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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
SUPPLEMENTAL BRIEF**

Pursuant to the Procedural Order issued by Administrative Law Judge Amy Bjelland on April 25, 2006, Qwest Corporation ("Qwest") hereby files its Supplemental Brief to address *Global NAPs, Inc. v. Verizon New England, Inc.*, ___ F.3d. ___, 2006 WL 924035 (1st Cir. April 11, 2006) ("*Global NAPs*") and specifically how it may affect the Recommended Opinion and Order ("ROO") issued by the ALJ on April 13, 2006. For the reasons that follow, the *Global NAPs* decision demonstrates that the ROO is inconsistent with binding federal law in several material respects and should therefore be amended to reach the conclusion that Qwest, as matter of law, is not liable for non-local traffic bound for Internet Service Provider ("ISPs") under the interconnection agreement between Qwest and Pac-West Telcomm ("Pac-West"). This non-local traffic is commonly known as Virtual NXX or "VNXX" traffic.

I. BACKGROUND

Historically, telephone calls have been divided into two major categories. Calls placed to

1 an end user in the same local calling area (“LCA”) have been classified as local calls. Calls
2 placed to an end user in a different local calling area have been classified as long distance (or
3 interexchange) calls. After the Telecommunications Act of 1996 (the “Act”) became law, the
4 FCC promulgated regulations that prescribed the intercarrier compensation rules that would
5 apply to each of the two basic types of calls. Local calls placed by a customer of one local
6 exchange carrier to a customer of another local exchange carrier would be subject to reciprocal
7 compensation. Pursuant to section 251(g) of the Act, long distance calls would remain subject to
8 the access charge rules that had applied before the Act.

9 One significant issue that arose under the reciprocal compensation rules was whether
10 calls placed to an ISP located in the same LCA as the calling party should be subject to
11 reciprocal compensation even though these calls were often routed to websites outside the LCA.
12 This issue was addressed in a series of decisions beginning with the FCC’s *ISP Declaratory*
13 *Order*.¹ The *ISP Declaratory Order* was appealed to the D. C. Circuit Court of Appeals which,
14 after review, remanded the issue back to the FCC. *Bell Atlantic Cos. v. FCC*, 206 F.3d 1 (D.C.
15 Cir. 2000). The FCC then issued its *ISP Remand Order* which was also appealed to the D. C.
16 Circuit. Once again, in *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), the D. C. Circuit
17 remanded the issue back to the FCC. In so doing, the D. C. Circuit confirmed that the issue
18 being addressed had remained the same throughout this series of proceedings. The question, as
19 described by the *WorldCom* court, was what intercarrier compensation should apply to “calls
20 made to internet service providers (“ISPs”) *located within the caller’s local calling area.*” (*Id.*
21 at 430; emphasis added).

22 In its complaint, Pac-West sought to obtain compensation pursuant to the *ISP Remand*
23

24 ¹ Declaratory Ruling in CC Docket No. 96-98 and NPRM in CC Docket No. 99-68, *In the Matter*
25 *of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*
26 *and Intercarrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689 (1999) (“*ISP*
Declaratory Order”).

1 Order for all calls placed to ISPs, not just calls placed to ISPs located in the same LCA as the
2 calling party. Qwest opposed the complaint, and argued that the *ISP Remand Order* expressly
3 recognized that section 251(g) of the Act preserved the existing access charge rules applicable to
4 long distance calls, including long distance calls placed to an ISP. (*ISP Remand Order* ¶¶ 36-
5 39). In the *ISP Remand Order*, the FCC said nothing to indicate that it was extending its new
6 compensation regime to cover long distance calls placed to ISPs, and the *ISP Remand Order*
7 does not even mention VNXX.

