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Arizona Corporation Commission

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

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

**QWEST CORPORATION'S APPLICATION FOR
REHEARING AND MODIFICATION OF ORDER**

Pursuant to Arizona Revised Statutes § 40-253 and A.A.C. § R14-3-111, Qwest Corporation ("Qwest") hereby files its Application for Rehearing and Modification of the Opinion and Order in Decision No. 68820, entered in this docket by the Arizona Corporation Commission ("Commission") on June 29, 2006 (the "Order" or "Pac-West Order").

I. INTRODUCTION

As a matter of public policy, the Commission should not order Qwest's local customers to subsidize Pac-West's long distance service to Internet Service Providers ("ISPs") by compelling Qwest to pay Pac-West for VNXX-delivered (long distance) ISP traffic. As the United States Second Circuit Court of Appeals has recently ruled with respect to a company with the same business plan as Pac-West (and substituting names of the parties here for the names of the parties in that case), "[Pac-West's] desired use of virtual NXX simply disguises traffic

subject to access charges as something else and would force [Qwest] to subsidize [Pac-West's] services. This would likely place a burden on [Qwest's] customers, a result that would violate the FCC's longstanding policy of preventing regulatory arbitrage [Pac-West] should not be permitted to game the system and take advantage of [Qwest] in a purported quest to compete."¹ The parties have identified \$865,000 as the amount of money in dispute for ISP termination charges stemming from VNXX traffic.

This Complaint bears great similarity to two other cases involving another company, Level 3 Communications,² which provides interexchange service to Internet Service Providers ("ISPs") using Virtual NXX ("VNXX") routing the same as Pac-West does. In the *Level 3 Arbitration Order* (Decision No. 68817), considered the same day as the instant Order, the Commission held that Level 3 should not use VNXX to provide service to ISPs and VoIP providers.³ However, the Commission was not ready in the *Level 3 Arbitration Order* to permanently ban VNXX the way some other state regulatory agencies have done, and instead determined to ban it while considering the overall issues related to VNXX in a generic docket.⁴ While the Commission recognized that VNXX should be discontinued, the Commission ordered the parties to work out an interim replacement for VNXX.⁵ The Commissioners characterized these actions as maintaining

¹ See, discussion of *Global NAPs II*, Section II.G, below.

² 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 Telecommunication Act of 1996*, Docket Nos. T-03654A-05-0350 & T-01051B-03-0350, Decision No. 68817 (ACC, June 29, 2006) ("*Level 3 Arbitration Order*" or "*Decision No. 68817*"); and

Recommended Order, *Level 3 Communications, LLC v. Qwest Corporation*, Docket No. T-01051B-05-0415 & T-03654A-05-0415 (ALJ Rodda, July 16, 2006) ("*Level 3 Complaint ROO*").

³ *Level 3 Arbitration Order*, at 28-29.

⁴ *Pac-West Order* (Decision No. 68220) ¶ 29; *Level 3 Arbitration Order*, at 82, lines 22-24.

⁵ *Level 3 Arbitration Order* at 82.

the *status quo* pending the resolution of a future generic docket.⁶ The Commission Staff characterized the order's mandate for the parties to work out an interim solution as a potential for a "win-win" for the parties.⁷

In the Level 3 Complaint docket, which is virtually identical to the Pac-West Complaint that is the subject of this proceeding, the ROO builds on the *Level 3 Arbitration Order* and likewise orders Level 3 to cease and desist from the use of VNXX; it also orders the parties to work together to implement an interim replacement for VNXX traffic consistent with the Commission's directive in the *Level 3 Arbitration Order*.⁸ The

⁶ Statement of Commission Chairman Hatch-Miller: "I want to be very, very clear about what we're imposing and how we're changing the status quo, because I don't want to change it without a thorough, thorough, thorough analysis." Certified Transcript of Audiotape of Arizona Corporation Commission Open Meeting Agenda Item U-7, Docket No. T-01051B-05-0350, June 27, 2006. TR 11, lines 15-21.

Statement of Commissioner Gleason: "[I]t looks to me like what we should do here is to keep . . . things as stable as we can . . . for a while." *Id.*, TR 62, lines 2-3.

Statement of Commissioner Mayes: "[M]y concern was I didn't want to do anything that was punitive to Qwest under the status, given the status quo, but I also didn't want us to do anything that would impose a cost on Level 3 that then would be passed onto Level 3's customers and that would disrupt the marketplace as it currently stands, until the Commission has a chance to do the generic docket and come to a policy decision on that. *Id.*, p. 10, lines 18-25.

⁷ *Id.*, TR 64, lines 16-19; TR 66, lines 2-5.

