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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 INTERCONNECTION AGREEMENT BETWEEN PAC-WEST TELECOMM AND QWEST CORPORATION	) DOCKET NO.	T-01051B-05-0495 T-03693~~B~~A-05-0495
	) **PAC-WEST TELECOMM'S NOTICE OF FILING OF SUPPLEMENTAL AUTHORITY**	

Pac-West Telecomm hereby files as a supplemental authority the following document: Final Order Affirming and Clarifying Recommended Decision, Wash. Utils. and Transp. Comm'n, Feb. 10, 2006, *Pac-West Telecomm, Inc. v. Qwest Corp.*, Docket No. UT-053036, Order No. 5.

Respectfully submitted this 13th day of February, 2006.

OSBORN MALEDON PA

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[Service Date February 10, 2006]

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

PAC-WEST TELECOMM, INC.,	)	DOCKET NO. UT-053036
	)	
Petitioner,	)	
	)	ORDER NO. 05
v.	)	
	)	
QWEST CORPORATION,	)	FINAL ORDER AFFIRMING AND
	)	CLARIFYING RECOMMENDED
Respondent.	)	DECISION
. . . . .	)	

1 ***Synopsis:*** *This Order affirms and clarifies a recommended decision that grants Pac-West's petition to enforce its interconnection agreement with Qwest. The Order requires Qwest to comply with the FCC's ISP Remand Order and fulfill its contractual obligation to compensate Pac-West for all ISP-bound traffic, including VNXX traffic. The Commission interprets the interim compensation mechanism in the ISP Remand Order to apply to all ISP-bound traffic, regardless of the point of origination and termination of the traffic. This Order also affirms the recommended decision's disposition of Qwest's counterclaims. The Order finds Qwest's claims about the use of VNXX neither material nor necessary to decide the issue of compensation for ISP-bound VNXX traffic in a petition for enforcement of Pac-West's interconnection agreement.*

2 **Nature of Proceeding.** This proceeding involves a petition filed by Pac-West Telecomm, Inc. (Pac-West), pursuant to WAC 480-07-650, for enforcement of its interconnection agreement with Qwest Corporation (Qwest). In particular, Pac-West asks the Commission to enforce the terms of the interconnection agreement relating to payment to Pac-West for terminating traffic. The dispute centers on

whether Pac-West is entitled to compensation for "VNXX"[1] ISP-bound traffic. Qwest filed an answer and counterclaims to the petition.

3 **Recommended Decision.** Administrative Law Judge Karen Caillé entered a recommended decision on August 23, 2005, proposing to grant Pac-West's petition and ordering Qwest to compensate Pac-West for transport and termination of all local and ISP-bound traffic originated by Qwest, including FX/VNXX traffic, according to the rates, terms, and conditions in the ISP Amendment to the parties' interconnection agreement.[2] The recommended decision proposed that Qwest's payment include all amounts Pac-West has billed Qwest for traffic terminated since January 1, 2004, plus interest.

4 **Exceptions to Recommended Decision.** Qwest asks the Commission to review the recommended decision, contending that the recommended decision erred in (1) concluding that VNXX traffic is "ISP-bound traffic" as that term is used in the *ISP Remand Order* and the parties' interconnection agreement, (2) failing to decide the counterclaims raised by Qwest in its answer, and (3) concluding that the amount due on VNXX traffic is the full $637,389.90 claimed by Pac-West.

5 **Commission decision.** We affirm the recommended decision with the following clarification regarding the scope of the *ISP Remand Order*. The *ISP Remand Order* applies to all ISP-bound traffic, regardless of the point of origination and termination of the traffic. Under the *ISP Remand Order*, the FCC created a separate compensation category for all ISP-bound traffic. Therefore, it is irrelevant for purposes of determining compensation whether the traffic is local, toll, or via VNXX arrangements. We also affirm the recommended disposition of

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[1] "VNXX" or "Virtual NXX" refers to a carrier's acquisition of a telephone number for one local calling area that is used in another geographic area. The call appears local based on the telephone number.

[2] On August 26, 2005, Administrative Law Judge Ann Rendahl entered an order in Docket No. UT-053039 that addresses similar issues, granting and denying certain claims in motions for summary determination filed by Level 3 and Qwest.

Qwest's counterclaims in the recommended decision, finding Qwest's claims about the use of VNXX neither material nor necessary to decide the issue of compensation for ISP-bound VNXX traffic in a petition for enforcement of Pac-West's interconnection agreement.

