

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

IN THE MATTER OF:

LEVEL 3 COMMUNICATIONS LLC'S
PETITION FOR ENFORCEMENT OF
INTERCONNECTION AGREEMENT WITH
QWEST CORPORATION

DOCKET NO. UT-053039

PAC-WEST TELECOMM, INC.

Petitioner,

v.

QWEST CORPORATION,

Respondent.

DOCKET NO. UT-053036

**QWEST'S POST-HEARING OPENING
BRIEF**

REDACTED

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I. INTRODUCTION

1 Qwest Corporation (“Qwest”)¹ hereby submits its opening post-hearing brief in this matter. The issues that remain to be decided are quite limited, and relate to the nature and amount of traffic originated by Qwest and terminated to Pac-West’s ISP customers during the time 2004-2009, the amount of compensation to be refunded to Qwest, and the additional amounts that Pac-West should be ordered to pay for the use of Qwest’s network to originate and transport Pac-West’s VNXX interexchange traffic.

2 It is simple. The parties entered into an amendment to their interconnection agreement (“ICA”) to implement terms of the ISP-Remand Order. Pac-West believed that the compensation regime established in that Order included Virtual NXX (“VNXX”) traffic. It does not. Although the Commission originally agreed with Pac-West, the Commission has since reversed its ruling, and has entered orders consistent with the remand from the Federal District Court², holding that VNXX traffic is not local traffic, and is therefore not compensable under the *ISP-Remand Order*.³

3 Pac-West will argue, as it has in the past, that VNXX traffic that is destined for the internet is jurisdictionally interstate and that the Commission consequently has no jurisdiction to determine the compensation scheme for that traffic. This is simply wrong. Either the traffic is interstate traffic and subject to the existing compensation scheme of access charges, or it is a class of traffic for which no compensation scheme exists. Regardless, the Commission can enforce the provisions of the ICA that impose access charges, and, because the traffic was exchanged over facilities established under the ICA,

¹ Qwest Corporation, and its parent company Qwest Communications International Inc., were acquired by CenturyLink Inc., in a merger that closed on April 1, 2011. Qwest Corporation is still a separate corporate entity, with a d/b/a of CenturyLink QC. Because this proceeding began in 2005, and there are significant volumes of documents that all reference “Qwest” as the respondent, that naming convention will continue to be used in this brief.

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

³ Order on Remand and Report and Order, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (FCC April 27, 2001)(“*ISP Remand Order*”).

it can prescribe compensation for this traffic. Whether ISP-bound VNXX is jurisdictionally interstate or not, it is clear that the FCC has not acted to displace state regulation of that traffic, and thus has not preempted state commissions from determining the appropriate compensation scheme for this traffic.

- 4 That is exactly what this Commission has done by addressing the issue of intercarrier compensation in the generic VNXX docket. There, the Commission prospectively ordered a bill and keep compensation structure for VNXX traffic, with the CLEC required to compensate the originating LEC for the transport of the traffic. Pac-West did not appeal that decision and with the Level 3 settlement, pending appeals of that decision will be withdrawn. Consequently, the Commission's decision on that issue is final. Even if it were not final, the new ICA between Qwest and Pac-West includes terms for the exchange of VNXX traffic that are consistent with the decision in the generic docket.
- 5 The decision in the generic docket does not necessarily apply retroactively though, so the Commission is still faced with deciding what the Parties' ICA required in terms of compensation for VNXX traffic during the period 2004 through 2009. Thus, at this point, the case is all about the money.
- 6 The first issue is the refund of the monies that Qwest originally paid to Pac-West in 2006, after the Commission ordered reciprocal compensation payments on ISP-bound VNXX traffic. Pac-West demanded payment of nearly \$1 million in 2005, after the original Commission order. In March 2006, Qwest paid an agreed amount for VNXX traffic – **[BEGIN REDACTED XXXXXXXX END REDACTED]** - which included an amount for interest at an annual rate in excess of 12%. Subsequently, Qwest paid Pac-West on VNXX traffic under protest. Qwest ceased paying Pac-West for VNXX traffic in 2007, when the Federal District Court held that pending the Commission's decision on remand, "Qwest is not, under the WUTC's present analysis, obligated to pay Pac-West...the interim compensation rates established by the FCC."⁴

⁴ *Qwest*, 484 F.Supp.2d, at 1177.

- 7 The Commission has already reversed, multiple times, the original holding and analysis that required the original payment. Pac-West continues to hold money that it has no lawful claim on and continues to claim that there are issues of fact with regard to the nature of the traffic, yet offers not a shred of traffic data to contradict Qwest's detailed studies.
- 8 The second issue is that of determining the appropriate intercarrier compensation for use of Qwest's facilities to transport interexchange traffic. It is undisputed that the VNXX numbering scheme creates a routing scenario that enables traffic to leave the originating local calling area and cross exchange boundaries. It is undisputed that Pac-West used VNXX routing, thereby enabling interexchange traffic, with no option for Qwest to refuse to complete the calls, even if Qwest had been able to identify and segregate it on a real-time basis.⁵
- 9 It is undisputed that carriers who wish to enable interexchange calling should purchase tariffed access services and compensate the originating local exchange carrier accordingly. It is therefore undisputed that Pac-West, who enabled this interexchange traffic, also received access services from Qwest that should have been ordered out of the access tariff.
- 10 It is further undisputed that Pac-West did not formally order access services out of the tariff. As Qwest has acknowledged, the tariff language does not specifically describe VNXX numbering arbitrage. However, to allow Pac-West to claim that it did not order, and thus does not have to pay for, the access services that it was clearly affirmatively seeking to avoid paying for by use of VNXX numbering would simply reward Pac-West for its access avoidance scheme. Pac-West essentially jumped on the train without buying a ticket, and now, when asked to pay for the transport it undeniably received, is saying "well, I didn't go through the turnstile and buy a ticket, so you can't make me

⁵ RCW 80.36.200 provides that "[e]very telecommunications company operating in this state shall receive, transmit and deliver, without discrimination or delay, the messages of any other telecommunications company.

pay.”