⁸ *Level 3 Complaint ROO*, at 15 (ordering provision). Qwest notes that the term "FX-like traffic" in ordering provisions of the *Level 3 Arbitration Order* is not defined and must be read consistently with the other provisions of the ICA adopted in that Order. Furthermore, consistent with its name, an "FX-like" service must be consistent with and like FX service. Qwest will work with Level 3 to adopt an "FX-like" product that can serve Level 3 during the period in which the Commission considers VNXX issues on a generic basis. Likewise, in this case, and as set forth herein, Qwest's approach is to raise issues for reconsideration as to which it believes the Commission erred; however, Qwest's immediate goal is to reach an interim approach that maintains the *status quo*.

Level 3 Complaint ROO also upholds Qwest's counterclaim that the terms of the ICA do not allow for the exchange of VNXX traffic over LIS trunks.⁹

Compared to the Level 3 Arbitration, and the ALJ's Level 3 Complaint ROO, the Pac-West Order matter stands in stark contrast, and the differences cannot be reconciled. In the Pac-West Order, the Commission does not order Pac-West to cease and desist using VNXX as it does in both of the Level 3 cases.

The issues in the Pac-West Complaint are identical in all material respects to the issues the Commission decided in the Level 3 Complaint, and similar to issues in the Level 3 Arbitration, and the same course of action should be taken by the Commission.¹⁰ Further, just as the ALJ ruled in the *Level 3 Complaint ROO*, the Commission should uphold Qwest's counterclaim that the terms of the ICA do not allow for the exchange of VNXX traffic over LIS trunks. In order to reconcile the Pac-West Order with the findings and course of action laid down by the Commission in the *Level 3 Arbitration Order* and *Level 3 Complaint ROO*, the Commission must order Pac-Qwest to cease and desist using VNXX, and order the parties to work together to implement an interim replacement for VNXX traffic, just as the Commission did in the *Level 3 Arbitration Order*.

Further, the Commission should also conclude that Qwest is not obligated to pay Pac-Qwest for termination of VNXX ISP traffic for the past periods, pending the new interim resolution. The part of the Order compelling Qwest to pay for VNXX termination for past periods the Order must be reversed because it disrupts, rather than maintains the *status quo*, and is utterly at odds with the Commission's ruling that VNXX is not permitted by the ICA. The Order's analysis of the "plain language" of the ICA is clearly wrong. The Commission's finding

⁹ *Id.* ¶ 61.

¹⁰ This does not mean that Qwest agrees with all reasonings and conclusions in the Level 3 Complaint ROO. Qwest identified erroneous portions of that ROO in Qwest's Exceptions filed on July 17, 2006. *See* fn 11 below.

that the scope of the FCC's *ISP Remand Order* is unclear cannot be supported in light of four separate decisions by U.S. Courts of Appeal construing the FCC's *ISP Remand Order* (two of which have been released in just the last three weeks).

The actions Qwest requests are legally correct and will maintain the true status quo for past periods, as well as establish the possibility for a "win-win" solution prospectively. For past periods the parties will be left in the same economic position they occupied coming into the hearing room. Pac-West will have provided its interexchange service to its ISP customers using VNXX without penalty, using LIS trunking, and without paying for originating access; and Qwest will not have had to subsidize Pac-West by the payment of termination charges for VNXX (long distance).

II. DISCUSSION

Qwest seeks reconsideration of the dismissal of Qwest's counterclaims in this docket. Qwest asks for a ruling that Pac-West's use of "Virtual NXX" ("VNXX") routing over local interconnection service (LIS) trunks is not permitted by the ICA, just as the Commission did in the *Level 3 Arbitration Order*. Qwest further asks that the Order be modified to require the parties to work with each other to implement an interim replacement for VNXX, just as the Commission did in the *Level 3 Arbitration Order*. Qwest seeks reconsideration of the Commission's finding and order that the ICA, including the ISP Amendment, requires Qwest to pay ISP terminating compensation to Pac-West for VNXX ISP traffic for past periods and on a going-forward basis. Qwest asks that the Commission reverse the finding and order requiring Qwest to pay ISP terminating compensation to Pac-West for VNXX traffic. Qwest thus requests that the Commission reconsider its order to accomplish the above-described modifications to its order. Those actions will complete the steps necessary to maintain the *status quo* between the parties with respect to the thorny issue of ISP compensation in the context of VNXX until the

Commission issues a future decision resolving the use of VNXX, just as the Commission sought to do in the *Level 3 Arbitration Order*.¹¹

Qwest incorporates by reference the arguments it has made previously in this docket, as a part of this application for rehearing, including but not limited to, the illegality of VNXX routing under existing Arizona rules.

