-West's argument in this regard is predicated on the assumption that it will continue to act as it has—providing local numbers to customers whose locations are known by Pac-West to be outside of that LCA, and not informing Qwest. The Commission should order Pac-West to cease its VNXX practices. As stated above, Pac-West could establish a service that truly is exactly identical to Qwest's FX, and continue to serve its customers. In the course of providing that service, service orders will be placed to carriers selected by Pac-West, and appropriate billing would follow normally.

One clear option open to the Commission is to simply ban the use of VNXX in Arizona, an option the Vermont board adopted. In its order, which was reviewed by a federal district court in *Global Naps, Inc. v. Verizon New England* (“*Global Naps*”),⁷³ the Vermont board ruled that the local/toll distinction is based on “the physical termination points of the calls.” (*Global Naps* at 298). It also banned the CLEC's use of VNXX in Vermont. (*Id.*). The CLEC (Global) raised numerous objections to the Board's decision on appeal, from a discrimination claim to a filed rate doctrine argument. The federal district court, however, dismissed these objections:

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

⁷³ 327 F.Supp.2d 290 (D. Vt. 2004).

or terms of Global's tariff, nor has it attempted to enforce obligations between Global and its customers that do not appear in the federal tariff. The filed rates doctrine does not prevent the Public Service Board from prohibiting the use of VNXX within Vermont. (*Id.* at 301)

The Commission, in the *AT&T Arbitration*, raised many concerns and policy implications of VNXX in Arizona.⁷⁴ The passage of time has heightened, not eliminated those concerns. Thus, Qwest requests that the Commission seriously consider simply banning the use of VNXX in Arizona.

L. Arizona Public Policy Objectives Are Well-Served by Denial of Pac-West's Complaint and Qwest's Counterclaims Should be Granted

If Pac-West is permitted to continue its VNXX scheme, the effect on rating and routing of calls and the assignment of numbers will have far reaching impact on all carriers in Arizona. Pac-West, and the other carriers who seek approval of VNXX, do not commit to any limitations on the assignment of numbers. The result is that the carriers, and not the Commission, determine the assignment of numbers and the boundaries of LCAs.

As Qwest pointed out in its Answer, VNXX has widespread and significant implications for the entire access compensation system established in Arizona. The evidence shows that Pac-West offers its customers VNXX at no charge—thus, they essentially have set up the equivalent of 8XX numbers for inbound toll free dialing. Pac-West seeks to benefit not once, but twice. Pac-West not only wants to allow its ISP customer and the ISP's customers to avoid paying toll charges for long distance calls, but also seeks to force ILECs like Qwest to pay Pac-West for the privilege of routing and transporting toll calls to Pac-West. Pac-West's scheme confers on the ISPs, who are the cost-causer and the beneficiary, what is essentially a free-ride, at the expense

⁷⁴ *AT&T Arbitration*, p. 13.

of Qwest, and by extension, all of Qwest's customers in Arizona.

Pac-West derides as a "Chicken Little scenario" Qwest's statement that VNXX may lead to severe financial repercussions for the industry, erosion of the financial support that originating access provides to local rates, and further distortion of the compensation scheme (including universal services funding) underlying the public switched telephone network⁷⁵ After minimizing those important Arizona policy issues, Pac-West states that in any event these are matters that the Commission should leave to the FCC. It is true that issues of intercarrier compensation are before the FCC. Nonetheless, while those proceedings are pending Pa-West seeks to operate as if some new compensation scheme were already the law in Arizona. In fact, Pac-West's scheme is not supported by current state law, current federal law or the parties' current ICA. At a minimum, the Commission should order that Pac-West cease such practices while the issues are sorted out.

Last, sound public policy counsels against permitting Pac-West to recover intercarrier compensation on VNXX traffic. The customer who places the call to an ISP is a customer of the ISP on Pac-West's network. Pac-west should not be 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.

III. CONCLUSION

For the reasons stated herein, the Commission should deny Pac-West's complaint. 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

⁷⁵ See, *Id.* p. 17.

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.

RESPECTFULLY SUBMITTED this 19th day of October 2005.

By 
Norman G. Curtright
Corporate Counsel, Qwest Corporation
4041 N. Central Ave., 11th Floor
Phoenix, Arizona 85012
(602) 630-2187

**ORIGINAL and 13 copies hand-delivered for
Filing this 19th day of October, 2005 to:**

Docket Control
ARIZONA CORPORATION COMMISSION
1200 W. Washington Street
Phoenix, AZ 85007

**COPY of the foregoing emailed/mailed
this 19th day of October, 2005 to:**

Lyn Farmer, Chief Administrative Law Judge
Jane Rodda, Administrative Law Judge
Hearing Division
ARIZONA CORPORATION COMMISSION
1200 W. Washington
Phoenix, AZ 85007
Email: lfarmer@cc.state.az.us

Ernest G. Johnson, Director
Utilities Division
ARIZONA CORPORATION COMMISSION
1200 W. Washington Street
Phoenix, AZ 85007
Email: ernestjohnson@cc.state.az.us

Christopher Kempley, Chief Counsel
Legal Division
ARIZONA CORPORATION COMMISSION
1200 W. Washington Street
Phoenix, AZ 85007

Joan S. Burke
OSBORN MALEDON, P.A.
2929 N. Central Avenue, 21st Floor
P.O. Box 36379
Phoenix, AZ 85067-6379
Email: jsburke@omlaw.com



EXHIBIT A

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