



presented by the parties is purely legal and does not require a factual hearing. The contradicting legal arguments are as follows:

**The Qwest argument:**

Under both the *ISP Remand Order* and the *ISP Mandamus Order*, there are two Intercarrier compensation regimes that apply to calls to ISPs. The applicability of these regimes turns on the location of the ISP in relation to the calling party. For calls placed to ISPs located within the caller's local calling area, the *ISP Remand Order* compensation schedule applies. . . . For calls placed to the ISPs located outside of the caller's local calling area including specifically VNXX ISP traffic, the FCC's access charge rules apply.

Qwest Initial Br. 5-6.

**The Pac-West argument:**

A single compensation scheme applies to all locally dialed ISP-bound traffic. Section 251(b)(5) is the overarching compensation obligation applicable to all telecommunications including ISP-bound traffic. The *ISP Mandamus Order* expressly states "that section 251(b)(5) is not limited only to the transport and termination of certain types of telecommunications traffic, such as local traffic. . . . [and] "ISP-bound traffic falls within the scope of section 251(b)(5)." *ISP Mandamus Order* ¶¶ 8, 16. Pursuant to the FCC Order, ISP-Bound traffic is section 251(b)(5) traffic – no matter where it travels.

See generally Pac-West Initial Br. 12, 15.

Given these two positions, the only question for the Commission to resolve is whether the *ISP Remand Order*<sup>1</sup> and the *ISP Mandamus Order*<sup>2</sup> create a single a compensation

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<sup>1</sup> *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*. Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*").

<sup>2</sup> *In the Matter of High-Cost Universal Service Support; Federal-State Joint Board on Universal Service; Lifeline and Link Up; Universal Service Contribution Methodology; Numbering Resource Optimization; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Developing a Unified Intercarrier Compensation Regime; Intercarrier Compensation for ISP-Bound Traffic; IP-Enabled Services*, Order on Remand and

scheme for locally dialed ISP-bound traffic. The answer is yes. Qwest's theory – that a separate category of ISP-bound long-distance traffic exists – finds no support in the *ISP Remand Order*, the *ISP Mandamus Order*, or the D.C. Circuit order affirming the *ISP Mandamus Order*.<sup>3</sup> No legal authority exists for the proposition that the FCC has designed or sanctioned a separate compensation system for ISP-bound traffic that travels outside the local calling area.

## II. The *ISP Remand Order* and the *ISP Mandamus Order*

### A. The *ISP Mandamus Order*

The parties to this dispute generally agree that FCC orders and regulations govern the compensation to be paid by and to carriers for ISP-bound calls. The parties do not agree on what the FCC orders require. Pac-West submits that the *ISP Mandamus Order* resolves this dispute entirely. In the *ISP Mandamus Order*, the FCC recognized that ISP-bound traffic is “interstate, interexchange traffic” and section 251(b)(5) traffic.<sup>4</sup> Specifically, the FCC explained that section 251(b)(5) “is not limited geographically (‘local,’ ‘intrastate,’ or ‘interstate’) or to particular services (‘telephone exchange service,’ ‘telephone toll service,’ or ‘exchange access’).”<sup>5</sup> The FCC designed a compensation system that could operate as a comprehensive solution for all ISP-bound traffic. Ignoring these clear edicts, Qwest argues that VNXX ISP-bound traffic is carved out of section 251(b)(5) and subject instead to compensation as long-distance traffic,

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Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475 (2008) (“*ISP Mandamus Order*”).

<sup>3</sup> *Core Communications, Inc. v. FCC*, 592 F.3d 139 (D.C. Cir. 2010) (“*Core*”).

<sup>4</sup> *ISP Mandamus Order* ¶¶ 6, 16.

<sup>5</sup> *ISP Mandamus Order* ¶ 8 (footnotes omitted).

otherwise known as section 251(g) traffic. As discussed below, the law promulgated by the FCC does not support this argument.

