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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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PAC-WEST TELECOMM, INC.,

Complainant,

v.

QWEST CORPORATION,

Respondent.

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

**STAFF'S RESPONSE TO PAC-WEST'S
MOTION FOR SUMMARY JUDGMENT**

Pursuant to the procedural order dated January 21, 2009, the Arizona Corporation Commission Staff ("Staff"), files the following Response to Pac-West Telecomm, Inc. ("Pac-West")'s Motion for Summary Determination of its formal complaint for enforcement of its interconnection agreement ("ICA") with Qwest Corporation ("Qwest").¹

On July 13, 2005, Pac-West filed a formal complaint with the Arizona Corporation Commission ("Commission") to enforce the terms of its amended ICA with Qwest. The central question presented to the Commission was whether the parties intended to include Virtual NXX ("VNXX") Internet Service Provider ("ISP")-bound traffic within the scope of their ISP ICA Amendment. If the parties intended that it be included, then Pac-West would be entitled to compensation from Qwest under the Federal Communications Commission's ("FCC") interim compensation regime for Qwest originated traffic terminating with Pac-West's ISP end-user customers.

On June 29, 2006, the Commission issued Decision No. 68820 finding that the parties intended to include VNXX ISP-bound traffic within the scope of their ISP ICA Amendment and consequently required Qwest to pay compensation (under the FCC's interim compensation regime) to Pac-West for all ISP-bound traffic, including VNXX traffic.

¹ At the outset, Staff agrees with Pac-West's statement that "this case does not touch on larger generic questions about VNXX compensation in Arizona generally."

1 Qwest sought review of Decision No. 68820 in Federal District Court. On March 6, 2008, the
2 District Court issued its Order which faulted the Commission for not interpreting the *ISP Remand*
3 *Order* when it arrived at its decision in this matter. The District Court interpreted the FCC's *ISP*
4 *Remand Order*² to include local ISP-bound traffic only. It therefore reversed Decision 68820 and
5 remanded the case back to the Commission to determine the proper classification of VNXX traffic as
6 local, non-local, or subject to some other classification.

7 For the reasons discussed below, it is Staff's position that Pac-West's Motion for Summary
8 Judgment should be denied. First, Staff believes that the Commission should apply the law as it
9 existed during the relevant periods of the dispute. The formal complaint filed by Pac-West involves
10 the period from January 2004³ to March 21, 2008. Effective March 22, 2008, Pac-West chose a
11 different ICA providing for Commission approved intercarrier compensation of "FX-like" service in
12 lieu of VNXX. Thus, application of the FCC's most recent November 5, 2008 Order would not be
13 appropriate. The parties' intended that a specific FCC Order apply (the *ISP Remand Order*) and the
14 ICA therefore needs to be interpreted with that FCC Order in mind.

15 Second, in the *ISP Mandamus Order*, the FCC has once again changed its interpretation of the
16 relevant provisions of the Telecommunications Act of 1996 ("1996 Act"). Contrary to its previous
17 positions on the scope of Sections 251(b)(5), the FCC now states that that all traffic, both local and
18 interexchange, falls within the scope of section 251(b)(5). The FCC's success rate with respect to the
19 classification of ISP-bound traffic for compensation purposes has not been good. Most of its
20 decisions to-date have been either reversed or vacated by the D.C. Circuit Court of Appeals. Staff
21 notes that the FCC's most recent order is again the subject to appeal in the D.C. Circuit by Core
22 Communications, Inc., the National Association of Regulatory Utility Commissioners ("NARUC")
23 and the New York Public Service Commission ("NYPSC"). The Arizona Commission is
24 participating as an amicus curiae in support of NARUC and the NYPSC.

25 Third, in the *ISP Mandamus Order*, the FCC was addressing the issue in the context of
26 intercarrier compensation generally. It is the position of many, that the FCC was intending to reach a

27 ² *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Intercarrier
28 Compensation for ISP Bound Traffic, 16 F.C.C.R. 9151, 2001WL 455869 (April 27, 2001) ("*ISP Remand Order*").

³ It is Staff's understanding that Pac-West specified a beginning date of January 2004 in its Complaint.

1 particular result with respect to all traffic, and therefore the Order's relevance to what the FCC
2 intended in the *ISP Remand Order* is tenuous at best.

3 Finally, Pac-West, Qwest and the Commission all declined to appeal the decision by the
4 United States District Court. The Decision is final and controlling until the Ninth Circuit rules on the
5 issues addressed in that decision, including the definition of ISP-bound calls in the FCC's *ISP*
6 *Remand Order*.⁴ Pac-West's arguments that the District Court was wrong because of FCC's newest
7 interpretation of Section 251(b)(5) are really not relevant here since this issue was not appealed by
8 any of the parties subject to this proceeding.

9 With respect to addressing the issues on remand, the District Court gave the Commission
10 wide latitude to categorize VNXX and apply the appropriate compensation regime.

11 The ACC may find that VNXX is local, i.e., it originates and terminates
12 in the same local calling area. In the alternative, the ACC may
13 determine that VNXX is not now, or that it never was, local traffic
14 subject to reciprocal compensation, and instead that it is subject to
15 access charges. As a third option, the ACC could opt for some other
16 yet-to-be defined rate scheme that the ACC deems appropriate.⁵

17 The Court further stated that "the ACC shall deal with VNXX, however, any decision is to be
18 guided by its own discretion and no party may rely on this Order to argue that a particular result is
19 required."

20 ...

21 ...

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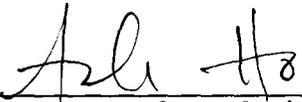
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24 ⁴ Level 3 filed a virtually identical Complaint with the Commission which the Commission decided in a similar
25 manner to Pac-West. Qwest also appealed this decision to the Arizona District Court. The Arizona District Court
26 actually addressed both Commission decisions in its Order. Level 3 appealed the District Court Order to the Ninth Circuit
27 Court of Appeals. That appeal is still pending.

28 ⁵ *Id.* at 23.

1 Since the issues remanded by the District Court involve both questions of law and of fact,
2 Staff agrees with Qwest that the Commission would be best served by an evidentiary hearing.

3
4 RESPECTFULLY SUBMITTED this 9th day of April 2009.

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7 _____
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