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8 IN THE MATTER OF
9 PAC-WEST TELECOMM, INC.,
10 Complainant,
11 vs.
12 QWEST CORPORATION,
13 Respondent.

DOCKET NO. T-01051B-05-0495
DOCKET NO. T-03693A-05-0495

NOTICE OF FILING

QWEST CORPORATION'S STATEMENT
OF POSITIONS AND ISSUES ON REMAND

15 Pursuant to the Procedural Order dated December 19, 2008, ordering the parties to file
16 their statements of position on issues of law and fact they believe the Arizona Corporation
17 Commission must decide to resolve the Complaint in this matter, Qwest Corporation ("Qwest")
18 files its Statement of Positions and Issues.

19 The Formal Complaint filed by Pac-West on July 13, 2005, sought an order compelling
20 Qwest to pay for Pac-West's termination of VNXX traffic pursuant to the parties' ISP
21 Amendment to ICA that was then in effect, after January 1, 2004.¹ The Commission ruled in

22 ¹ There is no disagreement about what VNXX is. VNXX has been described in several
23 Commission decisions and court orders: "Pac-West offers VNXX service by assigning an NPA-
24 NXX to an ISP customer physically located outside the rate center to which the NPA-NXX is
25 assigned." Arizona Corporation Commission Decision No. 68820, finding of fact ¶9. "VNXX
26 ISP-bound traffic does not originate and terminate in the same LCA." Decision No. 68855, ¶60.
The United States District Court for the District of Arizona has observed, VNXX ISP-bound
traffic, by definition, involves an ISP located outside the caller's local calling area.
Order, *Qwest Corporation v. Arizona Corporation Commission, et al.*, United States District

1 Pac-West's favor in Decision No. 68820, and Qwest paid Pac-West the charges for VNXX
2 traffic, plus interest, that had accrued under Pac-West's theory, and continued to pay termination
3 fees for termination of VNXX traffic under the Commission's order, until that old ICA was
4 terminated by Pac-West. Effective March 22, 2008, Pac-West "opted-in" to a different ICA
5 providing for Commission-approved intercarrier compensation of "FX-like" service in lieu of
6 VNXX.

7 Upon review the United States District Court overturned the Commission's order in
8 Decision No. 68820, determining that: (1) VNXX traffic does not fall within the ISP Remand
9 Order's definition of "ISP bound traffic;" and (2) the plain language of the parties'
10 interconnection agreement (including an ISP amendment) simply incorporates the requirements
11 of the FCC's *ISP Remand Order*.² Having correctly interpreted the *ISP Remand Order* and the
12 parties' interconnection agreement, the court enjoined the conflicting provisions of Decision No.
13 68820. The court further remanded Decision No. 68820 for further consideration and action
14 consistent with the Court's Order.

15 It is important to recognize that this Complaint involves an historical, time-bounded
16 period, starting in January, 2004, and extending to March 21, 2008.

17 With that background, Qwest submits the following positions and issues:

18 1. Qwest submits that the ultimate question is how much of a refund Qwest is
19 entitled to. That amount will be determined based on past traffic and usage. In addition, Qwest
20 will be entitled to interest on the amount, if any, that the Commission determines should be
21 refunded to Qwest.

22 2. It will be necessary for the Commission to determine which traffic during the
23 period was VNXX and therefore not compensable under the ICA. If the Commission
24 determines that some but not all of the traffic at issue was compensable, the Commission will

25 Court for the District of Arizona, Case No. CV-06-2130-PHX-SRB, at p. 14.

26 ² District Court Order, at 20-21.

1 need to determine what portion of the traffic was compensable in order to determine how much
2 of a refund Qwest is entitled to. These will be fact-based issues. In support of its position Qwest
3 will rely on Arizona statutes, regulations, rules, tariffs, Commission decisions, as well as court
4 decisions and state regulatory decisions from other jurisdictions.

5 3. Qwest asserts that VNXX should not be permitted because it violates state
6 statutes, regulations, rules, and tariffs, and would work a substantial change in
7 telecommunications regulation, operations and intercarrier compensation that was never intended
8 or approved by the Commission. The Commission should not vary from its earlier determination
9 in Decision No. 68817 (involving materially similar facts and Level 3) that CLECs should not
10 utilize VNXX arrangements because they undermine the long-standing intercarrier compensation
11 scheme approved by the Commission. These are mixed issues of law and fact.

12 4. Qwest asserts that VNXX is not permitted by the terms of the ICA, as amended.
13 Specifically, and without limitation, under the terms of the ICA, the use of LIS trunks is limited
14 to EAS/Local traffic that is specifically defined as traffic that is originated and terminated within
15 a single LCA. VNXX traffic does not originate and terminate in the same LCA, and therefore is
16 not permitted. *See*, Decision No. 68855, ¶60. This is a mixed issue of law and fact.