- 11 The answer to the intercarrier compensation question is that Pac-West should be required to pay the over \$6 million in access charges as shown in Qwest’s calculations. Alternatively, Qwest has proposed another compensation solution, which is to require Pac-West to pay, at a minimum, for the transport it received on Qwest’s facilities. This amount is approximately \$900,000, and is more than fair to Pac-West – it only asks them to pay for facilities they have already received the benefit of. It provides some measure of compensation to Qwest, and is consistent with the outcome in the VNXX generic docket.
- 12 The refunds and other compensation sought by Qwest are shown in the Confidential Executive Summary, Appendix A, in accordance with the Administrative Law Judge’s request at the close of the hearing.⁶

II. BACKGROUND

- 13 In this section of the brief, Qwest provides a brief background of VNXX and the relevant docket history, based on the direct testimony of William Easton, hearing exhibit WRE-1T.

a. VNXX Generally

- 14 “VNXX” is a number assignment scheme used by Competitive Local Exchange Carriers (“CLECs”) serving Internet service providers (“ISPs”) to allow dial-up customers to place long distance calls to connect to the Internet without paying toll charges. In a VNXX telephone numbering arrangement, a CLEC assigns a telephone number to one of its ISP customers that is not physically located in the local calling area associated with the NXX⁷ of the assigned telephone number. To a dial-up ISP customer who is located in

⁶ Tr. 492.

⁷ As the Commission noted in its November 14th 2011 order in this docket, Order 12, “a telephone number typically has ten digits, labeled by telecommunications carriers as NPA-NXX-XXXX. The first three digits are known as the Numbering Plan Area (NPA) or area code. The second set of three digits is the exchange or NXX code. These codes

the same local calling area as the one associated with the telephone number assigned to the ISP, a call to the VNXX number appears to be local. In other words, the calling party does not need to dial “1+”, and no toll charges are assessed to the calling party. Yet, in reality, the calls actually terminate to the CLEC ISP customer physically located in a separate local calling area. So, while the calls appear to be local, they are not. In effect, VNXX is a number assignment scheme that disguises interexchange calls as local calls.

15 By assigning VNXX telephone numbers to its ISP customers, Pac-West creates the interexchange link between the caller and the ISP and functions as an IXC with respect to the VNXX service it is providing to its ISP customers. The practical effect is that, through the use of the VNXX numbering scheme, the CLEC provides its ISP customer a toll-free interexchange service, but at no extra charge to the calling party, and without the proper intercarrier compensation being paid to the originating ILEC. VNXX thus ignores the historic and current framework for NXX code assignments, network architectures, and the rating and billing of calls which have been based upon the geographic assignment of NXX codes and the associated local rate center configuration. As such, VNXX is inconsistent with the existing national framework for calls within which all carriers currently operate.⁸

generally correspond to geographic areas served by a local exchange carrier that operates central offices and switches that are identified by NXX codes. When a customer dials a number, the NXX code helps direct that call to a particular central office and, in turn, helps to route that call to the called number on the terminating end. Historically, the NXX number determines whether a call is to terminate within or outside the local calling area. This, in turn, determines whether a call is rated a local call or an interexchange call, and determines the applicable intercarrier compensation between carriers.” (¶ 18).

⁸ In its Final VNXX Order in the VNXX complaint docket, the Commission stated:

VNXX traffic arrangements occur when the carrier assigns a telephone number from a rate center (NXX) in a local calling area different from the one where the customer is physically located. For example, a customer in Seattle is assigned a number for a local calling area in Olympia. The effect of this assignment is that a call to the VNXX number appears to terminate within the Olympia local calling area, but will actually terminate in the Seattle local calling area. Because intercarrier compensation depends on whether this call is classified as “local” (subject to reciprocal compensation) or interexchange (subject to access charges), the classification decision is central to determining who pays whom and how much.

16 When two carriers collaborate to complete a local call, the originating carrier is compensated by its end user, and the terminating carrier is entitled to compensation from the originating carrier for the transport and termination it provides pursuant to Section 251(b)(5) of the Telecommunications Act.⁹ The payment to the terminating carrier for the transport and termination of local traffic is referred to as reciprocal compensation. By contrast, interexchange (toll) traffic is traffic that originates and terminates between end users physically located in different local calling areas/EAS areas and is commonly referred to as “long distance” traffic.

17 The Commission’s existing rules and orders categorize traffic that originates and terminates in different local calling areas as interexchange traffic and applicable interexchange compensation rules apply. This interexchange access traffic is governed by the switched access compensation rules that have been defined since 1984 and that are still in effect today. A CLEC’s use of VNXX numbering arbitrage is an attempt to turn these historical local and interexchange compensation rules on their head by making interexchange calls appear to be local. The use of VNXX numbering arrangements not only denies originating carriers, such as Qwest, the access compensation to which they are entitled for interexchange traffic, but also attempts to force them to pay reciprocal compensation for traffic which is not truly local.

b. Relevant Docket History¹⁰

18 This dispute between the parties dates back to 2004 when Qwest began withholding reciprocal compensation payments from Level 3 and Pac-West for VNXX traffic. In

The great majority of VNXX calls are made to ISPs (ISP-bound traffic). CLECs use VNXX arrangements primarily to serve their ISP customers. VNXX enables the ISP dial-up customers to connect with the Internet without incurring toll or access charges. (Citations omitted).

