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IN THE MATTER OF
PAC-WEST TELECOMM, INC.,
Complainant,
vs.
QWEST CORPORATION,
Respondent.

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

**QWEST CORPORATION'S RESPONSE TO
THE MOTION FOR SUMMARY
DETERMINATION OF PAC-WEST
TELECOMM, INC.**

Qwest Corporation ("Qwest") submits the following response to the motion for summary determination filed by Pac-West Telecomm, Inc. ("Pac-West"). For the reasons that follow, the Arizona Corporation Commission (the "Commission") should deny Pac-West's motion.

I. BACKGROUND AND MATERIAL FACTS IN DISPUTE

A. VNXX Traffic and Pac-West's Role as an Interexchange Carrier

Pac-West's motion raises a myriad of factual and broader policy issues that cannot be decided summarily as Pac-West contends. At the crux of this dispute is the intercarrier compensation treatment of "Virtual NXX" (or "VNXX") arrangements. Pac-West uses VNXX arrangements in order to make long distance calls to Internet Service Providers ("ISPs") appear

1 to be local calls.¹ Pac-West assigns local Arizona telephone numbers to ISPs that are located
2 outside of the callers' local calling area ("LCA") and outside of the state of Arizona. The result
3 is that customers of the ISPs Pac-West serves do not pay per minute toll charges when they place
4 calls to their ISP. The service Pac-West offers through VNXX arrangements is in substance the
5 same as a toll-free 1-800 service or interstate FX service.²

6 By using VNXX arrangements, Pac-West seeks to avoid some of the costs it would
7 otherwise incur to provide its long distance service to its ISP customers and to reverse the
8 intercarrier compensation flow that would otherwise apply. Pac-West seeks to obtain payments
9 from Qwest rather than having to compensate Qwest for Qwest's origination costs. The Second
10 Circuit Court of Appeals aptly described how CLECs use VNXX to foist their costs on to
11 ILECs.³ For a CLEC, the court explained, an "essential point" of VNXX is "to use infrastructure
12 [the CLEC] acquires [from an ILEC] without cost."⁴ Affirming the Vermont Board's ruling that
13 VNXX is not local and not within § 251(b)(5), the court described the anti-competitive effects of
14 VNXX:

15 Global's desired use of virtual NXX simply disguises traffic subject to
16 access charges as something else and would force Verizon to subsidize
17 Global's services. This would likely place a burden on Verizon's
18 customers, a result that would violate the FCC's longstanding policy of
19 preventing regulatory arbitrage. Telecommunications regulations are
20 complex and often appear contradictory. But the FCC has been consistent
21 and explicit that it will not permit CLECs to game the system and take
22 advantage of the ILECs in a purported quest to complete.⁵

23 In this case, the VNXX calls at issue were placed by customers of ISPs served by Pac-
24 West. The callers also happened to be located on Qwest's network. During this time, federal

25 ¹ *Global Naps, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 64 (1st Cir. 2006) ("Global Naps
26 IP").

² Order Ruling on Arbitration, *In re Petition of MCI Metro Access for Arbitration of Proposed
Agreement with Horry Telephone Cooperative*, 2006 S.C. PUC LEXIS 2, at *35 (S.C. PUC,
January 11, 2006) ("[V]irtual NXX calls...are no different from standard dialed long distance toll
or 1-800 calls.")

³ *Global Naps, Inc. v. Verizon New England, Inc.*, 454 F.3d 91.(2nd Cir. 2006) ("Global Naps IP").

⁴ *Id.* at 96.

⁵ *Id.* at 103.

1 law prohibited Qwest in Arizona from transporting traffic across local access and transport area
2 ("LATA") boundaries.⁶ Qwest therefore carried the VNXX calls to one of Pac-West's points of
3 interconnection ("POIs") in Arizona⁷, and Pac-West then transported that traffic across LATA
4 boundaries to ISP modem(s) owned and maintained by Pac-West outside the state of Arizona.
5 Pac-West then routed the calls onto the Internet to websites throughout the United States and the
6 world. The VNXX traffic at issue is jurisdictionally interstate traffic and subject to the FCC's
7 pre-Act intercarrier compensation rules. Pac-West carries the traffic across state lines in its
8 capacity as a common carrier and the traffic ultimately interconnects with the public Internet.

9 In its motion, Pac-West has submitted no evidence that it actually delivered (or
10 terminated) any of the calls to its ISP customers. However, if Pac-West did terminate the calls
11 by delivering them to ISPs, the delivery took place at the modem(s) provided by Pac-West and
12 located outside of Arizona. Thus, in deciding this motion, the Commission must conclude that
13 Pac-West functioned as an interexchange carrier ("IXC") because it offered an interexchange
14 service to its ISP customers and provided the interexchange transport used to provide that
15 service.⁸ This is true regardless of whether Pac-West doubled as a LEC and participated in the
16 origination or termination of the calls in question.

17
18 **B. The Dispute Between the Parties**

19
20 Qwest and Pac-West were parties to an interconnection agreement that was amended in

21 ⁶ Qwest was prohibited from providing interLATA service within its 14-state region until it
22 obtained FCC authorization under § 271 of the Act to offer that service in December 2003.
23 Upon receiving that authorization, Qwest created a separate corporate affiliate, as required by
24 § 272(e), through which it provided in-region interLATA service. That affiliate provided
25 interLATA service until December 2006, at which time Qwest became eligible to provide
26 interLATA service based upon application of the sunset provision in § 272(f)(1). *See Section*
272 Sunsets for Qwest in Arizona By Operation of Law, 21 FCC Rcd. 14157 (Dec. 4, 2006).
Notwithstanding the sunset of the separate affiliate requirement, Qwest still does not provide
interLATA service. That is done by its affiliate.

⁷ Pac-West has POIs in Phoenix and Tucson.

⁸ Affidavit of Larry Brotherson, attached as Exhibit A, ¶7.

1 2002 to reflect the FCC's *ISP Remand Order*.⁹ Under this ISP Amendment, the parties agreed to
2 exchange "ISP-bound traffic at the FCC order rates pursuant to the [*ISP Remand Order*]." ¹⁰ The
3 ISP Amendment defined "ISP-Bound" to be "as described by the FCC" in the *ISP Remand*
4 *Order*. The parties also agreed to exchange "EAS/Local (§251(b)(5)) traffic" at the same rates
5 that applied to "ISP-bound traffic."¹¹ The ISP Amendment remained in effect until Pac-West
6 opted into the Level 3 interconnection agreement in the Spring of 2008.

7 Contrary to Pac-West's assertions, Qwest did not knowingly pay reciprocal compensation
8 to Pac-West for VNXX traffic.¹² Indeed, for the first three years after the *ISP Remand Order*,
9 Qwest made no payments for any ISP traffic. Furthermore, at no time did Pac-West advise
10 Qwest that Pac-West was engaging in VNXX arrangements or advise Qwest of the extent to
11 which Pac-West was using such arrangements in Arizona.¹³ In its motion, Pac-West presented
12 no evidence of any alleged course of dealing or industry practice to support the assertions Pac-
13 West makes that Qwest agreed to pay for VNXX traffic by its conduct.¹⁴ Thus, for purposes of
14 deciding Pac-West's motion, the Commission must conclude that no such course of dealing or
15 industry practice existed.

16 This dispute arose after the FCC issued its *Core Forbearance Order* which lifted the
17 growth and new markets caps imposed in the *ISP Remand Order*. Pac-West filed its complaint
18 alleging that it was entitled to collect intercarrier compensation from Qwest for all traffic
19 delivered to ISPs, even where the ISP was located in another state. In Decision No. 68820, the
20 Commission concluded that it could not "say that the *ISP Remand Order* is limited to ISPs with a

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22
23 ⁹ Order on Remand, *In the Matter of Implementation of the Local Competition Provisions in the*
Telecommunications Act of 1996; Intercarrier Compensation for ISP-bound Traffic, 16 FCC Rcd
9151 (Rel. April 27, 2001) ("ISP Remand Order").

24 ¹⁰ ISP Amendment, attached as Exhibit B, §3.1.

25 ¹¹ ISP Amendment, §2.

26 ¹² Affidavit of Larry B. Brotherson, ¶¶5-8.

¹³ *Id.*

¹⁴ Pac-West alludes to accounting records in its motion but never supplied any such records.
(Motion, p. 15).

1 server located in the same local calling area as its customers.”¹⁵ Thus, the Commission found
2 that the ISP Amendment provides for reciprocal compensation for all traffic delivered ultimately
3 to an ISP point of presence, no matter where located.¹⁶

4 Qwest appealed Decision No. 68820 and a companion decision involving Level 3
5 Communications (“Level 3”) to the United States District Court for the District of Arizona. The
6 Arizona District Court reversed and remanded the Commission’s decisions in both cases.¹⁷ In
7 connection with the Level 3 ISP Amendment, the Arizona District Court concluded that “the
8 term ‘ISP-bound traffic’ as it appears in the ISP Amendment incorporates the definition from the
9 *ISP Remand Order*, which did not address VNXX traffic.”¹⁸ Turning to the Pac-West ISP
10 Amendment, the Court noted that an examination of the Pac-West Amendment “leads the Court
11 to the same result.”¹⁹ The Court concluded that it would violate principles of federal
12 administrative law to interpret the term “ISP-bound” in the *ISP Remand Order* to apply to
13 interexchange calls to ISPs. Thus, the Court found “that the [Commission’s] order in the Pac-
14 West matter violates federal law by failing to properly interpret the *ISP Remand Order*, which
15 was fundamental to the [Commission’s] interpretation of the Pac-West ISP Amendment.”²⁰

17 II. ARGUMENT

18
19 Under Arizona law, in ruling on a motion for summary determination, the fact-finder
20 must view the evidence and draw all reasonable inferences in the light most favorable to the
21 party opposing the motion.²¹ Summary judgment is proper only when there is no genuine issue

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23 ¹⁵ Decision No. 68820, ¶22.

¹⁶ Decision No. 68820, ¶26.

¹⁷ *Qwest Corporation v. Arizona Corporation Commission*, Docket No. CV-06-2130-PHX-SRB
(Dist. Ariz. March 6, 2008)(“*Arizona Qwest Decision*”), attached as Exhibit C.

¹⁸ *Id.*, at 20.

¹⁹ *Id.*,

²⁰ *Id.*, at 21.

²¹ *Samsel v. Allstate Ins. Co.*, 204 Ariz. 1, 59 P.3d 281 (Ariz. 2002).

1 as to any material fact.²² The Commission follows these same rules in proceedings before it.²³
2 In this case, Pac-West has moved for summary determination without presenting any evidentiary
3 support for any of the factual assertions it makes in its motion. Thus, the Commission must draw
4 all inferences concerning issues of fact in Qwest's favor in deciding Pac-West's motion.

5 Pac-West's arguments breakdown as follows. Pac-West claims that the FCC's recent *ISP*
6 *Mandamus Order*²⁴ somehow reverses the Arizona District Court's decision and makes all traffic
7 destined for an ISP point of presence subject to reciprocal compensation under Section 251(b)(5)
8 of the Act. (Motion, pp. 9-10). Next, Pac-West contends that long distance traffic destined to a
9 remote ISP point of presence does not fall within the Section 251(g) carve out from Section
10 251(b)(5) of the Act recognized in the *ISP Remand Order* and the *ISP Mandamus Order*.
11 (Motion, pp. 11-14). To support this assertion, Pac-West relies exclusively on statements taken
12 out of context from the DC Circuit's *WorldCom* decision and completely ignores the rules of the
13 Federal Communication Commission ("FCC") regarding the treatment of interstate calls to ISP
14 points of presence dating back more than two decades. Finally, Pac-West presumes that the *ISP*
15 *Mandamus Order* has been retroactively incorporated into the ISP Amendment and asserts that
16 the ISP Amendment between the parties requires Qwest to pay Pac-West intercarrier
17 compensation on all ISP traffic at the rate of \$.0007 per MOU. (Motion, pp. 14-15). Pac-West
18 relies on an alleged industry practice or course of dealing to support this final argument.
19 (Motion, p. 15).

20 Each of Pac-West's contentions is erroneous. The *ISP Mandamus Order* does not hold
21 that all ISP traffic is subject to reciprocal compensation. It is a decision on remand that uses the
22 term "ISP-bound" to refer only to calls placed to an ISP located in the caller's LCA, just as all of
23 the previous FCC's reciprocal compensation orders have. VNXX ISP traffic is not subject to
24

25 ²² *Id.* at 284.

26 ²³ See A.A.C. R14-3-106(K).

²⁴ Order on Remand, *In re High-Cost Universal Service Support*, CC Docket Nos. 01-92 and 99-68, 2008 FCC LEXIS 7792, 2008 WL 4821547 (FCC, Nov. 5, 2008) ("*ISP Mandamus Order*").

1 reciprocal compensation because it is carved out of Section 251(b)(5) by Section 251(g) which
2 preserves pre-Act rules governing intercarrier compensation for calls (such as VNXX traffic)
3 placed to ISPs located outside of the caller's LCA. Pac-West's reliance upon *WorldCom* is
4 completely misplaced because that case addressed only calls placed to ISPs located within the
5 caller's LCA. It would be unlawful to interpret the *ISP Remand Order* and the *ISP Mandamus*
6 *Order* to extend to VNXX ISP traffic as Pac-West contends. Finally, the ISP Amendment does
7 not incorporate the *ISP Mandamus Order* and does not require Qwest to pay Pac-West
8 intercarrier compensation on calls placed to ISPs located outside of the caller's LCA.

9
10 **A. Contrary to Pac-West's Assertions, Both the *ISP Remand Order* and the *ISP***
11 ***Mandamus Order* Use the Term "ISP-Bound" to Refer Only to Calls Placed to an**
12 **ISP Located in the Caller's Local Calling Area**

13 Pac-West's entire argument that the *ISP Remand Order* and the *ISP Mandamus Order*
14 require the payment of reciprocal compensation for all traffic destined for ISPs rests on the false
15 premise that these orders use the term "ISP-bound" to refer to all calls destined for an ISP.
16 (Motion, p.7). Indeed, Pac-West erroneously asserts that Qwest agrees that the VNXX traffic
17 that is in dispute is ISP-bound. (Motion, p. 6). Pac-West's premise is wrong and Qwest does not
18 agree that the VNXX traffic at issue in this remand proceeding constitutes "ISP-bound" traffic as
19 that term has been used in the FCC's reciprocal compensation orders. In point of fact, the term
20 "ISP-bound" in context has been used as a term of art, referring only to traffic delivered to a
21 local ISP point of presence.

22 From the very beginning, the FCC's orders addressing reciprocal compensation for "ISP-
23 bound" traffic have used the term "ISP-bound" to refer to calls placed to an ISP point of
24 presence ("POP") located within the caller's local calling area. The *ISP Mandamus Order* is no
25 different. This conclusion is made clear by the history of proceedings leading up to the *ISP*
26 *Mandamus Order*.

1 On July 2, 1997, the FCC provided public notice of a pleading cycle to address the
2 question whether local calls to ISPs were governed by the FCC's reciprocal compensation
3 rules.²⁵ The dispute, presented to the FCC in a letter dated June 20, 1997, from the Association
4 for Local Telecommunications Services ("ALTS") was narrowly described as whether "local"
5 calls to an ISP "made from within a local calling area" are subject to reciprocal compensation
6 under §251(b)(5).²⁶ At the time of the FCC's notice, the only calls that were subject to
7 reciprocal compensation under the FCC's rules were calls that originated and terminated within
8 the same local calling area.²⁷ CLECs argued that calls to an ISP terminated at the ISP's modem
9 or server located in the caller's local calling area. While arguing that ILECs should be required
10 to pay reciprocal compensation on these local calls, ALTS expressly recognized that the *Local*
11 *Competition Order* excluded interexchange calls from §251(b)(5) and that those calls were not at
12 issue.²⁸

13 On February 26, 1999, the FCC released the *ISP Declaratory Order*.²⁹ The issue the
14 FCC sought to resolve in the *ISP Declaratory Order* was whether calls to an ISP located within
15 the caller's LCA ("ISP-bound" calls) were local for purposes of reciprocal compensation. The
16 FCC described the arrangement that it was addressing by stating that "[u]nder one typical
17 arrangement, an ISP customer dials a seven-digit number to reach the ISP server in the same
18 local calling area." The FCC then framed the issue of whether reciprocal compensation was due
19 for the traffic as a question of whether the calls to ISPs "terminate at the ISP's local server."³⁰
20 Throughout the *ISP Declaratory Order*, the FCC refers to the "ISP's local server."³¹ Moreover,

21 ²⁵ Public Notice with ALTS Letter, Attached as Exhibit D.