6 **Appearances.** Gregory J. Kopta, Davis Wright Tremaine, LLP, Seattle, Washington, represents the petitioner, Pac-West. Lisa Anderl, attorney, Seattle, Washington represents the respondent, Qwest.

I. MEMORANDUM

A. Introduction.

7 This matter involves a petition by Pac-West for enforcement of its interconnection agreement with Qwest. In particular, Pac-West asks the Commission to enforce the terms of the interconnection agreement, as amended by the "ISP Amendment," relating to payment for transport and termination of all local and ISP-bound traffic originated by Qwest, including VNXX traffic.

8 A VNXX arrangement "converts what would otherwise be toll calls into local calls."[3] Traditionally, whether a call is billed as a local call or toll call depends on the location, or local calling area, in which the telephone call originates and terminates. Ten-digit telephone numbers use the NPA/NXX format, in which the NPA is the area code and the NXX is the 3-digit prefix or number that identifies the specific telephone company central office serving the line. The NXX code identifies where a call is terminated, and determines whether a caller incurs local or toll charges. VNXX numbers are telephone numbers that have the same NXX as the local calling area of an end-user customer. The numbers are "virtual" as the dialing pattern tells callers that it is made within the callers' local calling area,

[3] *Global Naps, Inc. v. Verizon New England Inc.*, 327 F.Supp.2d 290, 295 (D. Vermont, 2004).

rather than the called party's local calling area, when in fact the call may terminate in a different calling area, Local Access and Transport Area (LATA), or state.[4]

9 The parties in this proceeding requested that the matter proceed on a paper record with briefing and oral argument, followed by a recommended decision. The Administrative Law Judge entered a recommended decision on August 23, 2005, resolving the issues in the petition in favor of Pac-West. Qwest seeks review of the recommended decision. Pac-West responds, supporting the initial order.

B. Background

1. History of Intercarrier Compensation for ISP-Bound Traffic

10 The definition of ISP-bound traffic and proper compensation for ISP-bound traffic are two of the primary issues in this proceeding. The Federal Communications Commission (FCC) has entered several orders addressing these issues, which orders have been reviewed by the federal courts. When the FCC first adopted rules implementing the 1996 Telecommunications Act, the FCC determined that reciprocal compensation obligations under Section 251(b)(5) "apply only to traffic that originates and terminates within a local area."[5] The FCC further provided that carriers would be compensated for the costs of interstate or intrastate non-local calls through existing access charges, and that state commissions had authority to identify the geographic areas of a local calling area.[6]

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[4] Qwest Opening Brief, ¶¶ 19-21.
[5] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 1034 (1996) [Hereinafter "*First Report and Order*"].
[6] *Id.*, ¶¶ 1034-35.

11 The FCC first addressed the nature of reciprocal compensation for ISP-bound traffic in 1999 in its *Declaratory Ruling*.[7] The FCC determined that ISP-bound traffic was interstate in nature and subject to the jurisdiction of the FCC, not states.[8] The FCC further determined that because ISP calls were interstate calls jurisdictionally, they are not local calls subject to the reciprocal compensation obligations of Section 251(b)(5).[9] Because the FCC had not adopted a rule governing intercarrier compensation for ISP-bound traffic, the FCC allowed states to consider the issue in arbitrating agreements among carriers.[10] On appeal, the D.C. Circuit Court of Appeals vacated the decision, finding that the FCC had not explained why ISP-bound calls being jurisdictionally interstate was relevant to whether the calls were "local" for purposes of reciprocal compensation.[11]

12 In April 2001, the FCC released its *ISP Remand Order*.[12] In that Order, the FCC determined that Section 251(g) excludes ISP-bound traffic from the reciprocal compensation obligations of Section 251(b)(5), and found that ISP-bound traffic is not subject to reciprocal compensation obligations.[13] The FCC also modified its decision in the *First Report and Order* that only "transport and termination of local traffic" is subject to reciprocal compensation, finding that all telecommunications not excluded by Section 251(g) are subject to reciprocal compensation.[14] The FCC established a separate interim compensation regime for all ISP-bound traffic until

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[7] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-988 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689 (1999) [Hereinafter "*Declaratory Ruling*"].
[8] *Id.*, ¶¶ 12, 18.
[9] *Id.*, ¶ 26.
[10] *Id.*, ¶¶ 26-27.
[11] *Bell Atlantic Telephone Co. v. FCC*, 206 F.3d 1, 6 (D.C. Cir. 2000)
[12] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, CC Docket Nos. 96-98, 99-68, FCC 01-131 (rel. April 27, 2001) [Hereinafter "*ISP Remand Order*"].
[13] *Id.*, ¶¶ 3, 35.
[14] *Id.*, ¶ 46.

