BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

PAC-WEST TELECOMM, INC. Petitioner, v. QWEST CORPORATION, Respondent.	DOCKET NO. UT-053036 QWEST'S EXCEPTIONS TO THE RECOMMENDED DECISION

TABLE OF CONTENTS

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

I. INTRODUCTION

1 Qwest Corporation ("Qwest") hereby files its Exceptions to the Administrative Law Judge's Recommended Decision to Grant Petition, entered on August 23, 2005. Qwest asks the Commission to review the Recommended Decision and to remand or consolidate this case for decision on the issues raised in Qwest's counterclaims, and to defer a final decision on the issues that were decided in the Recommended Decision until such time as a recommended decision can be entered on all of the issues. Alternatively, Qwest asks that the Commission reverse the Recommended Decision on the issues that were decided, and rule on the remaining issues presented in Qwest's counterclaims as set forth in Qwest's Answer and Qwest's Opening Brief, and as further explained herein. If the Commission selects the latter alternative, Qwest requests oral argument prior to the entry of a final order.

2 Qwest believes that the Recommended Decision is in error in failing to decide several critical issues – issues that Qwest raised in its counterclaims in both the Pac-West and the Level 3 cases, issues that are to be decided on a more complete record in the Level 3 proceeding (Docket No. UT-053039). Consistent with its motion for consolidation filed in both dockets, Qwest believes that the Level 3 proceeding offers an opportunity for the undecided issues to be heard and decided. These issues include the question of whether VNXX is permissible in the first instance under state law; whether the use of VNXX constitutes misassignment of numbers, and whether it is permissible for Pac-West to use LIS trunks to carry VNXX traffic.

3 The Recommended Decision is also in error in concluding that VNXX traffic is "ISP-bound traffic" as that term is used in the ISP Remand Order and the parties' interconnection agreement. Finally, the Recommended Decision's conclusion that the amount due on VNXX traffic is the full $637,389.80 claimed by Pac-West, when Qwest's evidence shows that the number of minutes in dispute are split between the VNXX dispute and a more traditional

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

volume dispute, is in error. The VNXX minutes constitute approximately 80% of the total disputed minutes – the remaining balance is disputed by Qwest under a wholly different theory, and that amount is not properly at issue in this enforcement proceeding.

II. REQUIRED STATEMENT PURSUANT TO WAC 480-07-825

4 Qwest challenges findings of fact (10) and (11) at paragraphs 51-52, conclusions of law (3) and (4) at paragraphs 56-57, and the "Decision" section of the order contained in paragraphs 36-40 of the Recommended Decision. Qwest also challenges the Recommended Decision's failure to decide all material issues of fact, policy, and law that were raised in this proceeding. Qwest proposes that the Commission enter findings and conclusions consistent with its argument herein and the relief requested in paragraph 106 of this filing.

III. THE RECOMMENDED DECISION FAILED TO DECIDE ALL MATERIAL ISSUES

5 This proceeding is being conducted under the Administrative Procedure Act, Chapter 34.05 RCW, and the Commission's procedural rules in Chapter 480-07 WAC.[1] Under the requirements set forth in statute and rule, a recommended decision, or initial order, must decide all of the material issues of fact and law.[2] WAC 480-07-650, the rule governing petitions for enforcement of interconnection agreements, does not contain any different requirements, and does not permit a recommended decision to refuse to decide material issues of fact and law.

6 Qwest brought three separate counterclaims, encompassing two issues, that were not decided in the Recommended Decision. A decision on at least one of those issues is a necessary predicate to the issues that were decided, and a decision on all of those issues is necessary to

[1] See, paragraph 2 of the Notice of Prehearing Conference in this matter, dated June 16, 2005.

[2] RCW 34.05.461(3) requires that initial and final orders "shall include a statement of findings and conclusions, and the reasons and basis therefor, on all the material issues of fact, law, or discretion presented on the record, including the remedy or sanction . . . ." Although the order in this case is called a "Recommended Decision" and not an "Initial Order", it is in all respects an initial order as that term is defined in the APA.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

fully resolve the dispute in this case. This issue is therefore a material issue in this case and it was thus error to fail to address it in the Recommended Decision.

7 In explaining why these issues were not decided, the Recommended Decision states, at paragraph 40, that "this Order does not address the remainder of Qwest's counterclaims because they are resolved by the recommended outcome in this proceeding or they allege violations of law other than the Interconnection Agreement, or there are no laws to be violated with respect to the particular counterclaim." Qwest is not able to discern from this explanation which reason applies to which undecided counterclaim. However, the offered rationale is insufficient in any event.