QWEST CORPORATION V. LEVEL 3 COMMUNICATIONS, LLC, et al; In the Matter of the Request of MCIMETRO ACCESS TRANSMISSION SERVICES, LLC d/b/a VERIZON ACCESS TRANSMISSION SERVICES and QWEST CORPORATION For Approval of Negotiated Agreement Under Telecommunications Act of 1996; Order 10, Docket UT-063038; Order 3, Docket UT-063055; ¶¶21-22, 2008 Wash. UTC LEXIS 515 (WUTC July 16, 2008) (“Final VNXX Order”).

⁹ 47 U.S.C. §251(b)(5).

¹⁰ In addition to the discussion below, see Appendix B for relevant excerpts from the Commission’s orders in this docket and the generic VNXX docket.

response, in June 2005, both Level 3 and Pac-West filed Petitions for Enforcement of Interconnection Agreements with the Commission, asking the Commission to enforce the terms of the interconnection agreements concerning compensation for traffic to ISPs, including VNXX traffic. In its counterclaims, Qwest asserted among other things that the CLECs' use of VNXX was illegal and that the traffic in question was not subject to the FCC ordered compensation for ISP-bound traffic since the calls did not physically originate and terminate in the same local calling area.¹¹

- 19 In February 2006, the Commission granted Level 3's and Pac-West's motions for summary judgment, finding that Qwest must compensate the CLECs for ISP traffic, regardless of whether the traffic physically originated and terminated in the same local calling area.¹² As a result of the order, Qwest was required to retroactively pay Level 3 and Pac-West reciprocal compensation, plus interest. Going forward, Qwest was required to pay reciprocal compensation for all ISP traffic. Qwest appealed that decision to federal court.
- 20 In April 2007 the U.S. District Court for the Western District of Washington issued a decision finding the Commission's decision was inconsistent with the FCC's *ISP Remand Order* and remanded the case back to the Commission for further proceedings.¹³
- 21 In May 2006, Qwest brought a complaint against nine CLECs asserting that the CLECs violated state law by using VNXX arrangements to provide ISP service, in an attempt to

¹¹ In accordance with the Administrative Law Judge's request at the close of the hearings (Tr. 496), Qwest has reviewed the original petition for enforcement and Qwest's own counterclaims. Pac-West asked the Commission to enforce the ICA, and to order Qwest to pay for transport and termination of all ISP-bound traffic, including FX/VNXX (June 8, 2005 Petition for Enforcement, page 6, ¶ A.) That issue has been decided against Pac-West in prior Commission orders, and no further or other relief should be granted to Pac-West. Qwest, in its counterclaims, asked the Commission for various relief, including prohibiting VNXX, invalidating Pac-West's bills for VNXX traffic, etc. (June 15, 2005 Answer and Counterclaims, pages 24-25, ¶¶ A.-F.). Much of that relief has been overtaken by subsequent events. For example, the Commission has determined the terms and conditions under which VNXX traffic may be exchanged, so Qwest is no longer seeking a declaration that VNXX is prohibited or unlawful. Paragraphs A., C., and E., are the only ones still implicated at this stage of the proceedings, and would be fully satisfied with an order requiring refunds with interest, and compensation for transport facilities as set forth in Confidential Appendix A.

¹² *Level 3 Communications, LLC v. Qwest Corporation*, Docket UT-053039, Order No. 5 (February 9, 2006).

¹³ *Qwest*, 484 F. Supp. 2d at 1177

avoid access charges. The Qwest complaint was docketed as UT-063038. In July 2008, the Commission issued its final order in the VNXX complaint case, finding that VNXX service was lawful if compensation was paid to the originating LEC for transport it provides.¹⁴

22 On November 14, 2011 the Commission issued Order 12 in this docket. The Commission found that VNXX traffic does not originate and terminate within the same local calling area and is thus, either intrastate interexchange traffic subject to commission determined compensation and not subject to section 251(b)(5) of the Act, or interstate interexchange traffic subject to the FCC's jurisdiction. The Commission also found that the VNXX traffic in question is intraLATA toll or toll-like traffic under the agreements, and that it is necessary to conduct a further evidentiary proceeding to determine the location of the ISP modems in each Qwest local calling area and to determine the volume of VNXX ISP-bound traffic subject to compensation.

III. LEGAL ARGUMENTS

23 The legal issues are straightforward. Does the Commission have jurisdiction to decide the remaining issues in this case? And, if so, who has the burden of proof on these issues?

a. Jurisdiction

24 Qwest believes it is clear from the Commission's prior orders that the jurisdictional issue has been decided, and that the Commission is lawfully and properly continuing to exercise jurisdiction over this case.¹⁵ The nature of this action is a petition to enforce the ICA, something the Commission undeniably has the authority to do. The Commission's authority to enforce ICAs encompasses both intrastate and interstate traffic in accordance with the terms of the ICA. The Commission also has authority over intrastate interexchange traffic independent of its authority to enforce the ICA.

¹⁴ *Final VNXX Order*; ¶¶ 268, 276.

¹⁵ *See e.g.* Order 18 in this proceeding, ¶¶ 12-20.