8 On April 13, 2006, the ALJ issued a Recommended Opinion and Order (“ROO”)²
9 concluding that “[w]e do not read the *ISP Remand Order* as limited to ISPs with a server located
10 in the same local calling area as its customers.” (ROO ¶ 20). The ALJ thus concluded that
11 VNXX ISP-bound traffic was covered by the ICA. (*Id.* ¶ 21). Thus, the ALJ ordered that Qwest
12 “shall compensate Pac-West Telecomm, Inc. for ISP-bound traffic consistent with this decision.”
13 (ROO at 11). Qwest filed Exceptions to the ROO on April 24, 2006. Among other arguments,
14 Qwest argued that the *ISP Remand Order* left intact the access charge compensation regime
15 applicable to long distance calls placed to ISPs and therefore did not prescribe intercarrier
16 compensation for VNXX ISP traffic. (Qwest Exceptions at 4-11).

17 Shortly before the ALJ issued the ROO, the First Circuit Court of Appeals issued its
18 decision in *Global NAPs*. *Global NAPs* rejects the conclusion that the *ISP Remand Order*
19 compensation scheme applies to all ISP traffic, and in particular, long distance or VNXX ISP
20 traffic. For the reasons that follow, *Global NAPs* requires the reversal of the ROO and entry of
21 an order in Qwest’s favor.

22 II. ARGUMENT

23
24

25 ² Recommended Opinion and Order, , *In the Matter of Pac-West Telecomm, Inc. v. Qwest*
26 *Corporation*, Docket Nos. T-01051B-05-495 & T-03693A-05-0495 (ALJ Bjelland, April 13,
2006) (“ROO”).

1 **A. Several Findings in the ROO are Directly Impacted by *Global NAPs*.**

2

3 The ROO is explicitly premised on a reading of the *ISP Remand Order* that, under the
4 binding authority of *Global NAPs*, is demonstrably incorrect. The incorrect reading of the *ISP*
5 *Remand Order* affects several critical findings in the order. Among those findings are:

6 1. Finding No. 6 recites the provisions of the ISP Amendment to the parties'
7 ICA that govern this case. While the finding is not, in itself, incorrect, the ROO's
8 interpretation of the breadth of the *ISP Remand Order* results in these provisions being
9 misinterpreted and misapplied (*see* Finding No. 21).

10 2. The ROO's misreading of the *ISP Remand Order* is most notably stated in
11 Finding No. 20: "We do not read the ISP Remand Order as being limited to ISPs with a
12 server located in the same local calling area as its customers." This finding is directly
13 contrary to the holding of *Global NAPs*.

14 3. The conclusion of Finding No. 21 is that "[t]he plain language of the ISP
15 Amendment provides for reciprocal compensation for *all* ISP-bound traffic. Because it
16 does not exclude VNXX ISP-bound traffic, we find that such traffic should be subject to
17 reciprocal compensation under the terms of the ICA and ISP Amendment." (Emphasis
18 added). This finding is likewise premised on a misreading of the *ISP Remand Order* that
19 is corrected by *Global NAPs*.

20 4. Finding No. 22 outlines the concern of the Commission to avoid "a matter
21 of such gravity [as VNXX] without broad industry participation." Yet the effect of the
22 conclusions of the ROO is to do the precise opposite: the conclusion of the ROO
23 validates VNXX in the face of binding authority to the contrary. In light of *Global NAPs*,
24 the correct result under the parties' ICA is to invalidate VNXX, thus avoiding such a
25 serious change in policy during the period in which the Commission may choose to
26 assess the industry and public policy implications of VNXX.

1 **B. *Global NAPs* Requires the Reversal of the ROO's Conclusion.**

2
3 The decision in *Global NAPs* requires reversal of the ROO for three reasons. First,
4 *Global NAPs* holds that the *ISP Remand Order* did not establish a compensation regime
5 applicable to VNXX traffic or other non-local ISP traffic—to the contrary, the *ISP Remand*
6 *Order* applies only to local ISP traffic (*i.e.*, where the calling party and the ISP are physically
7 located in the same LCA). Second, the *Global NAPs* court reaches this conclusion based on a
8 preemption analysis established by the United States Supreme Court that is applicable in all
9 circuits, including the Ninth Circuit in which Arizona is located. Third, to the extent that the
10 Commission retains authority to establish the terms of intercarrier compensation for VNXX or
11 other non-local ISP traffic, it may establish such terms only prospectively and only after a
12 hearing on the merits that includes Staff and other industry participants.

