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BEFORE THE ARIZONA CORPORATION

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AZ CORP COMMISSION  
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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-03693B-05-0495

**QWEST CORPORATION'S REPLY  
TO PACWEST'S RESPONSE TO  
QWEST'S SUPPLEMENTAL  
CITATIONS OF AUTHORITY**

Qwest Corporation ("Qwest") hereby replies to "Pac-West's Response to Qwest's Supplemental Citations of Authority" ("Pac-West Response") filed by Pac-West with the Arizona Corporation Commission ("Commission") on or about January 10, 2006. The Pac-West Response is in reply to Qwest's notice of supplemental authority filed December 7, 2005 (34 days prior to the Pac-West Response) and to Qwest's notice of supplemental authority filed December 20, 2005 (three full weeks prior to the Pac-West Response).

Pac-West claims that in neither the Oregon decision (OPUC Order No. 05-874) nor the Arbitration Order of Iowa Board "did the state commission alter its previous position on VNXX traffic." (Pac-West Response, p. 1.) While that statement is true, it completely misses the point. Neither authority was cited to the Commission on that point; instead, both decisions were cited as authorities that directly challenge legal theories propounded by Pac-West. Both decisions are on point on those issues and therefore merit serious consideration by the Commission.

**I. Oregon Public Utility Commission Order No. 05-1219**

1 In its untimely response, Pac-West notes that the Oregon PUC did not “alter its previous  
2 position on VNXX traffic.” (Pac-West Response, p.1.) That is certainly true, and Qwest did not  
3 state or imply that the Oregon PUC had somehow altered its previous position that VNXX traffic  
4 is not local traffic by definition (and therefore, that reciprocal compensation should not apply to  
5 VNXX traffic). Rather, the points that Qwest raised in its December 7, 2005 notice of  
6 supplemental authority were merely that (1) this was a decision reached by the full Oregon  
7 Commission, on rehearing (which Pac-West does not deny), (2) the Oregon Commission  
8 concluded that “[t]here is nothing in the *ISP Remand Order* or the judicial decisions interpreting  
9 the FCC’s order to substantiate Pac-West’s assertion that the FCC’s definition of ISP-bound  
10 traffic includes VNXX traffic” (which Pac-West neither denies nor addresses), (3) the Oregon  
11 Commission noted an inconsistency between Pac-West’s argument and the FCC’s Intercarrier  
12 NPRM (which Pac-West neither denies nor addresses) and that (4) the Oregon Commission noted  
13 that Qwest’s tariffs define local traffic in a manner that is explicitly tied to the physical location  
14 of the customer (which Pac-West neither denies nor addresses). All of these points are directly  
15 relevant to show that the Oregon PUC once again concluded that VNXX traffic is not “local  
16 traffic” under the ICA being construed.

17 In addition, Pac-West’s untimely response is odd in that it argues that the definition of  
18 “local/EAS” in the Oregon ICA between Pac-West and Qwest is “completely different” from the  
19 definition in the Arizona ICA between Qwest and Pac-West. (Pac-West Response, p.2.) For  
20 support of this argument, Pac-West cites to a comparison of footnote 6 of the Oregon PUC Order  
21 No. 05-1217 with Part A, p. 5, of the Arizona ICA. However, footnote 6 does not quote the  
22 definition of the Oregon ICA between Pac-West and Qwest; it merely states that the definition is  
23 the same as that in an ICA between Qwest and another CLEC (Universal) and then discusses  
24 what the Oregon federal court (in the *Universal* case) had concluded about that definition. More  
25 importantly, Order No. 05-1219 specifically stated that the *Universal* court’s holding “is  
26 inconsistent with Pac-West’s claim that the *ISP Remand Order* requires payment of reciprocal  
27 compensation for VNXX traffic.” Order No. 05-1219, p. 3, fn. 6.

1 Further still, as the Commission knows, the definition of “Extended Area Service”  
2 (“EAS”) in the Pac-West/Qwest ICA in Arizona is “intraLATA traffic treated as ‘local’ traffic  
3 between exchanges (rather than as ‘toll’ traffic) as *established by the Commission and as*  
4 *reflected in the effective U S WEST tariffs.*” See Arizona ICA, Part A, p. 5. (Emphasis added.)  
5 Similarly, as the Oregon PUC found in its earlier order in the Pac-West case that Qwest had  
6 previously cited (Order No. 05-874), the Oregon ICA between Pac-West and Qwest “specifies  
7 that local traffic must originate and terminate *within the same local calling area* or extended area  
8 service (EAS),” and that the ICA “adopts the definition of ‘local’ included in *Qwest’s tariff* at the  
9 time the agreement became effective.” See Order No. 05-874, p. 36 and fn. 121. (Emphasis  
10 added.) Accordingly, it is simply untrue that the Oregon and Arizona ICAs have “completely  
11 different” definitions of local/EAS.