the FCC finalizes the structure and rates for a new intercarrier compensation system.[15] The FCC's interim regime includes specific minutes-of-use, or MOU, rates that decline over a three year period, rate caps, growth caps, a requirement that LECs mirror or charge the same rates for ISP-bound traffic as Section 251(b)(5) traffic, and an exception for carriers serving in new markets.[16]

13 In May, 2002, the D.C. Circuit Court of Appeals rejected the FCC's findings that Section 251(g) excluded ISP-bound traffic, and remanded the matter to the FCC.[17] The Court did not vacate the order, finding that "there may well be legal bases for adopting the rules chosen by the Commission for compensation between the originating and the terminating LECs in calls to ISPs."[18]

14 In October, 2004, the FCC entered its *Core Forbearance Order*, in which the FCC chose to forbear from enforcing the growth caps and new market provisions of the *ISP Remand Order*.[19] The FCC, on its own motion, extended the grant of forbearance with respect to those rules to all telecommunications carriers.[20]

2. Pac-West's Petition and Qwest's Answer

15 In its petition, Pac-West alleges that Qwest is in breach of the interconnection agreement, as well as the underlying federal law, in refusing to compensate Pac-West for all local and ISP bound traffic, including calls from Qwest customers to an ISP that obtains FX/VNXX service from Pac-West. [21]

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[15] *Id.*, ¶ 77.
[16] *Id.*, ¶¶ 78, 81, 89.
[17] *WorldCom, Inc., v. FCC*, 288 F.3d 429, 430 (D.C. Cir. 2002).
[18] *Id.*
[19] *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, Order, WC Docket No. 03-171, FCC 04-241 (rel. Oct. 18, 2004) [Hereinafter "*Core Forbearance Order*"].
[20] *Id.*, ¶ 27.
[21] Pac-West Petition, ¶ 12.

16 Pac-West alleges that the interconnection agreement requires the parties to compensate each other for terminating "Exchange Service (EAS/Local) traffic." Pac-West asserts that FX/VNXX service is "Exchange Service" provided to a customer physically located in a different exchange. According to Pac-West, the industry has recognized this fact by rating and routing calls within the customer's local calling area as local calls, regardless of the physical location of the customer.

17 Pac-West references the *ISP Remand Order* and asserts, "[s]pecifically with respect to ISP-bound traffic, the FCC has concluded that 'traffic delivered to an ISP is predominantly interstate access traffic subject to section 201 of the Act, and [the FCC has] establish[ed] an appropriate cost recovery mechanism for the exchange of such traffic."[22] Pac-West states that the compensation requirements of the *ISP Remand Order* are incorporated in the interconnection agreement through the ISP Amendment. According to Pac-West, nothing in the *ISP Remand Order* or the interconnection agreement limits compensable traffic to ISPs that are physically located in the same local calling area as the calling party.[23]

18 Pac-West seeks an order from the Commission requiring that Qwest comply with the interconnection agreement, specifically that Qwest compensate Pac-West for transport and termination of all local and ISP-bound traffic originated by Qwest, including VNXX traffic, according to the rates, terms, and conditions in the ISP Amendment to the interconnection agreement. The compensation requested by Pac-West includes all amounts Pac-West has billed Qwest for traffic terminated since January 1, 2004, plus interest for all overdue payments at the interest rate specified in the interconnection agreement.[24]

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[22] *ISP Remand Order*, ¶ 1.
[23] Pac-West Petition, ¶ 12.
[24] *Id.*, p. 6.

19 Countering Pac-West's position that all calls to an ISP server are to be treated pursuant to the *ISP Remand Order*, no matter where the server is physically located, Qwest points to FCC precedent requiring that a call to a computer (such as an ISP server) be treated exactly the same as other end-user customers in determining whether the call is treated as a toll or local call. In other words, a call originated from one local calling area to an ISP server physically located in another local calling area is treated as a toll call.[25]

20 Qwest denies Pac-West's allegations about the compensation for traffic that Pac-West has terminated. Qwest counters Pac-West's claim that there is approximately $637,389.90 in dispute from January 1, 2004 through March 31, 2005, asserting that the maximum amount is approximately $401,736.[26]

21 Qwest counterclaims that Pac-West's assignment of local telephone numbers and NPA/NXXs in local calling areas other than the local calling area where its customer's ISP server is physically located constitutes misuse of telephone numbering resources, and billing Qwest the *ISP Remand Order* rate for such VNXX traffic violates federal law (Count 1) and WAC 480-120-021, which establishes definitions of local calling areas and exchange access areas (Count 2). Qwest also asserts that Pac-West violates the parties' interconnection agreement, which provides that each party is responsible for administering NXX codes (Section 13.4), and by improperly routing VNXX ISP-bound traffic over Qwest's local interconnection service (LIS) trunks (Counts 3 and 4).[27]