- 25 In addition to having found already that it has subject matter jurisdiction, the Commission has squarely rejected the interpretation of the ICA that Pac-West proffers in an attempt to avoid paying compensation for VNXX traffic to ISPs. Based on an exhaustive review of the ICAs, the Commission ruled in Order 12 that these calls fit within the ICA definition of IntraLATA Toll traffic: "In light of our findings above *and our review of the terms of the parties' interconnection agreements*, we interpret those agreements to require Pac-West and Level 3's VNXX ISP-bound traffic to be treated as IntraLATA Toll or Toll-like traffic, unless the parties subsequently agree to different terms."¹⁶
- 26 No one disputes that this case is an action under the ICA. The facilities used to complete the calls were facilities ordered and provided under the ICA. And the Commission has jurisdiction to enforce the ICA – Pac-West conceded that point when it asked the Commission to do so – it is the ones who initiated this action. Included in the ICA are provisions that reference the access tariffs as the proper compensation method when interexchange, as opposed to local, traffic is being exchanged.
- 27 In prior decisions in this docket, the Commission explained that "CLECs should bear the cost of using Qwest's network to serve their customers," and that "this fundamental principle of intercarrier compensation [] is reflected *in interconnection agreements between these parties* and those of all other companies within our jurisdiction."¹⁷
- 28 As to the periods of time where the ISP-bound VNXX traffic was sent to Pac-West modems outside the local calling area of the calling party, the Commission may exercise jurisdiction where the FCC has chosen not to. For traffic that is bound for the internet - even for *jurisdictionally interstate* traffic - the following discussion from a 2011 9th circuit decision affirms the Commission's authority to decide these issues:

We begin with a few well-settled principles. First, there is no question that, for jurisdictional purposes, ISP-bound traffic is interstate in nature. ISP-bound traffic is therefore subject to the FCC's congressionally-delegated jurisdiction. Within

¹⁶ Order 12 in this proceeding, ¶95 (emphasis added).

¹⁷ Order 12 in this proceeding, ¶77 (emphasis added).

this ambit, the FCC's actions can preempt state regulation to the contrary. But, as the district court noted, '[a] matter may be subject to FCC jurisdiction without the FCC having exercised that jurisdiction and preempted state regulation.' Determining whether the FCC has chosen to displace state law turns on the scope of its intent in exercising its jurisdiction. In issuing the *ISP Remand Order*, the FCC clearly understood that it was displacing at least some state laws.¹⁸

29 The court goes on to quote the FCC on ISP-bound traffic, where the FCC clearly indicated the scope of its preemption: "Because we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic, however, state commissions will no longer have authority to address this issue." However, it is clear that this preemption applies only to ISP-bound calls that originate and terminate in the same local calling area, and it does not apply to VNXX calls.

30 Continuing its discussion of this issue, the court states:

Nonetheless, it is also well settled that, with the *ISP Remand Order* and related pronouncements, the FCC has not exercised its jurisdiction over all manifestations of ISP-bound traffic. For example, this Court held in *Peevey* that the CPUC correctly interpreted the *ISP Remand Order* as not applying to interexchange (that is, non-local) ISP-bound traffic. See 462 F.3d at 1159. Other courts have reached the same conclusion. See *Global NAPs I*, 444 F.3d at 72; *Global NAPs, Inc. v. Verizon New Eng., Inc.*, 603 F.3d 71, 81-82 (1st Cir. 2010) ("*Global NAPs III*") (same, even after *ISP Mandate Order*); cf. *Global NAPs, Inc. v. Verizon New Eng., Inc.*, 454 F.3d 91, 98 (2d Cir. 2006) ("*Global Naps II*") (holding that the FCC did not intend "to preempt the state commissions' authority to define local calling areas for the purposes of intercarrier compensation"). In sum, it is well settled that the *ISP Remand Order* has preemptive effect with regard to the ISP-related issues it encompasses.

31 On the other hand, the FCC has clearly chosen *not* to regulate non-local ISP-bound traffic, despite many opportunities to do so. Pac-West acknowledged this in its Motion for Summary Determination filed on June 1, 2012, in which Pac-West and Level 3 jointly argued that because the FCC "has not yet decided what compensation regime applies to non-local (VNXX) ISP-bound traffic",¹⁹ the Commission has no authority to act, but

¹⁸ *AT&T v. PAC-WEST* 651 F.3d 980, 991 (9th Cir. 2011)(quotations in original).

¹⁹ Level 3 and Pac-West Motion for Summary Determination, ¶ 24. "Thus, and contrary to the Commission's apparent assumption in Order No. 12, the fact that the *compensation regime* only applies to some ISP-bound traffic does not create a jurisdictional *lacuna* which this Commission may fill with its *intrastate* ratemaking authority.

rather must wait for the FCC to act. This argument is plainly contrary to the reasoning in the *AT&T v. Pac-West* case discussed above, and is unsupported by citation to authority.

b. Burden of Proof

32 In complaint proceedings before the Commission, the complainant carries the burden of proof.²⁰ A party who files a counterclaim carries the burden of proof with respect to its counterclaim.²¹ In this case, Pac-West is the complainant and has sought to recover reciprocal compensation on VNXX traffic. Since the Commission initially required Qwest to pay reciprocal compensation on VNXX traffic, Pac-West now bears the burden of proving that it is entitled to retain the payments made by Qwest for VNXX traffic and the amount or portion of the payments that it is entitled to retain. In this case, Qwest filed counterclaims which encompassed its claims for access charges and, in the alternative, compensation for the transport that Qwest provides. Qwest bears the burden of proof on these counterclaims. As will be discussed in more detail below, Qwest has met its burden while Pac-West has not.

33 On the issue of the refund, the only proof that is necessary is that Qwest paid the amount owed under the Commission order. Exhibit WRE-16C, as well as other testimony, establishes that fact. Pac-West now has the burden of establishing that the traffic was in fact compensable, i.e., local ISP-bound traffic. Pac-West offered no evidence on that issue.

34 Regarding the amounts paid under protest and for which Qwest now seeks a refund as well, the analysis is the same. Qwest has established that those amounts were paid for

Rather, it simply means that the relevant ratemaking body—the *Federal Communications Commission*—has not yet decided what compensation regime applies to non-local (VNXX) ISP-bound traffic. However, because ISP-bound traffic is jurisdictionally interstate, and because this Commission’s rulings establish that VNXX ISP-bound traffic is *not* addressed in the parties’ ICAs, the rates applicable to such traffic must be established *by the FCC*; that decision does not default to this Commission as a result of FCC inaction.” (footnotes omitted).