22 ²⁶ *Id.*

23 ²⁷ First Report and Order, *In the Matter of the Local Competition Provisions in the*
Telecommunications Act of 1996, 11 FCC Rcd 15499, ¶ 1034 (Rel. Aug. 8, 1996) ("*Local*
Competition Order") (subsequent history omitted).

24 ²⁸ Exhibit D, ALTS Letter at 4-6..

25 ²⁹ *In the Matter of Implementation of the Local Competition Provisions in the*
Telecommunications Act of 1996, Inter-carrier Compensation for ISP-Bound Traffic, 14 FCC
Rcd 3689 (1999) ("*ISP Declaratory Order*").

26 ³⁰ *ISP Declaratory Order* ¶ 7.

³¹ *Id.* ¶¶ 8, 12 and 14.

1 there are no references in the order to calls made to ISP points of presence located outside of the
2 caller's LCA. Accordingly, in *Bell Atlantic v. FCC*³², the D.C. Circuit confirmed that in the *ISP*
3 *Declaratory Order*, the FCC "considered whether calls to internet service providers ("ISPs")
4 within the caller's local calling area are themselves 'local.'"

5 *The ISP Declaratory Order* was followed by the *ISP Remand Order*. In the *ISP Remand*
6 *Order*, the FCC once again defined the issue it was addressing to be "whether reciprocal
7 compensation obligations apply to the delivery of calls from one LEC's end-user customer to an
8 ISP in the same local calling area that is served by a competing LEC."³³ In *WorldCom v.*
9 *FCC*³⁴, the D.C. Circuit confirmed that the traffic referred to as "ISP-bound" in the *ISP Remand*
10 *Order* were "calls made to internet service providers ("ISPs") located within the caller's local
11 calling area."³⁵ In *WorldCom*, the DC Circuit remanded but did not vacate the *ISP Remand*
12 *Order*.³⁶ Thus, the *ISP Remand Order* remained in effect during the time period the ISP
13 Amendment was in effect.³⁷

14 *The ISP Mandamus Order* is the FCC's decision on remand of the *ISP Remand Order*.
15 The "ISP-bound traffic" that the FCC is addressing in the *ISP Mandamus Order* is the same
16 traffic addressed in the *ISP Remand Order* – that is, calls placed to an ISP located in the caller's
17 LCA. Nowhere in the *ISP Mandamus Order* does the FCC state that it is expanding the scope of
18 the remand to encompass calls placed to ISP points of presence located outside of the caller's
19 LCA. The *ISP Mandamus Order* does not even mention VNXX or other types of long distance

20
21 ³² *Bell Atlantic v. FCC*, 206 F.3d 1, 2 (D.C. Cir. 2000).

22 ³³ *ISP Remand Order* ¶ 13 (*emphasis added*).

23 ³⁴ *WorldCom v. FCC*, 288 F.3d 429, 430 (D.C. Cir. 2002) ("*WorldCom*"),

24 ³⁵ *WorldCom*, 288 F.3d at 430.

25 ³⁶ *Id.* at 434.

26 ³⁷ In the *ISP Remand Order*, the FCC prescribed certain caps limiting that amount that CLECs could collect for delivering calls to ISPs. The FCC eliminated two of these caps (the "new markets" and "growth") caps in *In Re Core Communications*, 19 FCC Rcd 20179 ¶ 26 (2004). However, by doing so, the FCC did not purport to create a uniform compensation regime applicable to all calls destined for ISPs. Rather, the FCC sought to create uniformity between CLECs so that certain CLECs would not be deprived of compensation for traffic in circumstances in which another CLEC could receive compensation for the very same traffic.

1 traffic. Because the *ISP Mandamus Order* was entered through a remand, the scope of that
2 Order is necessarily defined by the scope of the Order—the *ISP Remand Order*—that was
3 remanded in the first place. And that scope, as made clear by the Arizona District Court, is
4 limited to ISP calls originating and terminating in the same LCA.

5 In its motion, Pac-West argues that the *ISP Mandamus Order* must be interpreted to
6 apply to all calls destined for an ISP, no matter where located, because the Order does not carve
7 out any category of ISP traffic from its scope. (Motion, pp. 7-9). This argument rests entirely
8 upon the incorrect premise that all ISP traffic was included in the Order in the first instance.
9 However, the FCC never states in the *ISP Mandamus Order* that it was expanding the categories
10 of ISP traffic being addressed beyond the local ISP traffic addressed in the *ISP Remand Order*.
11 In short, the *ISP Mandamus Order* does not hold as Pac-West claims that *all* traffic destined for
12 an ISP “no matter where it travels” falls within the scope of Section 251(b)(5). (Motion, p. 10).

13
14 **B. Section 251(g), as Interpreted in the *ISP Remand Order*, Preserves Pre-Act**
15 **Intercarrier Compensation Rules Applicable to Calls Delivered to ISPs Located**
16 **Outside of the Caller’s Local Calling Area**

17 In its motion, Pac-West argues that the *ISP Mandamus Order* eliminates the
18 local/nonlocal distinction for purposes of Section 251(b)(5). (Motion, pp. 7-8). However, this
19 argument erroneously enlarges the FCC’s statements made narrowly about Section 251(b)(5)
20 standing alone and ignores the Section 251(g) carve-out recognized in the *ISP Remand Order*
21 and reaffirmed in the *ISP Mandamus Order*. The local/nonlocal distinction continues to exist
22 when the Section 251(g) carve out from Section 251(b)(5) is taken into account.

23 In the *ISP Remand Order*, the FCC held that Section 251(g) carved all interexchange
24 traffic (as historically defined) out of Section 251(b)(5). The FCC stated:

25 This limitation in section 251(g) makes sense when viewed in the overall context of the
26 statute. All of the services specified in section 251(g) have one thing in common: they are
all access services or services associated with access. Before Congress enacted the 1996

1 Act, LECs provided access services to IXCs and to information service providers in order
2 to connect calls that travel to points - both interstate and intrastate - beyond the local
3 exchange. In turn, both the Commission and the states had in place access regimes
4 applicable to this traffic, which they have continued to modify over time. It makes sense
5 that Congress did not intend to disrupt these pre-existing relationship. Accordingly,
6 Congress excluded all such access traffic from the purview of section 251(b)(5).³⁸
7 (citations omitted)

8 The FCC reaffirmed its determinations in the *ISP Mandamus Order*:

9 “[W]e agree with the finding in the ISP Remand Order that traffic encompassed by
10 section 251(g) is excluded from section 251(b)(5) except to the extent that the
11 Commission acts to bring that traffic within its scope. Section 251(g) preserved the pre-
12 1996 Act regulatory regime that applies to access traffic, including rules governing
13 ‘receipt of compensation.’”³⁹

14 Under Section 251(g), the access charge rules preserved by Section 251(g) are preserved until
15 they “are explicitly superseded by regulations” prescribed by the FCC.⁴⁰ By its terms, Section
16 251(g) preserves the pre-Act intercarrier compensation regime created by any “any court order,
17 consent decree, or regulation, order, or policy of the [FCC].”⁴¹ (*Emphasis added*). However, the
18 FCC specifically held as part of its analysis of Section 251(g) in the *ISP Remand Order*, that
19 “traffic subject to parallel intrastate access regulations” is also excluded from the scope of
20 section 251(b)(5).⁴²

21 Pac-West attempts to argue that Section 251(g) carves out only a subset of interexchange
22 traffic from the scope of Section 251(b)(5) of the Act. According to Pac-West, no traffic
23 destined for an ISP was ever subject to pre-Act intercarrier compensation rules preserved by
24 Section 251(g), and thus all ISP traffic is subject to reciprocal compensation. This argument is
25 demonstrably incorrect. In fact, there were at least three sets of intercarrier compensation
26 regulations, orders, and policies that applied to calls delivered to an ISP point of presence located

³⁸ *ISP Remand Order* ¶ 37 (*emphasis added*).

³⁹ *ISP Mandamus Order* ¶ 16 (*emphasis added*).

⁴⁰ See *Competitive Telecommunications Association v. FCC*, 117 F.3d 1068, 1073 (8th Cir. 1997) (“*CompTel*”), an appeal from the FCC’s *Local Competition Order*. In *CompTel*, the Eighth Circuit held that under Section 251(g) of the Act, “LECs will continue to provide exchange access to IXCs for long-distance service, and continue to receive payment, under the pre-Act regulations and rates.”

⁴¹ 47 U.S.C. §251(g).

⁴² *ISP Remand Order*, ¶ 37 n. 66.

1 outside of the caller's LCA.

2 First, under the FCC's pre Act rules, all interexchange traffic (as historically defined) was
3 subject to access charges unless exempted by the FCC. Thus, the FCC's access charge
4 regulations provide that "[c]arrier's carrier charges shall be computed and assessed upon *all*
5 interexchange carriers that use local exchange switching facilities for the provision of interstate
6 or foreign telecommunications services."⁴³ If a call was between different LCAs, it was and is
7 today subject to access charge rules.⁴⁴ Whether access charges applied did not depend upon the
8 dialing pattern used to accomplish the interexchange call. Indeed, there is nothing in the FCC's
9 regulations to suggest that the dialing pattern makes access charges inapplicable.

10 Access charges have consistently applied to all interexchange traffic. In *Global NAPs I*,
11 the First Circuit concluded that in its regulations "the FCC made clear that it was leaving in place
12 the pre-existing access charge regime that applied to *interexchange calls*."⁴⁵ In *Verizon*
13 *California, Inc. v. Peevey*⁴⁶, the Ninth Circuit concluded as a matter of federal law that VNXX
14 traffic is interexchange traffic. In *Peevey*, the Court held that it was permissible for the
15 California Commission acting as an arbitrator to classify VNXX traffic as local traffic for
16 intercarrier compensation purposes. However, the Ninth Circuit also recognized that the
17 California Commission did not make this determination under federal law, the Act or the FCC's
18 reciprocal compensation rules. The Ninth Circuit affirmed the California Commission's
19 determination that as a matter of federal law "VNXX traffic is interexchange traffic that is not
20 subject to the FCC's reciprocal compensation rules."⁴⁷

21 Second, under the FCC's pre-Act Enhanced Service Provider Exemption and continuing
22 today, Enhanced Service Providers ("ESPs") (including Internet service providers) are treated as

23
24 ⁴³ 47 C.F.R. § 69.5(b)(*emphasis added*).

⁴⁴ *Global Naps II*, 454 F.3d at 98. (noting that access charges apply under the FCC's rules
25 regardless of whether there is a separate charge for the call)

⁴⁵ *Global Naps I*, 444 F.3d at 63 (*emphasis added*).

⁴⁶ *Verizon California, Inc. v. Peevey*, 462 F.3d 1142 (9th Cir. 2006).

26 ⁴⁷ *Id.*, at 1158

1 “end users” for purposes of applying access charges.⁴⁸ The ESP exemption is not strictly
2 speaking an exemption. “Rather than directly exempting ESPs from interstate access charges,
3 the [FCC] defined them as “end users”—no different from a local pizzeria or barber shop.”⁴⁹
4 The FCC’s access charge rules do not distinguish between ESPs and other end users.⁵⁰

5 Accordingly, ESPs that provide their own interexchange connection do not pay access
6 charges, but, “[i]nterstate interexchange carriers are required to purchase federal access when
7 they provide interstate transmission for ESPs that lack their own interstate networks.”⁵¹ The ESP
8 Exemption simply treats ESPs like all other end users. Under the FCC’s orders, rules and policy,
9 ESP “[e]nd users that purchase interstate services from interexchange carriers do not thereby
10 create an access charge exemption for those carriers.”⁵²

11 When Pac-West provides an interexchange service to its ISP customers, any access
12 charge exemption the ISP customers may have does not extend to Pac-West, the IXC. Indeed,
13 the fact pattern here, was addressed directly in the FCC’s *Northwestern Bell* case.⁵³ In that case,
14 an ESP named Dial Info argued that the interexchange carriers that provided a toll free service to
15 Dial Info should be exempt from access charges. The FCC rejected Dial Info’s argument and
16 confirmed that ESPs are treated as end users for purposes of applying access charges and that

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18 ⁴⁸ *ISP Remand Order* ¶ 11; Notice of Proposed Rulemaking, *In the Matter of Amendments of*
19 *Part 69 of the Commission’s Rules Relating to the Creation of Access Charge Sub-elements for*
20 *Open Network Architecture*, 4 FCC Rcd 3983, ¶¶ 39, 42, fn. 92 (1989) (“*Part 69 NPRM*”); *ISP*
21 *Mandamus Order* ¶ 13 citing *Bell Atlantic*, 206 F.3d at 6 (reaffirming the *Bell Atlantic* decision’s
22 conclusion that ISP traffic is “switched by the LEC whose customer is the ISP and then delivered
23 to the ISP, which is clearly the ‘called party.’”)

24 ⁴⁹ *ACS of Anchorage, Inc. v. Federal Communications Commission*, 290 F.3d 403, 409 (D.C.
25 Cir. 2002).

26 ⁵⁰ *Part 69 NPRM*, 4 FCC Rcd 3983, ¶¶ 39, 42, fn. 92 (Rel. May 9, 1989).

⁵¹ Memorandum Opinion and Order on Reconsideration, *In the Matter of Filing and Review of*
Open Network Architecture Plans, 5 FCC Rcd 3084 ¶44 (1990).

⁵² Memorandum Opinion and Order, *In the Matter of Northwestern Bell Telephone Company*
Petition for Declaratory Ruling, 2 FCC Rcd 5986 ¶ 21 (1987) (“*Northwestern Bell*”) (*emphasis*
added), vacated on other grounds with legal principles reaffirmed, Memorandum Opinion and
Order, *In the Matter of Northwestern Bell Telephone Company Petition for Declaratory Ruling*
and WATS Related and Other Amendments of Part 69 of the Commission’s Rules, 7 FCC Rcd
5644 (1992).

⁵³ *Northwestern Bell*, 2 FCC Rcd 5986, at ¶21.

1 interexchange carriers that provide toll free services to Dial Info are not exempt from access
2 charges.

3 Third, the FCC has, from the inception of the access charge rules at the time of
4 divestiture, had a method of dealing with the access charge treatment of services that enabled an
5 end user to receive a call from a distant exchange in which the calling party called a local
6 number—in essence a toll call that looked like a local call.⁵⁴ These services, the principal one of
7 which is known as interstate foreign exchange or “FX” service⁵⁵, are configured by connecting a
8 private line between the FX subscriber and the foreign exchange switching facilities.⁵⁶ When an
9 end user in the foreign exchange calls the local telephone number assigned to the FX subscriber,
10 the call traverses the local switch in the foreign exchange (the “open end”) and is transported to
11 the local calling area of the FX subscriber (the “closed end”). Under the FCC’s rules, the local
12 exchange carrier who provides the switching at the open end is entitled to charge switched access
13 to the carrier who provides the interstate FX service.⁵⁷

14 The FCC has long had a policy of avoiding discrimination in the application of access
15 charges to interexchange services.⁵⁸ In 1987, the FCC noted that it had “adopted rules for the
16 computation and assessment of charges for carrier common line and end office access elements
17 (switched access charges) that were designed to alleviate [discriminatory] disparities.”⁵⁹ The
18 FCC made it clear that, in order to avoid discrimination, its “access charge orders subject the
19
20

21 ⁵⁴ *General Services Administration v. American Telephone and Telegraph Company*, 6 FCC Rcd
5873 ¶ 6 (1991).

22 ⁵⁵ Interstate FX and intrastate FX are different. Unlike interstate FX, an intrastate FX subscriber
is required to purchase local exchange service in the foreign exchange.

23 ⁵⁶ *In the Matter of Amendment of Part 69 of the Commission’s Rules Relating to Private
Networks and Private Line Users of the Local Exchange*, 2 FCC Rcd. 7441, 7442, ¶ 2, fn. 3
24 (1987).

25 ⁵⁷ *Id.* ¶ 12.

26 ⁵⁸ See 47 U.S.C. § 202.

⁵⁹ Memorandum Opinion and Order, *In the Matter of Bell Atlantic Petition for Declaratory
Ruling Concerning Application of the Commission’s Access Charge Rules to Private
Telecommunications Systems*, 2 FCC Rcd. 7458 ¶ 5 (1987).