22 Qwest requests that the Commission enter an order requiring Pac-West to refrain from assigning NPA/NXXs in local calling areas other than the local calling area where the ISP server is physically located, to cease its misuse of telephone numbering resources and to properly assign telephone numbers based on the

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[25] Qwest Answer, ¶¶ 8-11.
[26] *Id.*, ¶ 49.
[27] *Id.*, ¶¶ 57-66.

actual physical location of its customer's ISP server. Qwest asks for a finding that the parties' interconnection agreement does not require any compensation for Pac-West's VNXX traffic and that Pac-West be directed to follow the change of law procedures contained in the interconnection agreement to implement the *Core Forbearance Order*. Qwest seeks to invalidate all Pac-West invoices charging reciprocal compensation at the *ISP Remand Order* rate of $0.0007 per minute for any of the VNXX traffic described above and to stop routing VNXX traffic to Pac-West utilizing LIS facilities.[28]

C. Review of the Recommended Decision.

1. The recommended decision.

23 The recommended decision adopted Pac-West's interpretation of "ISP-bound" traffic described in the *ISP Remand Order*, specifically finding that ISP-bound calls enabled by VNXX should be treated the same as other ISP-bound calls for purposes of determining intercarrier compensation requirements. The decision recognized that "[t]his interpretation is consistent with the Commission's decision in the *Level 3 Arbitration*, as well as a recent decision of the U.S. District Court for the District of Connecticut."[29]

24 The recommended decision also acknowledged Qwest's counterclaims concerning the legality and propriety of VNXX service, but declined to address

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[28] *Id.*, ¶ 67.

[29] Recommended Decision, ¶ 37; *In the Matter of the Petition for Arbitration of an Interconnection agreement Between Level 3 Communications, LLC, and CenturyTel of Washington, Inc., Pursuant to 47 U.S.C. Section 252*, Fifth Supplemental Order, Arbitrator's Report and Decision, WUTC Docket No. UT-023043, ¶¶ 33-35 (Jan. 2, 2003) [Hereinafter "*Level 3/CenturyTel Arbitration*"], *affirmed* Seventh Supplemental Order: Affirming Arbitrator's Report and Decision, WUTC Docket No. UT-023043, ¶¶ 7-10 (Feb. 28, 2003); *Southern New England Tel. Co. v. MCI WorldCom Communications, Inc.*, 353 F.Supp.2d 287, 296-97, 299 (D. Conn. 2005) [Hereinafter "*SNET v. MCI*"], recons. denied, *Southern New England Tel. Co. v. MCI WorldCom Communications, Inc.*, 359 F.Supp.2d 229 (D. Conn. 2005).

them on the basis that the counterclaims addressed matters outside the parties' interconnection agreement, that there was no law regarding VNXX to be violated, or that Qwest's claims were resolved by the recommended outcome, i.e., compensation for ISP-bound traffic via VNXX service.[30]

2. Qwest's exceptions to the recommended decision.

25 Qwest objects to and seeks review of nearly all of the issues decided in the recommended decision, including whether the decision: (a) properly interpreted the FCC's *ISP Remand Order*, (b) erred in determining the amounts due Pac-West, and (c) erred in not deciding Qwest's counterclaims regarding the propriety of VNXX traffic generally, and whether the parties' agreement prohibits use of local interconnection service (LIS) trunks for exchanging VNXX traffic.

26 We will address each of the challenged rulings in light of the record, and the parties' pleadings.

a. Did the recommended decision err in holding that the *ISP Remand Order* applies equally to VNXX traffic?

27 The primary issues Pac-West raises in its enforcement petition, and which Qwest contests, are legal questions: The definition of ISP-bound traffic and proper compensation for ISP-bound traffic. The parties argued these issues extensively on brief. We will not repeat the arguments in this Order, as the recommended decision, Order No. 03, adequately summarizes the arguments.