²⁰ *QWEST CORPORATION V. LEVEL 3 COMMUNICATIONS, LLC, et al; In the Matter of the Request of MCIMETRO ACCESS TRANSMISSION SERVICES, LLC d/b/a VERIZON ACCESS TRANSMISSION SERVICES and QWEST CORPORATION For Approval of Negotiated Agreement Under Telecommunications Act of 1996*; Order 5, Docket No. UT-063038; Order 2; Docket No. UT-063055, ¶¶18, 125; 2007 Wash. UTC LEXIS 624, (WUTC October 5, 2007)(finding that CLEC failed to meet burden of proof to show that traffic in question was local traffic); *Final VNXX Order*, ¶276

²¹ *Id.*

traffic that was VNXX traffic. Pac-West has not challenged the calculation with evidence to show that the traffic was indeed local.

35 For the period of 2007-2009, Qwest agrees that it has the burden of proof on its claim for access charges, and in the alternative, its claim for transport compensation. Qwest has provided evidence showing transport routes and minutes of use. Qwest has provided a reasonable calculation for compensation for the use of its network facilities. Pac-West has done little more than refuse to pay.

IV. NATURE AND AMOUNT OF TRAFFIC

36 During the time periods at issue in this dispute, Pac-West was in the business of providing service to Internet service providers. As a result, substantially all of the traffic exchanged between Qwest and Pac-West was ISP traffic.²² The vast majority of this traffic was also VNXX traffic. Pac-West assigned telephone numbers to its ISP customers to make it appear that the calls were delivered to ISP modems located in the callers' local calling area. In fact, from February, 2006 through November, 2007, from **[BEGIN REDACTED XXXXXXXXXXXX END REDACTED]** of the calls delivered by Qwest to Pac-West were delivered to ISP modems located outside the callers' local calling area.²³ The Commission has already determined that Pac-West was not entitled to reciprocal compensation on this VNXX traffic under its ICA with Qwest.

37 At hearing, Qwest proved both the amount and the percentage of traffic terminating to Pac-West that was VNXX traffic for the relevant time periods. Qwest's proof was based on straightforward and uncontradicted calculations. To determine the amount of VNXX traffic, Qwest first calculated the percentage of Pac-West's traffic that was VNXX traffic using systems that record the amount of traffic carried on particular trunk groups.²⁴ Each trunk group originates at a Qwest switch that corresponds with a particular local calling

²² Shiffman, Exhibit SS-1T, p. 3 line 10 – p. 4 line 2.

²³ Exhibit WRE-8C.

²⁴ Easton, Exhibit WRE-1T, p. 13 line 24 – p. 17 line 20.

area. Traffic delivered to Pac-West from these trunk groups was switched by Pac-West and terminated at Pac-West modems in Tukwila during the time period from 2004 through November 2007.²⁵ Tukwila is part of the Seattle local calling area.

38 Thus, to determine the percentage of Pac-West's traffic that is VNXX traffic (and therefore not compensable local traffic), Qwest divided the amount of traffic that originated and was carried over trunks outside of the Seattle local calling area by the total amount of traffic delivered to Pac-West.²⁶ The resulting percentage equals the portion of Pac-West's traffic that is VNXX traffic for the time period in question.

39 To quantify the amount of VNXX traffic, Qwest next applied the VNXX percentages to Pac-West billed amounts that were previously paid by Qwest. Qwest Exhibit WRE-8C sets forth the VNXX percentages and the amounts that Qwest paid Pac-West for VNXX traffic through December, 2007.²⁷ Beginning in late 2007 through the end of 2009, Pac-West had no modems, switches or servers located in Washington.²⁸ As a result, all of traffic terminating to Pac-West's ISP customers during this time period was VNXX traffic.²⁹

40 PacWest did not offer any evidence to refute Qwest's traffic studies and analysis. Indeed, even though PacWest has known for literally *years* what Qwest's refund claim is, and how it was calculated, and has known since 2011 that the purpose of this evidentiary hearing was to determine the nature and amount of the traffic, Pac-West's opening testimony was a mere eight pages long, with no data on the amount of traffic at issue, or any evidence regarding the originating/terminating locations of calls.

41 Qwest asked Pac-West repeatedly for information regarding the number of minutes at issue, and any evidence that Pac-West had that might show the originating and

²⁵ Easton, Exhibit WRE-1T, p. 17 line 22 – p. 21 line 2.

²⁶ Id.

²⁷ Pac-West and Qwest stipulated to the amount of VNXX traffic for the time period prior to February, 2006 when Qwest made the payment to Pac-West to comply with the Commission's order initially requiring Qwest to pay reciprocal compensation for termination of VNXX traffic. WRE-16C, p. 3; WRE-8C.

²⁸ Easton, WRE-1T, p. 20 line 9 – p. 21 line 2.

²⁹ Easton, WRE-1T, p. 23 lines 3 – 11.

terminating location of the calls. WRE-4C reflects the last information provided by Pac-West, which showed only the total minutes for Washington and Oregon for certain months in 2006. Pac-West simply did not respond to Qwest's specific request to clarify how to determine more detailed information than the aggregate number of minutes, or to explain any methodology it employed to contest Qwest's calculation of the proper VNXX percentage.

42 In a March 19, 2012 pleading in which Pac-West claimed that it was premature at that time to order refunds to Qwest, Pac-West argued that this evidentiary proceeding was necessary to determine modem locations, and other information relevant to determining the proper compensation for the traffic. In light of these arguments, it was reasonable for Qwest to expect that Pac-West would produce such relevant data in its direct testimony, or at least in its rebuttal testimony. However, what is clear now is that Pac-West has no data that sheds any light on these issues.