**B. Qwest's Use of the *ISP Remand Order* and *WorldCom***

Qwest cites to, and relies upon, the *ISP Remand Order* without discussing or acknowledging its tortured past. The *ISP Remand Order* was a failed order. In the *ISP Remand Order*, the FCC ruled that ISP-bound traffic fell within the section 251(g) “carve out” from section 251(b)(5), reasoning that section 251(g) was designed to protect the preexisting access charge “regimes” already in place when the 1996 Act was passed. In *WorldCom, Inc. v. F.C.C.*, the D.C. Circuit reversed this ruling, directing the FCC to scrap its section 251(g) analysis and directed the FCC to issue a new rationale for the rates contained in the *ISP Remand Order*.<sup>6</sup> The D.C. Circuit explained that section 251(g) provides *only* for “the ‘continued enforcement’ of certain pre-Act regulatory ‘interconnection restrictions and obligations’” and that “there had been *no* pre-Act obligation relating to intercarrier compensation for ISP-bound traffic.”<sup>7</sup> The FCC left in place the pricing plan constructed by the FCC for ISP-bound traffic, but the FCC’s grounds for adopting that plan were completely rejected. As a direct consequence of this holding, the section 251(g) framework for intercarrier compensation cannot apply to ISP-bound traffic.<sup>8</sup>

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<sup>6</sup> *WorldCom, Inc. v. F.C.C.*, 288 F.3d 429, 434 (D.C. Cir. 2002) (“*WorldCom*”).

<sup>7</sup> *Id.* at 432-33 (emphasis in original).

<sup>8</sup> *Id.*

Qwest overlooks this critical holding, and instead argues that “*WorldCom* is important because the DC Circuit explains that the traffic referred to as ‘ISP-bound’ in the *ISP Remand Order* involved ‘calls made to internet service providers (‘ISPs’) located within the caller’s local calling area.”<sup>9</sup> No fair reading of *WorldCom* supports Qwest’s assertion that this description was a component of the Court’s holding. The “located within the caller’s local calling area” reference is stray *dictum* that had nothing to do with the court’s actual holding, which was explicitly limited to the issue of whether section 251(g) provided the FCC with proper authority to exclude ISP-bound traffic from section 251(b)(5)’s reciprocal compensation regime.<sup>10</sup>

By virtue of the actual holding in *WorldCom*, the D.C. Circuit expressly *rejected* the Qwest’s present argument that section 251(g) carves out VNXX ISP-bound calls from the reach of section 251(b)(5). The Court held unequivocally that the section 251(g) carve-out by its plain language cannot be extended to services provided by one local exchange carrier (“LEC”) to another LEC, such as VNXX traffic termination.<sup>11</sup> Likewise “LECs’ services to other LECs, even if en route to an ISP, are not ‘to’ either an IXC or to an ISP” and thus cannot qualify for 251(g) compensation.<sup>12</sup> Although Qwest cites

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<sup>9</sup> Initial Br. and Procedural Recommendation of Qwest at 7.

<sup>10</sup> *WorldCom, Inc.*, 288 F.3d at 434 (“[T]he issues we do not decide . . . are in fact *all issues other than* whether § 251(g) provided the authority claimed by the Commission for not applying § 251(b)(5).”) (emphasis added).

<sup>11</sup> *WorldCom, Inc.*, 288 F.3d at 433-34.

<sup>12</sup> *WorldCom, Inc.* 288 F.3d at 433. See also *Pac-West Motion for Summary Determination* at 7-8. This aspect of the *WorldCom* holding also disposes of Qwest’s unsupported argument that Pac-West is an interexchange carrier. Initial Br. of Qwest at 6: “Level 3 and Pac-West are interexchange carriers because they employ VNXX arrangements to create a toll free interexchange service for their ISP Customers.” Even if Qwest’s arguments had merit – which they do not – the service at issue is not “to” an interexchange carrier.

*WorldCom* in support of its 251(g) argument, the case actually provides a road map for why this traffic cannot qualify for compensation under 251(g).

### III. *Core Communications, Inc v. FCC*

In *Core Comm., Inc. v. FCC*, the D.C. Circuit upheld the FCC's analysis in the *ISP Mandamus Order* reaffirming "that section 251(b)(5) is not limited only to the transport and termination of certain types of telecommunications traffic, such as local traffic."<sup>13</sup> Qwest cites the *Core* decision in support of its argument, specifically quoting the D.C. Circuit's use of the term "local call."<sup>14</sup> However, this in no way furthers Qwest's argument. The calls at issue in this case are "local calls." A Qwest customer's call to an ISP that subscribes to VNXX service from Pac-West is dialed and billed to the customer as a "local call," not a "long distance call." To place that call, the Qwest customer dials a seven-digit number, and toll charges do not apply. In *Verizon California v. Peevey*, the Ninth Circuit upheld the California Public Utilities Commission's conclusion that "[w]hether or not a call is "local" depends solely upon the NPA-NXXs of the calling and called parties as established by [the carrier's] traditional local calling areas, and does not depend upon the routing of the call, even if it is outside the local calling area."<sup>15</sup> The D.C. Circuit's reference to "local calls" is simply an accurate colloquial description of a typical ISP-bound call – including VNXX ISP-bound calls. Likewise, the D.C. Circuit's

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<sup>13</sup> *Core*, 592 F.3d at 144; *ISP Mandamus Order*.