28 The recommended decision interpreted the parties' interconnection agreement to exchange ISP-bound traffic, and requires compensation for such traffic as required by the FCC's *ISP Remand Order*.[31] The recommended decision also

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[30] *Id.*, ¶ 40.
[31] Order No. 03, ¶ 37.

interpreted the *ISP Remand Order* to require compensation for all ISP-bound traffic, regardless of where an ISP server or modem is located.[32] Thus, the recommended decision required Qwest to compensate Pac-West under the parties' agreement for ISP-bound VNXX traffic.[33]

29 **Commission decision.** We deny Qwest's exception and affirm and clarify the recommended decision on this issue. Our review of the *ISP Remand Order*, the D.C. Circuit's review of the *ISP Remand Order* in *WorldCom*, the FCC cases preceding the *ISP Remand Order*, our Order in the *Level 3/CenturyTel Arbitration*, and recent district court decisions in Vermont and Connecticut support our conclusion.

30 We interpret the *ISP Remand Order* to apply to all ISP-bound traffic, regardless of the point of origination and termination of the traffic. Under the *ISP Remand Order*, the FCC created a separate compensation category for all ISP-bound traffic.[34] According to the FCC's compensation scheme for ISP-bound traffic, it is irrelevant for purposes of determining compensation whether the traffic is local, toll, or via VNXX arrangements. We reject Qwest's interpretation of the *ISP Remand Order* as limited to calls between a customer and an ISP modem physically located within the same calling area, as well as Pac-West's interpretation that the *ISP Remand Order* applies to all ISP-bound traffic between parties whose numbers are assigned to the same local calling area.

31 Our review of the FCC's decisions preceding the *ISP Remand Order* reveals an evolution in intercarrier compensation mechanisms for ISP-bound traffic that culminates in the unified interim approach applicable to all types of traffic and interconnection arrangements set forth in the *ISP Remand Order*. In its *Declaratory Ruling*, the FCC used an end-to-end analysis of ISP-bound traffic, finding that

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[32] *Id.*
[33] *Id.*, ¶ 38.
[34] *ISP Remand Order*, ¶¶ 66, 67, 77, 78.

ISP-bound traffic is jurisdictionally interstate, as the call terminating to the internet could terminate in a different state or country.[35] In describing how ISP customers access the internet, the FCC noted that "[u]nder one typical arrangement, an ISP customer dials a seven-digit number to reach the ISP server in the same local calling area."[36] The FCC described the historical nature of compensation for local and access, or toll traffic, explaining that it has treated ISP-bound traffic as if it were local through its decisions to exempt Enhance Service Providers, or ESPs, from payment of interstate access charges and other decisions governing access charges.[37] Qwest relies on this discussion in the *Declaratory Ruling*, describing the historical compensation scheme for local and exchange access traffic, as the basis for its argument that the FCC did not change the historical scheme in the *ISP Remand Order*.

32 After the D.C. Circuit Court vacated the *Declaratory Ruling* in the *Bell Atlantic* decision,[38] the FCC entered the *ISP Remand Order*. As described above, the FCC not only reevaluated the treatment of ISP-bound traffic, but also reconsidered its analysis of reciprocal compensation in the *First Report and Order*. The FCC determined that *all* telecommunications not excluded by Section 251(g) are subject to reciprocal compensation, rejecting the notion that reciprocal compensation is limited to "local" traffic.[39] Although the D.C. Circuit rejected the FCC's findings concerning Section 251(g) as both Qwest and Pac-West argue, the court did not vacate the decision or rules for compensating ISP-bound traffic adopted in the *ISP Remand Order*.[40]

33 In addition, while the FCC described in the *ISP Remand Order* its analysis and decisions reached in the *Declaratory Ruling*, including the discussion of the nature

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[35] *Declaratory Ruling*, ¶¶ 13, 18.
[36] *Id.*, ¶ 4; *see also* ¶ 7.
[37] *Id.*, ¶¶ 5, 23. The FCC considers ISPs a subset of ESPs.
[38] *Bell Atlantic*, 206 F.3d 1.
[39] *ISP Remand Order*, ¶ 46.
[40] *WorldCom*, 288 F.3d at 430.

of ISP-bound traffic,[41] this discussion does not represent the FCC's decision in the *ISP Remand Order*. In the Order, the FCC described ISP-bound traffic as "traffic destined for an information service provider," and as "information access" traffic.[42] The FCC defines "'information access' ... to include all access traffic that was routed by a LEC 'to or from' providers of information services, of which ISPs are a subset."[43] The FCC further held that "the definition does not require that the transmission, once handed over to the information service provider, terminate within the same exchange area in which the information service provider first received the access traffic."[44]

