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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 NOS. T-01051B-05-0495
T-03693A-05-0495

**QWEST CORPORATION'S
EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S
RECOMMENDED OPINION AND
ORDER**

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Qwest Corporation ("Qwest") respectfully submits these exceptions to the Recommended Opinion and Order ("ROO") issued by the Administrative Law Judge ("ALJ") in this docket on April 13, 2006. For the reasons set forth below, the Arizona Corporation Commission ("Commission") should reject the ROO, deny the relief sought by Pac-West Telecomm, Inc. ("Pac-West"), grant Qwest's counterclaims, and enter an order consistent with governing federal law, as discussed hereafter.

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I. INTRODUCTION

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Pac-West's primary business in Arizona is to serve Internet Service Providers ("ISPs"). It does so by using its status as a competitive local exchange carrier ("CLEC") to obtain local telephone numbers throughout Arizona that its ISP customers provide to their end-user customers in order to gain access to the ISPs (and thus to the Internet). Pac-West's ISP customers market their services to customers who are also local exchange customers of Qwest. Through the local numbers provided by Pac-West and through the use of transport services

1 currently provided to Pac-West pursuant to Qwest's interconnection agreement with Pac-West,
2 large quantities of one-way traffic are directed to those ISPs ("ISP traffic") over Local
3 Interconnection Service ("LIS") trunks. The traffic is routed by Qwest to Pac-West, which then
4 delivers the traffic to the ISPs' modems and servers; at that point, the traffic is placed on the
5 Internet and terminated at its ultimate destinations, websites on the Internet. It is undisputed that
6 most, perhaps all, of this traffic originates in one local calling area ("LCA") and is transmitted to
7 the ISPs' equipment (modems/servers), which are located in a different LCA (or even in another
8 state). Such traffic, traffic that originates in one LCA and is directed to ISP equipment
9 physically located in another LCA, is known as Virtual NXX or "VNXX" traffic.

10 Qwest and Pac-West amended their interconnection agreement ("ICA") to provide for the
11 payment of terminating compensation when one party delivers ISP traffic to the other, "as
12 described in the FCC's *ISP Remand Order*."¹ Pac-West's VNXX traffic is not local, but is
13 disguised interexchange traffic. Qwest does not contest that it agreed to pay terminating
14 compensation for ISP traffic that originates and terminates within the same local calling area, but
15 Qwest did not agree to pay terminating compensation for ISP traffic that is in reality,
16 interexchange calling.² Thus, the fundamental issues in this matter are whether (1) the FCC's
17 *ISP Remand Order* applies to all ISP traffic (both local and VNXX) and thus preempts state
18 regulation of intrastate access charges or any other applicable intercarrier compensation regime
19 for all ISP traffic, or (2) whether the *ISP Remand Order* applies only to calls placed to an ISP in
20 the same local calling area as the caller. Second, although the ROO calls for a future
21 investigation of VNXX generally, the ROO implicitly approves Pac-West's current use of
22 VNXX, a decision distinctly contrary to a previous decision of this Commission, and the

23
24 ¹ Order on Remand and Report and Order, *In the Matter of Implementation of the Local*
25 *Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for*
ISP-Bound Traffic, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*")

26 ² Historically, interexchange calling is subject to local exchange access charges.

1 Commission's own rules.³

2 The ALJ recognized that the issue of the breadth of the *ISP Remand Order* is "the crux of
3 the dispute." Thus, the ALJ recognized that the answer to that question is critical to the ultimate
4 contract interpretation issue in this docket. The ALJ concluded that federal law on this issue is
5 "inconclusive." (ROO ¶ 18). As a matter of law, this conclusion is in error, thus rendering the
6 ALJ's interpretation of the ICA equally erroneous.

7 Contrary to the ALJ's conclusion that federal law is "inconclusive," the governing federal
8 law is clear that the *ISP Remand Order* applies only to local ISP traffic. The D. C. Circuit court,
9 in *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), clearly described the holding of the *ISP*
10 *Remand Order* as limited only to local ISP traffic. Then, two weeks ago, the First Circuit of
11 Appeals, in *Global NAPs v. Verizon New England*, 2006 WL 924035 (1st Cir. April 11, 2006)
12 ("*Global NAPs*"), issued a comprehensive and definitive decision that the *ISP Remand Order*
13 applies *only* to traffic where the originating caller and the ISP's modems/servers are physically
14 located within the same LCA. Thus, as clear matter of federal law, VNXX ISP traffic is not
15 included in the traffic subject to the *ISP Remand Order*. (Unfortunately, because the *Global*
16 *NAPs* decision is so recent, Qwest was only able to provide it as supplemental authority the day
17 before the ALJ issued the ROO in this docket).

18 Given these decisions, the ALJ erred in concluding that the state of federal law is

19 _____
20 ³ The Commission has never permitted VNXX before, and indeed, has disapproved it before
21 because it is not good public policy to depart from established forms of intercarrier compensation
22 without a complete analysis. See, Recommended Opinion and Order of Administrative Law
23 Judge, *In the Matter of the Petition of Level 3 Communications LLC for Arbitration of an*
24 *Interconnection Agreement with Qwest Corporation Pursuant to Section 252(b) of the*
25 *Telecommunications Act of 1996*, Docket Nos. T-03654A-05-0350 and T-01051B-05-0350,
26 released April 7, 2006, at 28-29, citing Opinion and Order, *In the Matter of the Petition of*
AT&T Communications of the Mountain States, Inc. and TCG Phoenix, for Arbitration with
Qwest Corporation, Inc. Pursuant to 47 U.S.C. Section 252(b), Docket Nos. T-02428A-03-0553
and T-01051B-03-0553, at 13 (Ariz. Corp. Comm'n, April 6, 2004) ("*AT&T Arbitration*
Decision")

1 enjoin, set aside, suspend (in whole or in part), or determine the validity of (a) all final orders of
2 the Federal Communications Commission made reviewable by section 402(a) of title 47.”⁴
3 (Emphasis added). Thus, the interpretations of the federal courts of appeals are binding sources
4 of law that state commissions are obligated to follow in interpreting FCC orders and rules.