<sup>14</sup> Initial Br. and Procedural Recommendation of Qwest at 8, citing *Core*: "Reciprocal compensation arrangements require that when a customer of one carrier makes a local call to a customer of another carrier (which uses its facilities to connect, or 'terminate,' that call), the originating carrier must compensate the terminating carrier for the use of its facilities."

<sup>15</sup> *Verizon California v. Peevey*, 462 F.3d 1142 (affirming as rational the CPUC's view that whether a call is local is based on the NPA-NXXs of the calling and called parties.)

reference to “a LEC’s provision of access for completion of a long distance call,” is reference to a 1+ dialed long distance calls. No such calls are at issue in this case. It is worth remembering that the D.C. Circuit affirmed the FCC’s analysis in its entirety, so Qwest cannot assert that the D.C. Circuit decision can be read to limit or modify the conclusions reached by the FCC in the *ISP Mandamus Order*.<sup>16</sup>

Significantly, the D.C. Circuit *rejected* the *Core* Petitioner’s argument that it mattered that the call to the ISP terminated locally. The D.C. Circuit responded that all “dial-up internet . . . communications . . . are interstate” and “it has no significance for the FCC’s § 201 jurisdiction over interstate communications that these telecommunications might be deemed to “terminat[e]” at the LEC for purposes of §251(b)(5).”<sup>17</sup>

Qwest also submits that FCC briefs, filed by counsel for the FCC with the D.C. Circuit, are authority for the proposition that VNXX traffic was not at issue in the *ISP Remand Order* or the *ISP Mandamus Order*. FCC briefs, like Staff briefs before the ACC, are not the work of the FCC itself. Arguments in briefs represent the views of the FCC’s litigation counsel; they have no legal force or effect and cannot supersede a decision of the full FCC.<sup>18</sup> This is particularly true when those arguments directly

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<sup>16</sup> *Core*, 592 F.3d at 146 (“The petitions for review are denied.”).

<sup>17</sup> *Core*, 592 F.3d at 144.

<sup>18</sup> Section 0.251 of the FCC Rules specifies the authority delegated to the Office of its General Counsel. Notably absent from the list is any authority to revise, clarify, or overturn duly issued decisions of the FCC. 47 C.F.R. § 0.251. Only actions taken by a delegate of authority within the express scope of the delegation rules have the same force as FCC action. *See id.* §0.203. While explanatory statements of its counsel that are consistent with FCC rulings, or which clarify previously unexplained FCC rules, might be given some weight, no weight can be

contradict the FCC's conclusions in the *ISP Mandamus Order*.<sup>19</sup> The FCC's carefully crafted language in those orders is critical, not Staff briefs that are neither voted upon or issued by the FCC itself. The plain meaning of the *ISP Mandamus Order* confirms that the FCC's compensation scheme for ISP-bound traffic applies to all ISP-bound traffic and VNXX-ISP-bound traffic is not exempted.

**V. The First Circuit's Latest *Global NAPs* Decision Does Not Support Qwest's Position.**

As Level 3 discussed in its Initial Brief, the First Circuit's decision in *Global NAPs V*<sup>20</sup> is a product of the unique facts and circumstances of that particular case and is inconsistent with the D.C. Circuit's decision in *Core*.<sup>21</sup> Pac-West concurs in Level 3's discussion. Contrary to Qwest's characterization of the First Circuit decision, that court did not undertake an analysis of the impact of the FCC's conclusion that all ISP-bound traffic is governed by Section 251(b)(5). Rather, the First Circuit (which does not include Arizona) undertook only a limited review of the *ISP Mandamus Order*, finding that its

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given to arguments by the agency's lawyers before an appellate court that directly contradict or are inconsistent with FCC precedents.