34 The above summary of the FCC's discussion in the *ISP Remand Order* demonstrates that the FCC did not intend to limit ISP-bound traffic only to traffic originating and terminating in the same local calling area where the ISP server is located. In describing the nature of Internet-bound traffic in the *ISP Remand Order*, the FCC did not address where an ISP server or modem is located.[45] Thus, we reject Qwest's interpretation of the *ISP Remand Order*. Likewise, the FCC did not limit ISP-bound traffic only to traffic between parties whose numbers are assigned to the same calling area. Thus, we reject Pac-West's interpretation of the *ISP Remand Order* on this point as well. Our decision is consistent with the Commission's decision in arbitrating a recent agreement between Level 3 and CenturyTel,[46] and recent decisions by the District Courts of Connecticut and Vermont.[47] These decisions all find that the *ISP Remand Order* addresses *all* ISP-

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[41] *ISP Remand Order*, ¶¶ 9-13.
[42] *Id.*, ¶ 44.
[43] *Id.*
[44] *Id.*, n.82.
[45] *Id.*, ¶ 58; *see also* ¶ 61.
[46] *Level 3/CenturyTel Arbitration*, Fifth Supplemental Order, Arbitrator's Report and Decision, WUTC Docket No. UT-023043, ¶¶ 33-35 (Jan. 2, 2003) , *affirmed* Seventh Supplemental Order: Affirming Arbitrator's Report and Decision, WUTC Docket No. UT-023043, ¶¶ 7-10 (Feb. 28, 2003).
[47] *Global Naps*, 327 F.Supp.2d 290, 300 (D. Vermont, 2004); *SNET v. MCI.*, 353 F.Supp.2d 287, 296-97, 299 (D. Conn. 2005), recons. denied, 359 F.Supp.2d 229 (D. Conn. 2005).

bound traffic, and that "[t]he FCC did not distinguish traffic between an ISP and its customer in different local calling areas from traffic between an ISP and its customer in the same local calling area."[48]

35 In particular, the Vermont and Connecticut decisions identify that the FCC has preempted state commissions from determining the jurisdiction and compensation of ISP-bound traffic.[49] The FCC has established an interim compensation regime for ISP-bound traffic until it determines a different regime for intercarrier compensation.[50] States and carriers must abide by the FCC's interim compensation regime for ISP-bound traffic until the FCC adopts different rules. Thus, Qwest must compensate Pac-West for all ISP-bound traffic, including VNXX traffic, according to the rates, terms and conditions in the ISP Amendment to the parties' interconnection agreement, which adopts the *ISP Remand Order*.

b. Did the recommended decision err in determining the charges in dispute?

36 The recommended decision acknowledged that the parties are not in agreement on the amount that Qwest owes Pac-West, and recommended that the Commission use Pac-West's total of $637,389.90, which is based on spreadsheets provided by Qwest.[51] Qwest contends that the recommended decision erred by deciding a disputed issue of material fact without testimony or hearing.[52] Qwest claims that a substantial portion of the disputed amount is "due to a volume

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[48] *Global Naps*, 327 F.Supp.2d at 300; *see also SNET v. MCI*, 353 F.Supp.2d at 299; *SNET v. MCI*, 359 F.Supp.2d, 230-232; *Level 3/CenturyTel Arbitration*, Seventh Supplemental Order, ¶¶ 7-10.
[49] *Global Naps*, 327 F.Supp.2d, 300; *SNET v. MCI*, 353 F.Supp.2d, 295, 299; *SNET v. MCI*, 359 F.Supp.2d, 231.
[50] *ISP Remand Order*, ¶¶ 66, 67, 77, 78.
[51] Recommended Decision, ¶ 38.
[52] Qwest Exceptions, ¶ 98.

dispute regarding transiting traffic."[53] Qwest acknowledges that it was aware of the Pac-West figure at the outset of this case, but asserts that "it was not clear to Qwest that this material fact was in dispute until the briefs were filed."[54] Qwest argues that Pac-West has the burden of establishing that all of the disputed minutes are VNXX minutes, and that they are Qwest-originated traffic. Qwest maintains that the recommended decision erred in accepting Pac-West's figure.[55]

37 Pac-West responds that the recommended decision reached the only conclusion possible based on the record evidence.[56] Pac-West argues that Qwest had every opportunity to submit evidence to support its claim that a significant portion of the compensation that Qwest had been withholding since January 1, 2004, was attributable to some other dispute. Pac-West states that it presented evidence of the number of minutes of use and total compensation that Pac-West billed for the amount of traffic it received from Qwest over their interconnection facilities. Pac-West states that Qwest did not dispute this total.[57] Pac-West argues that "it was incumbent upon Qwest to produce evidence to prove that any subset of the traffic Qwest delivered to Pac-West should be excluded from the traffic for which Pac-West is entitled to compensation."[58]