5 **2. WorldCom and Global NAPs Conclusively Establish that only Local ISP**
6 **Traffic is Subject to the ISP Remand Order.**

7 The Hobbs Act court for the *ISP Remand Order* was the federal court of appeals for the
8 D. C. Circuit. It performed that function in *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir.
9 2002), where it described the *holding* of the *ISP Remand Order* in these terms: “In the order
10 before us the [FCC] *held* that under § 251(g) of the Act it was authorized to ‘carve out’ from §
11 251(b)(5) calls made to internet service providers (“ISPs”) *located within the caller’s local*
12 *calling area.*” (*Id.* at 430; emphasis added). Further, although criticizing the underlying logic
13 of the *ISP Remand Order*, the *WorldCom* Court did not vacate either the *ISP Remand Order* or
14 the FCC rules associated with it. As a result, the *ISP Remand Order*, as written, is binding on
15 state commissions, as is *WorldCom’s* description of the holding of the *ISP Remand Order*.⁵

16 _____
17 ⁴2 U.S.C. § 2342(1). 47 U.S.C. § 402(b) sets forth a few specific exceptions to 47 U.S.C. §
18 402(a), none of which applies here. Further, state commissions, under authority delegated by the
19 Act, must follow decisions of federal courts interpreting the Act and interpreting FCC decisions
20 that implement the Act. *See* 47 U.S.C. § 408 (Orders of the FCC “shall continue in force for the
21 period of time specified in the order or until the Commission or a court of competent jurisdiction
issues a superseding order.”); *see also Hawaiian Tel. Co. v. Hawaii Pub. Util. Comm’n*, 827 F.2d
1264, 1266 (9th Cir. 1987); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm’n*, 738 F.2d
901, 907 (8th Cir. 1984) *vacated on other grounds*, 476 U.S. 1167 (1986); *Southwestern Bell Tel.*
Co. v. Texas Pub. Util. Comm’n, 812 F. Supp. 706, 708 (W.D. Tex. 1993).

22 ⁵ Although the *WorldCom* court found much to criticize in the *ISP Remand Order* (the
23 ALJ described one of these problems in the ROO ¶ 20), it took the unusual step of remanding,
24 *but not vacating*, the *ISP Remand Order* or any of the FCC’s rules adopted pursuant to the *ISP*
Remand Order. The court explicitly stated that “there is plainly a non-trivial likelihood that the
Commission has authority to elect such a system (perhaps under §§ 251(b)(5) and 252(d)(B)(i)):

25 [W]e do not decide whether handling calls to ISPs constitutes ‘telephone
26 exchange service’ or ‘exchange access’ (as those terms are defined in the Act), . .
. or neither, or whether those terms cover the universe to which such calls might

1 However, to the extent there was any question whether the *WorldCom* decision meant
2 what it said, that question was resolved by *Global NAPs*. In *Global NAPs*, a company with the
3 same business plan as Pac-West (*i.e.*, providing services to ISPs for dial up access to the
4 Internet) appealed a decision of a Massachusetts federal district court that had upheld a decision
5 of the Massachusetts Commission that access charges apply to interexchange ISP calls. In so
6 ruling, the Massachusetts Commission, in effect, ruled that VNXX ISP traffic is not subject to
7 the *ISP Remand Order*. Global NAPs, the CLEC, argued that the *ISP Remand Order* preempted
8 state commissions and required that *all* ISP traffic be subject to the *ISP Remand Order*. The
9 First Circuit rejected that claim on several grounds.

10 First, the court described the legal principles that define whether a federal agency has
11 preempted state regulation:

12 [T]he law requires a clear indication that an agency intends to preempt state
13 regulation. *Hillsborough County v. Automated Med. Labs. Inc.*, 471 U.S. 707,
14 718 (1985) (“[B]ecause agencies normally address problems in a detailed manner
15 and can speak through a variety of means, . . . we can expect that they will make
16 their intentions clear if they intend for their regulations to be exclusive.”); *see also*
17 *Qwest Corp.*, 380 F.3d at 374 (finding no preemption of state regulation where
18 FCC regulations were “notably agnostic” on the question. (*Id.* at *10).

19 Applying those principles, the court concluded that “the *ISP Remand Order* does not clearly
20 preempt state authority to impose access charges for interexchange VNXX ISP-bound traffic; it
21 is, at best ambiguous on the question, and ambiguity is not enough to preempt state regulation
22 here.” (*Id.* at *11).

23 Second, Global NAPs argued that if the FCC only intended to preempt on local ISP
24 traffic, “it would have expressed its intent more clearly, by specifying ‘local ISP-bound traffic.’”

25 belong. Nor do we decide the scope of the “telecommunications” covered by §
26 251(b)(5). Nor do we decide whether the Commission may adopt bill-and-keep
for ISP-bound calls pursuant to § 251(b)(5); *see* § 252(d)(B)(i) (referring to bill-
and-keep). *Indeed, these are only samples of the issues we do not decide . . .*
(288 F.3d at 434; emphasis added).

1 (*Id.* at *12). The First Circuit responded to that argument by noting that Global NAPs was
2 ignoring the important distinction between local and interexchange traffic, as well as the existing
3 compensation regime for interexchange calls:

4 The FCC has consistently maintained a distinction between local and
5 “interexchange” calling and the intercarrier compensation regimes that apply to
6 them, and reaffirmed that states have authority over intrastate access charge
7 regimes. . . .

8 Indeed, in the *ISP Remand Order* itself, the FCC reaffirmed the distinction
9 between reciprocal compensation and access charges. It noted that Congress, in
10 passing the [Act], did not intend to disrupt the pre-[Act] access charge regime,
11 under which “LECs provided access services . . . in order to connect calls that
12 travel to points – both interstate and intrastate – beyond the local exchange. In
13 turn, both the Commission and states has in place access regimes applicable to
14 this traffic, which they have continued to modify over time.” (*Id.*, quoting *ISP*
15 *Remand Order* ¶ 37).

16 Third, the court addressed the context of the FCC’s two ISP orders, the 1999 *ISP*
17 *Declaratory Order*⁶ and the 2001 *ISP Remand Order*. The court described both orders as only
18 addressing the question “whether reciprocal compensation obligations apply to the delivery of
19 calls from one LEC’s end-user customer to an ISP *in the same local calling area* that is served
20 by the competing LEC.” (*Id.* at *13, quoting *ISP Remand Order* ¶ 13; emphasis added). The
21 First Circuit also cited the critical description of the holding of the *ISP Remand Order* articulated
22 in *WorldCom*, noting that *WorldCom* stated that the question before the FCC involved “calls
23 made to [ISPs] located within the caller’s local calling area.” (*Id.*, quoting *WorldCom*, 288 F.3d
24 at 430). Based on this contextual analysis, the court concluded that “[t]here is no express
25 statement that ISP-bound traffic is not subject to access charges.” (*Id.*).

26 Fourth, the court turned to the *Amicus Brief* filed by the FCC at the request of the First
27 Circuit panel: “The FCC’s helpful brief, while not taking a position on the outcome of this

⁶ 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*”).