13
14 **C. *Global NAPs* Holds that the *ISP Remand Order* Did Not Establish Intercarrier**
15 **Compensation Applicable to VNXX and Other Non-local ISP Traffic.**

16
17 In *Global NAPs*, a company with the same business plan as Pac-West (*i.e.*, providing
18 services to ISPs for dial up access to the Internet) appealed a decision of a Massachusetts federal
19 district court that had upheld a decision of the Massachusetts Commission³ that access charges
20 apply to interexchange ISP calls (*i.e.*, VNXX). The Massachusetts Commission had determined
21 that VNXX and other non-local ISP traffic is not subject to the *ISP Remand Order* compensation
22 regime. *Global NAPs* argued that the *ISP Remand Order* preempts state commissions and
23 requires that *all* ISP traffic be subject to the *ISP Remand Order's* compensation scheme.

24 After the *Global NAPs* case was fully briefed and argued by the parties, the First Circuit

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26 ³ The Massachusetts Commission is known as the Department of Telecommunications and
Energy ("DTE"). For clarity, Qwest will simply refer to it as the Massachusetts Commission.

1 panel took the unusual step of seeking input from the FCC. Specifically, the court asked the
2 FCC “[w]hether, in the *ISP Remand Order*, . . .the [FCC] intended to preempt states from
3 regulating intercarrier compensation for *all* calls placed to [ISPs], or whether it intended to
4 preempt only with respect to calls bound for [ISPs] in the same local calling area?” (*Amicus*
5 *Brief*⁴ at 2; emphasis in original). The *Amicus Brief* responds primarily to that issue.

6 In response to the First Circuit’s inquiry, the FCC made it clear that while the *ISP*
7 *Remand Order* could be interpreted in different ways, the only issue the FCC was addressing in
8 that order was the intercarrier compensation applicable to calls placed by callers to ISPs in the
9 same local calling area. In its *Amicus Brief*, the FCC stated:

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

14 “The administrative history that led up to the *ISP Remand Order* indicates that in
15 addressing compensation, *the Commission was focused on calls between dial-up*
16 *users and ISPs in a single local calling area. . . . Thus, when the Commission*
17 *undertook in the ISP Declaratory Ruling to address the question “whether a local*
18 *exchange carrier is entitled to receive reciprocal compensation for traffic that it*
19 *delivers to . . . an Internet service provider,” . . . the proceeding focused on calls*
20 *that were delivered to ISPs in the same local calling area.’*

21 ***The administrative history does not indicate that the Commission’s focus***
22 ***broadened on remand.*** The *ISP Remand Order* repeats the Commission’s
23 understanding that “an ISP’s end-user customers typically access the Internet
24 through an ISP service located in the same local calling area.” . . . *The Order*
25 *refers multiple times to the Commission’s understanding that it had earlier*
26 *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 12-13; citations to *ISP Remand Order* omitted;
emphasis added).

Based on the statements made by the FCC, the First Circuit held that “the FCC did not expressly
preempt state regulation of intercarrier compensation for non-local ISP-bound calls” and that the

⁴ A copy of the *Amicus Brief* was attached to Qwest’s final filing of supplemental authority.

1 Massachusetts Commission was “free to impose access charges for such calls under state law.”
2 (2006 WL 924035 at *1). The First Circuit determined that in order for the FCC to have
3 established a compensation regime for non-local ISP traffic, it would have had to have clearly
4 pre-empted the existing access charge rules applicable to interexchange calls placed to ISPs. The
5 Court concluded that the FCC did not clearly pre-empt existing access charge rules:

6 Regardless of which approach is used, the *ISP Remand Order* does not clearly preempt
7 state authority to impose access charges for VNXX ISP-bound traffic; it is, at best,
8 ambiguous on the question, and ambiguity is not enough to preempt state regulation
9 here. (*Id.* at *11; emphasis added).

