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BEFORE THE ARIZONA CORPORATION COMMISSION

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IN THE MATTER OF THE FORMAL  
COMPLAINT AND REQUEST FOR  
DECLARATORY JUDGMENT OF  
PAC-WEST TELECOMM, INC.  
AGAINST QWEST CORPORATION

DOCKET NO. T-03693A-05-0875  
T-01051B-05-0875

**QWEST CORPORATION'S RESPONSE  
TO PAC-WEST TELECOMM'S  
MOTION IN LIMINE TO BAR  
REFERENCES TO VNXX TRAFFIC**

Respondent Qwest Corporation ("Qwest") hereby files this Response to Pac-West Telecomm, Inc.'s ("Pac-West") Motion in Limine ("Motion"), filed on July 28, 2006. Qwest urges the Administrative Law Judge ("ALJ") to deny Pac-West's Motion on the following grounds: (1) Pac-West has failed to establish a prima facie case for collateral estoppel, and (2) because the Arizona Corporation Commission ("Commission") adjudicates each case on its specific facts and individual merits, continued discovery of VNXX-related issues is necessary for Qwest in formulating its defense and counterclaims in the above-captioned matter. This Response is supported by the following Memorandum of Points and Authorities.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. Introduction**

In its Motion, Pac-West claims that in Decision No. 68820 (June 29, 2006) ("Decision" or "Order"), the Commission unequivocally rejected Qwest's argument that the parties' interconnection agreement ("ICA") does not allow for the exchange of VNXX traffic over Local Interconnection Service ("LIS") trunks. Motion at 2. Pac-West grossly mischaracterizes the Order. In its Order, the Commission determined that "The crux of

1 the dispute is whether VNXX *ISP-bound traffic is eligible for reciprocal compensation*  
2 under the ICA, the ISP Amendment and the ISP Remand Order.” Decision at 8 (emphasis  
3 added).<sup>1</sup> The issues addressed in that proceeding concerned the interpretation of  
4 reciprocal compensation obligations under the ISP Amendment, which was entered into  
5 between Qwest and Pac-West on May 24, 2002. The Commission held that “The plain  
6 language of the *ISP Amendment* provides for reciprocal compensation for all ISP-bound  
7 traffic. Because it does not exclude VNXX ISP-bound traffic, we find that such traffic  
8 should be subject to reciprocal compensation under the terms of the ICA and *ISP*  
9 *Amendment*.” *Id.* at 10. As Pac-West recognized in its Motion, the Commission based its  
10 decision on the “plain language of the specific contract terms.” *Id.* These specific terms  
11 include Sections 1.4, 2, 3.1 and 5 of the ISP Amendment. The Commission’s holding in  
12 Decision 68820 did not reach the issue raised by the Counterclaims made by Qwest.  
13 Therefore, Qwest cannot be collateral estopped from raising it in this proceeding.

14 In addition, the Commission does not establish policies through piecemeal orders.  
15 Therefore, it is contrary for Pac-West to assume that the Commission will embrace  
16 Decision No. 68820 as anything more than a resolution of the dispute in that particular  
17 proceeding. Because the Commission renders its decisions based on the individual merits  
18 of each case, Qwest must be allowed to conduct its lawful discovery of VNXX-related  
19 issues (which, for purposes of this Response, includes “non-local” traffic, the physical  
20 location of Qwest customers or network facilities used to serve Pac-West customers) in  
21 order to establish a foundation for the arguments it will make in defending against Pac-  
22 West’s allegations, as well as pursuing its counterclaims in this proceeding.

23 **II. Pac-West Fails to Establish a Prima Facie Case for Collateral Estoppel in**  
24 **Seeking to Bar Qwest Discovery and Counterclaims Involving VNXX**

25 Collateral estoppel, or issue preclusion, binds a party to a decision on an issue  
26 litigated in a previous proceeding if the following factors are satisfied: (1) the issue was

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28 <sup>1</sup> Pac-West argued that Qwest withheld approximately \$443,784.34 in compensation owed  
for the termination of local exchange traffic between January 1, 2004 and May 31, 2005.