1 open end of *FX lines* and CCSA ONALs *and their equivalents*, along with MTS/WATS and their
2 equivalents, to these switched access charges.”⁶⁰

3 VNXX traffic is indistinguishable from interstate FX service for the purpose of
4 determining how access charges apply. VNXX traffic is interexchange traffic under the pre-Act
5 rules because, as with interstate FX service, the caller and the ISP end user to whom the traffic is
6 delivered are in different LCAs.⁶¹ Under federal law, these calls, like interstate FX services, are
7 subject to the FCC’s access charge regime.⁶² Pac-West is the party who offers the VNXX
8 interexchange service and thus qualifies as an interexchange carrier under federal law.⁶³

9 Because the rules described above predate the 1996 Act, they remain in place under
10 Section 251(g) until the FCC takes action to “explicitly supersede” them. Accordingly, VNXX
11 traffic could not be subject to the statutory reciprocal compensation provisions unless the FCC
12 took affirmative action to eliminate the application of access charge rules and to impose
13 reciprocal compensation. The FCC has not taken such action with respect to VNXX traffic or
14 any other long distance traffic delivered to or from a local exchange. Accordingly, under the
15 Section 251(g) principle that pre-existing access rules shall remain in place until they are
16

17 ⁶⁰ *Id.* ¶ 13 (*emphasis added*).

18 ⁶¹ *In the Matter of Level 3 Communications, LLC Petition for Arbitration of an Interconnection*
19 *Agreement with Qwest Corporation, Pursuant to Section 252(b) of the Telecommunications Act,*
20 *Arb 665, 2007 WL 978413, *3 and footnotes 5-6, 71, 153, 164 (Oregon PUC, March 14, 2007);*
21 *Decision Denying Application for Rehearing, Reargument or Reconsideration, In the Matter of*
22 *Level 3 Communications LLC’s Petition for Arbitration Pursuant to Section 252(b) of the*
23 *Communications Act of 1934, as amended by the Telecommunications Act of 1996, and the*
24 *Applicable State Laws for Rates, Terms, and Conditions of Interconnection with Qwest*
25 *Corporation, Decision No. C07-0318, 2007 WL 2163000 ¶ 22 (Colo. PUC, April 23, 2007).*

26 ⁶² *In re: Petition of MCIMetro Access Transmission Services, LLC for Arbitration of Certain*
Terms and Conditions of Proposed Agreement with Horry Telephone Cooperative, Inc.
Concerning Interconnection and Resale under the Telecommunications Act of 1996, 2006 S.C.
PUC LEXIS 2, 35-43 (S.C. PSC Jan. 11, 2006)(“The [South Carolina] Commission’s and the
FCC’s current intercarrier compensation rules for wireline calls clearly exclude interexchange
calls from both reciprocal compensation and ISP intercarrier compensation, These calls are
subject to access charges.”).

⁶³ *In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony*
Services are Exempt from Access Charges, 19 FCC Rcd 7457, ¶19, fn. 80 (2004)(“IP-in-the-
Middle decision”)..

1 “explicitly superseded by regulations prescribed by the [FCC],”⁶⁴ VNXX traffic, like interstate
2 FX service, continues to be governed by the rules and regulations relating to access charges.

3 Pac-West argues that because there were no pre-Act rules for “ISP-bound” traffic, there
4 cannot have been any rules for a “sub-set of ISP-bound traffic.” (Motion, p. 13). But this
5 argument is simply wrong, as the *Northwestern Bell* case cited above demonstrates. The
6 argument assumes incorrectly that the FCC used the term “ISP-bound” in its orders to refer to all
7 traffic destined for ISPs. It also rests on the false premise that there were no rules regarding
8 interexchange calls to a remote ISP point of presence. The statements Pac-West relies upon for
9 the proposition that there were no pre-Act rules for “ISP-bound” traffic were made only about
10 calls placed to an ISP located in the caller’s LCA.

11 In its motion, Pac-West also erroneously argues that in order for Section 251(g) to apply,
12 the traffic must be “exchanged” between a LEC and an interexchange carrier or information
13 service provider. (Motion, pp. 13-14). In fact, Section 251(g) merely requires that the traffic at
14 issue involve the provision of access services to an “interexchange carrier” or “information
15 service provider.” In this case, the VNXX traffic at issue falls within Section 251(g) because
16 Qwest is providing originating access to Pac-West who is functioning as an interexchange
17 carrier. Pac-West implies that because it qualifies as a CLEC for some purposes, that it cannot
18 simultaneously be classified as an interexchange carrier. The FCC rejected this argument in its
19 *IP in the Middle* decision.⁶⁵ As the FCC recognized, “[d]epending upon the nature of the traffic,
20 carriers such as ... competitive LECs may qualify as interexchange carriers for purposes of [Rule
21 69.5(b)].” Thus, it is irrelevant whether CLECs existed prior to the Act (Motion, p. 13) because
22 IXCs clearly did exist prior to the Act and Section 251(g) carves out all traffic involving the
23 provision of access services to IXCs.

24 Furthermore, Pac-West’s argument also fails on its own terms. Two LECs can exchange
25

26 ⁶⁴ 47 U.S.C. §251(g).

⁶⁵ *IP-in-the-Middle Decision* ¶19, fn. 80.

1 traffic and at the same time be providing access service to an interexchange carrier. This is
2 known as jointly provided switched access and FCC rules pre-dating the Act and preserved by
3 Section 251(g) provide that the two LECs will bill the interexchange carrier for the origination or
4 termination functions they provide.⁶⁶ In this case, if Pac-West received traffic from Qwest as a
5 LEC, it is only because Qwest and Pac-West were jointly providing originating access to Pac-
6 West in its capacity as an IXC.

7 Finally, Pac-West argues incorrectly in its motion that Qwest has the burden of showing
8 that there were pre-Act rules governing VNXX traffic and that the traffic involved a service to an
9 IXC. (Motion, pp. 13-14). However, that is not Qwest's burden. As the moving party and the
10 complainant in this proceeding, Pac-West bears the burden to establish that it is entitled to
11 judgment as a matter of law. To meet its burden, Pac-West would have to provide evidence that
12 the traffic at issue is not interexchange traffic and that Pac-West is not functioning as an IXC
13 with respect to that traffic. In all events, Pac-West has failed to meet its burden. Pac-West has
14 presented no affidavit or other evidence on these points to support its motion.

15
16 **C. Pac-West's Characterization of *WorldCom* and *Pacific Bell* Is Misplaced**

17
18 In its motion, Pac-West does not so much as acknowledge that ISPs are treated as end
19 users for purposes of applying access charges under the ESP exemption. Nor does Pac-West
20 acknowledge, mention or discuss any of the FCC's regulations, orders or policies pertaining to
21 interexchange calls to ISPs that are preserved by Section 251(g). Instead, Pac-West relies solely
22 upon statements made in *WorldCom* and *Pacific Bell* about pre-Act rules for "ISP-bound" traffic.
23 (Motion, pp. 11-12) Pac-West's reliance upon these two cases is completely misplaced.
24 The statements made in *WorldCom* upon which Pac-West relies were made only about calls
25

26 ⁶⁶ *In the Matter of Access Billing Requirements for Joint Service Provision; Applications for Review*, 4 FCC Rcd 7914, ¶¶ 1-3, n. 2 (Rel. November 8, 1989).

1 placed to an ISP located in the caller's LCA. That is clear because the *WorldCom* court relied
2 solely upon the *ISP Declaratory Order* as the basis for its statements,⁶⁷ and the *ISP Declaratory*
3 *Order* was only addressing calls placed to an ISP located within the caller's LCA. Moreover, the
4 category of traffic considered in *WorldCom* was necessarily no broader than the traffic at issue in
5 the *ISP Remand Order* – the order the *WorldCom* court was reviewing. Thus, Pac-West is
6 simply wrong when it claims *WorldCom* holds that “calls placed to an ISP are not toll calls even
7 if they leave the local calling area.” (Motion, p. 11). As discussed above, the access rules
8 relating to tariffed interstate service provided to IXCs, including the rules for interstate calls
9 initiated with a local number, have been in place for decades. It is therefore entirely implausible
10 to argue, as Pac-West does, that *WorldCom* found there were no pre-Act compensation rules for
11 interexchange calls to ISPs.⁶⁸

12 Pac-West also erroneously relies upon *WorldCom* to argue that ISP-bound calls do not
13 involve services provided “to interexchange carriers and information service providers.”
14 (Motion, pp. 13-14). Again, this observation was not made in the context of VNXX calls or
15 other interexchange calls. In any event, Pac-West functions as an IXC when it offers VNXX
16 service to its ISP customers, and Qwest therefore provides a service “to an interexchange carrier”
17 when it originates those Internet calls. Pac-West's status as a “CLEC” does not alter the fact that
18 it functions as an IXC when it provides VNXX, and it is the function a carrier is performing –
19 not the label applied to the carrier – that controls.⁶⁹

20 Pac-West's reliance on *Pacific Bell v. Pac-West Telecomm, Inc.*,⁷⁰ is similarly misplaced.
21 The traffic at issue in the California Commission orders under review in *Pacific Bell* consisted of
22 calls where “the customer who originates the call and the ISP modem that receives the call are
23

24 ⁶⁷ *WorldCom*, 288 F.3d at 433.

25 ⁶⁸ In its motion, Pac-West notes that the *ISP Mandamus Order* quotes *WorldCom*. (Pac-West
25 Motion, pp. 12-13). However, the *ISP Mandamus Order* does not extend the statement from
25 *WorldCom* to calls placed to ISPs located outside of the caller's LCA.

26 ⁶⁹ *INS v. Qwest Corporation*, 363 F.3d 683, 694 n.3 (8th Cir. 2004).

⁷⁰ *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114 (9th Cir. 2003)(“*Pacific Bell*”).

1 both within the same local calling area.”⁷¹ *Pacific Bell* did not involve VNXX traffic and,
2 consequently, does not support Pac-West’s position. Pac-West states that in *Pacific Bell*, the
3 Ninth Circuit recognized that as a direct result of *WorldCom*, “the compensation obligation
4 arising under section 251(g) cannot apply to ISP-bound traffic.” (Motion, p. 12). However,
5 because it relies upon *WorldCom*, *Pacific Bell* is confined to the fact pattern under review in
6 *WorldCom* – namely calls placed to an ISP located in the caller’s local calling area. In *Pacific*
7 *Bell*, the Court does not say anything to cast doubt on the indisputable fact that section 251(g)
8 preserves the access regime and thus the distinction between local and non-local traffic.

9 The real significance of *Pacific Bell* is not the part of the opinion Pac-West relies upon,
10 but, rather, the Court’s statement that “[u]nder the Act, ‘reciprocal compensation’ means that
11 when a customer of one [LEC] calls a customer of another [LEC] who is *within the same local*
12 *calling area*, the first carrier pays the second carrier for completing . . . the call.”⁷² In *Peevey*,
13 the Ninth Circuit confirmed again the initial holding in the *Local Competition Order* that the
14 “Act preserves the legal distinctions between charges for transport and termination of local
15 traffic and interstate and intrastate charges for terminating long-distance traffic.”⁷³

16
17 **D. The ISP Remand Order and the ISP Mandamus Order Cannot Be Lawfully**
18 **Interpreted to Apply to All ISP Traffic as Pac-West Argues**

19 Pac-West and Qwest have twice before litigated in federal court the question of whether
20 the *ISP Remand Order* required Qwest to pay reciprocal compensation on VNXX ISP traffic. In
21 both cases, the courts rejected Pac-West’s arguments that the *ISP Remand Order* required the
22 payment of reciprocal compensation on calls placed to an ISP located outside of the caller’s local
23 calling area. In the first case, *Qwest I*, the Washington District Court recognized that under the
24 *ISP Remand Order*, calls to ISPs are governed by one of two schemes: (1) the interim rate

25 ⁷¹ *Id.*, at 1120-1121.

26 ⁷² *Id.*, at 1120

⁷³ *Peevey*, 462 F.3d at 1146 (citing *Local Competition Order*, ¶1033).

1 regime established by the *ISP Remand Order*; or (2) the pre-Act access charge regime.⁷⁴ The
2 Washington District Court specifically rejected the argument Pac-West now makes that the
3 distinction between “local” and “interexchange” calls has been eliminated. The Washington
4 District Court stated:

5 Although the FCC did reevaluate its use of the term “local” in the *ISP Remand Order*, it
6 did not eliminate the distinction between “local” and “interexchange” traffic and the
7 compensation regimes that apply to each—namely reciprocal compensation and access
8 charges. Indeed, as the First Circuit [in *Global Naps I*] recently explained, the *ISP*
9 *Remand Order* itself “reaffirmed the distinction between reciprocal compensation and
access charges. It noted that Congress, in passing the [Act], did not intend to disrupt the
pre-[Act] 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” (citations omitted).⁷⁵

10
11 Furthermore, the District Court specifically rejected the argument that Pac-West makes
12 that “ISP-bound” encompasses all calls to ISPs. The Washington District Court recognized that
13 interpreting the term “ISP-bound” traffic as broadly as Pac-West advocates would run counter to
14 the very policy considerations that gave rise to the *ISP Remand Order*:

15 [I]nterpreting the *ISP Remand Order* narrowly—e.g., as not addressing VNXX traffic,
16 and as leaving intact the access charge system for interexchange ISP-bound traffic—
17 makes sense as a policy matter because the opposite approach, urged by the defendants,
18 would likely *reverse* the direction in which payments for this traffic is ordinarily made.
19 The defendant’s approach “would create new opportunities for regulatory arbitrage, by
requiring [Qwest] to pay compensation on calls to ISPs, including...calls to ISPs...for
which [i]t had previously received compensation under established rules.” (*Emphasis* in
the original; citations omitted).⁷⁶

20 The policy considerations underlying the rules in the *ISP Remand Order* were reaffirmed in the
21 *ISP Mandamus Order*.⁷⁷

22 As the Washington District Court observed, the *ISP Remand Order* cannot lawfully be
23

24 ⁷⁴ *Qwest Corporation v. Washington State Utilities and Transportation Commission*, 484
25 F.Supp.2d 1160, 1170 (W.D. Wash 2007) (“*Qwest I*”).

25 ⁷⁵ *Id.*

26 ⁷⁶ *Id.*

⁷⁷ *ISP Mandamus Order*, ¶¶24-27.

1 interpreted to extend to interexchange calls to ISPs:⁷⁸ “It is axiomatic that an agency choosing to
2 alter its regulatory course ‘must supply a reasoned analysis indicating that its prior policies and
3 standards are being deliberately changed, not casually ignored.’”⁷⁹ In both the *Local*
4 *Competition Order* and the *ISP Remand Order*, the FCC held that in enacting Section 251(b)(5),
5 Congress did not intend to alter the pre-existing interstate and intrastate access charge regimes.⁸⁰
6 Under Pac-West’s interpretation of the *ISP Remand Order*, after reaffirming the existence of the
7 interstate and intrastate access charge regimes, the FCC then changed them significantly, but
8 silently and without explanation. Pac-West’s interpretation is contrary to federal law and cannot
9 stand.

10 The Washington District Court’s analysis on this point was followed by the Arizona
11 District Court that remanded this case. The Arizona District Court concluded that it would be
12 unlawful to extend the *ISP Remand Order* to calls placed to ISPs located outside the caller’s
13 local calling area because to do so would violate well established principles of administrative
14 law. The Arizona District Court stated:

15 Any argument challenging the continuing validity of the original question presented [in
16 the *ISP Remand Order*] must presume that somehow the issue before the FCC was
17 significantly broadened on appeal—from mere consideration of a single area of ISP-
18 bound traffic to all ISP-bound calls, without so much as indicating once that it was doing
19 so. If the Court were to adopt Level 3’s position, then it would implicitly recognize that
20 the FCC acted in violation of the principle “that an agency choosing to alter its regulatory
21 course ‘must supply a reasoned analysis indicating that its prior policies and standards are
22 being deliberately changed, not casually ignored... The Court finds no evidence that the
23 FCC contravened administrative law principles by silently expanding the scope of its
24 action.”⁸¹

25 Pac-West’s interpretation of the *ISP Mandamus Order* suffers from the same deficiency.
26 The *ISP Mandamus Order* cannot be interpreted to subject interexchange calls (as historically

⁷⁸ *Qwest I*, 484 F.Supp.2d at 1176.

⁷⁹ *Action for Children’s Television v. FCC*, 821 F.2d 741, 745 (D.C. Cir. 1987) quoting *Greater Boston Television Corp v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

⁸⁰ First Report and Order, *In the Matter of the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499 ¶¶ 1033-34 (1996) (“*Local Competition Order*”); *ISP Remand Order* ¶¶ 11, 36-39.

⁸¹ *Arizona Qwest Decision*, p. 15 (citations omitted).

1 understood) placed to ISPs to reciprocal compensation because such a change would conflict
2 directly with the FCC's regulations, orders and policies discussed above that are applicable to
3 such traffic. To change those regulations, orders and policies, the FCC would by law be required
4 to explain both that it was changing them and provide its rationale for doing so.