12 Finally, Pac-West argues that “the Oregon PUC has its own ongoing proceedings related  
13 to VNXX and FX traffic,” apparently citing to the Oregon PUC’s Order No. 04-504. (Response,  
14 p. 2.) However, as that order makes clear, it was a final order *closing* the Commission’s  
15 investigation of VNXX traffic. Although Pac-West and other parties filed a motion for  
16 clarification or rehearing, in which the Commission clarified in part its original order on  
17 December 8, 2004 in its subsequent Order No. 04-704, Pac-West is simply wrong that “the  
18 Oregon PUC has its own ongoing proceedings related to VNXX and FX traffic.”

19 Accordingly, there is no basis for Pac-West’s Response. Thus, Qwest respectfully  
20 submits that the Commission should consider the Oregon PUC’s Order Nos. 05-874 and 05-1219  
21 in its consideration in this case.

## 22 23 **II. Arbitration Order, Iowa Utilities Board (Docket No. ARB-05-04)**

24  
25 Pac-West has completely misread the conclusion of the Iowa Board on VNXX  
26 issues. Pac-West reads the Board’s decisions as simply merging both local and non-local ISP  
27 traffic together into its conclusion to continue the bill-and-keep regime; thus, Pac-West says that,  
28 by lumping both types of ISP traffic together, the Iowa order actually supports Pac-West’s claim

1 that terminating compensation is due on *all* ISP traffic. This is grossly inaccurate reading of the  
2 Iowa order that flouts the analysis of the Iowa Board.

3 Pac-West begins its erroneous analysis by misstating Iowa's bill and keep rule. The rule,  
4 199 Iowa Administrative Code § 38.6(1), states that, until the board takes other action, "each  
5 local utility shall terminate *local and extended area service calls* on a mutual exchange of traffic  
6 basis, at no charge to the originating provider."<sup>1</sup> (Emphasis added). Thus, contrary to Pac-West's  
7 inference that the rule applies to non-local VNXX traffic, the Iowa bill and keep rule expressly  
8 applies only to "local and extended area service" traffic. This is made even more clear by a  
9 companion Iowa rule that requires that intrastate access charges apply to interexchange traffic,  
10 which is expressly defined to exclude local and EAS traffic. 199 Iowa Administrative Code §  
11 22(14)(1) and (2).<sup>2</sup>

12 Second, Pac-West grossly mischaracterizes the breadth of the Iowa order. For example,  
13 Pac-West quotes the Board as stating that the Board had historically applied bill and keep to  
14 "ISP-bound traffic." From this, Pac-West presumes, without analysis, that the term "ISP-bound  
15 traffic," as used by the Iowa Board, is an all-inclusive term that describes all traffic being sent to  
16 an ISP, including VNXX-routed ISP traffic. Pac-West did not read the order carefully enough.  
17 On the page 29 of the Iowa order, the Board found, based on its analysis of the *ISP Remand*  
18 *Order* and two governing federal appellate decisions, that "ISP-bound traffic does not include  
19 VNXX-routed ISP-bound traffic." Iowa Arbitration Order, p. 29. So when the Board states that  
20 "ISP-bound traffic" is subject to bill-and-keep, it is referring only to that subset of ISP traffic that  
21 is local in nature and that excludes VNXX traffic.

22 This conclusion is supported by the Iowa Board's clear ruling that the  
23 compensation regime under the *ISP Remand Order* applies only to local ISP traffic. Iowa  
24

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25 <sup>1</sup> The Iowa bill-and-keep rule may be viewed at page 5 of the following link to the Iowa  
26 Administrative Rules website:  
<http://www.legis.state.ia.us/Rules/Current/iac/199iac/19938/19938.pdf>.

27 <sup>2</sup> The Iowa access charge rule may be viewed at page 33 of the following link to the Iowa  
28 Administrative Rules website:  
<http://www.legis.state.ia.us/Rules/Current/iac/199iac/19922/19922.pdf>.

1 Arbitration Order, pp. 28-31. It is impossible to rationalize Pac-West's revisionist view of the  
2 Iowa order with the Board's conclusion that the *ISP Remand Order* applies only to local ISP  
3 traffic.

4 Finally, if that were not clear enough, the Board approved "Qwest's proposed language  
5 regarding compensation for ISP-bound and VNXX-routed ISP-bound traffic." Iowa Arbitration  
6 Order, p. 31. While there were several pieces of competing language, a review of two examples  
7 of Qwest's language demonstrates just how ridiculous Pac-West's characterization of the Iowa  
8 order really is. For example, the Board approved the following language as paragraph 7.3.6.3 of  
9 the new agreement: "Qwest will not pay reciprocal compensation on VNXX traffic."