<sup>19</sup> The only briefs cited by Qwest for the proposition that VNXX calls were not within the scope of the *ISP Remand Order* were filed by the FCC Staff in December of 2007, almost a year before the *ISP Mandamus Order* was issued. These briefs contradict the subsequent order of the FCC and must be disregarded. The subsequent brief filed in the *Core* litigation makes no such assertion regarding VNXX traffic and in fact implies that the Commission would rule that traffic characterized by the states as "non-local" would be categorized as 251(b)(5) traffic and "[t]he states would be free to challenge any future determination that section 251(b)(5) applies to non-local traffic at that time." Brief for the Federal Communications Commission, *Core Communications, Inc. v. FCC*, Nos. 08-1365 (D.C. Cir.), p. 45, attached as Exhibit 2 to Qwest's June 1, 2009 Notice of Supplemental Authority.

<sup>20</sup> *Global NAPs, Inc. v. Verizon New England, Inc.*, 603 F.3d 71 (1st Cir. 2010).

<sup>21</sup> Level 3 Initial Br. 10-12.

“express purpose was to justify – not change – a particular rate system.”<sup>22</sup> That court’s conclusion that the FCC had asserted jurisdiction over all ISP-bound traffic but had not exercised jurisdiction over interexchange ISP-bound traffic simply cannot be squared with the language and meaning of the *ISP Mandamus Order* and the D.C. Circuit’s *Core* decision, which represent the definitive federal law on this issue. In other words, *Global Naps V* was incorrectly decided, and conflicts with the definitive precedent of the FCC itself, and the D.C. Circuit.<sup>23</sup>

One aspect of *Global NAPs V*, however, is noteworthy. The court in that case was asked to enforce an ICA that expressly incorporated a Massachusetts commission requirement that access charges apply to VNXX ISP-bound traffic. While disagreeing with that requirement, Global NAPs was fully aware that it had a contractual obligation to pay access charges for any such traffic it exchanged with Verizon, and Global NAPs disregarded that express obligation at its peril.

Pac-West, in sharp contrast, has been exchanging VNXX ISP-bound traffic with Qwest since June of 2001 under an ICA that expressly requires reciprocal compensation for “ISP-bound traffic” and “Section 251(b)(5) traffic.”<sup>24</sup> The FCC has concluded – and the D.C. Circuit (and even the First Circuit) has confirmed – that Section 251(b)(5) traffic

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<sup>22</sup> *Global NAPs V*, 603 F.3d at 82.

<sup>23</sup> As Level 3 accurately observes in its initial brief, under the Hobbs Act, the D.C. Circuit’s decisions on review of the *ISP Remand Order* and *ISP Mandamus Order* are the definitive federal law on the issue of compensation for ISP-bound traffic and are binding on all courts (and state commissions). The First Circuit’s view of those decisions, on the other hand, is precedential only within the New England states that comprise the First Circuit, which has far less experience reviewing FCC orders than the D.C. Circuit.

<sup>24</sup> Pac-West Initial Brief 19-20.

includes all locally dialed calls to ISPs.<sup>25</sup> Accordingly, even in the First Circuit's view of the relationship between FCC and state commission jurisdiction over traffic bound for ISPs, Pac-West is entitled to enforcement of its ICA and Qwest's express contractual obligation to pay compensation for all locally dialed traffic bound for ISPs.

#### **IV. Federal Law Requires Application of the *ISP Mandamus Order* as Written**

Qwest's refusal to accept the law as it has been announced by the FCC is reminiscent of a different telephone company's similar reaction to another broadly drafted federal law. In 1970, Congress passed the Racketeer Influenced and Corrupt Organizations Act ("RICO") to prosecute the Mafia and others who were engaged in organized crime.<sup>26</sup> In the 1980s, cases began percolating up through the federal courts involving large corporate defendants and their officers – officers who were decidedly not members of the Mafia. These defendants (Northwestern Bell Telephone and its officers among others) argued vigorously that RICO was never intended to reach their conduct and was, instead, created solely to combat organized crime. The Supreme Court, led by Chief Justice William Rehnquist, surprised many by declaring itself powerless to do anything other than apply the law stating instead that:

[RICO's] use "against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued." If plaintiffs' ability to use RICO against businesses engaged in a pattern of criminal acts is a defect, we said, it is one "inherent in the statute as written," and hence beyond our power to correct. RICO may be a poorly drafted statute; but rewriting it is a job for Congress, if it is so inclined, and not for this Court.