1 appeal, *nonetheless supports the conclusion that the order did not clearly preempt state*
2 *regulation of intrastate access charges.*” (*Id.*; emphasis added). Citing several portions of the
3 *Amicus Brief*, the First Circuit observed:

4 The FCC further notes that “in establishing the new compensation scheme for
5 ISP-bound calls, the Commission was considering only calls placed to ISPs
6 located in the same local calling area as the caller.” According to the FCC, “[t]he
7 Commission itself has not addressed application of the *ISP Remand Order* to ISP-
8 bound calls outside the local calling area” or “decided the implications of using
9 VNXX numbers for intercarrier compensation more generally.” (*Id.* at *14,
10 *quoting Amicus Brief* at 10, 11).

11 The First Circuit thus concluded that, “[g]iven the requirement of a clear indication that
12 the FCC preempted state law, the *ISP Remand Order* does not have the broad preemptive effect
13 that Global NAPs seeks to assign it.” (*Id.* at *14).

14 **3. The FCC *Amicus Brief* in *Global NAPs* Supports Qwest’s Position.**

15 As discussed above, the *Global NAPs* court relied on an *Amicus Brief* filed by the FCC.
16 After the case was fully briefed and argued by the parties, the First Circuit panel took the unusual
17 step of seeking input from the FCC. Specifically, the FCC was asked “[w]hether, in the *ISP*
18 *Remand Order*, . . . the [FCC] intended to preempt states from regulating intercarrier
19 compensation for *all* calls placed to [ISPs], or whether it intended to preempt only with respect
20 to calls bound for [ISPs] in the same local calling area?” (*Amicus Brief* at 2; emphasis in
21 original). The *Amicus Brief*—attached hereto as Exhibit A—responds primarily to that issue.

22 The FCC was careful to state that the *ISP Remand Order* could be read to answer the
23 question in either the affirmative or the negative. Nonetheless, FCC stated that the FCC *did not*
24 establish a compensation regime for VNXX traffic in the *ISP Remand Order*:

25 “The Commission itself has not addressed application of the *ISP Remand Order*
26 to ISP-bound calls outside a local calling area. Nor has the Commission decided
27 the implications of using VNXX numbers for intercarrier compensation more
28 generally.” (*Amicus Brief* at 10-11).

29 “The administrative history that led up to the *ISP Remand Order* indicates that in
30 addressing compensation, *the Commission was focused on calls between dial-up*

1 users and ISPs in a single local calling area. . . . Thus, when the Commission
2 undertook in the *ISP Declaratory Ruling* to address the question “whether a local
exchange carrier is entitled to receive reciprocal compensation for traffic that it
3 delivers to . . . an Internet service provider,” . . . the proceeding focused on calls
that were delivered to ISPs in the same local calling area.

4 ***The administrative history does not indicate that the Commission’s focus
broadened on remand.*** The *ISP Remand Order* repeats the Commission’s
5 understanding that “an ISP’s end-user customers typically access the Internet
through an ISP service located in the same local calling area.” . . . *The Order*
6 *refers multiple times to the Commission’s understanding that it had earlier
addressed – and on remand continued to address – the situation where ‘more
7 than one LEC may be involved in the delivery of telecommunications within a
local service area.’”* (*Id.* at 12-13; citations to *ISP Remand Order* omitted;
8 emphasis added).

9 Thus, while avoiding a definitive answer to the question posed by the First Circuit, the FCC’s
10 statements were completely consistent with Qwest’s analysis of the *ISP Remand Order*, and with
11 the Oregon, Iowa, Minnesota, and South Carolina decisions that support that analysis. (These
12 state commission decisions were provided to the ALJ in Qwest’s filings of supplemental
13 authority).⁷ Most importantly, however, is the fact that the *Global NAPs* court interpreted the
14 *Amicus Brief* as directly supporting its conclusion that the *ISP Remand Order* does not apply to
15 VNXX traffic. Thus, far from being “inconclusive,” the governing federal law on this issue is
16 absolutely clear that the *ISP Remand Order* does not preempt intrastate access charges for
17 VNXX ISP traffic. The *WorldCom* language is sufficient alone to compel that conclusion, but
18 once *Global NAPs* and the FCC’s *Amicus Brief* are considered, there is simply no reasonable
19 basis to conclude that the governing federal law is unclear in any manner.⁸

20
21 ⁷ In addition to references to Oregon decisions in Qwest’s briefs, Qwest filed three Oregon
22 decisions as supplemental authority (one decision was filed on December 7, 2005; two additional
23 Oregon decisions were filed in the Fifth Supplemental filing on February 3, 2006). Qwest filed
24 the Iowa Board order December 20, 2005. The Minnesota ALJ decision (which has now been
unanimously approved by the Minnesota Commission) was filed on January 23, 2006. The
South Carolina Commission order was filed on March 20, 2006. See footnote 9 for discussion of
an Oregon Commission decision issued last week that specifically relies on *Global NAPs*.

25 ⁸ Pac-West relied on *Southern New England Telephone v. MCI WorldCom Telecommunications*,
26 359 F.Supp.2d 229 (D. Conn. 2005) (“*SNET*”). The *Global NAPs* court disposed the *SNET*
analysis with a straightforward statement: “We simply disagree with the *SNET* court’s

1 Finally, while ultimately irrelevant in light of the governing nature of *WorldCom* and
2 *Global NAPs*, the decisions of other state commissions, particularly recent decisions that have
3 comprehensively addressed the issue, are solidly in agreement with *WorldCom* and *Global*
4 *NAPs*.⁹

5
6
7 analysis.” (2006 WL 924035 at fn. 17).