A. The Order's Failure to Prohibit Pac-West's Use of VNXX Directly Conflicts With the Commission's Recent Decision in the *Qwest/Level 3 Arbitration Order*, and With the *Level 3 Complaint ROO* in the Level 3 Complaint, and Is Therefore Arbitrary and Capricious.

On the same day that the Commission entered its Order in this matter, the Commission ruled in *Decision No. 68817* in the Level 3/Qwest Arbitration that Level 3 must cease using VNXX in sixty days, and that the parties must work to implement an interim replacement for VNXX until the Commission issues a decision resolving issues concerning use of VNXX.¹² Seven days later, in the Level 3 Complaint case¹³ which is virtually identical to this case, the

¹¹ On July 17, 2006, Qwest filed Exceptions to the ALJ's Recommended Opinion and Order in the closely related matter of the *Formal Complaint of Level 3 v. Qwest*, Docket No. T-01051B-05-415. In its Exceptions Qwest notes the Commission's efforts to maintain the *status quo* between the parties regarding the questions of ISP compensation for VNXX traffic. By its actions in the Level 3 Arbitration to date, the Commission seeks to maintain the *status quo* going forward by ordering the parties to effect a replacement for VNXX; the Commission has maintained the *status quo* by not sanctioning Level 3 for using an unauthorized routing scheme; and Level 3 has provided its long distance service over the last two years without Qwest billing it for access charges. Qwest argued that unless the ROO's ruling forcing Qwest to pay ISP termination for VNXX for the past traffic is rejected, the ROO changes the status quo in only one respect—by making Qwest retroactively pay for ISP termination charges on VNXX traffic. In its Exceptions filed in the Level 3 Complaint matter Qwest asked the Commission to maintain the *status quo* by holding that Qwest does not have to pay termination charges for VNXX traffic—just as Qwest is requesting in this matter.

¹² *Level 3 Arbitration Order*, at 82.

¹³ Recommended Order, *Level 3 Communications, LLC v. Qwest Corporation*, Docket No. T-01051B-05-0415 & T-03654A-05-0415 (ALJ Rodda, July 16, 2006) ("*Level 3 Complaint ROO*"). Qwest filed exceptions to certain portions of the *Level 3 Complaint ROO*.

ALJ issued her *Level 3 Complaint ROO* that concludes, consistent with *Decision 68817*, that Level 3 cease and desist from the use of VNXX within 60 days¹⁴; in addition, the *Level 3 Complaint ROO* ruled that the terms of the ICA do not allow for the exchange of VNXX traffic over LIS trunks¹⁵. Despite these two rulings banning the use of VNXX, the Commission did not order Pac-West to discontinue the use of VNXX as it did in the Level 3 cases.¹⁶ This incongruity is all the more perplexing in view of the fact that in the *Pac-West Order*, the Commission has also ordered a future generic review of VNXX. Thus in the *Pac-West Order*, the Commission has only done half of what it did in the Level 3 cases—it orders a generic proceeding on VNXX, but allows Pac-West to continue indefinitely to use VNXX over LIS trunks in violation of the ICA. Nothing in the *Pac-West* case justifies such disparate treatment.

B. The Commission's dismissal of Qwest's Counterclaims Regarding the Lawfulness of VNXX and the Misuse of LIS Trunks in Violation of the Interconnection Agreement is Erroneous.

The Commission should reconsider its dismissal of Qwest's counterclaim that asks the Commission to order PacWest to cease using VNXX routing. Qwest argued extensively that VNXX is an illegal scheme because it violates a number of Arizona Corporation Commission regulations.¹⁷ Qwest incorporates those arguments here by reference. In this Order and in the *Level 3 Arbitration Order*, the Commission recognizes that VNXX is a departure from the historic means of routing and rating calls and has broad implications for intercarrier compensation. By banning VNXX in the near term and ordering a generic docket regarding VNXX, the Commission implicitly recognizes the distinct possibility that it will find VNXX to

¹⁴ *Id.* ¶ 64.

¹⁵ *Id.* ¶ 61.

¹⁶ *Pac-West Order* ¶ 29.

¹⁷ *See*, Qwest's Opening Brief, at 26-29; Qwest's Response Brief, at 7-10.

be inconsistent with existing regulations and contrary to public policy generally. The Commission's dismissal of Qwest's VNXX counterclaim is thus inconsistent with the provisions of the order regarding a generic docket on the question. The Commission should, at a minimum, state that Qwest's counterclaim is not decided at this time, and Qwest is not prejudiced with respect to its claims that VNXX is unlawful..