9 The First Circuit further noted that the *ISP Remand Order* reaffirmed the distinction between
10 reciprocal compensation and access charges:

11 The FCC has consistently maintained a distinction between local and
12 “interexchange” calling and the intercarrier compensation regimes that apply to
13 them, and reaffirmed that states have authority over intrastate access charge
14 regimes. Against the FCC’s policy of recognizing such a distinction, a clearer
15 showing is required that the FCC preempted state regulation of both access
16 charges and reciprocal compensation for ISP-bound traffic. . . .

17 Indeed, in the *ISP Remand Order* itself, the FCC reaffirmed the distinction
18 between reciprocal compensation and access charges. It noted that Congress, in
19 passing the [Act], did not intend to disrupt the pre-[Act] access charge regime,
20 under which “LECs provided access services . . . in order to connect calls that
21 travel to points—both interstate and intrastate—beyond the local exchange. In
22 turn, both the Commission and the states had in place access regimes applicable to
23 this traffic, which they have continued to modify over time.” (*Id.* at * 12, quoting
24 *ISP Remand Order* ¶ 37)

19 Under federal law, enhanced service providers (which include ISPs) are treated as end
20 users for purposes of applying access charges.⁵ The *ISP Remand Order* itself recognizes this
21 rule in paragraph 11 where it states that “ESPs, including ISPs, are treated as end users for the
22 purpose of applying access charges.” Moreover, as the First Circuit noted, “[t]here is no express
23 statement [in the *ISP Remand Order*] that ISP-bound traffic is not subject to access charges.”

25 ⁵ “Under our present rules, enhanced service providers are treated as end users for purposes of
26 applying access charges.” *Northwestern Bell Telephone Company Petition for a Declaratory
Ruling, Memorandum Opinion and Order*, 2 FCC Rcd 5986, 5988, ¶ 20 (1987).

1 (2006 WL 924035 at * 13). Accordingly, interexchange calls to ISPs are rated as interexchange
2 calls, and subject to access charges, just as any other calls between end users would be rated.
3 The FCC has “defined them as ‘end users’ – no different from a local pizzeria or barber shop.”⁶

4
5 **D. The *Global NAPs* Pre-emption Analysis Applies in the Ninth Circuit**

6
7 *Global NAPs* relies upon a well-established pre-emption analysis in reaching its
8 conclusion that the *ISP Remand Order* did not establish compensation for VNXX or other non-
9 local calls to ISPs. (*Id.* at *10-*11). In *Hillsborough County v. Automated Med. Labs. Inc.*, 471
10 U.S. 707 (1985), the United States Supreme Court held that if an agency intends to preempt state
11 regulation, it must clearly indicate its intention. *Hillsborough* is the law and has been followed
12 in the Ninth Circuit.⁷ Thus, the First Circuit’s analysis applies with equal force in the Ninth
13 Circuit, not just in the First Circuit as Pac-West may argue.

14 In arguing that the *ISP Remand Order* applies to VNXX and other non-local ISP traffic,
15 Pac-West has to read the *ISP Remand Order* out of context. As the WorldCom decision made
16 clear, the issue addressed in the *ISP Remand Order* was limited to the treatment of calls placed to
17 ISPs in the same local calling area.⁸ *WorldCom*, 288 F.3d at 430. However, even if one can
18 read the *ISP Remand Order* more broadly, that is not enough under federal law to expand the

19 _____
⁶ *ACS of Anchorage v. FCC*, 290 F.3d 403, 409 (DC Circ. 2002).

20 ⁷ *SkySign International, Inc. v. City and County of Honolulu*, 276 F.3d 1109, 1116-17 (9th Cir.
21 2002); *Siuslaw Concrete Construction Co. v. State of Washington Dept.t of Trans.*, 784 F.2d 952,
957 (9th Cir. 1986).