8 ⁹ The ALJ stated that “state jurisprudence is conflicting” on the issue of the breadth of the *ISP*
9 *Remand Order*. (ROO ¶ 18). It is certainly true that there has not been unanimity on this issue
10 in state commission decisions, but given the governing authority of *WorldCom* and *Global*
11 *NAPs*, the issue is irrelevant. Nonetheless, it is important to note that recent decisions,
12 particularly in Oregon and Minnesota, that engaged in comprehensive analyses of the issue, are
13 in complete agreement with *WorldCom* and *Global NAPs*. As Qwest has demonstrated in its
14 briefs and in its supplemental filings of authority, more state commissions in the Qwest region
15 (Oregon, Iowa, and Minnesota) have ruled that the *ISP Remand Order* does not apply to VNXX
16 ISP traffic than have ruled otherwise. The Minnesota ALJ decision was unanimously adopted by
17 the Minnesota Commission in open meeting on April 6, 2006. These orders are comprehensive
18 analyses of the issue that take into account *all* parts of the *ISP Remand Order*, in particular those
19 paragraphs of the order that make it clear that the FCC did not intend to interfere with existing
20 federal and state access charge regimes for interexchange traffic (paragraphs 37-40). Last week,
21 the Oregon Commission affirmed an ALJ decision that held that the *ISP Remand Order* does not
22 apply to VNXX traffic. The Oregon Commission affirmatively relied on the *Global NAPs*
23 decision. Order, *In the Matter of Qwest Corporation’s Petition for Arbitration of*
24 *Interconnection Rates, Terms, Conditions, and Related Arrangements with Universal*
25 *Telecommunications, Inc.* Docket ARB 671, Order No. 06-190, at 5 (OPUC, April 19, 2006)
26 (characterizing the First Circuit as “the highest court to address” this issue). This order may be
viewed at <http://apps.puc.state.or.us/orders/2006ords/06-190.pdf>.

20 The only commission decision from the 14-state Qwest region that has ruled against
21 Qwest on this issue is the decision of the Washington commission that Pac-West relied upon in
22 its briefs. The Washington Commission’s legal analysis is lacking on key issues. For example,
23 the decision ignores the *WorldCom* court’s conclusion that the *ISP Remand Order* applies only to
24 local ISP traffic. The decision also ignores paragraphs 36-40 of the *ISP Remand Order*, where
25 the FCC ruled that it was not interfering with the existing access charge regime—the
26 Washington decision makes no reference at all to those paragraphs. In *Global NAPs*, the First
Circuit relied on both the *WorldCom* language and on the paragraphs of the *ISP Remand Order*
(in particular paragraph 37) that make it clear that the FCC intended no disruption of the existing
access charge regime. (*Global NAPs*, 2006 WL 924035, at *12,*13). The Washington analysis
ignored key arguments that the *Global NAPs* court found to be persuasive.

1 **B. The ALJ Erred as a Matter of Law in Concluding that the Language of the ISP**
2 **Amendment to the Interconnection Agreement Provides for Reciprocal**
3 **Compensation for all ISP Traffic.**

4 Based on the ALJ's erroneous conclusion that the *ISP Remand Order* applies to all ISP
5 traffic, the ALJ concluded that "[t]he plain language of the ISP Amendment provides for
6 reciprocal compensation for all ISP-bound traffic. Because it does not exclude VNXX ISP-
7 bound traffic, we find that such traffic should be subject to reciprocal compensation under the
8 terms of the ICA and ISP Amendment." (ROO ¶ 21). Given the clearly articulated law on the
9 breadth of the *ISP Remand Order*, it is impossible to conclude that, in agreeing to the foregoing
10 language, Qwest was agreeing to pay terminating compensation on VNXX ISP traffic. Among
11 other things, Pac-West never disclosed its intention to use a novel dialing scheme that was
12 inconsistent with the Commission's own rules (and which the Commission has rejected as
13 inappropriate for AT&T in the *AT&T Arbitration Order*).¹⁰

14 Furthermore, by defining the term "ISP-Bound" in the ICA as being the traffic governed
15 by the *ISP Remand Order*, Qwest could not have agreed that VNXX traffic was included to be
16 included within the terms of the Amendment. The ISP Amendment did not need to explicitly
17 exclude VNXX traffic because it defined the traffic to which it applied as only the traffic subject
18 to the *ISP Remand Order*. The parties in their recitals state that the reason they are amending the

19 ¹⁰ Opinion and Order, *In the Matter of the Petition of AT&T Communications of the Mountain*
20 *States, Inc. and TCG Phoenix, for Arbitration with Qwest Corporation, Inc. Pursuant to 47*
21 *U.S.C. Section 252(b)*, Docket Nos. T-02428A-03-0553 and T-01051B-03-0553, at 13 (Ariz.
22 *Corp. Comm'n*, April 6, 2004) ("*AT&T Arbitration Decision*") (rejecting AT&T's proposed
23 language that would have defined local calling by NXX because, among other reasons, it would
24 represent "a departure from the establishment of local calling areas"). In addition, in the
25 currently pending Level 3/Qwest arbitration before the Commission, the ALJ concluded (1) that
26 VNXX "disregards the concept of LCAs and avoids the compensation regime that the state has
established for calls between LCAs," (2) that VNXX would "alter a long-standing regime for
rating calls," (3) that VNXX "raises issues of equity and whether cost causers are paying there
fair share," and (4) suggesting that costs could be shifted to Qwest end users who do not "use
their phone lines to call ISPs." Recommended Opinion and Order, *In the Matter of the Petition*
of Level 3 Communications LLC for Arbitration of an Interconnection Agreement with Qwest
Corporation Pursuant to Section 252(b) of the Telecommunications Act of 1996, Docket Nos. T-
03654A-05-0350 & T-01051B-05-0350, at 26, 28 (ALJ Rodda, April 7, 2006).

1 agreement “to reflect the aforementioned order [the *ISP Remand Order*] under the terms and
2 conditions contained herein.”¹¹ (ISP Amendment, Third Recital; the ISP Amendment is attached
3 hereto as Exhibit B). In other words, the reason for the amendment was to incorporate the
4 requirements of the *ISP Remand Order* into the parties’ ICA. To make that clear, the parties
5 adopted a definition of “ISP-Bound” as the traffic “described by the FCC in its Order on Remand
6 and Report and Order (Intercarrier Compensation for ISP-Bound Traffic) CC Docket 99-68.”
7 (ISP Amendment, § 1.4.) The entirety of Section 3 of the ISP Amendment related solely to
8 “ISP-Bound Traffic” as defined by the parties. Thus, by definition, the only subject matter of
9 that amendment is the traffic to which the *ISP Remand Order* applies, and nothing more. Thus,
10 because the affirmative language of the amendment defined and limited its subject matter only to
11 traffic governed by the *ISP Remand Order*, there was no need to an additional provision to
12 exclude VNXX traffic. Because federal law is clear that VNXX ISP traffic is not included
13 within the compensation regime of the *ISP Remand Order*, it follows *a fortiori* that the ISP
14 amendment includes only the traffic that is subject to the *ISP Remand Order*, and that traffic is
15 only traffic that originates in the same LCA as the ISP’s modems or servers to which the traffic
16 is delivered before it is sent on to the Internet. It follows that the ALJ’s conclusion (ROO ¶ 23)
17 that Qwest breached the terms of the agreement, as amended, by withholding compensation for
18 VNXX traffic is erroneous as a matter of law.