1 actually litigated in the previous proceeding; (2) the parties had a full and fair opportunity  
2 and motive to litigate the issue; (3) a valid and final judgment on the merits was entered;  
3 (4) resolution of the issue was essential to the decision; and (5) there is common identity  
4 of the parties. *Campbell v. SZL Properties*, 204 Ariz. 221, 223, 62 P.3d 966, 968 (App.  
5 2003); *see also Lovitch v. Indus. Comm'n of Ariz.*, 202 Ariz. 102, 106, 41 P.3d 640, 644  
6 (App. 2002); *Garcia v. Gen. Motors Corp.*, 195 Ariz. 510, 514, 990 P.2d 1069, 1073  
7 (App. 1999); *Hawkins v. State*, 183 Ariz. 100, 103, 900 P.2d 1236, 1239 (App. 1995).

8         The ISP traffic compensation issues decided by the Commission in Decision 68820  
9 are not the same as those raised by Qwest in this proceeding. First, the plain language of  
10 the ISP Amendment, upon which the Commission based its Order, is not at issue. Rather,  
11 Qwest asserts that Pac-West cannot use LIS facilities for VNXX service under the ICA,  
12 InterLCA and SPOP amendments. In Decision 68820, the Commission neither analyzed  
13 nor ruled on whether the ICA allows the routing of VNXX traffic over LIS.<sup>2</sup> Instead, the  
14 Commission: (1) held that Qwest is obligated to pay compensation for all ISP traffic,  
15 without exception for VNXX-delivered ISP traffic, and (2) ordered that a generic docket  
16 should be opened to investigate VNXX.

17         By contrast, Qwest's counterclaims in this proceeding seek to preclude Pac-West  
18 from using LIS facilities ordered under the ICA for VNXX service. In another recent  
19 case, the question of whether the ICA allows VNXX over LIS has been treated by the  
20 Commission as a separate question from the question of whether Qwest is obligated to pay  
21 compensation for ISP traffic, regardless of how delivered. *See Opinion and Order, Level*  
22 *3 Communications, LLC v. Qwest Corporation*, Decision No. 68855 (July 28, 2006)  
23 ("*Level 3 Complaint Order*"). In the *Level 3 Complaint Order*, which was issued *after*  
24 Decision No. 68820, the Commission held that the exchange of traffic over LIS trunks is  
25 not allowed by the ICA; the Commission ordered Level 3 to cease and desist VNXX  
26 traffic routing; and the Commission ruled that under the ICA and the ISP Amendment,  
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28 <sup>2</sup> Qwest has asserted that the Commission's failure to so rule was in error.

1 Qwest is obligated to pay retroactively for ISP traffic, regardless of whether it is  
2 transmitted over VNXX routing.<sup>3</sup> Because Decision No. 68820 does not resolve the  
3 specific issue of whether the ICA allows VNXX over LIS, Qwest cannot be collaterally  
4 estopped from raising it in this proceeding.

5 Further, Pac-West now attempts to expand the limited ruling in Decision No.  
6 68820 to unintended conclusions. Pac-West states, “now that the Commission has issued  
7 its Decision,” “non-local traffic does not exist under the Pac-West ICA, and the physical  
8 location of Pac-West customers is not relevant to the parties’ respective obligations to  
9 fund direct trunk transport.” *Id.* This extension of the holding in Decision 68820 is both  
10 unwarranted and dangerous. As discussed above, the Decision addressed compensation  
11 for ISP traffic. The Decision did not address the issue of the respective obligations of the  
12 parties to fund direct trunk transport. Nor did Decision 68820 hold that the physical  
13 location of Pac-West customers, or the concept of local vs. non-local traffic, was not a  
14 meaningful concept under the ICA. Pac-West’s total assault against the concept that  
15 interconnection under the Act and under the ICA is limited to the exchange of local  
16 traffic, finds no support in Decision No. 68820.

17 Indeed, Decision No. 68820 expressly disclaims that it reaches judgment on the  
18 merits of VNXX. The Commission states:

19 “Our finding in the matter before us is premised on the language of  
20 the ICA and ISP Amendment and the holding in the ISP Remand Order,  
21 and makes no findings concerning the appropriateness of VNXX  
arrangements on a going-forward basis.” Decision, at 11.

22 The Commission’s disavowal provides persuasive proof that Qwest’s claims regarding  
23 VNXX in this proceeding were not fully addressed or litigated in the previous proceeding  
24 leading to Decision No. 68820. Furthermore, in Decision No. 68820, the Commission  
25 ordered the opening of a generic VNXX docket. Decision at 13. Therefore, there was no  
26 previous applicable final judgment on the merits, which is a requirement under Arizona

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28 <sup>3</sup> Qwest has asserted that the *Level 3 Complaint Order’s* conclusion that the ISP  
Amendment requires payment for VNXX ISP traffic is in error.