Additionally, as discussed above, the Commission should find that the ICA does not allow for the exchange of VNXX traffic over LIS trunks just as Administrative Law Judge Rodda does in the *Level 3 Complaint ROO*. There is no difference in the two agreements that would account for a different result.¹⁸ Therefore, the Commission should grant, rather than dismiss, Qwest's counterclaim regarding the misuse of LIS trunks.

C. The Conclusion That Compensation Must be Paid On All ISP Traffic Without Exception for VNXX ISP Traffic (¶¶ 26, 28), Is Not Supported By the "Plain Language" of the ICA.

The Commission should reconsider its conclusion that the plain language of the ISP Amendment provides for compensation for all ISP-bound traffic. The "plain language" interpretation is plainly wrong. The language the Commission cites for its "plain language" finding clearly relates to the compensation rate for local / EAS traffic, not for VNXX. That language, from Section 2 of the ISP Amendment states as follows:

"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."

Section 5 provides:

"The reciprocal compensation rate elected for (§251(b)(5)) traffic is . . . [t]he rate applied to ISP traffic."

¹⁸ The *Level 3 Complaint ROO* concludes at ¶61, "Under the terms of the ICA, the use of LIS trunks is limited to EAS/Local traffic that is specifically defined as traffic that is originated and terminated within an LCA. VNXX ISP-bound traffic does not originate and terminate in the same LCA. Thus the terms of the ICA do not allow for the exchange of VNXX traffic over LIS trunks." Qwest's Opening Brief describes the exact same issues and corresponding sections from the Pac-West / Qwest ICA, at 42-44.

The sections relied upon in the Order, quoted above, clearly distinguish two types of traffic—ISP-bound traffic, on the one hand, and § 251(b)(5) traffic on the other.¹⁹ As an adjunct to the rate caps which were part of the *ISP Remand Order*, the FCC established a “mirroring rule,” which provided that the rate caps on ISP-bound traffic would apply only if the ILEC also offered to charge the CLEC the same capped rate to terminate local traffic that originated on the CLEC’s network.²⁰ Considered in that light, it is clear that the language quoted concerns only the rate to be charged for EAS and local traffic exchanged under section 251(b)(5)— it does not concern ISP-bound traffic at all.

Further, the word “all” may not reasonably be construed to modify “ISP-bound.” The words “ISP-bound” do not even appear in that sentence. In the sentence quoted, the word “all” clearly only applies to EAS and local traffic exchanged under section 251(b)(5), which is a distinctly different type of traffic from ISP-bound traffic under the still-binding *ISP Remand Order*.²¹

The Order notes that the ISP Amendment does not expressly exclude VNXX ISP traffic from the scope of ISP-bound traffic. However, the Commission could just as easily have concluded that, if the Parties meant to include VNXX traffic in the meaning of ISP-bound traffic, they would have said so. The interpretation that is most supportable, however, is that the parties

¹⁹ The Order seems to confuse the two types of traffic into one. However, there is no basis for doing so. In the *ISP Remand Order*, the FCC was very clear that it regarded ISP traffic as something different from § 251(b)(5) traffic. *ISP Remand Order* ¶¶ 1, 3.

²⁰ See *ISP Remand Order* ¶8 9; see also explanation of rate caps and mirroring rule provided in *In Re Core Communications, Inc.*, 2006 WL 1789003, at *4 (D.C. Cir. June 30, 2006).

²¹ It appears that the order accepts the idea that ISP-bound traffic is section 251(b)(5) traffic (see *Pac-West Order* ¶ 22). In fact, the *ISP Remand Order* found that ISP traffic is not section 251(b)(5) traffic (¶¶ 1, 3), and the *WorldCom* decision, while critical of the rationale of the *ISP Remand Order*, remanded but did not vacate the order. *The ISP Remand Order* thus remains fully in effect. Thus, relying on language in the ICA related to section 251(b)(5), a category designed to govern only local traffic, cannot be the basis for validating and requiring compensation for VNXX.

did not need to carve out that which was never included in the first place. As ALJ Rodda concluded in the *Level 3 Complaint ROO*, “under the terms of the ICA, the use of LIS trunks is limited to EAS/local traffic VNXX ISP-bound traffic does not originate and terminate in the same LCA. Thus the terms of the ICA do not allow for the exchange of VNXX traffic over LIS trunks.”²² In that light, the fact that the ISP Amendment does not carve out VNXX ISP traffic provides no basis for finding that Qwest must pay termination for such traffic. Indeed, the absence of any reference to VNXX in the Amendment is strong evidence that the parties did not intend to include it.