19 Thus, both the ALJ’s interpretation of the ISP Amendment and the ALJ’s conclusion that
20 Qwest breached the agreement are erroneous. The Commission should, therefore, reverse these
21 conclusions and find that Qwest is in full compliance with the ICA.

22 **C. The ALJ’s Conclusions Regarding VNXX Are in Error and Should be Reversed.**

23 Regarding VNXX, the ALJ concludes that “the precise classification of VNXX traffic
24

25 ¹¹ The parties entered into the ISP Amendment on February 6, 2003, and it was filed with the
26 Commission on February 18, 2003. The Amendment was approved by operation of law on May
19, 2003. Docket No. T-01051B-03-0107, T-03693A-03-0107.

1 remains unsettled,” (ROO ¶18), and declines to make a finding regarding the appropriateness of
2 intercarrier compensation as it relates to intercarrier compensation.” (*Id.* ¶ 22). Implicitly, the
3 ROO condones VNXX for Pac-West. This decision is “based . . . on the plain language of the
4 specific contract issue.” (*Id.*).

5 Given the clearly articulated law on the breadth of the *ISP Remand Order*, it is
6 impossible to conclude that, in agreeing to the foregoing language, Qwest was agreeing that
7 VNXX is lawful or to pay terminating compensation on VNXX ISP traffic. Besides the clarity
8 that *Global NAPs* brings to the contract interpretation issue, Qwest notes that the ICA does not
9 mention VNXX. Nor was the VNXX business model every disclosed to Qwest by Pac-West.
10 Qwest’s understanding at the time the ICA was amended, and its understanding now, is that only
11 that traffic which is originated and terminated within the same local calling area was addressed
12 by the ICA. These distinctions between local exchange traffic, on the one hand, and toll service
13 between local exchange areas on the other hand, are embodied in the Commission’s Rules.¹²
14 Pac-West’s VNXX scheme violates those rules. In light of these matters, it is impossible to
15 conclude that the plain language of the ICA supports Pac-West’s use of VNXX.

16 While the ROO denies that it is making any findings concerning the appropriateness of
17 VNXX arrangements on a going-forward basis, it implicitly sanctions VNXX for Pac-West,
18 ignoring the public policy concerns articulated by this Commission when the Commission
19 previously declined to sanction VNXX (*See, fn.3, supra*). In the *AT&T Arbitration*, the
20

21 ¹² The Commission’s “Competitive Telecommunications Services” rule ties local exchange
22 traffic to traffic *within* exchange areas. The rule defines “Local Exchange Service” as “[t]he
23 telecommunications service that provides a *local dial tone*, access line, and *local usage within an*
24 *exchange or local calling area*.” AAC § R14-2-1102(7) (emphasis added). On the other hand,
25 the Commission’s “Telephone Utilities” rule defines “toll service” as service “*between stations*
26 *in different exchange areas* for which a long distance charge is applicable.” *Id.* § R14-2-501(23)
(emphasis added). The Commission’s “Telecommunications Interconnection and Unbundling”
rule states: “The incumbent LEC’s *local calling areas and existing EAS boundaries will be used*
for the purpose of classifying traffic as local, EAS, or toll for purposes of intercompany
compensation. *Id.* § R14-2-1305(A) (emphasis added).

1 Commission concluded that it was not good public policy to depart from the established form of
2 intercarrier compensation based on the record before the Commission. Nothing in the record of
3 this proceeding provides the basis for different treatment of Pac-West. Pac-West unilaterally
4 assumed the risk of implementing its VNXX scheme, and the Commission should not reward
5 Pac-West's unsanctioned actions by bestowing upon it the financial windfall that it seeks, either
6 in the form of terminating compensation, or by allowing Pac-West to avoid access charges which
7 traditionally have supported local exchange carriers. *See* fn. 10, *supra*.

8 **D The ALJ's Disposition of Qwest's Counterclaims Was Erroneous as a Matter of**
9 **Law and Should be Reversed.**

10 Because of the manner in which the ALJ ruled the issues discussed above, the ALJ
11 concluded that the "resolution of the dispute addresses Qwest's counterclaims." (ROO ¶ 33).
12 Given that the ALJ erroneously ruled on the earlier issues, the dismissal of Qwest's
13 counterclaims was error as well. The Commission should either rule in Qwest's favor on
14 Qwest's counterclaims on the basis of the briefs already filed by the parties or the Commission
15 should remand that issue to the ALJ for resolution of those issues consistent with a correct
16 interpretation of the *ISP Remand Order*, and the impact on that interpretation on the ICA.

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III. CONCLUSION

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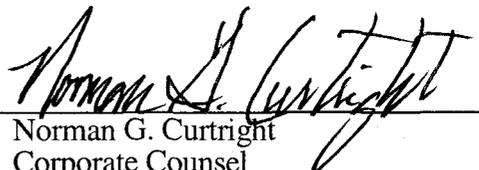
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On the basis for the foregoing exceptions, Qwest respectfully requests that the
Commission reject the ROO, deny the relief sought by Pac-West, grant Qwest's counterclaims,
and enter an order consistent with governing federal law.

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RESPECTFULLY SUBMITTED this 24th day of April, 2006.

QWEST CORPORATION

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19 _____

EXHIBIT A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 05-2657

GLOBAL NAPS, INC.,

Plaintiff-Appellant,

v.

VERIZON NEW ENGLAND, INC., ET AL.,

Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR AMICUS CURIAE FEDERAL COMMUNICATIONS COMMISSION

STATEMENT OF INTEREST AND QUESTIONS PRESENTED

Amicus curiae Federal Communications Commission (FCC) is the federal regulatory agency charged by Congress with “regulating interstate and foreign commerce in communication by wire and radio.” 47 U.S.C. § 151. In particular, the FCC regulates many aspects of the compensation scheme among telecommunications carriers that collaborate to complete a telephone call. *See, e.g.,* 47 U.S.C. § 251(b)(5). This case involves the Court’s interpretation of an FCC order pertaining to compensation for telephone calls placed to internet service providers (ISPs). By order entered January 4, 2006, the Court requested that the FCC file a brief addressing the following questions:

1. Whether, in the *ISP Remand Order*, 16 FCC Rcd 9151 (2001), the Commission intended to preempt states from regulating intercarrier compensation for *all* calls placed to internet service providers, or whether it intended to preempt only with respect to calls bound for internet providers in the same local calling area?
2. Whether, if the FCC did not intend to preempt state regulation of all calls, a state regulator's decision to impose access charges on certain calls violates the Telecommunications Act of 1996?
3. What is the standard of review for a reviewing court assessing a state commission's interpretation of an FCC order?