1 law before Qwest can be collaterally estopped in this proceeding. *Campbell* at 204 Ariz.  
2 221, 223, 62 P.3d 966, 968.

3  
4 **III. The Discovery of Relevant Information Regarding VNXX May Lead to the**  
5 **Discovery of Admissible Evidence, and Assist the Commission in Resolving the**  
6 **Dispute Based on the Specific Facts and Individual Merits of this Case.**

7 While a general principle of administrative law is to favor the promulgation of  
8 rules and regulations of general applicability – over the generation of policy in piecemeal  
9 fashion through individual adjudicatory orders – Arizona law recognizes that the  
10 Commission, in regulating public service corporations, may make use of orders pertaining  
11 to particular situations or to particular public service corporations. *Arizona Corp.*  
12 *Commission v. Palm Springs Utility Co., Inc.*, 24 Ariz.App.124, 129, 536 P.2d 245, 250.  
13 Previous Commission decisions also recognize this general principle, and intentionally  
14 limit their holdings to the specific facts and individual merits of each case despite broader  
15 policy considerations. *See* Decision No. 62993 (November 3, 2000); Decision No. 68453  
16 (February 2, 2006). As illustrated above in connection with the *Level 3 Complaint Order*,  
17 despite Decision No. 68820, VNXX-related issues continue to be addressed in other  
18 proceedings.

19 In Decision No. 68820, the particular situation at issue involved reciprocal  
20 compensation for VNXX ISP-bound traffic under the plain language of the ISP  
21 Amendment. In contrast, the particular situation raised in this proceeding involves Pac-  
22 West's use of LIS facilities for VNXX service under the plain language of the ICA,  
23 InterLCA and SPOP amendments. Granted, the Commission ordered its Staff to open a  
24 generic docket to address VNXX-related issues on a broader scale. And, Qwest has filed  
25 an Application for Rehearing of Decision No. 68820. However, while these two forums  
26 may provide Qwest an opportunity to address VNXX-related issues, they do not provide a  
27 means for Qwest to specifically challenge Pac-West's use of VNXX when ordering  
28

1 services pursuant to the ICA, InterLCA and SPOP amendments.<sup>4</sup>

2 **IV. Conclusion**

3 By filing its Motion, Pac-West seeks to deny Qwest an opportunity to raise and  
4 address VNXX-related issues specific to this proceeding. Pac-West's Motion fails to cite  
5 any legal authority (Arizona case law or Commission precedent) other than Decision No.  
6 68820 to support its request for collateral estoppel in this proceeding. In fact, Arizona  
7 case law demonstrates that Pac-West failed to establish a prima facie case for collateral  
8 estoppel to prevent Qwest from seeking discovery, or advancing its counterclaims,  
9 concerning VNXX-related matters. Nor does Pac-West acknowledge that Commission  
10 decisions are generally limited to the specific case at issue despite broader policy  
11 implications. For the reasons set forth herein, Qwest urges the ALJ to deny Pac-West's  
12 Motion.

13 RESPECTFULLY SUBMITTED this 23rd day of August, 2006.

14 Norman Curtright  
15 QWEST CORPORATION  
16 20 E. Thomas Road, 16th Floor  
17 Phoenix, AZ 85012  
(602) 630-2187

18 -and-

19 FENNEMORE CRAIG, P.C.

20  
21 By   
22 Timothy Berg  
23 Theresa Dwyer  
24 Patrick J. Black  
25 3003 N. Central Ave, Suite 2600  
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Attorneys for Qwest Corporation

27 <sup>4</sup> At least Pac-West concedes that the type of traffic carried on any one trunk is relevant as  
28 it relates to eligibility for trunks ordered pursuant to the SPOP Amendment.

1 ORIGINAL and 15 copies hand-delivered for  
2 filing this 23rd day of August, 2006, to:

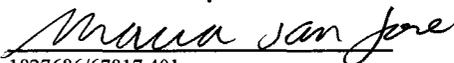
3 Docket Control  
4 ARIZONA CORPORATION COMMISSION  
5 1200 West Washington  
6 Phoenix, Arizona 85007

7 COPY of the foregoing hand-delivered  
8 this 23rd day of August, 2006 to:

9 Amy Bjelland  
10 Hearing Division  
11 ARIZONA CORPORATION COMMISSION  
12 1200 West Washington  
13 Phoenix, Arizona 85007

14 COPY of the foregoing mailed/e-mailed  
15 this 23rd day of August, 2006 to

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