22 ⁸ *Global NAPs* relied directly on the language from *WorldCom* that stated that the *ISP Remand*
23 *Order* applies only to local ISP traffic. (2006 WL 924035 at *13). Qwest has previously briefed
24 the impact of the Hobbs Act on this case (*see* Qwest’s Opening Brief at 23; Qwest Response
25 Brief at 17, 19; Qwest’s Exceptions to Administrative Law Judges Administrative Opinion and
26 Order at 4.). Without repeating that argument, suffice it to say that under federal law the courts
of appeal have the exclusive jurisdiction to interpret FCC orders. Two federal circuit court
decisions, first *WorldCom*, and now *Global NAPs*, have ruled that the *ISP Remand Order*
applies only local ISP traffic. Under the Hobbs Act, those decisions are binding on state
commissions.

1 legal effect of the order to change the pre-existing intercarrier compensation rules applicable to
2 long distance calls placed to ISPs.⁹

3 In *Global NAPs*, the VNXX provider argued that, if the FCC only intended to preempt on
4 local ISP traffic, “it would have expressed its intent more clearly, by specifying ‘local ISP-bound
5 traffic.’” (*Global NAPs*, 2006 WL 924035 at *12). The First Circuit pointed out that this
6 argument ignores the distinction between local and interexchange traffic, and the existing
7 compensation regime for interexchange calls. Relying on paragraph 37 of the *ISP Remand*
8 Order, the court concluded that the FCC had reaffirmed the distinction between access charges
9 and reciprocal compensation, and that the FCC clearly had no intention of upsetting or altering
10 the existing federal and state access charge regimes. (*Id.*, referring to *ISP Remand Order* ¶ 37).

11 Not only did *Global NAPs* rule that the FCC had not altered the intra- and interstate
12 access charge regimes, it also ruled that the relationship between access charges and the
13 compensation scheme of the *ISP Remand Order* cannot be divorced from their historical context:
14 “Such a rule [that orders be read in context] properly applies to interpretations of agency orders,
15 especially where the order itself details the background against which it was passed.” (2006 WL
16 924035 at *12, relying on *Central Va. Cmty. Coll. v. Katz*, ___ U.S. ___, 126 S.Ct. 990, 996
17 (2006)). The historical context of the *ISP Remand Order* led the *Global NAPs* court to conclude
18 that the only issue being considered by the FCC was compensation for local ISP traffic.

19

20 **E. The Commission May Not Establish New Intercarrier Compensation Terms for**
21 **VNXX or non-Local ISP Traffic Without a Hearing and the Commission’s Ruling Would**
22 **Operate Only Prospectively**

23

24

25 ⁹ *Qwest Corporation v. Scott*, 380 F.3d 367, 373-74 (8th Cir. 2004) (“The FCC’s statement...is
26 susceptible of a broader interpretation if plucked out of context, but we conclude that when the
{FCC Order} is read as a whole, the [FCC’s] expressed intent to preempt state regulation does
not extend to performance measurements and standards.”).

1 When Pac-West employs VNXX, it offers its ISPs what is in substance a 1-800 service.
2 Accordingly, Qwest is entitled to charge Pac-West intrastate or interstate originating access, as
3 the case may be, for Pac-West's use of Qwest's local network to originate these calls.

4 *Global NAPs* holds that the FCC did not preempt any Commission authority to establish
5 or enforce the terms of intercarrier compensation applicable to intrastate VNXX or non-local ISP
6 traffic. That holding does not give the Commission *carte blanche* authority to change or
7 establish new intercarrier compensation terms applicable to VNXX or non-local ISP traffic. The
8 Commission authority remains circumscribed by Arizona law. Two rules of Arizona law are
9 significant in this regard. First, the Commission may not set new rates for VNXX or non-local
10 ISP traffic without a hearing. Second, if the Commission determined that it should establish
11 intercarrier compensation terms for VNXX or non-local ISP traffic, any new terms it established
12 could operate only prospectively.