43 Pac-West seems to suggest that data in the form of call detail records ("CDRs") would be relevant to the determination of the nature and amount of traffic. Pac-West complained that Qwest refused to produce CDRs, and stated in its reply testimony that Pac-West's CDRs were offered to Qwest.³⁰ However, Qwest has explained in its testimony, and in its data request responses to Pac-West, that the CDRs will not show anything about the originating and terminating locations of the calls. CDRs will show only the originating and terminating numbers – and the VNXX numbering arbitrage is specifically designed to make the originating and terminating numbers show as a local call. Thus, CDRs offer no insight into how much traffic is truly local and how much is VNXX.³¹

44 Pac-West provided no meaningful data to the Commission from which the type or amount of traffic can be determined. Pac-West also claimed that Qwest had not provided any information, or workpapers, or calculations, or traffic detail.³² This claim is simply

³⁰ Shiffman, Ex. SS-2T, p. 13, lines 1-3.

³¹ Easton, Ex. WRE-14RT, p. 21 line 13 – p. 22 line 4.

³² See, Ex. SS-2RT, p. 13, lines 4-6 and lines 14-21.

false. Qwest responded to all of the Pac-West data requests, and provided volumes of data, workpapers, route-by-route analysis, and other items requested by Pac-West.³³

45 In fact, in 2005, PacWest did not contest or deny that the traffic was VNXX as Qwest calculated. PacWest's arguments at this point are little more than an attempt to delay the outcome of this proceeding.

V. REFUND CLAIM

46 In Orders 12 and 13, the Commission determined that Qwest is not required to pay reciprocal compensation on VNXX traffic under the ICA between Qwest and Pac-West.³⁴ The purpose of this proceeding is to determine the amount of the refund to be awarded to Qwest for prior payments of reciprocal compensation on VNXX traffic and to determine what compensation is due to Qwest for originating and transporting this interexchange traffic.

47 The amount of the refund due to Qwest is undisputed. Only Qwest submitted evidence addressing the proper amount of the refund. To comply with the Commission's initial orders requiring Qwest to pay reciprocal compensation on VNXX traffic, Qwest paid Pac-West **[BEGIN REDACTED XXXXXXXX END REDACTED]** for VNXX traffic for the time period from February, 2004 through January, 2006.³⁵ From February, 2006 through December, 2007, Qwest paid an additional **[BEGIN REDACTED XXXXXXXX END REDACTED]** under protest to comply with the Commission's orders.³⁶ When the payments are added together, the principal amount of the refund due to Qwest is **[BEGIN REDACTED XXXXXXXX END REDACTED]**.³⁷ In addition, as discussed below, Qwest is entitled to interest on the amounts it paid at the statutory rate of 12% per annum. Simple interest at 12% on the amounts that Qwest paid under protest

³³ Exhibits SS-5-X through SS-15-XC.

³⁴ Order 12 in this proceeding, Conclusions of Law 10 & 11; Order 13 in this proceeding, ¶¶30, 31.

³⁵ WRE-1T, p. 26 line 10 – p. 28 line 12; WRE-8C.

³⁶ *Id.*

³⁷ *Id.*

equals [BEGIN REDACTED XXXXXXXXXXXX END REDACTED].³⁸ Thus, the total amount of the refund due to Qwest as of December 31, 2012 is [BEGIN REDACTED XXXXXXXXXXXX END REDACTED].³⁹ The dollar amount of the refund is essentially undisputed.

48 Qwest is entitled to recover interest on the payments made to Pac-West for VNXX traffic. Section 3.4.2 of the ICA between the Parties provides in pertinent part that in the event Pac-West withholds payments due to Qwest, “and upon resolution of the matter it is determined that such payments should have been made to [Qwest], [Qwest] is entitled to collect interest on the withheld amount...”⁴⁰ The ICA does not specify an interest rate. However, after the Commission initially ordered Qwest to pay reciprocal compensation on VNXX traffic, Pac-West argued that the appropriate interest rate was 18% per annum.⁴¹ Ultimately, Qwest paid an interest rate greater than 12% on the amounts that it had withheld for VNXX traffic.⁴²

49 In this case, Qwest is requesting 12% interest on the amounts that it paid to Pac-West for VNXX traffic. Twelve percent (12%) is the Washington statutory post-judgment interest rate and is also the appropriate prejudgment interest rate for contract claims.⁴³ Under Washington law, prejudgment interest is always appropriate when a claim is liquidated.⁴⁴ A claim is liquidated where the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness.⁴⁵

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Qwest/Pac-West ICA, August 23, 2012 Stipulation in this proceeding.

⁴¹ Easton, Tr. 342, line 25 – 343, line 6.

⁴² Easton, Tr. 343, lines 7-13.

⁴³ RCW 4.56.110(4), referencing RCW 19.52.020(1); *Stevens v. Brink's Home Security, Inc.*, 162 Wn.2d 42, 50-52 (Wash. Supreme Ct. 2007)(affirming award of 12% prejudgment interest on back wages claim).

⁴⁴ *Humphrey Industries, LTD v. Clay Street Associates, et al.*, 2013 Wash. LEXIS 141, *12-*16 (Wash. Supreme Ct., 2013)(holding that trial court abused discretion in failing to award prejudgment interest on reversed attorney's fee awards that had been previously paid); *Forbes v. American Building Maintenance Company West*, 170 Wn.2d 157, 166-168 (Wash. Supreme Ct. 2010)(affirming award of prejudgment interest); *Scoccolo Construction, Inc. v. The City of Renton*, 158 Wn.2d 506, 519-520 (Wash. Supreme Ct. 2006)(affirming award of prejudgment interest notwithstanding that jury did not award Plaintiff the amount of damages requested).