17 5. The District Court stated that “No party to this action can achieve the ultimate
18 financial result they seek until the ACC definitively categorizes VNXX.” The Commission’s
19 examination of how to categorize VNXX in this dispute must be conducted within the context of
20 the ICA as it existed during the period, and in the context of the applicable statutes, regulations,
21 and law (including FCC decisions) then extant. In explaining its decision to remand the case to
22 the Commission, the District Court expanded on its holding that it was not the Court’s place to
23 make a determination of what compensation should be applied to VNXX. The Court stated that
24 the Commission may find that VNXX is local, subject to reciprocal compensation, or that it is
25 not local traffic subject to reciprocal compensation, but instead is subject to access charges, or
26 that the Commission could opt for some other yet-to-be defined rate scheme that the Commission

1 deems appropriate. Qwest cautions that these particular passages of the Court's opinion are
2 *dicta*. The Commission cannot establish rates that will be applied retroactively, and cannot
3 retroactively apply heretofore undetermined rules. These propositions are legal issues.

4 6. The District Court stated that in the Commission's dealing with VNXX , any
5 decision is to be guided by the Commission's own discretion, and no party may rely on the
6 District Court's Order to argue that a particular result is required. However, the District Court's
7 admonition cannot be construed as giving the Commission the latitude to ignore the direct
8 rulings made by the District Court. The District Court decided that contrary to the
9 Commission's conclusion in Decision No. 68820, the FCC did not include VNXX traffic in the
10 meaning of "ISP-bound" in the ISP Remand Order. The Commission's unlawful interpretation
11 of the ISP Remand Order was fundamental to its interpretation of the ISP Amendment. Thus, the
12 Complaint's cause of action claiming that the ISP Amendment compels payment of ISP
13 termination charges for VNXX traffic has failed. And, accordingly, Qwest's view is that, absent
14 reformation of the Complaint, Pac-West's Complaint as it was articulated must be dismissed
15 based on the District Court's Order. In order for Pac-West to proceed under a theory other than
16 the one it just lost at the District Court, it must amend its complaint; Qwest reserves the right to
17 assert objections and affirmative defenses that may apply, including but not limited to applicable
18 limitations to the bringing of claims. Should Pac-West be permitted to pursue theories for
19 compensation alternative to the one it pursued in its Complaint and lost at the District Court,
20 Pac-West should be asked to state its claims with specificity, and Qwest should be given the
21 opportunity to answer. These propositions are legal issues.

22 7. Qwest expects that on remand Pac-West will assert that the historical VNXX
23 traffic at issue in this proceeding originated and terminated within the same local area (based
24 solely on whether the NPA-NXX's of the calling number and the called number are associated
25 with the same local calling area), and that VNXX traffic was therefore subject to reciprocal
26 compensation. Qwest's position is that the traffic in question cannot be "local" when it was

1 originated by Qwest customers and terminated to Pac-West customers that are not physically
2 located in the same LCA. These are mixed issues of law and fact.

3 8. On November 5, 2008, the FCC issued and released its Order on Remand in CC
4 Docket 99-68 (the "*ISP Mandamus Order*"), responding to the D.C. Circuit Court's remand
5 order in *WorldComm v. FCC*, and the court's writ of mandamus in *Core Communications Inc.*,
6 which directed the FCC to issue an order which explains its legal authority to issue the pricing
7 rules for ISP-bound traffic adopted in the *ISP Remand Order*. Qwest believes that the *ISP*
8 *Mandamus Order* supports Qwest's basic position in this proceeding. Pac-West may take a
9 different view and depending upon Pac-West's position, there may be other issues that need to be
10 addressed.

11 9. Qwest should be given the same degree of latitude to assert new counterclaims as
12 Pac-West is given to assert new claims on remand. Without limiting the foregoing, Qwest's
13 position is that the dismissal of Qwest's counterclaims in Decision 68820 was unlawful and
14 those counterclaims should be reinstated. The stated basis for the dismissal of the counterclaims
15 was the resolution of the Complaint, which has been held an improper resolution. This is a legal
16 proposition. Qwest's counterclaims involve mixed questions of fact and law.

17 10. Qwest seeks relief from the claims of Pac-West, and dismissal of the complaint.
18 Qwest intends to assert affirmative defenses of illegality of VNXX, the misassignment of local
19 telephone numbers, the improper routing of traffic over LIS trunks, and may assert the defense of
20 unlawful retroactive rate setting. These propositions involve legal and some factual issues.

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RESPECTFULLY SUBMITTED this 15th day of January, 2009.

QWEST CORPORATION

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2 filing this 15th day of January, 2009, to:

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