8 Qwest's three undecided counterclaims address two essential issues – whether VNXX is permissible at all (counterclaims 2 and 3) and whether VNXX traffic, if permitted, can be carried over LIS trunks (counterclaim 4). The issue of whether VNXX is permissible at all under state law and the parties' interconnection agreement is a necessary predicate to determining whether ISP-bound traffic must be compensated on a going forward basis under the interconnection agreement. In other words, deciding that VNXX is compensable under the ISP-Remand Order simply assumes, without deciding, that VNXX is also permissible. On the other hand, a decision that VNXX is not permissible, or is permissible only under certain circumstances, clearly affects the interconnection agreement on a going forward basis, and is a central issue in this proceeding, where Pac-West seeks to "enforce" the interconnection agreement. However, the Recommended Decision contains no analysis or decision on that critical issue.

9 Qwest clearly raised these issues in both rounds of pleadings filed in this matter. For example, in both its Answer and its Opening Brief, Qwest specifically asked that the Commission enter an order "prohibiting Pac-West from assigning NPA/NXX's in local calling areas other than

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

the local calling area where Pac-West's customer has a physical presence" and prohibiting "routing VNXX traffic utilizing LIS facilities".[3]

10 Further, Qwest's Opening Brief directly asks the ALJ/Commission to order Pac-West "to cease using virtual NXX ("VNXX") numbers." The Opening Brief then states that "if the ALJ concludes that VNXX numbers are permissible, the ALJ should rule that no intercarrier compensation is due for calls terminated to those numbers."[4]

11 Qwest then goes on to state that this case presents several issues, the first being whether intercarrier compensation is due for non-local VNXX ISP traffic, the second being the issue of VNXX traffic in general, and the extent to which the use of VNXX numbering schemes is permissible, and the last being the question of whether local interconnection ("LIS") facilities may be used to route VNXX traffic over Qwest's network.[5] A decision was only made on the first issue, and not on the others. However, a decision on that issue did not render the remaining issues moot, as there is no finding that VNXX is either permitted or required under either federal or state law, only a finding that *if* calls are routed in this manner, they are compensable. Thus, the other issues remain open.

12 Pac-West will no doubt claim that the Commission *has* ruled on VNXX traffic, in the *Level 3/CenturyTel* arbitration decision.[6] Pac-West is incorrect. At issue in that proceeding was the question of compensation for VNXX traffic that was bound for an ISP – CenturyTel claimed that access charges should be paid while Level 3 argued that bill and keep was the proper mechanism under the *ISP Remand Order*.[7] But the issue of the propriety of VNXX in the first

---

3 See, Qwest's Answer at ¶ 67, and Qwest's Opening Brief at ¶ 101

4 Qwest's Opening Brief at ¶ 1.

5 Id. at ¶ 2.

6 *In re Petition for Arbitration for an Interconnection Agreement Between Level 3 Communications, LLC, and Centurytel*, Docket No. UT-023043, ("*Level 3/CenturyTel"*).

7 Order on Remand and Report and Order, *In the Matter of Implementation of the Local Competition Provisions of the*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

instance was not at issue, and no Commission ruling expressly endorsing VNXX can be found in that decision. Furthermore, that decision was entered in a case to which Qwest was not a party – that case is not binding precedent in this matter. And, since the issue was not raised or decided in that case, it does not offer guidance herein.

13 Qwest believes that the undecided issues, which are the same issues that remain open in the Level 3 case, should be decided on a more developed record, and should be presented to the Commission with the benefit of a recommended decision by the ALJ. As such, Qwest reiterates its request to consolidate the two cases, and defer a Commission order until such time as all issues are before the Commission, having been decided in a recommended decision in the consolidated cases. If the Commission declines to do so, Qwest submits that the information presented in its Answer and Opening Brief establishes that the Commission should enter an order prohibiting VNXX as currently offered by Pac-West, or ordering that Pac-West is responsible to pay access charges on that toll-like traffic. If VNXX is no longer allowed, then Qwest would agree that the issue of VNXX over LIS trunks is rendered moot and need not be decided. However, if VNXX is allowed, the Commission should strictly limit its use, and should not allow VNXX traffic to be carried over LIS trunks.

A. VNXX Should Not be Permitted in Washington

14 Qwest presented a number of arguments in its Opening Brief about why the Commission should not allow VNXX calling in Washington. First, Qwest believes that VNXX is simply a toll-avoidance mechanism that arbitrages the switched access regime in Washington, allowing Pac-West and its customers to improperly avoid paying for their access to the public switched telephone network ("PSTN"). