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BEFORE THE ARIZONA CORPORATION COMMISSION

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PAC-WEST TELECOMM, INC.,	)	DOCKET NOS. T-01051B-05-0495
	)	T-03693A-05-0495
Complainant,	)	
	)	**MOTION OF PAC-WEST**
QWEST CORPORATION,	)	**TELECOMM, INC. FOR**
	)	**RECONSIDERATION AND**
Respondent.	)	**REQUEST FOR SUSPENSION OF**
	)	**DOCKET PENDING**
	)	**RESOLUTION OF LEVEL 3**
	)	**APPEAL**

Pac-West Telecomm, Inc. ("Pac-West") files the following Motion for Reconsideration and Request for Temporary Suspension of the Docket.

I. Motion for Reconsideration of Denial of Motion for Summary Determination.[1]

[1] This motion for reconsideration is intended to preserve Pac-West's legal argument on this issue. If the Administrative Law Judge's ruling is a final ruling on Pac-West's request for relief as a matter of law, Pac-West hereby applies for reconsideration of that decision under A.R.S. §40-253.

The reciprocal compensation obligations in §251(b)(5) of the Telecommunications Act of 1996 apply to *all telecommunications traffic* exchanged between local exchange carriers ("LECs"). The only narrow exception to this compensation obligation is traffic excluded by §251(g), a "grandfather clause" that "preserved the pre-1996 Act regulatory regime" for certain enumerated types of traffic.[2] In 2002, the D.C. Circuit Court of Appeals held unambiguously that §251(g) *does not apply* to ISP-bound traffic exchanged between LECs – and thus that calls made to an ISP are not toll calls (not 251(g) calls).[3] In *WorldCom*, the route taken by the ISP-bound call was not integral to the Court's analysis. The key inquiry under *WorldCom* was whether the traffic was compensated under a "pre-1996 Act regulatory regime."[4] VNXX ISP-bound traffic was not compensated under a pre-1996 Act regulatory regime. CLECs were created by the 1996 Act and did not exchange ISP-bound traffic prior to the 1996 Act. These conclusions require no evidentiary hearing. The ISP Amendment in this matter required Qwest to pay reciprocal compensation for 251(b)(5) traffic and under the *ISP Mandamus Order* and *WorldCom, Inc. v. F.C.C,* the traffic in question is 251(b)(5) traffic.

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[2] *In the Matter of Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262 (rel. November 5, 2008) ("*ISP Mandamus Order*") ¶¶ 9-16.

[3] *WorldCom, Inc. v. F.C.C.*, 288 F.3d 429, 432 (D.C. 2002).

[4] *Id.* at ¶¶15-16.

To preserve this issue for appeal, and permit Pac-West to re-urge this argument as this case evolves, Pac-West hereby files this motion for reconsideration or, alternatively, this application for rehearing.

II. Request for Limited Suspension of Docket.

The district court remanded this case to the Arizona Corporation Commission by order dated March 6, 2008 ("Order"). That Order addressed the ICA Amendments of Level 3 Communication LLC ("Level 3") and Pac-West on exactly the same issue: compensation for VNXX ISP-bound traffic. Level 3 appealed the Order to the Ninth Circuit Court of Appeals, arguing that the district court had erred in its analysis. Level 3 relied, in part, on the FCC's further description of the *ISP Remand Order* in the *ISP Mandamus Order*, which was issued eight months after the Order. The Level 3 appeal is now fully briefed and argument is set for November 4, 2009. The Ninth Circuit may vacate, reverse, affirm or remand the Order. What transpires in the Ninth Circuit is relevant not only to Level 3 and Qwest, but also to Pac-West and the Arizona Commission. Consistent with the law of the case doctrine, "the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case." *Maag v. Wessler*, 993 F.2d 718, 720 n. 2 (9th Cir.1993) (quotations omitted); *See, also, Rivers v. Roadway Express, Inc.,* 511 U.S. 298, 312-13, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994) ("[J]udicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction."). To address the treatment of VNXX ISP-bound traffic most efficiently,

the Commission should suspend this docket until the Ninth Circuit's decision on the Order -- the very order that was remanded to the Commission for further proceedings.

Similarly, in two weeks, the D.C. Circuit Court of Appeals will hear argument in *Core Communications, Inc. v. FCC,* [5] which is the appeal challenging the legal justification provided by the FCC in the *ISP Mandamus Order* and the FCC rules governing intercarrier compensation for telecommunications traffic bound for internet service providers. A ruling by the D.C. Circuit Court of Appeals in the *Core* case may impact the Commission's analysis in this case.

Action on intercarrier compensation – either by the D.C. Circuit Court of Appeals[6] or the Ninth Circuit Court of Appeals[7]– is eminent. In anticipation of these developments Pac-West recommends that this docket be temporarily suspended.

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[5] *Core Communications, Inc. v. FCC*, (D.C. Cir. No. 08-1365) (FCC Docket No. 96-98, 99-68, 01-92, et al.) (FCC Order No 08-262) (oral argument scheduled for October 16, 2009).

[6] *Id.*

[7] *Qwest Corporation v. Level 3 Communications LLC, et al.* No. 08-15887 (on appeal from the United States District Court for the District of Arizona, No. 2:06-CV-2130-SRB). Oral Argument scheduled for November 4, 2009.

RESPECTFULLY SUBMITTED this 5th day of October 2009.

OSBORN MALEDON, P.A.

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