5 Pac-West is bound by the Arizona District Court's determinations under the doctrines of
6 collateral estoppel and law of the case. Collateral estoppel bars the relitigation of issues of law
7 and issues of fact adjudicated in prior litigation between the same parties.⁸² Law of the case
8 precludes reexamination of an issue previously decided by a higher court.⁸³ Where, as here, Pac-
9 West seeks to have the Arizona District Court's determinations reconsidered, Pac-West must
10 seek relief from the Court. This Commission is not free to disregard the Arizona District Court's
11 decision as Pac-West is requesting the Commission to do.

12
13 **E. The ISP Amendment Does Not Require Qwest to Pay Reciprocal Compensation on**
14 **VNXX Traffic**

15 When it filed its complaint, Pac-West initially argued that VNXX traffic was
16 compensable as "ISP-bound traffic" under the ISP Amendment. The Arizona District Court
17 rejected that conclusion.⁸⁴ Now, Pac-West asserts that ISP-bound traffic is compensable as
18 Section 251(b)(5) traffic under the ISP Amendment. Pac-West's new theory treats the *ISP*
19 *Mandamus Order* as if it has been incorporated into the parties interconnection agreement. Pac-
20 West claims that ISP-bound traffic and Section 251(b)(5) traffic are no longer distinct categories.
21 (Motion, p. 6).

22 Pac-West's new theory should be rejected for three reasons. First, the ISP Amendment
23 does not incorporate the *ISP Mandamus Order* as part of its terms. The interconnection
24 agreement at issue in this remand proceeding was in effect until the Spring of 2008, at which

25 ⁸² *Steen v. John Hancock Mutual Life Ins. Co.*, 106 F.3d 904, 910 (9th Cir. 1997).

26 ⁸³ *In re Wiersma*, 483 F.3d 933, 941 (9th Cir. 2007).

⁸⁴ *Arizona Qwest Decision*, pp. 20-21.

1 time Pac-West opted into the most recent Level 3 ICA. Thus, it was not even in effect when the
2 *ISP Mandamus Order* was released on November 5, 2008.⁸⁵ Moreover, Pac-West's
3 interpretation of the *ISP Mandamus Order* is a change in law that would not apply retroactively
4 in any event.

5 The ISP Amendment incorporates only the *ISP Remand Order*, which was in effect
6 during the entire period at issue in this remand proceeding. The FCC's holding in the *ISP*
7 *Remand Order* was that ISP-bound traffic is not subject to reciprocal compensation.⁸⁶
8 *WorldCom* did not vacate the *ISP Remand Order* or the rules adopted in it. Thus, the conclusion
9 that ISP-bound traffic was not subject to reciprocal compensation under Section 251(b)(5) of the
10 Act was binding law during the term of the ISP Amendment.⁸⁷ Moreover, as the Ninth Circuit
11 held in *Peevey*, VNXX traffic is interexchange traffic that is not subject to reciprocal
12 compensation under the *ISP Remand Order*.⁸⁸

13 Second, the language of the ISP Amendment requires Qwest to pay reciprocal
14 compensation only for EAS/Local traffic. Section 2 of the ISP Amendment provides under the
15 heading "Exchange Service (EAS/Local) Traffic" that "[p]ursuant to the election in Section 5 of
16 [the] Amendment, the Parties agree to exchange all EAS/Local (§251(b)(5)) traffic at the state
17 ordered reciprocal compensation rate." This provision reflects the parties' understanding that
18 "EAS/Local" traffic was synonymous with Section 251(b)(5) traffic and that only local traffic
19 was subject to reciprocal compensation after the *ISP Remand Order*.

20 Pac-West does not argue in its motion that VNXX traffic constitutes "EAS/Local" traffic,

21 ⁸⁵ The cases cited by Pac-West on page 7 of its motion do not stand for the proposition that an
22 expired interconnection agreement must be interpreted under existing federal law. Rather, those
23 cases hold only that an existing agreement must be interpreted in a way that does not violate
24 federal law. The general rule is that an agreement is interpreted in accordance with the law
25 existing at the time it was formed. *Norfolk & W. Ry. V. American Train Dispatchers' Assoc.*,
499 U.S. 117, 130 (1991); *see eg. McDonald V. Farm Bureau Ins. Co.*, 747 N.W.2d 811, 818
(Mich. 2008) ("[T]he general rule is that contracts are interpreted in accordance with the law in
effect at the time of their formation.").

26 ⁸⁶ *ISP Remand Order*, ¶¶3, 23 and 35..

⁸⁷ *Peevey*, 462 F.3d at 1147, n. 1.

⁸⁸ *Peevey*, 462 F.3d at 1157-58

1 nor could it. Pac-West's entire argument is that it does not matter whether the traffic is local or
2 not. As discussed above, Pac-West is wrong. The local/non-local distinction between reciprocal
3 compensation and the access charge regime is preserved by the FCC's recognition that traffic
4 that falls within Section 251(g) is not subject to Section 251(b)(5) of the Act until the FCC
5 makes it so by "explicitly" superseding pre-Act "regulations, orders and policies."

6 Third, Pac-West's new theory presupposes that there is ambiguity in the ISP Amendment.
7 Thus, Pac-West alleges that industry practice and the parties' course of dealing should be used to
8 resolve the ambiguity. (Motion, p.15) According to Pac-West "accounting records show that
9 Qwest paid Pac-West reciprocal compensation for all ISP-bound traffic for over three years
10 before articulating the VNXX basis for non-payment." *Id.* However, Pac-West failed to submit
11 an affidavit or the accounting records to support this alleged industry practice or course of
12 dealing.⁸⁹

13 In fact, Qwest did not agree by its conduct or course of dealing to pay Pac-West for
14 VNXX traffic.⁹⁰ For starters, Qwest never knowingly paid Pac-West for VNXX traffic.⁹¹ At no
15 time did Pac-West advise Qwest that it was billing Qwest for VNXX traffic or the extent to
16 which Pac-West engaged in VNXX in Arizona. Moreover, when Qwest did develop the
17 evidence that Pac-West was engaging in VNXX, Qwest disputed that it was obligated to pay
18 intercarrier compensation on such traffic and withheld payment.⁹²

20 III. CONCLUSION

21
22 In ruling on a motion for summary judgment, all facts and legitimate inferences
23 (including any contract ambiguities) must be resolved in favor of the party opposing the motion

24 ⁸⁹ Pac-West should not be permitted to submit evidentiary support in its reply brief because that
25 would deprive Qwest of an opportunity to respond to any such evidence.

⁹⁰ Affidavit of Larry Brotherson, ¶7.

⁹¹ *Id.*, at ¶¶5-8.

⁹² *Id.*, at ¶8.

1 for summary judgment.⁹³ Pac-West did not present any information in its motion concerning the
2 services it offers to ISPs or the endpoints of the traffic at issue. Thus, in ruling on Pac-West's
3 motion, the Commission must conclude that the traffic in dispute is not local traffic, that it was
4 subject to pre-Act FCC regulations, orders and policies applicable to interstate, interexchange
5 calls to ISPs and that it is not subject to reciprocal compensation under the ISP Amendment. The
6 Commission must interpret the ICA as amended by the ISP Amendment to reflect the *ISP*
7 *Remand Order*, for the period of time the ICA was effective. In doing so, the Commission
8 cannot consider whether there was a subsequent change of law, or even whether the Commission
9 believes different state or federal rules for VNXX should be made. This dispute is a past dispute
10 only, over whether Pac-West wrongly asserted a claim for termination charges for traffic that
11 was not ISP-bound, as that term was defined in the ISP Amendment.

12 In this proceeding, Qwest is entitled to a refund from Pac-West, the amount of which
13 should be determined after a hearing on the merits. For all of the reasons given above, the
14 Commission should deny Pac-West's motion and proceed to schedule discovery, pre-filed
15 testimony and a hearing on the merits.

16 RESPECTFULLY SUBMITTED this 9th day of April, 2009.

17
18 QWEST CORPORATION

19
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26 ⁹³ *Walk v. Ring*, 202 Ariz. 310, 44 P.3d 990 (Ariz. 2002).

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Deane Kypar

EXHIBIT A

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BEFORE THE ARIZONA CORPORATION COMMISSION

KRISTIN K. MAYES
Chairman
GARY PIERCE
Commissioner
PAUL NEWMAN
Commissioner
SANDRA D. KENNEDY
Commissioner
BOB STUMP
Commissioner

IN THE MATTER OF
PAC-WEST TELECOMM, INC.,

Complainant,

vs.

QWEST CORPORATION,

Respondent.

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

**AFFIDAVIT OF LARRY B. BROTHERSON
IN SUPPORT OF QWEST'S RESPONSE TO
THE MOTION FOR SUMMARY
DETERMINATION OF PAC-WEST
TELECOMM, INC.**

I, Larry B. Brotherson state as follows:

1. I am employed by Qwest Corporation (Qwest) as a Director Wholesale Advocacy in the Wholesale Markets organization. My business address is 1801 California Street, Room 2350, Denver, Colorado, 80202. I have personal knowledge of the facts set forth below.
2. I received a Bachelor of Arts degree from Creighton University in 1970 and a Juris Doctor degree from Creighton in 1973.
3. I joined Northwestern Bell Telephone Company in 1979. Since then, I have held several positions within Northwestern Bell, US WEST Communications, and Qwest. Most of my responsibilities and assignments have been within the Law Department. For years, my legal duties included being a state regulatory attorney in Iowa, a general litigation attorney, and a commercial attorney supporting several organizations within Qwest's predecessor companies.

1 My responsibilities also included advising the company on legal issues, drafting contracts, and
2 addressing legal issues that arise in connection with specific products. With the passage of the
3 Telecommunications Act of 1996 (the Federal Act), I took on responsibility for providing legal
4 advice and support for Qwest's Interconnection Group. In that role, I was directly involved in
5 working with competitive local exchange carriers (CLECs). I negotiated interconnection
6 agreements with CLECs that implemented various sections of the Act, including the Act's
7 reciprocal compensation provisions. In 1999, I assumed my current duties as director of
8 wholesale advocacy. My current responsibilities include coordinating the witnesses for all
9 interconnection arbitrations and for hearings involving disputes over interconnection issues. In
10 addition, I regularly testify in commission and court cases involving interconnection issues of all
11 kinds, including billing issues related to interconnection agreements.

12 4. As part of my duties, and with the assistance of others upon whom I rely in the
13 normal course of business, I have reviewed the information as to the types of traffic exchanged
14 between Qwest and Pac-West Telecomm, Inc. ("Pac-West"). I have also reviewed information
15 as to the payments that Qwest has made to Pac-West.

16 5. I have reviewed the Motion for summary determination filed by Pac-West in this
17 matter. Pac-West claims that Qwest "paid Pac-West reciprocal compensation for all ISP-bound
18 traffic for over three years before articulating the VNXX basis for non-payment." (Pac-West
19 motion, p. 15). That is not true. Qwest did not make payments in Arizona to Pac-West for ISP
20 traffic during the three years after the issuance of the FCC's ISP Remand Order.

21 6. One of the significant problems that Qwest has had in dealing with the VNXX
22 issue is the fact that CLECs like Pac-West have never disclosed to Qwest when or the extent to
23 which they began using VNXX-routing to deliver traffic to their Internet Service Provider (ISP)
24 customers.

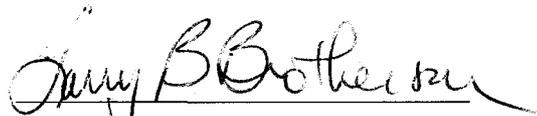
25 7. Qwest has consistently maintained that VNXX traffic, because it is not local
26 traffic, is not subject to reciprocal compensation. Carriers such as Pac-West engage in VNXX

1 arrangements to make long distance calls appear to be local. Pac-West assigns telephone
2 numbers to ISPs that correspond with the local calling area in which the ISPs' customers are
3 located. Qwest switches are programmed to recognize local telephone numbers assigned by Pac-
4 West as Pac-West numbers and thus route calls to those numbers to Pac-West. The calls are
5 switched by Qwest and transported to a point of interconnection between Qwest and Pac-West
6 that is typically located in the local calling area in which the calls are placed. Pac-West then
7 transports the calls from its points of interconnection in Arizona to the modems that Pac-West
8 owns or operates. I have found no evidence that these modem(s) are located in Arizona.
9 Through its telephone number assignment, Pac-West creates the interexchange link between its
10 callers and the modems that answer the calls before they are routed onto the Internet. Thus, Pac-
11 West's service using VNXX arrangements is an interexchange service and Pac-West functions as
12 an interexchange carrier.

13 8. In the years following the issuance of the ISP Remand Order, Qwest became
14 suspicious that CLECs might be using VNXX arrangements. To test its suspicions, Qwest
15 developed some analytical tools to analyze the traffic of CLECs. Once Qwest was able to
16 determine that a carrier was using VNXX, Qwest disputed bills for intercarrier compensation
17 based on Qwest's estimate of the amount of VNXX traffic.

18 9. I have determined, based on network data available to me at this time, that Qwest
19 and Pac-West interconnect at three points of interconnection in Arizona, which are located in the
20 largest local calling areas in Arizona.

21 By entering my signature and under penalty of perjury I affirm the truth of the statements
22 written above.

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25 Larry B. Brotherson
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Subscribed and sworn to before me, this 8th day of April, 2009.

Notary Public *Jan M. Towner*

My Commission Expires 4-13-2010



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 -- Intercarrier 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 intercarrier 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 Intercarrier 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.

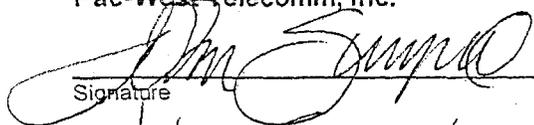
7. Further Amendments

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.

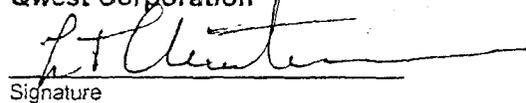

Signature

John Sumpter
Name Printed/Typed

Vice President, Regulatory
Title

8/12/2002
Date

Qwest Corporation


Signature

L. T. Christensen
Name Printed/Typed

Director - Business Policy
Title

2/6/03
Date

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EXHIBIT C

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Qwest Corporation,
Plaintiff,

No. CV-06-2130-PHX-SRB

ORDER

vs.

Arizona Corporation Commission; Jeff Hatch-Miller, Chairman, William A. Mundell, Commissioner, Mike Gleason, Commissioner, Kristin K. Mayes, Commissioner, and Barry Wong, Commissioner, in their official capacities) as Commissioners of the Arizona Corporation Commission; and

Level 3 Communications, LLC; and

Pac-West Telecomm, Inc.,

Defendants.

Pending before the Court is Plaintiff, Qwest's challenge to the final orders of the Arizona Corporation Commission ("ACC") issued in two separate proceedings held to construe Qwest's obligations to Defendants Level 3 and Pac-West under amendments to their Interconnection Agreements.

I. BACKGROUND

A. Telecommunications Regulation

1. The Telecommunications Act of 1996

1 Prior to the enactment of the Telecommunications Act of 1996 (“TCA”), 47 U.S.C.
2 151 *et seq.*, local telephone service in this country “was provided primarily by a single
3 company within each local area that had an exclusive franchise to serve an authorized
4 territory within the state.” *Verizon Cal., Inc. v. Peevey*, 462 F.3d 1142, 1147 (9th Cir. 2006).
5 Congress’s intent in enacting the TCA was ““to end the local telephone monopolies and
6 create a national telecommunications policy that strongly favored competition in the local
7 telephone markets.”” *Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 61-62
8 (1st Cir. 2006) (“*Global NAPs I*”) (quoting *Global NAPs, Inc. v. Verizon New England, Inc.*,
9 396 F.3d 16, 18 (1st Cir. 2005)). In the wake of the TCA, a variety of telephone companies
10 entered the local markets to take advantage of the new opportunities presented by
11 deregulation. Level 3 and Pac-West are among these new market entrants, known as
12 competitive local exchange carriers (“CLECs”), while Qwest, a carrier predating the TCA,
13 is classified as an incumbent local exchange carrier (“ILEC”). See *Peevey*, 462 F.3d at 1146.

14 At the heart of the TCA is 47 U.S.C. § 251 which allows CLECs to interconnect with
15 an ILEC’s physical network. Section 251(a)(1) provides generally that “[e]ach
16 telecommunications carrier has the duty - (1) to interconnect directly or indirectly with the
17 facilities and equipment of other telecommunications carriers.” Under interconnection, the
18 company serving the caller—known as the originating carrier—and the company serving the
19 recipient—known as the terminating carrier—have “[t]he duty to establish reciprocal
20 compensation arrangements for the transport and termination of telecommunications.” 47
21 U.S.C. § 251(b)(5). A reciprocal compensation arrangement is one where the LEC
22 originating the call pays the LEC that terminates the call. *Peevey*, 462 F.3d at 1146. Thus,
23 if a Qwest customer initiates a call to a Level 3 customer within the same local calling area,
24 then Qwest must pay reciprocal compensation to Level 3.