BACKGROUND

I. Reciprocal Compensation and Access Charges.

This case concerns the compensation paid by or to the carriers of telephone calls when more than one carrier collaborates to complete a call. Congress has placed on all local exchange carriers "[t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). In implementing that provision, the FCC determined that the statutory obligation "appl[ies] only to traffic that originates and terminates within a local area," as defined by state regulatory authorities. *Local Competition Order*, 11 FCC Rcd 15499, 16013 ¶1034 (1996) (subsequent history omitted).¹ See 47 C.F.R. § 57.701 (2000) (requiring reciprocal

¹ Although the *Local Competition Order* was the subject of various appeals that ultimately resulted in its partial reversal, no party challenged that aspect of the Order.

compensation for “[t]elecommunications traffic ... that originates and terminates within a local service area established by the state commission”). Thus, when a customer of one carrier places a local, non-toll call to the customer of a competing carrier, the originating carrier must compensate the terminating carrier for completing the call.

In the *Local Competition Order*, the Commission also decided that “the reciprocal compensation provisions of section 251(b)(5) do not apply to the transport or termination of interstate or intrastate interexchange traffic.” *Local Competition Order* at 16013 ¶1034. Interexchange traffic is traffic that terminates beyond a local calling area, and it is governed by a different compensation regime. When a customer places a toll or long distance call, the long distance carrier, known as an interexchange carrier or IXC, pays “access charges” to both the originating and terminating local carriers. See *Access Charge Reform*, 12 FCC Rcd 15982, 15990-15992 (1997); *Local Competition Order* at 16013 ¶1034. The Commission decided that the states should “determine whether intrastate transport and termination of traffic between competing LECs, where a portion of their local services areas are not the same, should be governed by section 251(b)(5)’s reciprocal compensation obligations or whether intrastate access charges should apply to the portions of their local service areas that are different.” *Local Competition Order* ¶1035.

II. Compensation For ISP Access.

In several recent orders, the FCC has addressed the intercarrier compensation regime that applies to calls placed to dial-up internet service

providers (ISPs). Dial-up access involves a customer who seeks to access the Internet via telephone. To do so, the customer dials a telephone number, usually but not always a local number, and is connected with the ISP's equipment. From there, the ISP connects the call to computers throughout the world. *See ISP Declaratory Ruling*, 14 FCC Rcd 3689, 3691 ¶4 (1999). In many cases, such as this one, the ISP is served by one telephone company, typically a competitive local exchange carrier (CLEC), and the dialing-in customer by a different company, typically the incumbent local exchange carrier (ILEC).

Disputes arose between ILECs and CLECs about the intercarrier payment mechanism that governs such calls. The CLECs argued that calls to ISPs are local calls, subject to reciprocal compensation payments, because the calls terminate at the ISP's equipment. The ILECs argued that such calls are not subject to the reciprocal compensation regime because they terminate only at the far-flung computer servers that constitute the world-wide-web.

The FCC first addressed the matter in the *ISP Declaratory Ruling*, 14 FCC Rcd 3689. The Commission noted that in the "typical arrangement, an ISP customer dials a seven-digit number to reach the ISP server in the same local calling area." *Id.* at 3691 ¶4. Even though the initial part of the call is local, however, the Commission found that the call, looked at "end-to-end," does not "terminate at the ISP's local server ... but continue[s] to the ultimate destination ... at a[n] Internet website that is often located in another state." *Id.* at 3697 ¶12. ISP-bound calls were not considered local calls subject to reciprocal compensation

under state regulatory auspices, but interstate calls subject to the regulatory authority of the FCC.

The Commission nevertheless acknowledged that at the time it “ha[d] no rule governing inter-carrier compensation for ISP-bound traffic.” *ISP Declaratory Ruling* at 3703 ¶22. In the absence of such a rule, the Commission found “no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic.” *Id.* at 3703 ¶21. In other words, the FCC left the existing state regulatory mechanisms in place for the time being. At the same time, the Commission began a rulemaking proceeding to formulate a federal rule that would govern ISP-bound calls. *Id.* at 3707-3710.

The D.C. Circuit vacated the *ISP Declaratory Ruling* in *Bell Atlantic Telephone Companies v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). It did not question the agency’s jurisdictional analysis, *id.* at 7, but found that inquiry not to be “controlling” on the question of whether a call is within the scope of § 251(b)(5), *id.* at 8. The Court also found that the FCC’s analysis seemed inconsistent with the Commission’s earlier ruling that ISPs were end users that could subscribe to telephone service pursuant to rates established for local service. *Id.* at 7-8. The Court also held that the Commission had failed to make its rules comport with the statute’s distinction between “telephone exchange service” and “exchange access.” *Id.* at 8-9.

On remand, the Commission issued the *ISP Remand Order*, 16 FCC Rcd 9151 (2001), the interpretation of which is before the Court in this case. The

Commission described the issue it had confronted in the *ISP Declaratory Ruling* as “whether reciprocal compensation obligations apply to the delivery of calls from one LEC’s end-user customer to an ISP in the same local calling area that is served by a competing LEC.” *ISP Remand Order*, 16 FCC Rcd at 9159 ¶13. The Commission determined that ISP-bound calls are not subject to reciprocal compensation payments pursuant to § 251(b)(5). Rather, the Commission found that ISP-bound calls are “information access” calls within the meaning of 47 U.S.C. § 251(g), which states that LECs shall provide information access “with the same equal access and non-discriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediate preceding the date of enactment of” the statute. *Ibid.* The Commission interpreted § 251(g) as a “carve-out” of the reciprocal compensation requirement of § 251(b)(5) for calls placed to ISPs. *Id.* at 9166-9167 ¶34.² The Commission found that § 251(g)’s exception to the reciprocal compensation requirement was intended to apply to “all access traffic that [is] routed by a LEC” to an ISP. *Id.* at 9171 ¶44.

The Commission next reiterated its earlier conclusion that calls to ISPs are interstate calls over which the Commission has regulatory authority. *ISP Remand*

² The Commission also changed 47 C.F.R. § 51.701 to reflect the terminology used in § 251(g) of the statute. Instead of referring to “local” calls, a term not used in the statute, the regulation now exempts from the reciprocal compensation requirement “telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access.” 47 C.F.R. § 51.701(b)(1) (2004). The Commission made the change because use of the term “local” “created unnecessary ambiguity ... because the statute does not define the term ‘local call,’ [which] ... could be interpreted as meaning either traffic subject to local rates or traffic that is jurisdictionally intrastate.” *ISP Remand Order* at 9172 ¶45.