Once the Commission reconciles the Pac-West Order with the Level 3 finding of Judge Rodda that VNXX is not permitted to be offered over LIS trunks, it will be clear that the ISP Amendment could not reasonably be interpreted to require payment for traffic delivered by means which are forbidden by other provisions of the very same agreement.

D. The Conclusion That the Scope and Breadth of *ISP Remand Order* Is Unclear Is Erroneous. Four Different U. S. Courts Of Appeal Decisions (Two More Decisions Handed Down In The Last Three Weeks) Preclude a Finding That the *ISP Remand Order* Applies To All Calls To ISPs.

In regard to the crux of the dispute, whether the VNXX ISP-bound traffic is eligible for compensation under the *ISP Remand Order*, the Order concludes that “current jurisprudence at the federal level is inconclusive, (¶ 20) and “unsettled” (¶ 25). The *Pac-West Order* found that neither *WorldCom, Inc. v. FCC*²³ (“*WorldCom*”) nor the First Circuit’s decision in *Global NAPs v. Verizon New England*²⁴ (“*Global NAPs I*”) are dispositive of the scope of the *ISP Remand Order* (¶ 25). These conclusions are demonstrably incorrect. Moreover, those two decisions were reaffirmed by two more federal circuit court decisions (another from the D.C. Circuit and a

²² *Level 3 Complaint ROO* ¶ 61. (emphasis added)

²³ 288 F.3d 429 (D.C. Cir. 2002).

²⁴ 444 F.3d 59 (1st Cir. 2006).

decision of the Second Circuit) that likewise conclude that the scope of the *ISP Remand Order* is limited to local ISP traffic. Given those clear holdings, there is simply no basis to conclude that the law regarding the scope of the *ISP Remand Order* is unsettled.

Qwest's Opening and Response briefs provided a detailed analysis of the history leading up to the *ISP Remand Order* and an analysis of the order itself, all of which demonstrates conclusively that the *ISP Remand Order* applies only to local ISP traffic. (Qwest Opening Brief at 11-25, Qwest Reply Brief, at 12-22).²⁵ But other compelling authority leads to the same conclusion. Four federal circuit court decisions have all concluded that the scope of the *ISP Remand Order* is limited to local ISP traffic, and that existing state and federal compensation regimes for interexchange calls remain unaffected by the order.²⁶ With four federal circuit court decisions agreeing on the scope of the *ISP Remand Order*, that question is no longer subject to any reasonable debate.

The first statement on the question of the breadth of the *ISP Remand Order* comes in the D.C. Circuit's review of the *ISP Remand Order* in *WorldCom*, where the D.C. Circuit stated the *holding* of the *ISP Remand Order*: "In the order before us the [FCC] held that under § 251(g) of the Act it was authorized to 'carve out' from § 251(b)(5) calls made to internet service providers

²⁵ Among those reasons were the fact that the context and language *ISP Remand Order* is clear that the only issue being considered by the FCC was local ISP traffic (*ISP Remand Order* ¶¶ 10-13), a proposition that is confirmed by FCC's unequivocal statements that it had no intent to interfere with either the interstate or intrastate access charge regime that applies to interexchange calls (*Id.* ¶¶ 34-41). Those reasons alone are more than sufficient to conclude that the *ISP Remand Order* applies only to local ISP traffic.

²⁶ The decisions of the federal circuit courts must be followed by the Commission because, by statute, they are given the authority to definitively interpret FCC orders. 2 U.S.C. § 2342(1) (known as the Hobbs Act) states: "The court of appeals (other than the United States Court of Appeals for the federal circuit) has *exclusive jurisdiction* to enjoin, set aside, suspend (in whole or in part), or determine the validity of (a) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." 2 U.S.C. § 2342(1) (emphasis added). 47 U.S.C. § 402(b) sets forth a few specific exceptions to 47 U.S.C. § 402(a), none of which applies here.

("ISPs") located within the caller's local calling area."²⁷ Thus, the court that was statutorily armed with exclusive jurisdiction to interpret the *ISP Remand Order* states, in plain and unequivocal language, that the *ISP Remand Order* applies *solely* to local ISP traffic. Events since *WorldCom* have demonstrated that the D. C. Circuit's description of the holding of the order is neither ambiguous nor unsettled.