25 ILECs’ and CLECs’ duties when negotiating the terms of an interconnection
26 agreement are set forth in § 252. Carriers are obligated to negotiate in good faith, however,
27 if they are unable to reach an agreement, then either “party to the negotiation may petition
28 a State commission to arbitrate any open issues.” 47 U.S.C. § 252(b)(1). The state

1 commission then must “resolve each issue set forth in the petition and response,” and any
2 resolution reached by the state commission must adhere to both the requirements of § 251
3 and any regulation promulgated pursuant to § 251. 47 U.S.C. § 252(b)(4)(C), (c)(1). If the
4 parties are able to reach an agreement without resort to arbitration, then the agreement may
5 be made “without regard to the standards set forth in subsections (b) and (c) of section 251.”
6 47 U.S.C. § 252(a)(1).

7 Despite the TCA’s overhaul of the regulatory landscape, the FCC has definitively
8 stated that “the [TCA] preserves the legal distinctions between charges for transport and
9 termination of local traffic and interstate and intrastate charges for terminating long-distance
10 traffic.” *Peevey*, 462 F.3d at 1146 (quoting *In re Implementation of the Local Competition*
11 *Provisions in the Telecomms. Act of 1996*, 11 F.C.C.R. 15499, 16013, ¶ 1034, 1996 WL
12 452885 (Aug. 8, 1996) (“*Local Competition Order*”). The first category, generally referred
13 to as local calls, includes “traffic [that] stays within the boundaries of a local calling area.”
14 *Global NAPs I*, 444 F.3d at 62. The latter, which encompasses both interstate long distance
15 and intrastate calls that cross the boundaries of a local calling area (commonly called
16 exchange service or toll calls), is termed interexchange traffic. *Id.* at 62-63. The reciprocal
17 compensation requirement created by § 251(b)(5) “applies only ‘to traffic that originates and
18 terminates within a local area.’” *Peevey*, 462 F.3d at 1146 (quoting *Local Competition*
19 *Order*, 11 F.C.C.R. at 16013, ¶ 1033). Interexchange traffic, on the other hand, is subject to
20 an intercarrier compensation scheme know as access charges. With access charges, the long
21 distance companies receive payment from the caller and they then pay compensation to the
22 originating LEC as well as the terminating LEC. Thus, if a caller with local service provided
23 by Level 3, and long distance provided by AT&T, were to initiate a long distance call to an
24 out of state friend with local phone service supplied by Qwest, then AT&T would collect a
25 usage-based fee from the caller and would distribute a portion of that money to both Level
26 3 and Qwest.

27 2. Internet Service Provider (“ISP”)-Bound Traffic

28

1 Generally, the reciprocal compensation system is an effective means for adequately
2 compensating LECs for voice-based telecommunications. However, in the context of traffic
3 delivered to ISPs, the system created by the TCA has presented entrepreneurial CLECs with
4 an opportunity to engage in a sort of regulatory arbitrage—where the CLEC profits not by
5 charging their customer, but instead by positioning itself to receive a disproportionate amount
6 of reciprocal compensation. *In re Implementation of the Local Competition Provisions in the*
7 *Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16
8 F.C.C.R. 9151, 9153, ¶ 2, 2001 WL 455869 (Apr. 27, 2001) (“*ISP Remand Order*”). This
9 situation arises because CLECs, not ILECs, typically serve ISP clients, and ISPs are in the
10 unique position of receiving almost exclusively one-way traffic. *In re Core Commc’ns*, 455
11 F.3d 267, 270 (D.C. Cir. 2006). Unlike a normal voice customer, who would likely both
12 place and receive local telephone calls, the ISPs typically only receive traffic; a customer
13 (who generally obtains service from an ILEC) initiates the telephone call to the ISP (served
14 by the CLEC), and that ISP then provides access to the world wide web through the local
15 telephone connection. This is problematic because, under the reciprocal compensation
16 system, the calling party’s carrier pays the terminating carrier, thus providing economic
17 incentives for companies to serve ISPs at rates well below market cost while deriving their
18 revenues not from the ISPs, but from the ILECs instead.

19 Recognizing that “the existing intercarrier compensation mechanism for the delivery
20 of [ISP] traffic . . . has created opportunities for regulatory arbitrage and distorted the
21 economic incentives related to competitive entry into the local exchange and exchange access
22 markets,” the FCC has repeatedly attempted to deal with the issue. *ISP Remand Order*, 16
23 F.C.C.R. at 9153, ¶ 2. In 1999 the FCC issued the *Declaratory Ruling, In re Implementation*
24 *of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier*
25 *Compensation for ISP-Bound Traffic*, 14 F.C.C.R. 3689, 1999 WL 98037 (Feb. 26, 1999)
26 (“*Declaratory Ruling*”), where it concluded that ISP-bound calls are “interstate traffic subject
27 to the jurisdiction of the Commission under section 201 of the [TCA] and [are] not, therefore,
28 subject to the reciprocal compensation provisions of section 251(b)(5).” *ISP Remand Order*,

1 16 F.C.C.R. at 9152, ¶ 1. On appeal, the Court of Appeals for the District of Columbia
2 Circuit vacated the *Declaratory Ruling*, and held “that the Commission had inadequately
3 explained its conclusion that ISP-bound traffic is non-local.” *In re Core Commc’ns*, 455
4 F.3d at 271. On remand, the FCC produced the *ISP Remand Order* wherein it again
5 concluded that ISP-bound calls within a local calling area are not subject to reciprocal
6 compensation, and did so in reliance on an alternative statutory provision, 47 U.S.C. §
7 251(g). *Id.* Section 251(g) exempts certain forms of telecommunications from the reciprocal
8 compensation requirement of § 251(b)(5), including “exchange access, information access,
9 and exchange services for such access to interexchange carriers and information service
10 providers.” 47 U.S.C. § 251(g). The FCC “found that calls made to ISPs located within the
11 caller’s local calling area fall within those enumerated categories-specifically, that they
12 involve ‘information access.’” *In re Core Commc’ns*, 455 F.3d at 271 (quoting *ISP Remand*
13 *Order*, 16 F.C.C.R. at 9171, ¶ 42).

14 After concluding that local ISP-bound calls are not subject to reciprocal compensation
15 under § 251(b)(5), the *ISP Remand Order* went on to create an interim regime where
16 “reciprocal compensation rates for ISP-bound calls were capped, with the rate cap declining
17 over time towards zero.” *Peevey*, 462 F.3d at 1147. In conjunction with the filing of the *ISP*
18 *Remand Order*, the FCC issued a notice of proposed rulemaking to decide whether to abolish
19 the entire system of reciprocal compensation in favor of a bill-and-keep regime to create
20 continuity and remove the vulnerabilities of the current system. *In re Core Commc’ns*, 455
21 F.3d at 272-3 (citing *Notice of Proposed Rulemaking, In the Matter of Developing a Unified*
22 *Intercarrier Compensation Regime*, 16 F.C.C.R. 9610, 2001 WL 455872 (Apr. 27, 2001)).
23 Thus, with the ultimate goal of moving towards a bill-and-keep regime, the *ISP Remand*
24 *Order* created rate caps, market caps, the mirroring rule, and the new markets rule, all in an
25 effort to slowly wean the CLECs off of reciprocal compensation for ISP-bound traffic. *Id.*
26 at 273-74. For the purposes of this Order it is unnecessary to examine the details of the
27 aforementioned provisions of the interim regime. However, the goal of the FCC actions in
28 the *Declaratory Ruling* and the subsequent *ISP Remand Order*, to “move aggressively to

1 eliminate arbitrage opportunities presented by the existing recovery mechanism for ISP-
2 bound traffic,” is of paramount importance. *ISP Remand Order*, 16 F.C.C.R. at 9156, ¶ 7.¹

3 ²

4 3. Virtual NXX (“VNXX”) ISP-Bound Traffic

5 At the crux of the dispute in this case are Level 3 and Pac-West’s use of VNXX
6 technology for the transport of ISP-bound calls. The national system of telephone numbering
7 is designed so that the first six digits of each ten digit telephone number correspond to the
8 physical location of the customer to whom the number is assigned. *Peevey*, 462 F.3d at
9 1147-48; *see also Global NAPs I*, 444 F.3d at 63-64; *Global NAPs, Inc. v. Verizon New*
10 *England, Inc.*, 454 F.3d 91, 96 (2d Cir. 2006) (“*Global NAPs IP*”). The industry uses the
11 following format: NPA-NXX-XXXX to route telephone calls and to determine how those
12 calls should be billed to the customer and compensated from carrier to carrier. *Id.* As
13 intended, the first three digits, the numbering plan area (commonly called the area code), and
14

15 ¹In *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), the D.C. Circuit rejected
16 the FCC’s reasoning given in the *ISP Remand Order*, holding that it was error to exclude
17 ISP-bound traffic from reciprocal compensation based upon the language of § 251(g).
18 Despite finding that the FCC’s logic was faulty, the D.C. Circuit left in place the interim
19 rules created by the *ISP Remand Order*. *Id.* at 434. Rather than vacate the order, the court
20 remanded the decision back to the FCC for further consideration based upon its belief that
21 “there is plainly a non-trivial likelihood that the Commission has authority to elect such a
22 system (perhaps under §§ 251(b)(5) and 252(d)(B)(i)).” *Id.* Therefore, “the *ISP Remand*
23 *Order* remains binding.” *Peevey*, 462 F.3d at 1147 n.1.

24 ²Following *WorldCom*, in July 2003 Core Communications petitioned the FCC to
25 forbear from applying the four interim provisions set forth in the *ISP Remand Order*. *In re*
26 *Core Commc’ns*, 455 F.3d at 274; *see Pet. of Core Commc’ns, Inc. for Forbearance Under*
27 *47 U.S.C. § 160(c) from Application of the ISP Remand Order*, 19 F.C.C.R. 20179, 2004 WL
28 2341235 (Oct. 18, 2004) (“*Core Forbearance Order*”). After considering the continuing
necessity of the interim provisions, the FCC determined that the rate caps and the mirroring
rule remained vital to furthering the objectives articulated in the *ISP Remand Order*. *In re*
Core Commc’ns, 455 F.3d at 275. In contrast, the Commission concluded that the new
markets rule and the growth caps had been obviated by recent trends in the ISP market,
writing “[m]arket developments since 2001 have eased the concerns about growth of dial-up
ISP traffic.” *Id.* (quoting *Core Forbearance Order*, 19 F.C.C.R. 20186, ¶ 20). On appeal,
the D.C. Circuit upheld the Commission’s decision. *See generally Id.*

1 the middle three digits, the exchange code, are assigned based upon physical location. *Id.*
2 Under this system, when a customer assigned a particular NPA-NXX calls a second customer
3 with a different NPA-NXX, the call will be compensated as an interexchange call subject to
4 access charges if it migrates beyond the bounds of the local calling area. *Id.* Despite the
5 geographical correlation of NPA-NXX codes to customers, technology permits carriers to
6 assign virtual NPA-NXX codes—where the NPA-NXX bears no relation to the physical
7 location of the customer. *Id.*

8 CLECs employ VNXX technology allowing them to provide local numbers to ISPs
9 whose physical equipment resides in one centralized location. *Id.* Under this arrangement,
10 ISPs avoid the inconvenience of having to locate their equipment in each distinct NPA-NXX
11 area, ISPs' customers gain convenient access to the Internet without paying toll charges for
12 the call, and it allows the CLECs to advance an argument—as they do here—that these calls
13 are local calls because the NPA-NXX number initiating the call is assigned to the same local
14 calling area as the NPA-NXX number receiving the call.

15 VNXX traffic is of special significance because it defies normal classification under
16 either the access charge or reciprocal compensation regimes. *See Global NAPs II*, 454 F.3d
17 at 100-01. Determining which area of intercarrier compensation VNXX calls fall under is
18 of critical importance to the parties before this Court. If compensated pursuant to the access
19 charge system used for calls placed outside the caller's local calling area, the originating
20 LEC—generally an ILEC such as Qwest—will receive compensation for the phone call.
21 However, if this traffic were subject to either the reciprocal compensation scheme or the
22 capped scheme created by the *ISP Remand Order*, then Qwest would pay compensation to
23 the terminating LEC—generally a CLEC such as Pac-West or Level 3.

24 Qwest's arguments in this case revolve solely around Pac-West and Level 3's use of
25 VNXX, and can be summed up rather succinctly: Qwest believes that VNXX calls should
26 be treated as long distance calls subject to the access charge regime. Qwest does not argue
27 that VNXX technology is ineffective nor does it claim that allowing an ISP to locate its
28 equipment in one central facility is inefficient, it simply argues that the use of VNXX is

1 designed to skirt the statutorily preserved access charge regime unfairly depriving Qwest of
2 compensation for use of its infrastructure.

3 **B. Arizona Corporation Commission Decisions**

4 **1. Pac-West v. Qwest, ACC Decision No. 68820**

5 The proceedings before the ACC were initiated by Pac-West to redress what it
6 believes to be Qwest's breach of the parties' interconnection agreement ("Pac-West ICA")
7 and the ISP Amendment to the Pac-West ICA. (ACC R., *Pac-West Telecomm, Inc. v. Qwest*
8 *Commc 'ns*, Docket Nos. T-01051B-05-0495, T-03693A-05-0495 ("P-W R."), ACC Decision
9 No. 68820 ("ACCD"), at 1.) The central question presented to the ACC was "whether
10 VNXX ISP-bound traffic is eligible for reciprocal compensation under the [Pac-West] ICA,
11 the ISP Amendment, and the *ISP Remand Order*." (P-W R., ACCD at 8, ¶ 20.)

12 The ACC began its decision by noting that "the precise classification of VNXX traffic
13 remains unsettled" because "jurisprudence at the federal level is inconclusive, and state
14 jurisprudence is conflicting." (P-W R., ACCD at 8, ¶ 20.) Relying primarily on language
15 found in *Global NAPs I*, and emphasizing the unsettled nature of the law, the ACC concluded
16 that the *ISP Remand Order* could be interpreted to include VNXX calls. (P-W R., ACCD
17 at 9-10, ¶ 25.) After it reached the conclusion that the *ISP Remand Order* may be read to
18 include VNXX traffic, the ACC turned to the issue of the Pac-West ICA and ISP
19 Amendment. The ACC found pursuant to Sections 2 and 5 of the ISP Amendment that
20 "[t]he plain language of the ISP Amendment provides for reciprocal compensation for all
21 ISP-bound traffic." (P-W R., ACCD at 10, ¶ 26.) Without any indication that the ISP
22 Amendment was intended to "exclude VNXX ISP-bound traffic, [the ACC] f[ound] that such
23 traffic should be subject to reciprocal compensation under the terms of the ICA and ISP
24 Amendment." (P-W R., ACCD at 10, ¶ 26.) As a result of the decision, the ACC determined
25 that Qwest had "breached the terms of the ICA and ISP Amendment," and it ordered Qwest
26 to pay reciprocal compensation to Pac-West as outlined in the decision. (P-W R., ACCD at
27 10-11, ¶¶ 28, 14.)

1 Sensing that the VNXX issue would continue to present difficulties and only create
2 further disputes between telecommunications companies in Arizona, the ACC added the
3 following observation as well as an order to the same effect:

4 Because the issue of VNXX has now come before the
5 Commission more than once, and we anticipate that it will
6 continue to be an issue in the future, we will order Staff to open
7 a generic docket to investigate and make recommendations in
8 the form of a Staff Recommendation to the Commission
9 regarding VNXX. Issues to be addressed by Staff should
10 include what rates are applicable on an ongoing basis; whether
11 VNXX results in misassigned local telephone numbers; and
12 whether VNXX results in misused telephone numbering
13 resources.

14 (P-W R., ACCD at 11, ¶¶ 29, 14.)

15 2. Level 3 v. Qwest, ACC Decision No. 68855

16 One month later, on July 28, 2006, the ACC issued a second order, this time to resolve
17 a virtually identical complaint to the one addressed in the Pac-West matter. In the complaint
18 filed with the ACC, Level 3 argued that Qwest had breached the Interconnection Agreement
19 (“L 3 ICA”), and the accompanying ISP Amendment, by failing to pay the agreed upon rate
20 of reciprocal compensation for ISP-bound VNXX traffic. (See generally ACC R., *Level 3*
21 *Commc 'ns, LLC v. Qwest Commc 'ns*, Docket Nos. T-01051B-05-0415, T-03654A-05-0415
22 (“L 3 R.”), ACC Decision No. 68855 (“ACCD”).)