38 **Commission decision.** We deny Qwest's exception and affirm the recommended decision on this issue. The recommended decision determined the amount owed based on spreadsheets provided by Qwest to Pac-West. Qwest had several opportunities to provide information about disputed amounts due to transit traffic, but did not. There is no apparent reason why this issue could not have been identified prior to the record closing and no persuasive reason to allow the record to be reopened at this late date. Accordingly, Qwest is required

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[53] *Id.*, ¶ 96.
[54] *Id.*, ¶ 100.
[55] *Id.*, ¶ 104.
[56] Pac-West Response, ¶32.
[57] *Id.*, ¶ 31.
[58] *Id.*

to pay Pac-West all compensation that it has withheld based on the evidence submitted by Pac-West.

c. Did the recommended decision err in not deciding Qwest's counterclaims?

39 The recommended decision acknowledged Qwest's counterclaims, but declined to address them, finding that Qwest's claims of violations of state and federal standards are matters outside the parties' interconnection agreement, that there are no laws to be violated, or that having held compensation is required for all ISP-bound traffic, including VNXX service, Qwest's counterclaims are resolved.[59]

40 Qwest contends that by not addressing its counterclaims, the recommended decision failed to decide all material issues of fact and law contrary to the requirements of RCW 34. 05.461(3).[60] According to Qwest, the three undecided counterclaims address two essential issues – whether VNXX is permissible at all (counterclaims 2 and 3) and whether VNXX traffic, if permitted, can be carried over LIS trunks (counterclaim 4).[61] Qwest claims that "[t]he issue of whether VNXX is permissible at all under state law and the parties' interconnection agreement is a necessary predicate to determining whether ISP-bound traffic must be compensated on a going forward basis under the interconnection agreement."[62]

41 Pac-West responds that the recommended decision properly disposes of Qwest's counterclaims. According to Pac-West, "Qwest's second counterclaim that 'VNXX' is unlawful under state law does not involve any provision of the parties' interconnection agreement, and Qwest has failed to identify any state

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[59] Recommended Decision, ¶ 40.
[60] Qwest Exceptions, ¶ 5.
[61] *Id.*, ¶ 8.
[62] *Id.*

law that Pac-West has violated."[63] "Qwest's third and fourth counterclaims arise out of language in the ICA[64] but essentially make the same contention that 'VNXX' is improper that the remainder of the decision rejects."[65]

42 **Commission decision.** We deny this exception and affirm the recommended decision on this issue. The only material issue in this proceeding is whether the parties' interconnection agreement requires Qwest to compensate Pac-West for the transport and termination of all ISP-bound traffic originated by Qwest, including VNXX traffic. The recommended decision interpreted the scope of "ISP-bound" traffic described by the FCC in the *ISP Remand Order* and concluded that ISP-bound calls enabled by VNXX should be treated the same as other ISP-bound calls for purposes of determining intercarrier compensation requirements.

43 Qwest's counterclaims are beyond the scope of this proceeding, where the issues are the interpretation and enforcement of the interconnection agreement. *WAC 480-07-650.* Qwest has not met its burden to demonstrate that its counterclaims involve breach of provisions in the interconnection agreement. Moreover, Qwest's counterclaims address the use of VNXX service generally, not the specific issue of compensation for VNXX ISP-bound traffic. Should Qwest wish to pursue the broader issue of VNXX generally, it may file its own complaint about specific carriers and their behavior regarding intercarrier compensation methods.

II. FINDINGS OF FACT

44 Having discussed above in detail the documentary evidence received in this proceeding concerning all material matters and having stated findings and conclusions upon issues in dispute among the parties and the reasons and bases

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[63] Pac-West Response, ¶ 5.
[64] Interconnection agreement.
[65] Pac-West Response, ¶ 5.

for those findings and conclusions, the Commission now makes and enters the following summary of those facts. Those portions of the preceding detailed findings pertaining to the ultimate findings stated below are incorporated into the ultimate findings by this reference.

45 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate in the public interest the rates, services, facilities and practices of telecommunications companies in the state.

46 (2) The Washington Utilities and Transportation Commission is designated in the Telecommunication Act of 1996 as the agency responsible for arbitrating and approving interconnection agreements between telecommunications carriers, pursuant to sections 251 and 252 of the Act.

47 (3) Qwest is an incumbent local exchange carrier, as defined in the Act, furnishing basic local exchange services in the state of Washington.

48 (4) Pac-West is a competitive local exchange carrier, as defined in the Act, providing basic local exchange service in the state of Washington.

49 (5) Pac-West and Qwest have negotiated an interconnection agreement that was approved by the Commission on February 14, 2001, in Docket No. UT-013009.