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<sup>25</sup> *ISP Mandamus Order* ¶¶ 7-8; *Core*, 592 F.3d at 144; *See Global NAPs V*, 603 F.3d at 82-83.

<sup>26</sup> 18 U.S.C. § 1961-68.

*H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 249 (1989) (internal citations omitted) (“*Northwestern Bell*”). Time has shown that application of the RICO statute to racketeering generally (not just the Mafia) was an effective prosecutorial tool.

*Northwestern Bell* was just one of a number of cases issued by the Supreme Court rejecting restrictive interpretations of RICO because those conditions were not contained in the text of the statute. See e.g. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985).

This lesson from the RICO line of cases – that the courts may not change the plain language of a statute – is applicable here. The text of the order is determinative. Qwest has not – and cannot – identify a provision in the *ISP Remand Order* or the *ISP Mandamus Order* that exempts locally dialed VNXX traffic ISP-bound from the FCC ordered ISP-bound traffic compensation scheme. That’s because no such limitation exists. Just as the RICO statute contained no language restricting its application to the Mafia, the *ISP Remand Order* and the *ISP Mandamus Order* contain no language restricting their application to ISP-bound calls within a local calling area. In fact, as this case has dragged on, the FCC has announced with increasing clarity that the traditional “local,” “non-local” or “interexchange” labels are no longer relevant when discussing section 251(b)(5) traffic, and that ISP-bound traffic is section 251(b)(5) traffic.

## **V. Conclusion**

The FCC announced unequivocally in the *ISP Mandamus Order* that the reciprocal compensation obligations in section 251(b)(5) apply not just to “local” traffic but to all telecommunications traffic exchanged between local exchange carriers unless

excluded by section 251(g).<sup>27</sup> The *ISP Mandamus Order* also held that “ISP-bound traffic falls within the scope of section 251(b)(5).”<sup>28</sup> Qwest’s argument that a second compensation scheme for ISP-bound traffic exists which transforms VNXX ISP-bound traffic into section 251(g) traffic is not supported by the text of the *ISP Mandamus Order* or the D.C. Circuit decision affirming that order. In fact, Qwest offers no FCC order citation whatsoever to support the existence of a second compensation system for any subcategory of ISP-bound traffic. Likewise, Qwest has no legal citation for the proposition that VNXX ISP-bound traffic is 251(g) traffic. The text, history, and the past application of section 251(g) compel that it be reserved exclusively for the narrow range of “LEC duties that antedated the 1996 Act.”<sup>29</sup>

Qwest has argued that when the FCC initially addressed ISP-bound traffic compensation, the FCC’s attention was focused on calls that remained in the local calling area. True or not, this is simply irrelevant. What matters is the text of the *ISP Mandamus Order* and the *Core* order affirming that FCC order. As with the RICO statute, Congress may have intended to write a law to bring down the Mafia, but as the Supreme Court explained, the law as written had the further beneficial effect of halting other types of organized crime. Likewise the *ISP Mandamus Order* contains no geographic limitation on the type of ISP-bound traffic subject to its compensation scheme and its broad application has additional beneficial impacts including expanding the reach

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<sup>27</sup> *ISP Mandamus Order* ¶¶ 9-16.

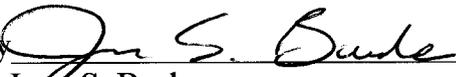
<sup>28</sup> *ISP Mandamus Order* ¶ 16.

<sup>29</sup> *WorldCom*, 288 F.3d at 430.

of competitive dial-up internet service to rural, hard to reach locations that would not otherwise have the benefit of broadband service.

For these reasons, Pac-West submits that the VNXX traffic at issue in this case is ISP-bound traffic and section 251(b) (5) traffic, and was eligible for reciprocal compensation under the plain language of the ISP Amendment. Further fact-finding is unnecessary and would cause further costly delay. The legal issue described above may be resolved as a matter of law under the *ISP Mandamus Order*. Pac-West requests that the Commission issue an order reaffirming Decision No. 68820 based upon the *ISP Mandamus Order* and the text of the ISP Amendment executed by Qwest and Pac-West.

RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of November 2010.

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