⁴⁵ *Id.*

50 Here, Qwest presented exact evidence as to the portion of Pac-West's traffic that was VNXX traffic and the dates and amounts that it paid Pac-West for this traffic.⁴⁶ Thus, the Commission should award Qwest prejudgment interest both because the ICA between the Parties provides for prejudgment interest and because Qwest's claim is a liquidated contract claim for which prejudgment interest is always appropriate under Washington law.

VI. TRANSPORT/ACCESS CHARGES

51 For the period after Pac-West emerged from bankruptcy until the time a new ICA was executed between Qwest and Pac-West, Pac-West used local interconnection facilities supplied by Qwest to enable customers to make interexchange calls via VNXX numbers. The Commission has already determined that VNXX traffic is interexchange traffic and that it is subject to the intercarrier compensation rules applicable to interexchange traffic under the Parties' ICA.⁴⁷ When, as with VNXX traffic, Qwest originates an interexchange call, it is entitled to access charges to cover its costs of switching and transporting the call.⁴⁸ In this case, Qwest is seeking access charges for the VNXX traffic exchanged by the parties during the time period subsequent to Pac-West's bankruptcy reorganization, from December, 2007 through December, 2009.

52 For the time period from December, 2007 through December, 2009, the appropriate rate to use for Pac-West's VNXX traffic is a composite (or average) switched access rate for interstate traffic. Pac-West's use of VNXX numbering disguised its traffic as local traffic such that Qwest's billing systems could not capture the proper call record information to apply specific rate elements.⁴⁹ As a result, the use of a composite rate is appropriate.

53 At hearing, only Qwest presented evidence as to the proper amount of access charges that

⁴⁶ Easton, WRE-8C; Tr. 402, line 8 – 409, line 1.

⁴⁷ Order 18 in this proceeding, ¶¶ 1, 25-34,

⁴⁸ Easton, WRE-1T, p. 7 line 25 – p. 8 line 12; p. 28 line 17 – p. 29 line 16; Tr. 348 line 17 – 349 line 2; Tr. 350 line 10 – 351 line 2.

⁴⁹ WRE-1T, p. 33 lines 8 – 19.

Pac-West should have paid Qwest for originating and transporting VNXX traffic. Qwest witness William Easton testified that Qwest originated and transported [BEGIN REDACTED XXXXXXXXXXXXXXXX END REDACTED] minutes of VNXX traffic during the time period from December, 2007 through December, 2009. The amount of access charges Pac-West should be required to pay Qwest for the origination and transport of this traffic is [BEGIN REDACTED XXXXXXXXXXXXXXXX END REDACTED].⁵⁰

54 If, the Commission determines not to require Pac-West to pay Qwest switched access charges on VNXX traffic, the Commission should at a minimum require Pac-West to compensate Qwest for the transport that Qwest provided to Pac-West to haul this VNXX traffic, consistent with the Commission’s finding in the VNXX complaint case. In the VNXX complaint case, the Commission determined that VNXX was permissible “provided that the CLEC bears the cost of transporting VNXX calls...”⁵¹ Under this approach, Pac-West should pay Qwest [BEGIN REDACTED XXXXXXXXXXXXXXXX END REDACTED] to compensate Qwest for the transport of VNXX traffic that Qwest provided to Pac-West during the time period from December, 2007 through December, 2009.⁵²

VII. CONCLUSION

55 For the reasons stated herein, the Commission should order Pac-West to make refunds to Qwest of principle and interest as shown in Exhibit WRE-8C, with additional interest from January 1, 2013 through the date of payment. The Commission should also order Pac-West to pay Qwest compensation for the use of Qwest’s network facilities that enabled VNXX for the period November 19, 2007 through December 3, 2009, as set forth in Exhibits WRE-11C or WRE-13C. These numbers are also shown in Confidential Appendix A.

⁵⁰ WRE-11C.

⁵¹ *Final VNXX Order*, Conclusion of Law 19.

⁵² Easton, WRE-1T, p. 35 line 27 – p. 36 line 10.

Respectfully submitted this 15th day of March, 2013.

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APPENDIX A

EXECUTIVE SUMMARY
QWEST CLAIMS

I.	Refund of Payments Qwest Made for VNXX Traffic (WRE-8-C)		
	March 2006 Payment to Comply With Commission's Initial Order	REDACTED	
	Payments Made for VNXX Traffic from February 2006 through December 2007	REDACTED	
	Total Principal Payments for VNXX Traffic		REDACTED
	Simple Interest on Payments Made for VNXX Traffic	REDACTED	
	Total Refund Due Qwest		REDACTED
II.	Originating Switched Access Charges on VNXX Traffic (WRE-11C)		REDACTED
III.	Alternative Compensation for Transport of VNXX Traffic if Originating Switched Access Charges Are Not Awarded (WRE-13C)		REDACTED

REDACTED

CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER IN DOCKET NO. UT-053036

APPENDIX B

COMMISSION'S FINDINGS FROM THE VNXX COMPLAINT DOCKET UT-063038

- In Washington, telephone calls are classified as local or interexchange based on geographic calling areas, not on the basis of assigned telephone numbers. VNXX traffic does not originate and terminate within the same local calling area and is thus intrastate interexchange traffic subject to Commission determined compensation and not subject to section 251(b)(5) of the Act. (Conclusions of Law 14).
- The Act preserved in section 251(g) the existing compensation scheme for interstate and intrastate interexchange and information access traffic, but under section 251(b)(5) required local exchange carriers to apply a new form of compensation, known as reciprocal compensation, to the transport and termination of telecommunications traffic. The FCC determined that reciprocal compensation obligations under section 251(b)(5) apply only to traffic that originates and terminates within a local calling area, such that the customer initiating the call pays the originating carrier and the originating carrier must pay the terminating carrier for completing the call. (§ 18).
- Regulatory arbitrage is associated with VNXX ISP-bound traffic in Washington. (Conclusions of Law 18).
- VNXX traffic is lawful under applicable state law if appropriate compensation is paid for the exchange of such traffic between carriers. RCW 80.36.080, .140, .160, .170. (Conclusions of Law 9).
- Bill and keep for VNXX traffic is a workable compensation methodology and it is reasonably possible to distinguish between VNXX traffic and truly local traffic. (Findings of Fact 18).
- Bill and keep is a reasonable methodology to address intercarrier compensation for the exchange of VNXX traffic at fair, just and reasonable rates, provided that the CLEC bears the cost of transporting VNXX calls, except where it has built its own transport facilities, has procured alternative facilities from a third party, or uses special access services for transporting VNXX calls to and from a local calling area where it does not have switching services. (Conclusions of Law 19).