50 (6) Pac-West and Qwest executed an ISP Amendment to the interconnection agreement, incorporating the *ISP Remand Order*, that the Commission approved on March 12, 2003, in Docket No. UT-013009.

51 (7) In early 2004, Qwest began to withhold payment on Pac-West's invoices for compensation alleging that Pac-West had exceeded the growth ceilings

for ISP-bound traffic described in section 3.2.2 of the ISP Amendment. This matter was ultimately decided by a private arbitrator who ruled in Pac-West's favor based on the FCC's *Core Forebearance Order*.

52 (8) In December 2004, Qwest notified Pac-West that Qwest intended to withhold compensation for alleged "VNXX" traffic retroactive to the beginning of 2004.

53 (9) In April 2005, Qwest notified Pac-West that Qwest had decided to withhold 68.3% of Pac-West's "billed ISP minutes" in Washington in the second quarter of 2005.

54 (10) Pac-West filed its Petition for Enforcement of Interconnection Agreement on June 9, 2005, alleging that Qwest refused to compensate Pac-West for all local and ISP-bound traffic, including calls from Qwest customers to an ISP that obtains foreign exchange service from Pac-West.

55 (11) Administrative Law Judge Karen M. Caillé entered her Recommended Decision, Order No. 03 in this proceeding, on August 23, 2005, recommending that Pac-West's petition for enforcement be granted and that Qwest be ordered to compensate Pac-West for transport and termination of all local and ISP-bound traffic originated by Qwest, including VNXX traffic.

56 (12) On September 9, 2005, Qwest filed Exceptions to the Recommended Decision. On September 30, 2005, Pac-West filed Response to Qwest's Exceptions to the Recommended Decision.

57 (13) Qwest seeks review of the following issues: (a) whether the decision properly interpreted the FCC's *ISP Remand Order*, (b) whether the decision erred in determining the amounts due Pac-West, and (c) whether the decision erred in not deciding Qwest's counterclaims.

58 (14) Based on our discussion herein, we affirm the recommended decision's factual determination that the amount owed to Pac-West is $637,389.90, based on the spreadsheets provided Pac-West by Qwest.

III. CONCLUSIONS OF LAW

59 Having discussed above in detail all matters material to this decision, and having stated general findings and conclusions, the Commission now makes the following summary conclusions of law. Those portions of the preceding detailed discussion that state conclusions pertaining to the ultimate decisions of the Commission are incorporated by this reference.

60 (1) The Commission has jurisdiction over the subject matter and parties to this proceeding.

61 (2) The Washington Utilities and Transportation Commission is designated in the Telecommunication Act of 1996 as the agency responsible for arbitrating, approving and enforcing interconnection agreements between telecommunications carriers, pursuant to sections 251 and 252 of the Act.

62 (3) The FCC did not limit ISP-bound traffic in its *ISP Remand Order* to traffic originating and terminating in the same local calling area where the ISP server is located, or to traffic between parties whose numbers are assigned to the same calling area.

63 (4) The FCC has established a separate interim compensation regime for all ISP-bound traffic until the FCC finalizes the structure and rates for a new intercarrier compensation regime.

64 (5) Pursuant to the parties' interconnection agreement as modified by the ISP Amendment, which incorporates the *ISP Remand Order,* and specifically the FCC's description of "ISP-Bound" traffic, Pac-West is entitled to compensation from Qwest for transport and termination of all ISP-bound traffic originated by Qwest, including VNXX traffic, according to the rates, terms and conditions in the ISP Amendment.

65 (6) Pursuant to the *Core Forebearance Order* and the Private Arbitrator's decision Pac-West is entitled to compensation described in Conclusion (5) from January 1, 2004.

66 (7) Qwest owes Pac-West $637,389.90, based on spreadsheets provided by Qwest to Pac-West.

67 (8) Qwest's counterclaim requesting Pac-West be directed to follow the change of law procedures contained in the interconnection agreement to implement the *Core Forebearance Order* is denied.

68 (9) Qwest's counterclaim regarding VNXX compensation is denied as it is resolved by Conclusion (5).

69 (10) Qwest's counterclaims regarding VNXX in general are denied as they are beyond the scope of this proceeding and not material to the interpretation and enforcement of the interconnection agreement. *WAC 480-07-650.*

IV. ORDER

THE COMMISSION ORDERS:

70 (1) Qwest's exceptions to the Recommended Decision are denied.

71 (2) The Recommended Decision is affirmed as clarified herein.

DATED at Olympia, Washington, and effective this 10th day of February, 2006.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.