Order at 9175 ¶52. The Commission analyzed the matter once again under an end-to-end analysis and found that ISP-bound calls are predominantly interstate. *Id.* at 9178 ¶58. As such, under the authority set forth in 47 U.S.C. § 201, the Commission set about developing a federal rule for compensation.

In developing a federal compensation rule, the Commission was particularly concerned about problems that had arisen with reciprocal compensation payments that had been ordered by State utility commissions under the *ISP Declaratory Ruling*. The Commission found that ISP dial-up access had distorted the market and “created the opportunity to serve customers with large volumes of exclusively incoming traffic.” *ISP Remand Order* at 9182-9183 ¶69 (emphasis in original). The record showed that CLECs terminated 18 times more calls than they originated, leading to their receipt of net reciprocal compensation payments amounting to nearly \$2 billion annually at the time of the Order. *Id.* at 9183 ¶70. The Commission thus found that, due to this type of regulatory arbitrage, reciprocal compensation had “undermine[d] the operation of competitive markets.” *Id.* at 9183 ¶71.

The Commission expressed the view that a “bill and keep” regime under which each carrier collected its costs from its customer and not another carrier would be a viable compensation approach to ISP-bound traffic. *ISP Remand Order* ¶74. The Commission did not, however, employ a “flash cut” – *i.e.*, an immediate transition – to such a regime because the absence of a transition period would “upset the legitimate business expectations of carriers and their customers.” *Id.* at 9186 ¶77. The Commission instead instituted an interim compensation

mechanism that placed a declining cap on the rate paid for termination of ISP-bound calls and limited the volume of calls eligible for compensation. *ISP Remand Order* at 9187 ¶78, 9191 ¶86. “This interim regime satisfies the twin goals of compensating LECs for the costs of delivering ISP-bound traffic while limiting regulatory arbitrage.” *Id.* at 9189 ¶83.

On review, the D.C. Circuit reversed and remanded, but did not vacate, the *ISP Remand Order*. *WorldCom Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). The Court held that the Commission’s “carve-out” analysis was not consistent with the language of § 251(g) and would allow the Commission to “override virtually any provision of the 1996 Act so long as the rule it adopted were in some way ... linked to LECs’ pre-Act obligations.” *Id.* at 433. In the meantime, the Commission began a rulemaking proceeding (which is still pending) to examine all aspects of intercarrier compensation, including compensation for ISP-bound calls. *See Developing a Unified Intercarrier Compensation Regime, Notice of Proposed Rulemaking*, 16 FCC Rcd 9610 (2001); *Developing a Unified Intercarrier Compensation Regime, Further Notice of Proposed Rulemaking*, 20 FCC Rcd 4685 (2005).

III. The Present Dispute.

The dispute before the Court involves a variation on the typical ISP dial-up access scenario. The calls at issue are not delivered to an ISP that is located in the caller’s local calling area. Instead, the dialing-in customer, served by Verizon, an ILEC, is located in one exchange and the equipment of the ISP, served by Global Naps, a CLEC, is located in a different exchange. Ordinarily, such a call would be

subject to a toll paid by the caller to the IXC (in many cases, the originating LEC acts as the de facto IXC), which would carry the call to the facilities of the terminating LEC. In that way, the originating LEC, acting in the role of an IXC, would pay a terminating access charge to the terminating LEC. In order to allow the customer to reach the ISP without paying a toll, however, Global Naps has assigned a virtual or "VNXX" number to the ISP. A VNXX number is a telephone number that appears to be assigned to one exchange but actually is assigned to a customer in a different exchange. Thus, when the Verizon customer calls the ISP – a phone call ordinarily subject to toll charges – he does not incur any toll charges, because the switching equipment treats the call as a local call even though it is not.

That arrangement led to a dispute between Verizon and Global Naps over the applicable payment regime. Global Naps claimed that ISP-bound VNXX calls are entitled to compensation from Verizon under the federal regime established in the *ISP Remand Order*. Verizon claimed that the federal compensation plan applied only to calls delivered to an ISP in the same local calling area and that Verizon was entitled to state-ordered access charge compensation for VNXX calls to make up for the lost toll revenue that resulted from Global Naps' use of VNXX numbers. The parties submitted their dispute to the Massachusetts Department of Telecommunications and Energy (DTE) for arbitration pursuant to the process set forth in 47 U.S.C. § 252(b).

DTE ruled that "VNXX calls will be rated as local or toll based on the geographic end points of the call." DTE Order at 33 (App. 611). As such, DTE accepted language proposed by Verizon to govern compensation for VNXX calls.

Id. at 37-38 (App. 615-616). That language would require Global Naps to “pay Verizon’s originating access charges for all [VNXX] traffic originated by a Verizon Customer ...” App. 867. Thus, DTE effectively required Global Naps to pay access charges for ISP-bound calls made to VNXX numbers.

The district court affirmed the DTE order. The court took note of Global Naps’ argument that the *ISP Remand Order* preempted state regulation of compensation for ISP-bound calls, but rejected the claim on the ground that Global Naps had “impliedly consented to DTE’s jurisdiction” over the rates when it voluntarily sought arbitration.” *Memorandum of Decision* in Civil Action No. 02-12489 (Sept. 21, 2005) (App. 1164).

DISCUSSION

The Court has asked us to address whether the *ISP Remand Order* was intended to preempt states from establishing the compensation regime that governs a call placed by an ILEC customer in one exchange to a CLEC-served ISP located in a different exchange using a VNXX number assigned to the ISP by the CLEC. The *ISP Remand Order* does not provide a clear answer to this question. As set forth below, the *ISP Remand Order* deemed *all* ISP-bound calls to be interstate calls subject to the jurisdiction of the FCC, and the language of the *ISP Remand Order* is sufficiently broad to encompass all such calls within the payment regime established by that Order. Nevertheless, the order also indicates that, in establishing the new compensation scheme for ISP-bound calls, the Commission was considering only calls placed to ISPs located in the same local calling area as the caller. The Commission itself has not addressed application of the *ISP Remand*

Order to ISP-bound calls outside a local calling area. Nor has the Commission decided the implications of using VNXX numbers for intercarrier compensation more generally. In this situation, the Commission's litigation staff is unable to advise the Court how the Commission would answer the first question posed by the Court.