APPENDIX B

KEY FINDINGS FROM THE NOVEMBER 14TH, 2011 ORDER IN THIS DOCKET, ORDER 12.

- Neither the *ISP Remand Order* nor the *Mandamus Order* eliminated the distinction between local and interexchange calls. Rather those orders found that, even though ISP-bound calls within a local calling area fell under the reciprocal compensation provisions of section 251(b)(5), the calls were interstate calls under an end-to-end analysis. Because those ISP-bound calls were interstate in nature, the FCC had the authority to set the rates for such calls under section 201. We find nothing in the *ISP Remand Order* or the *Mandamus Order* that affects our authority to classify intrastate VNXX traffic. (¶ 74)
- Furthermore, the rules for classifying calls as local or interexchange in Washington have been clearly delineated and understood by the parties. When the CLEC's adopted Qwest's local calling areas by and through their interconnection agreements, we have to believe that they understood the financial implications of their actions. No matter what innovative network or numbering arrangements have been made to facilitate ISP-bound traffic, calls are either local as defined by our rules or they are not. If they terminate outside the callers local exchange, we treat them as interexchange in nature and require compensation as such. This is the import of our *Final VNXX Order* and we believe our analysis then and now to be correct. The CLECs should bear the cost of using Qwest's network to serve their customers. This is a fundamental principle of intercarrier compensation that is reflected in interconnection agreements between these parties and those of all other companies within our jurisdiction. (¶ 77)
- We determined above that: (1) the *Mandamus Order* does not change the scope of the *ISP Remand Order* and the compensation scheme it created, which only applies to calls within a local calling area; (2) that the section 251(g) exclusion still applies to ISP-bound traffic outside of a local calling area, and (3) that VNXX traffic does not originate and terminate within a local calling area. Thus, we find that the parties' interconnection agreements and amendments, which require compensation at the rates set by the FCC, are not determinative of the rate for the narrow scope of ISP-bound traffic at issue in this case. Similarly, because we have found that VNXX ISP-bound traffic is subject to the section 251(g) exclusion, the traffic is *not* subject to compensation under section 251(b)(5). (¶ 90).
- Under these terms, it appears that VNXX traffic does not meet the definitions of Exchange Service or Access Services, but does meet the definition of IntraLATA Toll. (¶ 92).
- In light of our finding that the VNXX traffic in question is IntraLATA Toll or Toll-like traffic under the agreements, and the parties' disputes about the amount and type of traffic at issue, it is necessary to develop a full evidentiary record as to the exact location of the CLECs' ISP modems, at the time of the traffic in question in this

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proceeding, in order to determine which traffic is subject to our jurisdiction and should be subject to such toll rates (§ 96).

FROM ORDER 13 IN THIS DOCKET – regarding the terms of the ICA

- We do not read the definition of “telephone exchange service” to include the VNXX service the CLECs provide. Neither do we read the portion of the definition which allows a “comparable service” to apply to the CLECs’ VNXX service. A “comparable service” must still be provided “within an exchange or connected system of exchanges,” i.e., a local calling area. As we stated in Order 12, “[s]tate law distinguishes local and interexchange traffic based on the geographic endpoints of the call.” However, these proceedings ultimately concern enforcement of the CLECs’ interconnection agreements with Qwest, and the terms of those agreements determine the compensation for the VNXX traffic at issue. The CLECs ignore the actual terms of their agreements in their petition for reconsideration. As we noted in Order 12, those agreements define the following types of service: “Exchange Service,” “Access Service,” and “Exchange Access (IntraLATA Toll)”. While the Act may define “telephone exchange service,” the parties specifically defined the types of service allowed under the agreements, including “Exchange Service,” which determines the compensation due under the agreements. We continue to find that these contractual definitions and terms control the outcome of this proceeding. (§ 15, internal footnotes omitted).

FROM ORDER 18 IN THIS DOCKET – regarding jurisdiction

- The Commission is not attempting to set new rates for interstate traffic in this case. The District Court, fully aware of the authority the CLECs cite, remanded this case to the Commission so that the agency would apply state law to classify VNXX calls as within or outside a local calling area. The Commission did so in Order 12, finding that VNXX ISP-bound calls that were outside a local calling area should be classified as either intrastate toll or interstate traffic depending on the geographic or physical aspects of the origination and termination of such traffic. We see no reason to revisit our earlier decision. (§ 18).
- To be clear, the Commission is not asserting jurisdiction to set rates for ISP-bound calls that are interstate in nature. There is a clear distinction between our ratemaking authority and our powers of interpretation and enforcement under Section 252 of the Act. As the CLECs originally requested in 2005, the Commission is exercising its authority under Section 252 of the Act to interpret and enforce the parties’ ICAs, including applying the appropriate compensation under the ICA, depending on the nature of the traffic. Significantly, the CLECs expressly acknowledge that Section 252 of the Act authorizes the Commission to apply the rates set forth in the parties’ ICAs to the traffic in question, whether intrastate or interstate. In either case, the Commission has authority to interpret and enforce the compensation arrangements set out in the parties’ ICAs. (§ 19).