The most definitive subsequent decision is the *Global NAPs I* decision, wherein the First Circuit ruled that the scope of the preemption in the *ISP Remand Order* applies only to local ISP traffic. After the case was fully briefed and argued, the First Circuit panel asked the FCC to comment on the scope of the *ISP Remand Order*, which the FCC did in an *Amicus Brief*.²⁸ The *Pac-West Order* suggests that, because the FCC declined to opine on the ultimate question, the *Amicus Brief* leaves the question of the scope of the order; therefore, the order concludes that, despite *Global NAPs I*, no dispositive ruling has been made (§ 25). But this position can only be reached by ignoring the very specific comments made by the FCC and by ignoring the clear holding of *Global NAPs I*. While declining to take a position on the ultimate question, the FCC was extremely specific and forthright in stating that the *only issue* before the FCC in the *ISP Remand Order* was intercarrier compensation for local ISP traffic:

"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*. . . . 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," . . . *the proceeding focused on calls that were delivered to ISPs in the same local calling area.*"

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." . . . *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*

²⁷ 288 F.3d at 430 (emphasis added).

²⁸ A copy of the *Amicus Brief* was attached to Qwest's seventh filing of supplemental authority.

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).

The Order’s conclusion that the *ISP Remand Order* could apply to all ISP traffic cannot be squared with the FCC’s own unequivocal statements that only local ISP traffic was at issue. Unless one were to make the unsupported argument that the FCC rendered a decision on an issue that it acknowledges was not even before it, the only issue the FCC could have decided in the order was the compensation regime for local ISP traffic. That is precisely the holding of *Global NAPs I*, that the FCC did not preempt the existing access charge rules applicable to interexchange calls placed to ISPs. 444 F.3d at 72. The First Circuit further noted that the *ISP Remand Order* reaffirmed the distinction between reciprocal compensation and access charges:

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

Indeed, in the *ISP Remand Order* itself, the FCC reaffirmed the distinction between reciprocal compensation and access charges. It noted that Congress, in passing the TCA, did not intend to disrupt the pre-TCA access charge regime, under which “LECs provided access services ... in order to connect calls that travel to points—both *interstate* and intrastate—beyond the local exchange. In turn, both the Commission and the states had in place access regimes applicable to this traffic, which they have continued to modify over time.” *ISP Remand Order* ¶ 37. (444 F.3d at 73).

The court also quoted several statements from the *Amicus Brief* that support “the conclusion that the order did not clearly preempt state regulation of intrastate access charges.” *Id.* at 74. Thus, since *Global NAPs I* holds unequivocally that the *ISP Remand Order* did not establish a compensation regime applicable to non-local ISP traffic (VNXX), the Arizona Commission retains authority over intrastate access charges, those charges remain fully in effect, and any change to the tariffs that impose the charges may occur only after proper notice and hearing (neither of which has occurred). The fact that, in its *Amicus Brief*, the FCC did not reach a conclusion on the ultimate issue of the scope of the order is irrelevant because the First Circuit

was unequivocal on that issue, concluding through the application of its appellate authority to interpret a federal administrative order that the *ISP Remand Order* applies only to local ISP traffic.

In the last three weeks, the D.C. Circuit, in *In re Core Communications*,²⁹ and the Second Circuit, in *Global NAPs v. Verizon New England*³⁰ (“*Global NAPs II*”), have weighed in on this issue, and both confirm the conclusions reached in *WorldCom* and *Global NAPs I*.

In *Core Communications*, the D. C. Circuit (the same court that decided *WorldCom*) upheld the FCC’s order that removed the new markets rule and growth cap rule that were initially adopted in the *ISP Remand Order*. In the course of describing the history leading up to the order under consideration, the court described the *ISP Remand Order*:

“[The FCC] found that calls made to ISPs located within the caller’s local calling area fall within those enumerated categories—specifically, that they involve ‘information access.’ . . . Those calls, the FCC concluded, are not subject to § 251(b)(5), but are instead subject to the FCC’s regulatory authority under § 201. . . .”³¹

It is impossible to read this language as anything other than a reaffirmation of the *WorldCom* conclusion that the *ISP Remand Order*’s holding applies only to local ISP traffic.³²

Finally, on July 5, 2006, the Second Circuit issued the *Global NAPs II* decision, wherein it affirmed the Vermont Board’s decision to ban VNXX in Vermont. The court first concluded that, while the FCC has addressed Internet compensation issues, it “has never directly addressed the issue of ISP-bound calls that cross local-exchange boundaries.” 2006 U. S. App. LEXIS 16906, at *11. The implication of that statement is obvious. If the FCC has never addressed the

²⁹ 2006 WL 1789003 (D. C. Cir. June 30, 2006).

³⁰ 2006 U. S. App. LEXIS 16906 (2nd Cir., July 5, 2006),

³¹ 2006 WL 1789003, at *2 (citations to *ISP Remand Order* and other authorities omitted; emphasis added).