23 Focusing on the plain language of the ISP Amendment, the ACC held that the
24 agreement “does not carve out, or except, VNXX ISP-bound traffic.” (L 3 R., ACCD at 13,
25 ¶ 54.) The Commission then looked to the *ISP Remand Order*, which controls the definition
26 of the term “ISP-bound traffic” as it is used in the ISP Amendment, and found that “the
27 FCC’s *ISP Remand Order* do[es] not limit the compensation scheme to only ISP-bound calls
28 that originate and terminate in the same LCA.” (L 3 R., ACCD at 13, ¶ 55.) The ACC
further supported its decision by citing *Global NAPs I’s* holding “that the *ISP Remand Order*
does not preempt state authority to regulate intercarrier compensation for all ISP-bound
traffic.” (L 3 R., ACCD at 13, ¶ 57.) Finally, the Commission pointed to the FCC’s own
statement that the *ISP Remand Order* could be read to either support or oppose the argument

1 that VNXX traffic was addressed by the *ISP Remand Order*, and the FCC declined to opine
2 which position was the better reading. (L 3 R., ACCD at 13, ¶ 55.) Thus, the ACC ordered
3 Qwest to compensate Level 3 in a manner consistent with the order and further ordered Level
4 3 to discontinue use of VNXX technology per its resolution of an earlier case involving the
5 parties. (L 3 R., ACCD at 14-15.)

6 C. Requested Relief

7 On September 6, 2006, Qwest filed this action seeking declaratory and injunctive
8 relief from the orders of the ACC. Qwest has requested, among other relief, that the Court
9 vacate the orders of the ACC issued in Decision Nos. 68820 and 68855; declare that the *ISP*
10 *Remand Order* does not include VNXX ISP-bound traffic; and order Level 3 and Pac-West
11 to refund monies that Qwest contends were paid in excess of its obligations under the
12 agreements. After extensive briefing and consideration of the parties' oral arguments, the
13 Court now turns to address the issues.

14 II. LEGAL STANDARDS AND ANALYSIS

15 A. Jurisdiction

16 The ACC has jurisdiction to arbitrate interconnection agreements under 47 U.S.C. §
17 252(b). *U.S. W. Commc'ns, Inc. v. Wash. Utils. & Transp. Comm'n*, 255 F.3d 990, 993 (9th
18 Cir. 2001). Review by this Court is provided under 47 U.S.C. § 252(b) and 28 U.S.C. §§
19 1331, 1337. *Id.*

20 B. Standard of Review

21 The district courts review *de novo* state agency interpretations and applications of
22 federal telecommunications law. *See Peevey*, 462 F.3d at 1147 (citing *U.S. W. Commc'ns*,
23 255 F.3d at 994). "A state agency's interpretation of federal statutes is not entitled to the
24 deference afforded a federal agency's interpretation of its own statutes under *Chevron U.S.A.*
25 *Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 843 (1984)." *Orthopaedic*
26 *Hosp. v. Belshe*, 103 F.3d 1491, 1495 (1997). All other determinations, including those of
27 contract interpretation, are reviewed under the arbitrary and capricious standard. *Peevey*, 462
28 F.3d at 1147. "A state commission's decision is arbitrary and capricious if the decision 'was

1 not supported by substantial evidence,' or the commission made a 'clear error of judgment.'"
2 *Id.* (quoting *U.S. W. Commc'ns*, 255 F.3d at 994).

3 **C. Qwest v. Level 3**

4 The ISP Amendment to the L 3 ICA controls the relationship between the parties.
5 Thus, before moving beyond the four corners of that document, it is necessary to determine
6 whether the contract addresses VNXX ISP-bound traffic. The relevant language from the
7 ISP Amendment reads: "The Parties agree to exchange all EAS/local (§ 251(b)(5)) and ISP-
8 bound traffic (as that term is used in the FCC ISP Order) at the FCC ordered rate pursuant
9 to the FCC ISP Order." (L 3 R., ACCD at 4, ¶ 22.) It is readily apparent that in order to give
10 meaning to the term "ISP-bound traffic," as that phrase is used in the ISP Amendment, it is
11 necessary to examine precisely how "that term is used in the FCC *ISP [Remand] Order*."
12 (L 3 R., ACCD at 4, ¶ 22.) Only through a comprehensive review of the *ISP Remand Order*
13 can the Court determine whether the FCC intended to include VNXX traffic within the
14 compensation regime created by that order.

15 **1. The *ISP Remand Order*'s Applicability to ISP-Bound VNXX Traffic**

16 Qwest argues that the ACC has misinterpreted the scope of the *ISP Remand Order* by
17 applying it to VNXX traffic. Specifically, Qwest contends that the Commission failed to
18 properly apply relevant case law and ignored key provisions of the *ISP Remand Order* which
19 demonstrate that the FCC was attempting to deal solely with ISP-bound calls that originate
20 and terminate within a single local calling area. In addition, Qwest argues that VNXX calls
21 are not local and, therefore, are subject to access charges.

22 In opposition, Level 3 contends that the *ISP Remand Order* applies to all ISP-bound
23 calls, regardless of whether they are VNXX. In support of this position, Level 3 points to the
24 language used in the *ISP Remand Order* and the context in which it was decided. Level 3
25 also challenges as fundamentally flawed any characterization of VNXX traffic that would
26 place it within the access charge regime. Finally, Level 3 claims that both public policy and
27 recent court cases support its interpretation of the *ISP Remand Order*.

28

1 Conducting a review of the regulatory history, context, policy considerations and
2 specific language used in the *ISP Remand Order* is critical to gain an understanding of its
3 breadth. Because the *ISP Remand Order* makes no mention of VNXX, it is imperative that
4 any reviewing court look to these crucial elements. The ACC's failure to conduct such an
5 examination led to its conclusion that VNXX was within the definition of "ISP-bound traffic"
6 as that term was used in the *ISP Remand Order*. Such an interpretation cannot be supported,
7 and is therefore in violation of federal law.

8 **a. Regulatory History and Context of the *ISP Remand Order***

9 The reciprocal compensation provisions of § 251(b)(5) apply solely to calls that
10 originate and terminate in the same local calling area. *ISP Remand Order*, 16 F.C.C.R. at
11 9159, ¶13. In its *Declaratory Ruling* and the subsequent *ISP Remand Order*, the FCC's
12 primary purpose was to consider whether ISP-bound calls *subject to reciprocal compensation*
13 *under the current regime* had a basis in law to be excluded from the requirements of §
14 251(b)(5). The only ISP-bound calls that could possibly have been subject to reciprocal
15 compensation were those originating and terminating within the same local calling area.
16 Thus, the *ISP Remand Order* did not address ISP-bound calls subject to access charges. *See*
17 *Global NAPs II*, 454 F.3d at 100 ("the FCC promulgated t[he *ISP Remand*] [*O*]rder
18 specifically to address only the issue of reciprocal compensation for ISP-bound traffic.") An
19 argument to the contrary would have to embrace the impossibility that the FCC was
20 considering removing ISP-bound toll calls from the reciprocal compensation regime when
21 those calls were not subject to reciprocal compensation in the first place.

22 This leaves the question of whether VNXX was ever subject to reciprocal
23 compensation under § 251(b)(5) prior to the entry of the *ISP Remand Order*. The
24 classification of VNXX traffic as either local, long distance, or some other non-traditional
25 type of traffic is the responsibility of either the FCC or the ACC. In fact, the ACC has
26 recognized this and has taken the initiative to establish a generic docket to address the issue.
27 (*See P-W R.*, ACCD at 11, ¶¶ 29, 14.) None of this, however, allows the Court to avoid the
28 reality that VNXX has yet to be designated as a certain type of traffic, or dealt with in any

1 way by the organizations possessing expertise in the regulation of telecommunications.
2 Without a finding that a VNXX call in Arizona is local—i.e., a call that actually originates and
3 terminates within a local calling area—the Court cannot determine whether VNXX logically
4 fits within the class of ISP-bound calls that spurred the FCC to take action to remove those
5 calls from the purview of § 251(b)(5).

6 Within a few years of the 1996 enactment of the TCA, the FCC embarked on a course
7 of action to remove ISP-bound traffic from the Act’s reciprocal compensation regime—first
8 in the *Declaratory Ruling* and later in the *ISP Remand Order*—because of its desire to
9 eliminate the “enormous incentive for CLECs to target ISP customers.” *ISP Remand Order*,
10 16 F.C.C.R. at 9183, ¶ 70. Due to the intercarrier compensation scheme created by §
11 251(b)(5), CLECs had an “incentive to target [ISPs] with little regard to the costs of serving
12 them.” *Id.* at 9183, ¶ 69. Based upon the findings of the FCC, this is exactly what CLECs
13 did, and it resulted in a windfall for CLECs while damaging ILECs and their customers who
14 do not use dial up Internet services. Evidence considered by the FCC in issuing the *ISP*
15 *Remand Order* demonstrates that “CLECs, on average, terminate eighteen times more traffic
16 than they originate, resulting in annual CLEC reciprocal compensation billings of
17 approximately two billion dollars, ninety percent of which is for ISP-bound traffic.” *Id.* at
18 9183, ¶ 70. This evidence led the FCC to conclude that “CLECs target ISPs in large part
19 because of the availability of reciprocal compensation,” not because of a legitimate free-
20 market-based desire to serve ISPs. *Id.* As a result of this regulatory arbitrage, a CLEC can
21 charge rates to its ISP customers “that bear little relationship to its actual costs, thereby
22 gaining an advantage over its competitors.” *Id.* at 9182, ¶ 68. This practice not only results
23 in market distortions, it also harms the customers of LECs who are forced to bear the
24 increased costs associated with the extreme imbalance in reciprocal payments to CLECs. *Id.*
25 Consumers are not charged based upon the amount of reciprocal billing that is paid on their
26 behalf, instead the costs of all local callers are averaged into the price charged to all
27 customers of the LEC. *Id.* Thus, a customer who makes and receives only voice calls will
28

1 bear the increased costs incurred by the LEC's customers who direct much of their traffic to
2 ISPs. *Id.*

3 While the *ISP Remand Order* can easily be faulted for failing to address VNXX
4 traffic, it does not waver in its depiction of the factual context and the regulatory posturing
5 that served as the catalyst for FCC action. In the *ISP Remand Order*, the FCC's motivation
6 was to eliminate regulatory arbitrage and distorted markets that arose from the inclusion of
7 ISP-bound traffic in the reciprocal compensation system applicable to calls originated and
8 terminated by LECs *within the same local calling area*. The regulatory history does not
9 support, as Level 3 contends, that the FCC was actually removing all ISP-bound calls,
10 regardless of classification, from the reciprocal compensation versus access charge
11 dichotomy and in place creating a separate class of traffic that would be controlled
12 exclusively by the terms of the *ISP Remand Order*. At the base of Level 3's argument is the
13 contention that "the FCC rejected the idea that the status of traffic as 'local' has any
14 relevance to reciprocal compensation under Section 251(b)(5)." (Level 3 Commc'ns, LLC's
15 Opening Brief ("L 3 Brief") at 21.) This argument, which is addressed in detail below, finds
16 no support in the language or regulatory history of the *ISP Remand Order* and, for that
17 reason, it fails.

18 **b. Essential Language of the *ISP Remand Order***

19 The plain language of the *ISP Remand Order* reveals that the FCC's objective was to
20 determine "whether reciprocal compensation obligations apply to the delivery of calls from
21 one LEC's end-user customer to an ISP *in the same local calling area* that is served by a
22 competing LEC." *ISP Remand Order*, 16 F.C.C.R. at 9159, ¶13 (emphasis added). VNXX
23 ISP-bound traffic, by definition, involves an ISP located outside the caller's local calling
24 area. Appearing in the "Background" section, this unambiguous statement is a description
25 of the original question presented in the *Declaratory Ruling*. This statement has been
26 attacked as being taken out of context, however, it is precisely the setting from which it was
27 taken which gives it such force.

28

1 When the FCC answered the question presented in the *Declaratory Ruling* it was
2 subsequently overturned on appeal and remanded to the Commission. On further
3 consideration, the FCC issued the *ISP Remand Order* wherein it achieved the same result,
4 albeit using a new analysis. Any argument challenging the continuing validity of the original
5 question presented must presume that somehow the issue before the FCC was significantly
6 broadened on appeal—from mere consideration of a single area of ISP-bound traffic to all
7 ISP-bound calls, without so much as indicating once that it was doing so. If the Court were
8 to adopt Level 3's position, then it would implicitly recognize that the FCC acted in violation
9 of the principle “that an agency choosing to alter its regulatory course ‘must supply a
10 reasoned analysis indicating that its prior policies and standards are being deliberately
11 changed, not casually ignored.’” *Action for Children’s Television v. FCC*, 821 F.2d 741, 745
12 (D.C. Cir. 1987) (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C.
13 Cir.1970)). The Court finds no evidence that the FCC contravened administrative law
14 principles by silently expanding the scope of its action.

15 Unsurprisingly, the FCC’s failure to clarify the scope of its action extends to its
16 treatment of VNXX, a term that appears nowhere in the *ISP Remand Order*. To explain how
17 the Commission addressed a form of telecommunications traffic without making mention of
18 it, Level 3 posits that no such reference was required because the FCC was addressing the
19 entire spectrum of ISP-bound calls, obviating the need for discussion of specific sub-classes,
20 such as VNXX. Underlying this theory is Level 3's central argument: that the *ISP Remand*
21 *Order* destroyed the distinction between “local” and “non-local” traffic, and instead created
22 a separate regime under which all ISP-bound calls are subject to the compensation scheme
23 created by the *ISP Remand Order*.

24 In the *ISP Remand Order* the FCC recognized that the “use of the phrase ‘local
25 traffic’” in the *Local Competition Order* and the *Declaratory Ruling* has “created
26 unnecessary ambiguities,” and, thus, it decided to discontinue use of those terms when
27 distinguishing between types of traffic. *ISP Remand Order*, 16 F.C.C.R. at 9173, ¶ 46.
28 Instead, the FCC concluded that calls are more properly classified either as calls subject to

1 § 251(b) or calls excepted from that regime by § 251(g). *Id.* at 9172, ¶ 46. In rejecting the
2 “local” versus “non-local” language, the FCC was simply implementing the D.C. Circuit’s
3 admonition that using such a distinction was an impermissible way to except certain ISP-
4 bound traffic from the coverage of § 251. The FCC explained this failed logic as follows:
5 “[t]here is no dispute that the Commission has historically been justified in relying on this
6 [end-to-end] method when determining whether a particular communication is
7 jurisdictionally interstate,’ [however,] the Commission had not adequately explained why the
8 jurisdictional analysis was dispositive of, or indeed relevant to, the question whether a call
9 to an ISP is subject to the reciprocal compensation requirements of section 251(b)(5).” *Id.*
10 at 9160-61, ¶ 16.

11 Level 3 places great weight on the FCC’s rejection of the “local” distinction, but this
12 reliance is misplaced. In its argument, Level 3 writes, “[c]learly it makes no sense to
13 interpret the *ISP Remand Order* as establishing a compensation regime limited to ‘local’
14 traffic (as somehow defined) when the FCC over and again repudiated any reliance on that
15 terminology.” (L 3 Brief at 24.) Although it may not make sense to distinguish “local”
16 traffic, it makes perfect sense to separate § 251(b)(5) traffic from traffic falling under the §
17 251(g) exception. In one sense, Level 3 is correct—the *ISP Remand Order* did not “establish
18 a compensation regime limited to ‘local’ traffic.” (L 3 Brief at 24.) It did, however, establish
19 a compensation regime limited to § 251(b)(5) traffic. This is fatal to Level 3’s argument
20 because neither the FCC nor the ACC have ever decided that VNXX traffic is subject to §
21 251(b)(5), and there remains the possibility that VNXX is instead subject to the access
22 charges preserved by § 251(g), an area outside of the scope of the *ISP Remand Order*. *See*
23 *Global NAPs II*, 454 F.3d at 101 (noting that “[V]NXX’s potential compensation
24 arrangement . . . [could] possibly involve toll and access charges[] [which] would differ from
25 that contemplated in the 2001 *ISP Remand Order*”).