10 Furthermore, the Board approved the following Qwest-proposed definition of "VNXX traffic":

11 "VNXX Traffic" is all traffic originated by the Qwest End User Customer that is  
12 not terminated to CLEC's End User Customer physically located within the same  
13 Qwest Local Calling Area (as approved by the State Commission) as the  
14 originating caller, regardless of the NPA-NXX dialed and, specifically, regardless  
15 of whether CLEC's End User Customer is assigned an NPA-NXX associated with  
16 a rate center in which the Qwest End User Customer is physically located.

17 In other words, the Iowa Board expressly excluded VNXX traffic (traffic that originates in  
18 one local calling area and terminates in another) from reciprocal compensation. In the face of  
19 that, it is sheer fantasy to suggest that the Iowa order supports Pac-West in this docket.

### 20 **III. AT&T Communications v. Illinois Bell**

21  
22 In its discussion of the Iowa Order, Pac-West states that the Iowa Board decision is  
23 consistent with *AT&T Communications v. Illinois Bell*.<sup>3</sup> Given Pac-West's complete  
24 misinterpretation of the Iowa Order, this proposition is untrue as well. In fact, the Iowa Order is  
25 directly contrary to the result of the *AT&T* case, which is easily distinguishable.

26 Qwest acknowledges that the term "ISP bound FX traffic" (as used in the *AT&T* opinion)  
27 refers to "long-distance traffic that uses a virtual number so the party making the call is not

28 <sup>3</sup> 2005 WL 8214122 (N.D. Ill. 2005).

1 charged a toll” (which sounds very much like VNXX), and that, at least implicitly, the Illinois  
2 judge appears to have concluded that ISP-bound FX is subject to the \$.0007 *ISP Remand Order*  
3 rate. But the case is at best tepid authority for Pac-West’s position because the judge never even  
4 addressed the question of the breadth of the *ISP Remand Order*. There is no indication that the  
5 judge was even aware of the issue, let alone that he made a conscious decision on it. While the  
6 judge used the generic term “ISP-bound traffic,” unlike the Iowa Board, he never explicitly stated  
7 how broadly he was construing that term nor did he examine the critical authorities on this issue.  
8 For example, the judge did not cite either the *Bell Atlantic* or *WorldCom* decisions. In the *ISP*  
9 *Remand Order*, the FCC likewise used the term “ISP-bound traffic,” but in context, and as  
10 explained by the D.C. Circuit decision in *WorldCom*, the FCC’s use of the term was limited only  
11 to ISP traffic that originates and terminates in the same LCA. The Iowa Board explicitly agreed  
12 with that more limited definition of the term “ISP-bound.” Pac-West’s suggestion the judge in  
13 the *AT&T* case decided the breadth issue has no basis since there is no analysis (let alone any  
14 mention) of the breadth issue in the opinion, and there is thus no reasoned analysis of the issue in  
15 the opinion.<sup>4</sup>

16 On the other hand, when the breadth issue is subjected to a reasoned examination, as it  
17 was in two Oregon decisions and the Iowa Order, it is clear that the most consistent and rational  
18 reading of the governing authorities, in particular the *WorldCom* decision and the *ISP Remand*  
19 *Order*, stand for the proposition that only local ISP traffic is governed by the *ISP Remand Order*.  
20 Given that the D.C. Circuit in *WorldCom* is the reviewing court of FCC decisions under the  
21 Hobbs Act, the D.C. Circuit’s conclusion that the only issue decided related to ISP traffic within  
22 the same LCA is not only correct, but it is also binding.

23  
24  
25 <sup>4</sup> There is also a curious internal inconsistency in the *AT&T* decision that bears on this  
26 issue. At one point, the judge notes that FCC regulations “no longer restrict reciprocal  
27 compensation to ‘local’ traffic. 2005 WL 820412, at \*5. Yet in another section of the opinion,  
28 the judge states that “[t]he Act entitles AT&T to reciprocal compensation *only for local traffic* . . .  
.” *Id.* at \*7. While neither of these statements were rendered in the context of ISP traffic, it  
demonstrates that the judge was, at best, extremely unclear on the requirements of the law on  
reciprocal compensation.

1                   **III. SUPPLEMENTAL AUTHORITIES GENERALLY**

2

3                   Qwest's filings of supplemental authority submitted decisions that have been

4 rendered after the close of the briefing schedule in this Complaint. In its Response Pac-West

5 attempts to adduce authority from other states, by citation to decisions rendered earlier, some of

6 which were decided as long ago as 2002. Pac-West could have made its arguments about these

7 authorities within the bounds of the briefing schedule, but it "intentionally did not." The

8 Commission should ignore these late-filed afterthoughts.

9

10                   RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of January, 2006.

11

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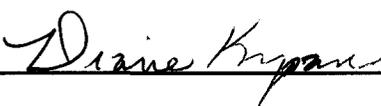
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