³² It is likewise impossible to conclude, given these decisions, that the term “ISP-bound,” as used in the *ISP Remand Order*, is anything other than a term of art used by the FCC to refer to local ISP traffic. A broader reading of that term results in an illogical, nonsensical result.

issue of terminating compensation for VNXX ISP traffic, the ROO's conclusion that "the *ISP Remand Order* applies to all ISP-bound traffic" (§ 59) is a logical impossibility. If the FCC has never addressed any issue other than local ISP traffic, it is impossible to say that the *ISP Remand Order* applies to all traffic—the order, by definition, cannot apply to an issue that it did not address. During the course of its decision, the Second Circuit cited *Global NAPs I* approvingly for the proposition that "[t]he ultimate conclusion of [*ISP Remand Order*] was that ISP-bound traffic *within a single calling area* is not subject to reciprocal compensation." 2006 U. S. App. LEXIS 16906, at *22, citing *Global NAPs I*.³³

There are only two conclusions that can be reached from these cases. First, the FCC did not even address VNXX ISP traffic in the *ISP Remand Order* and, second, there is no rational way to conclude that the *ISP Remand Order* applies to anything other than what it did address: local ISP traffic.³⁴ It is therefore also a logical impossibility to conclude that an amendment that was specifically designed to implement the *ISP Remand Order* could possibly govern traffic (VNXX traffic) that, by the FCC's own statements and the rulings of four different courts, is not governed by the *ISP Remand Order*. In light of the consistent and identical conclusions reached by each of these courts, it is hard to conceive of an issue that is more firmly settled than the scope of the *ISP Remand Order*. The Order's findings, in particular paragraphs 22-25, that reach a different conclusion are, as a matter of law, flawed and must be reversed.

³³ The court also noted that to accept the CLEC's arguments "would allow carriers to operate entirely outside the [access charge] compensation scheme so long as they provide some service to an ISP." 2006 U. S. App. LEXIS 16906, at *27.

³⁴ See, e.g., *Neshaminy School Dist. v. Karla B.*, 1997 WL 563421, at *7 (E.D. Pa. 1997) (Holding that an administrative agency "overstepped its authority by addressing an issue not before it. . . . [I]n order for the administrative review system to function properly, issues in dispute must be squarely placed before the agency for its consideration. If the issues are not raised and fully argued before the agency, *then the agency cannot properly decide the issue.*" (emphasis added). Under this principle and in light of the FCC's own statements that the only issue before it was local ISP traffic, the *ISP Remand Order* cannot be read, as the ROO does, to apply more broadly.

E. If the Meaning of the *ISP Remand Order* Is Unclear As the Order Found, the Commission May Not Supply An Interpretation of the ISP Amendment, Because the ISP Amendment Means Only What the *ISP Remand Order* Means. The Proper Result In that Case Is To Leave the *Status Quo*.

The standard for how to interpret the ISP Amendment was established by Arbitrator John Antonuk in the Arbitration Ruling between Qwest and Pac-West Telecomm (AAA Case #77181-00385-02, JAG Case No. 221368, 2004). In interpreting the ISP Amendment in that case, the Arbitrator concluded, “The parties’ intent was to do no more and no less than what the FCC provided for in the ISP Remand Order . . .”³⁵

The *Pac-West Order* finds uncertainty heaped upon uncertainty surrounding the underlying issues. First, the Order erroneously finds that the classification of VNXX traffic is “unsettled” (*Pac-West Order* ¶ 20). The Order erroneously finds that the meaning of the ISP Remand Order is “unsettled.” (*Id.* ¶ 25) However, in the face of all that uncertainty, rather than declaring that the obligations of the parties regarding payment of compensation is likewise unclear, the Commission proceeds to interpret the ISP Amendment as plainly requiring payment, ignoring all of its findings of uncertainty. The proper conclusion, under the rule of interpretation that the parties intended the ISP Amendment to mean nothing more and nothing less than the FCC intended in its *ISP Remand Order*, would be to maintain the *status quo*. Instead, in spite of its findings of uncertainty regarding the nature of VNXX, and its finding about lack of clarity in the federal law, the Commission proceeds to interpret the contract in favor of Pac-West’s interpretation. If the Commission continues to find that the central legal issue of this case, the meaning of the *ISP Remand Order*, is uncertain (a finding that is demonstrably in error as discussed in Section II.D. above), it should use that as a reason to maintain the *status quo*. If the

³⁵ The reason for that rule of interpretation is that the ISP Amendment defines what is meant by ISP-bound traffic by at least three references to the *ISP Remand Order*: (i) the recital clause of the ISP Amendment that “the Parties wish to amend the [ICA] to reflect the [*ISP Remand Order*]; (Emphasis added). (ii) Section 3.1 of the ISP Amendment, which states, “Qwest elects to exchange ISP-bound traffic . . . pursuant to the [*ISP Remand Order*]; and (iii) Section 1.4. of the ISP Amendment, which states, “ ‘ISP-Bound’ is as described by the FCC in the [*ISP Remand Order*].”