26 **c. Public Policy & the *ISP Remand Order***

27 An examination of the public policy concerns underlying the *ISP Remand Order*
28 illuminates the FCC’s intentions and further undermines Level 3’s arguments. Both Level

1 3 and Qwest advance public policy arguments, however, Level 3's position distorts the facts
2 and confounds common sense. Level 3 argues that the Commission's concerns were twofold,
3 "dealing with marketplace distortions . . . and establishing a unified regime for intercarrier
4 compensation." (L 3 Brief at 26 (citing *ISP Remand Order*, 16 F.C.C.R. at 9155-56, ¶ 7).)
5 Surprisingly, paragraph 7 of the *ISP Remand Order* contains no mention of "establishing a
6 unified regime for intercarrier compensation." It does, however, provide the following: "[i]n
7 sum, our goal in this Order is decreased reliance by carriers upon carrier-to-carrier payments
8 and an increased reliance upon recovery of costs from end-users." *ISP Remand Order*, 16
9 F.C.C.R. at 9155-56, ¶ 7. Creating a unified intercarrier compensation regime may be one
10 of the overall goals of the Commission, but it is not the policy concern that motivated it to
11 issue the *ISP Remand Order*.

12 From a policy perspective, Level 3's argument that all ISP-bound traffic should be
13 compensated pursuant to the *ISP Remand Order* regime is simply untenable. If this
14 interpretation were deemed credible, then the FCC would be placing *additional* traffic into
15 a carrier-to-carrier payment scheme—the exact practice that the FCC was attempting to
16 eliminate. A more logical conclusion is that the FCC intended to exclude both VNXX and
17 ISP-bound traffic subject to access charges. For ISP-bound traffic subject to access charges,
18 inclusion within the *ISP Remand Order* compensation system would only create additional
19 opportunities for regulatory arbitrage, this certainly could not have been the Commission's
20 intent.

21 **d. Subsequent Statements by the FCC Concerning the *ISP***
22 ***Remand Order***

23 In *Global NAPs I*, the First Circuit invited the FCC to submit a brief as *amicus curiae*
24 to address whether the *ISP Remand Order* preempts state regulation of VNXX ISP-bound
25 calls. *Global NAPs I*, 444 F.3d at 74. The FCC's brief acknowledges the ambiguity inherent
26 in the expansive language of the order and opines that, on its face, "the *ISP Remand Order*
27 appears to address all calls." *Global NAPs I*, Brief for *Amicus Curiae* FCC, 2006 WL
28 2415737, at *11. Yet, when taken in context of the administrative history, the FCC wrote

1 that “the Commission was considering only calls placed to ISPs located in the same local
2 calling area as the caller.” *Id.* at *10. The *ISP Remand Order*, however, does not stand in
3 a vacuum—which is the only setting where Level 3’s argument could survive.

4 After recognizing the *ISP Remand Order*’s lack of clarity concerning the intended
5 reach of the FCC’s action, the FCC’s brief recounted the administrative actions leading up
6 to the *ISP Remand Order*. *Id.* at *12. Beginning with the *Local Competition Order* and
7 again in the *Declaratory Ruling*, the FCC was “focused on calls between dial-up users and
8 ISPs in a single local calling area.” *Id.* In spite of the historical evidence supporting the
9 conclusion that the FCC never expanded its analysis beyond calls originating and terminating
10 in the same local calling area, Defendants cling to the FCC’s acknowledgment that “[t]he ISP
11 Remand Order . . . can be read to support the interpretation set forth by either party.” *Id.* at
12 *13. While either reading may be permitted, only one finds significant support in the
13 administrative history preceding the *ISP Remand Order*. Tellingly, the FCC concluded by
14 noting that “the Commission did not directly address VNXX calls in either of its ISP orders
15 and has not addressed VNXX calls more generally.” *Id.* Any likelihood that the FCC
16 intended to indirectly address VNXX ISP-bound traffic is heavily outweighed by the
17 evidence which supports a more limited reading, and the FCC’s *amicus brief* further supports
18 the Court’s conclusion in this regard.

19 **e. Relevant Case Law Interpreting the *ISP Remand Order***

20 In each instance that the United States appellate courts have addressed VNXX traffic,
21 the courts have recognized that the FCC’s analysis in the *ISP Remand Order* was limited to
22 traffic carried from a caller located within the same local calling area as the terminating ISP.
23 *Global NAPs I*, 444 F.3d at 73-74 (quoting *ISP Remand Order*, 16 F.C.C.R. at 9159, ¶ 13)
24 (“The issue that necessitated FCC action in the [*Declaratory Ruling*] and the *ISP Remand*
25 *Order* was ‘whether reciprocal compensation obligations apply to the delivery of calls from
26 one LEC’s end-user customer to an ISP in the same local calling area that is served by a
27 competing LEC.’”); *Global NAPs II*, 454 F.3d at 99 (“The ultimate conclusion of the 2001
28 [*ISP*] *Remand Order* was that ISP-bound traffic within a single calling area is not subject to

1 reciprocal compensation. . . . Although the 2001 Remand Order states explicitly that ISPs
2 are exempt from reciprocal compensation for intra-local calling area calls, it sheds little light
3 on inter-local calling area calls or access fees.”); *Peevey*, 462 F.3d at 1158-59 (finding the
4 rate caps imposed by the *ISP Remand Order* irrelevant to the issue of intercarrier
5 compensation for VNXX ISP-bound traffic because “[t]hose rate caps are intended to
6 substitute for the reciprocal compensation that would otherwise be due to CLECs for
7 terminating *local* ISP-bound traffic.”) (emphasis added); *In re Core Commc’ns*, 455 F.3d
8 at 272 (recounting the holding of the *ISP Remand Order* and recognizing that it applies to
9 “calls made to ISPs located within the caller’s local calling area”); *Worldcom*, 288 F.3d at
10 430 (“In the [*ISP Remand Order*] the [FCC] held that under § 251(g) of the Act it was
11 authorized to ‘carve out’ from § 251(b)(5) calls made to Internet service providers (“ISPs”)
12 located within the caller's local calling area.”).

13 Recognizing the significance of these cases, Level 3 devotes some fifteen pages of its
14 Reply to arguments that attempt to distinguish each case factually from the situation
15 presented to this Court. In doing so, Level 3 misses the point. The Court does not rely on
16 these cases for their primary holdings, none of which address the precise issue presented
17 here. Instead, each case, either in the background or analysis, identifies the scope of the
18 FCC’s action in the *ISP Remand Order*, which is of primary interest to the Court. Each
19 decision makes reference to the fact that in drafting the *ISP Remand Order*, the FCC was
20 only considering calls placed by a caller in the same local calling area as the terminating
21 LEC’s ISP customer, and, for that reason alone, these circuit court cases are highly relevant
22 to the dispute in this case.

23 2. **Conclusion**

24 Regrettably, in this instance, the rapid proliferation of ever evolving
25 telecommunications technology has outpaced the regulatory framework within which it must
26 operate. The result is a technology which defies certain assumptions intrinsic in the present
27 statutory scheme. Nevertheless, it is impermissible to attribute an intention to the FCC that
28 may make sense in retrospect, but clearly was not part of the analysis at the time the order

1 was entered. Perhaps the most sensible observation made in Level 3's brief is the realization
2 that "VNXX traffic does not fit the traditional 'local' model, but it is equally plain that this
3 traffic does not fit the traditional model of a 'long distance' call either." (L 3 Brief at 26.)
4 The Court is in complete agreement. This is precisely the reason that the Court cannot
5 conclude that the FCC intended to include VNXX traffic within the definition of the term
6 "ISP-bound traffic" in the *ISP Remand Order*. The Court has determined that the FCC
7 intended to remove ISP-bound traffic from the confines of § 251(b)(5), but only in regards
8 to traffic that was subject to such reciprocal payments before the issuance of the *ISP Remand*
9 *Order*. Whether VNXX traffic was among the calls subject to such reciprocal payments is
10 not a question that this Court can answer. Until such time that VNXX is addressed by the
11 ACC, the parties' dispute cannot be resolved.

12 For all of the reasons given above, the term "ISP-bound traffic" as it appears in the
13 ISP Amendment incorporates the definition from the *ISP Remand Order*, which did not
14 address VNXX traffic. To the extent that the ACC's ruling in the Level 3 matter conflicts
15 with this determination, it is in violation of federal law.

16 **D. Qwest v. Pac-West**

17 Although the Pac-West ISP Amendment and the Level 3 ISP Amendment do not
18 mirror each other, an examination of the relevant contract terms leads the Court to the same
19 result. As above, the Court looks first to the parties' agreement to determine whether it can
20 be enforced as written, or whether it necessitates interpretation of federal law to give
21 meaning to its essential terms.³ In its order, the ACC wrote that it "base[d] its decision . . .

22
23 ³At oral argument, Defendants reasoned that any contractual ambiguity concerning
24 VNXX should be construed against Qwest, the party allegedly responsible for drafting the
25 ISP Amendments. (*See also* Reply Br. of Pac-West Telecomm, Inc. ("P-W Reply") at 7.)
26 In support thereof, Defendants directed the Court to the level of specificity found in the
27 change of law provision (section 6) of the Pac-West ISP Amendment, which illustrates the
28 precision used in drafting the agreement. Defendants suggest that Qwest, had it actually
meant to exclude VNXX traffic from the ISP Amendment, had ample opportunity to do so
at the time of formation of the agreement.

The Court agrees with Defendants' general premise, but finds that their own actions

1 on the plain language of the specific contract terms.” (P-W R., ACCD at 10, ¶ 26.) Upon
2 review of the specific contract terms, however, it is clear that the plain language mandates
3 interpretation of the *ISP Remand Order* to give meaning to the disputed term, “ISP-bound.”
4 The relevant contract provision states: “Qwest elects to exchange ISP-bound traffic at the
5 FCC ordered rates pursuant to the [*ISP Remand Order*].” (P-W Reply, Ex. 1 (“P-W ISP
6 Amendment”) at 2, § 3.1.) The term “ISP-bound” is defined in the contract as follows:
7 “‘ISP-Bound’ is as described by the FCC in its [*ISP Remand Order*].” (P-W ISP
8 Amendment at 2, § 1.4.)

9 No permissible interpretation of the essential provision can be made without first
10 establishing exactly what was meant by the FCC when it used the term “ISP-bound” in the
11 *ISP Remand Order*. Having done that above, it is unnecessary to reexamine the issue as Pac-
12 West has not advanced any substantially different reasoning in support of its interpretation
13 of the breadth of the *ISP Remand Order*. Therefore, the Court concludes that the ACC’s
14 order in the Pac-West matter violates federal law by failing to properly interpret the *ISP*
15 *Remand Order*, which was fundamental to the ACC’s interpretation of the Pac-West ISP
16 Amendment.

17 **E. Injunctive and Declaratory Relief**

18 In its Complaint, Qwest identifies eight separate areas of injunctive and declaratory
19 relief that it asks the Court to grant. (Compl. at 17-18.) However, in its briefing of the
20 issues, Qwest narrows the requested relief and focuses on three actions it wishes the Court
21

22
23
24 undermine the legitimacy of their position. Regardless of which party actually drafted the
25 agreements, both Qwest and Defendants are highly sophisticated entities who were well
26 aware of the issues surrounding VNXX at the time of the signing of the ISP Amendments.
27 In fact, it is the CLECs, not Qwest, who employ this technology and therefore most likely
28 have an equal, if not greater, understanding of its implications and risks. None of the parties
to the ISP Amendments sought to mitigate the risk of future disputes over the use of VNXX,
and, as a result, they all share in the uncertainty of seeking judicial construction of
ambiguous contractual terms.

1 to take. (Qwest Corp.'s Reply Br. ("Qwest Reply") at 27.) The Court now turns to discuss
2 the relief granted.

3 Qwest first asks the Court to declare "that the *ISP Remand Order* prescribes
4 intercarrier compensation only for calls placed by a caller to an ISP located in the same local
5 calling area." (Qwest Reply at 27.) As this statement is consistent with the findings above,
6 it is adopted by the Court and becomes part of this Order. Next, Qwest seeks a "holding that
7 [ACC] Decision[] Nos. 68820 and 68855 violate Section 251(g) of the [TCA]." (Qwest
8 Reply at 27.) Qwest's position is premised on its belief that VNXX is covered by § 251(g)
9 and, therefore, subject to access charges. As explained more fully below, the Court is
10 instructing the ACC to determine the most appropriate compensation regime for VNXX,
11 thus, the Court will not enter the order as requested by Qwest. To do so would recognize that
12 access charges are the method of compensation to be applied to VNXX—that is not the
13 Court's decision to make. Finally, Qwest seeks an injunction preventing "enforcement of
14 Decision Nos. 68820 and 68855 because they are based on incorrect interpretations of the
15 *ISP Remand Order* and the ISP Amendments implementing the *ISP Remand Order*." (Qwest
16 Reply at 27.) Where the ACC Decisions conflict with the language of this Order, the ACC
17 is enjoined from enforcing those Decisions. Those portions of the Decisions not in conflict
18 with this Order remain intact.

19 No party to this action can achieve the ultimate financial result they seek until the
20 ACC definitively categorizes VNXX.⁴ This must occur before any determination can be
21 made as to which party may be entitled to compensation, or reimbursement, for VNXX ISP-
22 bound traffic transported since the entry of the *ISP Remand Order*. The ACC may find that
23 VNXX is local, i.e., it originates and terminates in the same local calling area. In the
24

25
26 ⁴In the ordering section of this Order, the Court provides the parties with one final
27 opportunity to amicably resolve the issue of past and present intercarrier compensation for
28 VNXX ISP-bound traffic. Should the parties choose to capitalize on this opportunity, it will
be unnecessary for the Arizona Corporation Commission to undertake the thorough review
of VNXX traffic contemplated by this section.

1 alternative, the ACC may determine that VNXX is not now, or that it never was, local traffic
2 subject to reciprocal compensation, and instead that it is subject to access charges. See
3 *Global NAPs II*, 454 F.3d at 101 (hypothesizing that “[V]NXX’s potential compensation
4 arrangement . . . [could] possibly involve toll and access charges”); *Global NAPs I*, 444 F.3d
5 at 72 (holding that “the *ISP Remand Order* does not clearly preempt state authority to impose
6 access charges for interexchange VNXX ISP-bound traffic”). As a third option, the ACC
7 could opt for some other yet-to-be defined rate scheme that the ACC deems appropriate.

8 The aforementioned resolutions are intended merely to suggest potential dispositions
9 of the VNXX issue. They are not exclusive of other equally reasonable potential solutions,
10 and do not bind the ACC to reach a particular result. The ACC shall deal with VNXX,
11 however, any decision is to be guided by its own discretion and no party may rely on this
12 Order to argue that a particular result is required. The Court expresses no opinion as to the
13 proper resolution of this matter and, as evidenced by the disparate conclusions reached by
14 other states that have addressed this issue, concludes that more than one reasonable solution
15 exists.

16 In declaring the intended coverage of the *ISP Remand Order* and requiring the ACC
17 to make difficult decisions concerning VNXX traffic, the Court fulfills its duty to resolve the
18 challenged ACC action without stepping into areas best reserved for those with
19 telecommunications regulatory expertise. In the Pac-West ACC Order, the Commission
20 stated that it was “disinclined to make a sweeping pronouncement regarding the
21 appropriateness of VNXX as it relates to intercarrier compensation,” with the source of this
22 sentiment being its general “unwillingness to determine a matter of such gravity without
23 broad industry participation.” (P-W R., ACCD at 10, ¶ 27.) So too, this Court is unwilling
24 to make such a broad pronouncement concerning the character of VNXX traffic.
25 Additionally, the Ninth Circuit in *Peevey* signaled that it is clearly permissible for state
26 commissions to address the VNXX issue. *Peevey*, 462 F.3d at 1158 (upholding the state
27 commission’s actions where it “applied its *own* balancing test in determining as a matter of
28 fair compensation policy that VNXX traffic is subject to reciprocal compensation as ‘local’

1 traffic; it did not make that determination under the [TCA] or the FCC's rules for reciprocal
2 compensation”).

3 **IT IS ORDERED** enjoining enforcement of those portions of Arizona Corporation
4 Commission Decision Nos. 68820 & 68855 that conflict with this Order.

5 **IT IS FURTHER ORDERED** remanding Decision Nos. 68820 & 68855 to the
6 Arizona Corporation Commission for further consideration and action consistent with the
7 findings of this Order, specifically Section E, Injunctive and Declaratory Relief.

8 **IT IS FURTHER ORDERED** that those portions of the ordering paragraphs of
9 Arizona Corporation Commission Decision Nos. 68820 & 68855 not affected by this Order
10 remain in force.

11 **IT IS FURTHER ORDERED** that the parties have 30 days (commencing the day
12 of entry of this Order) to resolve their ongoing dispute concerning intercarrier compensation
13 for VNXX ISP-bound traffic by mutual written agreement as an amendment to their
14 interconnection agreements.