13 In addition, an important policy issue is implicated by this case. The ROO notes in
14 Finding No. 22 that an issue as important as VNXX should not be decided "without broad
15 industry participation and the participation of Staff." The approval of VNXX will result in
16 wholesale changes, perhaps even the complete abandonment, of the intrastate access charge
17 regime. It also has profound implications for the historical administration of numbering
18 resources. None of these changes should be made without full industry participation and full-
19 scale review of the implications of VNXX on the public and providers.

20
21 **F. Application of *Global NAPs* to the ROO.**

22
23 It is clear federal law that the *ISP Remand Order* does not preempt state regulation of
24 access charges for intrastate interexchange traffic. Thus, the final question is how the holding of
25 *Global NAPs* applies to the interpretation of the ISP Amendment in this case. As noted in
26 Finding No. 6, the ISP Amendment provides that the term "ISP-bound" "is as described by the

1 FCC” in the *ISP Remand Order*.

2 The question of how to interpret the ISP Amendment in relation to the *ISP Remand*
3 *Order* was addressed in the 2004 arbitration between Qwest and Pac-West (the “2004 Arbitration
4 Ruling”).¹⁰ In the 2004 arbitration, as in this Complaint, Pac-West argued that the language of
5 the ISP Amendment was clear and unambiguous. Pac-West argued that it was therefore
6 unnecessary to examine the FCC’s intent with respect to the *ISP Remand Order* to determine
7 meaning of the ISP Amendment. (*See* 2004 Arbitration Ruling at 2). The arbitrator disagreed
8 with Pac-West, pointing to the recital clause in the ISP Amendment that “the Parties wish to
9 amend the Agreement to reflect the [*ISP Remand*] *Order*.” The arbitrator found, “The term
10 ‘reflection’ suggests a *mirroring of the FCC’s intent and scope*.” (*Id.* at 5; emphasis added).
11 Finally, the arbitrator ruled that “the parties’ intent was to do *no more and no less* than what the
12 FCC provided for in the *ISP Remand Order* with respect to the minutes cap.” (*Id.*; emphasis
13 added). The same approach must be taken in this proceeding.

14 The intent underlying the ISP Amendment is clear: the traffic that is subject to the *ISP*
15 *Remand Order* is the only traffic governed by the ISP Amendment. *Global NAPs* resolves the
16 question whether the term “ISP-bound traffic” should be read out of context to mean *all* traffic
17 bound to an ISP, including VNXX traffic. *Global NAPs* compels a different conclusion than that
18 reached in the ROO. *Global NAPs* requires (1) that the term “ISP-bound traffic” must be read in
19 context and (2), when read in the proper context, that the term “ISP-bound traffic” refers only to
20 local ISP traffic. Both the *ISP Remand Order* and the ICA Amendment use the term “ISP-bound
21 traffic.” The ICA Amendment requires that the term “ISP-bound traffic” be given the same
22 definition given to that term by the FCC in the *ISP Remand Order*. *Global NAPs* ruled that the
23 FCC’s preemption related to “ISP-bound traffic” applies only to local ISP traffic. It follows,
24 therefore, that the term “ISP-bound traffic,” as used in the ICA Amendment, must likewise mean

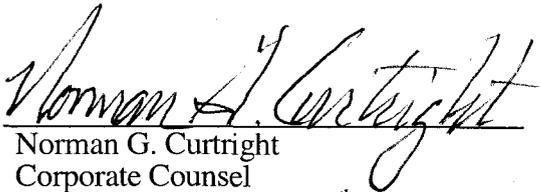
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26 ¹⁰ The 2004 Arbitration between the parties is referenced in paragraph 8 of the ROO and the Ruling is attached to Pac-West’s Complaint as Exhibit C.

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DATED this 10th day of May, 2006.

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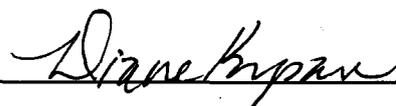
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