Commission continues to find that VNXX's proper classification as local exchange service or as interexchange service is uncertain (a finding that is contrary to the conclusions of the *Level 3 Complaint ROO*), it should use that as a reason to maintain the *status quo*. As regarding payment for VNXX ISP traffic, *status quo* means Qwest should not be forced to pay compensation, and the findings in ¶¶ 26 and 28 should be reversed.

F. A Contract to Pay Compensation for Unlawful Traffic is Void as Contrary to Public Policy.

A familiar rule of contract law holds that if the subject of a contract is illegal, then the contract is void or unenforceable as a matter of public policy. In Qwest's legal arguments made previously in this docket and noted above,³⁶ Qwest made the point that VNXX routing contravenes a number of Commission rules. The Commission did not rule on those arguments, but did decide to open a generic proceeding, which raises the distinct possibility that the VNXX will be found to violate Commission rules or otherwise contrary to public policy. In turn that raises the distinct possibility that Qwest's obligation to pay compensation for VNXX traffic should be void, or voidable, as a matter of public policy.

Because of the distinct possibility that VNXX is contrary to public policy, at a minimum Qwest's obligation to pay for that traffic, should be suspended until there is a determination of that issue.

G. The Commission Should Align It's Decision With Federal Policy Objectives

In *Global NAPs II*, the Second Circuit issued a strong reminder of the policy purposes of the FCC, one of which it emphasized at length in upholding a total ban on VNXX: to prevent arbitrage schemes that benefit the arbitrageur to the detriment of the company that has made the

³⁶ *See* fn 17, above.

actual investment in the network. For example, the court noted that the FCC has warned many times of companies who enter the market

"not so much to expand competition as to take advantage of the relatively rigid regulatory control of the incumbents. In connection with this concern, the FCC has warned time and time again that it will not permit competitors to engage in regulatory arbitrage—that is, build their businesses to benefit almost exclusively from the existing carrier compensation regimes at the expense of both the incumbents and the consumer." 2006 U. S. App. LEXIS 16906, at *8.

Thus, the court noted that it makes good sense for state commissions and not CLECs to define LCAs because "if carriers were free to define [LCAs] for the purposes of intercarrier compensation, the door would be open to *overweening conduct* by the CLECs. . . . Permitting CLECs to define [LCAs] and thereby set the rules for the sharing of infrastructure would eventually require the ILECs to absorb all the costs and allow the CLECs to reap all the profits." *Id.* at *21 (emphasis added). The court's final words in its decision are telling:

"Global's desired use of virtual NXX simply *disguises traffic* subject to access charges as something else and would force Verizon to subsidize Global's services. This would likely place a burden on Verizon's customers, a result that would violate the FCC's longstanding policy of preventing regulatory arbitrage. Telecommunications regulations are complex and often appear contradictory. But the FCC has been consistent and explicit that it will not permit CLECs to game the system and take advantage of the ILEC's in a purported quest to compete." *Id.* at *33.

These are precisely the policy issues here. Qwest has invested extensively in a state-wide network in Arizona, most specifically in the local distribution plant, loop plant, carrier systems, and local switches without which Level 3 would have no access to Qwest local customers. Yet, Level 3 not only wants to use them for free, it wants to profit from Qwest through the application of terminating compensation charges on all ISP traffic. That position is not consistent with the amendment, or with the *ISP Remand Order*, and results in precisely the regulatory arbitrage so strongly criticized by the FCC and the Second Circuit.

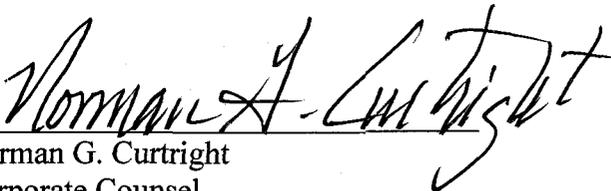
III. CONCLUSION

Based on the foregoing, Qwest respectfully requests the Commission to reconsider its Order set forth in Decision No. 68820, and modify that Order consistent with the principles set forth above.

RESPECTFULLY SUBMITTED, this 19th day of July, 2006.

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