15

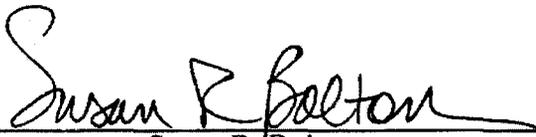
16 DATED this 6th day of March, 2008.

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Susan R. Bolton
United States District Judge

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EXHIBIT D

CC Docket #96-98
[REDACTED]

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PLEADING CYCLE ESTABLISHED FOR COMMENTS ON REQUEST BY ALTS FOR CLARIFICATION OF THE COMMISSION'S RULES REGARDING RECIPROCAL COMPENSATION FOR INFORMATION SERVICE PROVIDER TRAFFIC

CCB/CPD 97-30

Released: July 2, 1997

Comment Date: **July 17, 1997**
Reply Date: **July 24, 1997**

On June 20, 1997, the Association for Local Telecommunications (ALTS) filed a letter with the Common Carrier Bureau requesting expedited clarification of the Commission's rules regarding the rights of a competitive local exchange carrier (CLEC) to receive reciprocal compensation pursuant to section 251(b)(5) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (Act), for the transport and termination of traffic to CLEC subscribers that are information service providers. Section 251(b)(5) of the Act requires all local exchange carriers (LECs) "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." Section 51.701(a) of the Commission's rules limits this obligation to "local telecommunications traffic." Section 51.701(b)(1), in instances of traffic exchange between LECs and non-CMRS providers, defines "local telecommunications traffic" as traffic that "originates and terminates within a local service area established by the state commission."

Specifically, ALTS requests clarification that nothing in the *Local Competition Order*¹ requires information service traffic to be treated differently than other local traffic is handled under current reciprocal compensation agreements in situations in which local calls to information service providers are exchanged between incumbent local exchange carriers and CLECs. We ask for comment on ALTS's request both with regard to information service

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¹ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996), stayed in part pending judicial review sub nom. Iowa Utils. Bd. v. FCC, 109 F.3rd 418 (8th Cir. 1996)

providers, and, more specifically, with regard to enhanced service providers (ESPs).²

Interested parties may file comments on these letters on or before July 17, 1997, and reply comments on or before July 24, 1997, with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Comments and reply comments should reference CPD 97-30. An original and four (4) copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). Additionally, two (2) copies should also be sent to Wanda Harris, Common Carrier Bureau, FCC, Room 518, 1919 M Street, N.W., Washington, D.C. 20554, and one (1) copy should be sent to the Commission's contractor for public service records duplication, ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037.

Parties wishing to view the above-referenced letter may do so in the Common Carrier Bureau Reference Room, Room 575, 2000 M Street, N.W., Washington, D.C. Copies can also be obtained from ITS at (202) 857-3800. Additionally, a copy of the letters have been filed in CC Docket No. 96-98. Finally, the ALTS letter is also available on the Commission Internet site at <http://www.fcc.gov/Common_Carrier/Public_Notices/1997/da971399.pdf>.

We will treat this proceeding as permit-but-disclose for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§ 1.1200-1.1206. For further information on this proceeding, please contact Edward B. Krachmer, Competitive Pricing Division, at (202) 418-0198.

- FCC -

² Section 3(20) of the Act states that the term "information service" means "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." The Commission found that the term "information services" includes "enhanced services," but also includes additional services, as well. *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149 (released December 24, 1996) at paras 102-03.



Association for Local Telecommunications Services

DIRECT DIAL: (202) 466-3046

RICHARD J. METZGER
GENERAL COUNSEL

June 20, 1997

Ms. Regina M. Keeney
Chief, Common Carrier Bureau
Room 500
Federal Communications Commission
Washington, D.C. 20554

Re: Request for Expedited Letter Clarification -- Inclusion of Local Calls to ISPs Within Reciprocal Compensation Agreements, CC No. 96-98

The Association for Local Telecommunications ("ALTS") respectfully asks you to issue a letter clarifying that nothing in the Commission's Local Competition Order, CC Docket No. 96-98 (adopted August 8, 1996) altered the Commission's long standing rule that calls to an Information Service Provider ("ISP") made from within a local calling area must be treated as local calls by any and all LECs involved in carrying those calls. In particular, ALTS requests clarification that nothing in the Local Competition Order requires this traffic to be handled differently than other local traffic is handled under current reciprocal compensation agreements in situations where local calls to ISPs are exchanged between ILECs and CLECs. This clarification is needed because two large ILECs -- Bell Atlantic and NYNEX -- are refusing to pay CLECs for this traffic under their reciprocal compensation agreements, and at least four other ILECs (Ameritech, SWB, Pacific, and SNET) are threatening similar action.

ALTS requests the Bureau to issue this clarification as quickly as possible because the merits are clear, and because delay would impose two significant burdens. First, this clarification is plainly within the Commission's exclusive jurisdiction.¹ However, two states have now been

¹ The Commission's original preemption of state authority over enhanced services (adopted in Computer II, 77 F.C.C.2d 384 (1980)) was upheld in Computer & Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert.

(continued...)

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asked to issue their own clarifications (New York and Connecticut).² The Commission needs to issue a clarification promptly to preclude the jurisdictional confusion that inconsistent state actions could produce.

The second reason why clarification needs to be issued promptly is that contingency concerning the compensation to be paid for this traffic imposes much greater financial uncertainty on new entrants than on incumbents, at a time when new entrants need to raise substantial capital. The ratio of reciprocal compensation revenue relative to end user revenue is much higher for new entrants than for incumbents, thereby making them more vulnerable to unfounded allegations concerning the financial treatment of this traffic.

History of the ISP Rule

The Commission has long held that local calls to ISPs must be treated as local calls by LECs regardless of whether the ISP reformats or retransmits information received over such calls to or from further interstate destinations.³ The underlying facts are simple. Picture a local calling area, with a call going between an end user and an ISP within that area under three different scenarios: first, where a single LEC handles both ends of the call; second, where a CLEC handles one end and an ILEC the other; and

¹(...continued)

denied, 461 U.S. 938 (1983). Its decision not to impose access charges on ISPs was addressed and affirmed in NARUC v. FCC, 737 F.2d 1095, 1137 (D.C. Cir. 1984). And no party has challenged the Local Competition Order concerning its treatment of local calls to ISPs in relation to reciprocal compensation agreements as to either jurisdiction or merits in the appeals of CC Docket No. 96-98 now pending before the Eighth Circuit. The absence of this issue should not be surprising since, as noted below, the Local Competition Order neither altered nor addressed the existing ISP rule in the context of reciprocal compensation agreements.

² The NYPSC Staff has publicly stated its disagreement with this theory (see attached May 29, 1997, letter of Allan Bausback to William Allan).

³ See, e.g., MTS and WATS Market Structure, 97 FCC 2d 682, 715 (1983); Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, 3 FCC Rcd 2631, 2633 (1988).

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third, where an ILEC handles one end and an adjacent ILEC handles the other. In the fourteen years since the Commission originally issued its rule, such calls have been treated as local for the purpose of end user tariffs, for the purpose of separations, and for the purpose of interconnection agreements among LECs under each scenario.

Nothing in the Telecommunications Act of 1996 or in the Commission's implementing rules altered any aspect of this rule. The Commission in its Local Competition Order, CC Docket No. 96-98 (decided August 8, 1996), discussed at length the scope of the interconnection obligations contained in Sections 251 and 252 as they relate to local and interexchange traffic (¶¶ 356-365; 716-732; 1033-1038). This discussion carefully explained what kinds of traffic can be handled through reciprocal compensation agreements. Nowhere in this extensive discussion did the Commission announce any change in its longstanding rule that calls to ISPs from within a local calling area must be treated as local calls by LECs.

The Commission's NOI in Usage of the Public Switched Network by Information Service and Internet Access Providers (CC Docket No. 96-263, released December 24, 1996, "Internet NOI"), also recounted the long history of its requirement that calls to ISPs from within local calling areas be treated as local calls regardless of the ISP's subsequent handling of the call, and requested comments on whether this policy should be reconsidered in light of contentions about network congestion, inefficient network usage, etc. (¶¶ 282-290). Nowhere in that discussion did the Commission suggest that its Local Competition Order had somehow altered its long-standing rule in situations where one LEC hands-off local calls to an ISP to another LEC.⁴

⁴ Several LECs in the Internet NOI have acknowledged that local calls to ISPs are among the traffic exchanged between ILECs and CLECs pursuant to reciprocal compensation agreements. Because the inclusion of this traffic within reciprocal compensation agreements creates competition to gain ISP customers, these ILECs assert that the current rules need to be changed (SNET Internet NOI Comments at 10; Rochester petition to the NYPSC in 93-C-0103, filed May 6, 1997). I.e., these ILECs admit this traffic does fall within the scope of reciprocal compensation agreements.

***The ILECs' New Theory about Local Calls
to ISPs That Are Exchanged With CLECs***

Bell Atlantic and NYNEX now challenge the continued application of the ISP rule under the second scenario discussed above -- where local calls to ISPs are exchanged between ILECs and CLECs.⁵ They do not dispute that calls under the first scenario -- where the ILEC handles both ends -- must continue to be treated as local calls under the Commission's rules, and also be treated as local calls for separations and tariff purposes, but they now contend that identical calls under the second scenario cannot be treated as "local" for the purpose of being included in reciprocal compensation agreements between ILECs and CLECs.

Bell Atlantic and NYNEX claim that local calls to ISPs are "overwhelmingly interexchange, not local", and thus subject to the Local Competition Order's exclusion of interexchange traffic from the scope of reciprocal compensation agreements (BA-NYNEX Joint NOI Comments filed March 24, 1997, at 13). But, as discussed more fully below, these arguments have two fatal flaws:

- The Local Competition Order's exclusion of interexchange traffic from reciprocal compensation agreements is grounded on the need to prevent disruptions in access charge revenues, and the need to protect state authority over local calling areas, neither of which is implicated by local calls to ISPs.
- Bell Atlantic-NYNEX's argument that local calls to ISPs are "overwhelmingly interexchange" deliberately confuses calls that are "interexchange" for the purpose of the Commission's jurisdiction, with

⁵ See BA-NYNEX comments in Internet NOI filed March 24, 1997, at 13-15; see also attached SWB letter. Ameritech's Tim Whiting recently testified that: "I am informed by the Ameritech attorneys who are responsible for Ameritech's agreements with requesting telecommunications carriers under the Act that Ameritech in fact does not provide interconnection for Internet traffic under section 251(c)(2)" (emphasis in original; Petition by Intermedia Communications, Inc. For Arbitration with Ameritech Illinois Pursuant to the Telecommunications Act of 1996, ICC Docket No. 97 AB-002, submitted May 27, 1997, at 6).

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the entirely distinct category of calls that are "interexchange" for the purpose of paying Part 69 access charges. The portion of the Local Competition Order relied upon by Bell Atlantic and NYNEX uses the latter meaning of "interexchange," not the former.

First, the Local Competition Order recognized there are no fundamental cost differences between the transport and termination of interexchange traffic compared to local traffic (at ¶ 1033):

"We recognize that transport and termination of traffic, whether it originates locally or from a distant exchange, involves the same network functions. Ultimately, we believe that the rates that local carriers impose for the transport and termination of local traffic and for the transport and termination of long distance traffic should converge."⁶

Rather than adopt the jurisdictional definition of "interexchange" urged by Bell Atlantic and NYNEX, the Local Competition Order grounded its approach to the issue of which traffic should be included within reciprocal compensation agreements on the need to preserve existing access revenue flows, and the need to maintain state authority over local calling areas. For example, it ordered that all CMRS traffic not currently paying access charges be included in transport and termination agreements in order to insure this traffic would not be assessed access charges (¶ 1043):

"Based on our authority under section 251(g) to preserve the current interstate access charge regime, we conclude that the new transport and termination rules should be applied to LECs and CMRS providers so that CMRS providers continue not to pay interstate access charges for traffic that currently is not subject to such charges, and are assessed such charges for traffic that is currently subject to interstate access charges."

⁶ See also the discussion of the similarity of costs when UNEs are used for interexchange access services as compared to local services (*id.* at ¶ 717).

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Obviously, the existing ISP rule is part and parcel of the same "current interstate access charge regime," and the imposition of carrier access charges upon ISPs would be similarly disruptive. Furthermore, states do not have any authority over the rates or calling areas for any information services associated with local calls to ISPs. Consequently, neither of the two fundamental policy considerations implicated in the Local Competition Order's definition of the scope of transport and termination agreements suggest any reason why this traffic needs to be excluded.

Second, Bell Atlantic and NYNEX confuse the jurisdictional nature of these calls with the entirely distinct issue of their status under the access charge regime when they claim such calls are "overwhelmingly interexchange, not local." As a factual matter, an ISP receiving a local call might respond by connecting the end user to a destination over the Public Switched Network in some other telephone exchange (and if it did so using private lines, it would pay the private line surcharge). It is also possible, and much more likely, that any related calls would either be intraLATA or else carried over non-PSN facilities into other telephone exchanges.⁷

While the end points of the related calls may well be "interexchange" for the purpose of determining the Commission's jurisdiction under the Communications Act, the relevant point here is that Commission has ruled that ISPs be treated as end users, meaning that the inbound local call is not "interexchange" for the purposes of its access charge regime. The Local Competition Order employs the second use of this term in excluding "interexchange" calls from transport and termination agreements, so local calls to ISPs (which are "end users" under the access charge system) are not "interexchange" for the purpose of transport and termination agreements.⁸

⁷ See Digital Tornado: The Internet and Telecommunications Policy, OPP Working Paper Series, March 1997, at 15, describing how Internet traffic moves over the NSFNET backbone network.

⁸ In this regard, local calls to ISPs are identical to calls to leaky PBXs, in that they can be linked to subsequent calls to interexchange destinations without altering the regulatory nature of the first call.

***Discriminatory Treatment of Competitive
LECs in Comparison with Adjacent LECs***

Concerning the third scenario described above -- the exchange of local calls to ISPs between adjacent LECs -- Bell Atlantic and NYNEX are utterly silent. This silence conceals the discriminatory nature of their new theory, because, to the best of ALTS's knowledge, they continue to treat local calls to ISPs that they exchange with adjacent LECs as "local" for the purpose of their interconnection agreements with those companies (as well as for separations and tariff purposes) even though those calls present precisely the same circumstances, legally and economically, as the second scenario.⁹

Indeed, the Local Competition Order expressly held that: "section 251(b)(5) obligations apply to all LECs in the same state-defined local exchange service areas, including neighboring incumbent LECs that fit within this description" (at ¶ 1037, rejecting NYNEX's argument that the reciprocal compensation rules should apply only to competitive entrants, and not to adjacent LECs). By placing all reciprocal compensation agreements under the same regulatory regime, the Order effectively mandates that CLECs be treated the same as other LECs for the purpose of including local calls to ISPs within their reciprocal compensation agreements.¹⁰

⁹ None of the interconnection agreements between adjacent LECs of which ALTS is aware (all of which are to be filed with state agencies no later than June 30, 1997) distinguish between calls to an ISP within a local calling area that are exchanged between LECs, and any other kind of local traffic exchanged between the LECs.

¹⁰ Bell Atlantic and NYNEX's theory also discriminates against ISPs which choose CLEC local service because ISPs choosing ILEC service would continue to enjoy local rates. See, e.g., BA's proposed amendment to its CEI plan to expand its Internet Access Service dated May 5, 1997, CCB Pol. 96-09, at 3: "Bell Atlantic's vendor will subscribe to local telephone services -- either standard business lines or ISDN -- to receive the call." Under competitive conditions, CLECs would have no choice except to pass on any different expenses for the exchange of ISP traffic on to their ISP customers, thereby placing them in a different position than ISPs served by ILECs.

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Bell Atlantic and NYNEX's new theory thus lacks any foundation in law and policy. In particular, it is manifest that if such a fundamental change in the ISP rule had been intended in the Local Competition Order, the Commission would have made some reference to it. Furthermore, even if such a change had been silently accomplished, it would be unlawfully discriminatory for Bell Atlantic and NYNEX to treat the exchange of local calls to ISPs differently under their reciprocal compensation agreements with adjacent LECs than they do under their agreements with competitive LECs.

For all of the above reasons, ALTS respectfully asks you to issue a letter clarification that: (1) calls within local calling areas to ISPs should continue to be treated as local when an ILEC-to-CLEC hand-off is involved for the purposes of tariffs, separations, and reciprocal compensation agreements; and (2) even if such calls were not required to be treated as local, the fact that LECs do treat such calls as local when exchanged with adjacent LECs requires the same treatment when such traffic is exchanged with competitive LECs.

Yours truly,


Richard J. Metzger

cc: Ameritech
Bell Atlantic
Bell South
GTE
NYNEX
SNET
Southwestern Bell
USTA
US WEST