In the *ISP Remand Order* (as in the *ISP Declaratory Ruling*), the Commission found that calls to ISPs are interstate calls subject to federal regulatory jurisdiction. At the same time, Congress in § 252 gave the States significant authority over interconnection agreements between carriers. Thus, while "Congress has broadly extended its law into the field of intrastate telecommunications," in a few areas such as interconnection agreements Congress "has left the policy implications of that extension to be determined by state commissions." *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 385 n.10 (1999).

In some respects, the *ISP Remand Order* appears to address all calls placed to ISPs. The Commission's ruling that calls to ISPs are interstate calls because they may terminate at web sites beyond state boundaries necessarily applies to all ISP-bound calls. The Commission's theory that ISP-bound calls are "information access" calls within the meaning of § 251(g) that are thus exempted from the requirements of § 251(b) likewise applies to all ISP-bound calls. The *ISP Remand Order* is also replete with references to "ISP-bound calls" that do not differentiate between calls placed to ISPs in the same local calling area and those placed to ISPs in non-local areas.

At the same time, however, the administrative history that led up to the *ISP Remand Order* indicates that in addressing compensation, the Commission was focused on calls between dial-up users and ISPs in a single local calling area. The *Local Competition Order* and the regulations promulgated pursuant to that order contemplated that reciprocal compensation would be paid only for calls that “originat[e] and terminat[e] within a local service area.” 47 C.F.R. § 51.701(b)(1) (2000); see *Local Competition Order* at 16013 ¶1034. Thus, when the Commission undertook in the *ISP Declaratory Ruling* to address the question “whether a local exchange carrier is entitled to receive reciprocal compensation for traffic that it delivers to ... an Internet service provider,” *id.* at 3689 ¶1, the proceeding focused on calls that were delivered to ISPs in the same local calling area. Indeed, the Commission described the “typical arrangement” (although not the exclusive arrangement) it had in mind as one where “an ISP customer dials a seven-digit number to reach the ISP service in the same local calling area.” *Id.* at 3691 ¶4.

The administrative history does not indicate that the Commission’s focus broadened on remand. The *ISP Remand Order* repeats the Commission’s understanding that “an ISP’s end-user customers typically access the Internet through an ISP service located in the same local calling area.” *Id.* at 9157 ¶10. The Order refers multiple times to the Commission’s understanding that it had earlier addressed – and on remand continued to address – the situation where “more than one LEC may be involved in the delivery of telecommunications

within a local service area.” *Id.* at 9158 ¶12; *see also id.* at 9159 ¶13, 9163 ¶24, 9180 ¶63.

The *ISP Remand Order* thus can be read to support the interpretation set forth by either party in this dispute. The Commission itself, however, has not expressed a position on the matter. Moreover, the Commission has not addressed the more general effects on intercarrier compensation of the use of VNXX numbers. In the circumstances, it would not be possible for the Commission’s litigation staff to provide an official position on a matter that the Commissioners themselves have not yet directly confronted and addressed in a rulemaking or adjudicatory proceeding. As this Court has recognized, post hoc rationalizations offered by agency counsel are not substitutes for an agency order issued in the appropriate manner. *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273, 1289 (1st Cir. 1996), *cert. denied*, 521 U.S. 1119 (1997); *see also Western Union Corp. v. FCC*, 856 F.3d 315, 318 (D.C. Cir. 1988) (agency rationale “must appear in the agency decision and the record; post hoc rationalizations by agency counsel will not suffice”).

The Court also asked the FCC if any other provisions of the Telecommunications Act of 1996 would prohibit a State from imposing access charges on ISP-bound VNXX calls. As described above, the Commission did not directly address VNXX calls in either of its ISP orders and has not addressed VNXX calls more generally. In the circumstances, we are unable to advise the Court whether the Commission might in the future interpret any provision of the Communications Act to prohibit State-imposed access charges. For similar

reasons, we are unable to address the Court's third question regarding the standard of review of a state commission interpretation of FCC orders, another matter on which the Commission has not spoken.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Joel Marcus", is written over the printed name and title of Joel Marcus.

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March 13, 2006

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

GLOBAL NAPS, Inc.,

PLAINTIFF-APPELLANT,

V.

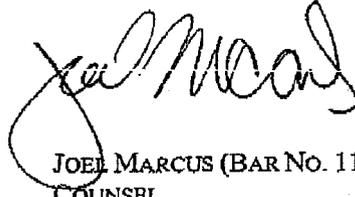
VERIZON NEW ENGLAND, INC., ET AL.,

DEFENDANTS-APPELLEES.

No. 05-2657

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Amicus Curiae Federal Communications Commission" in the captioned case contains 3432 words.



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CERTIFICATE OF SERVICE

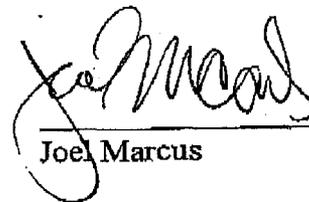
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Joe Marcus

EXHIBIT B

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

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

RECITALS

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

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

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

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

AGREEMENT

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

1. Definitions

For purposes of this Amendment the following definitions apply:

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

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

2. Exchange Service (EAS/Local) Traffic

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

3. ISP-Bound Traffic

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

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

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

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

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

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

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

equal to the 2002 ceiling applicable to that Agreement.

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

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

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

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

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

4. Effective Date

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

5. Rate Election

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

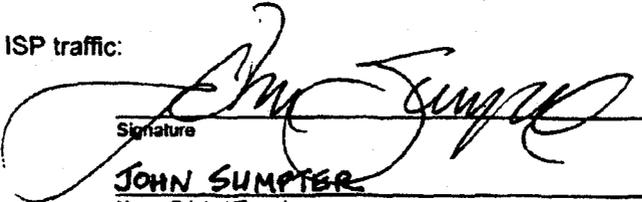
Current rate for voice traffic in the existing Interconnection Agreement:

Signature

Name Printed/Typed

OR

The rate applied to ISP traffic:



Signature

JOHN SUMPTER

Name Printed/Typed

6. Change of Law

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

7. Further Amendments

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

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

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

Pac-West Telecomm, Inc.

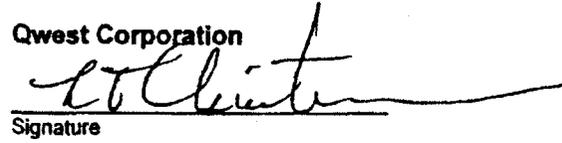

Signature

John Supter
Name Printed/Typed

Vice President - Regulatory
Title

8/12/2007
Date

Qwest Corporation


Signature

L. T. Christensen
Name Printed/Typed

Director - Business Policy
Title

2/6/03
Date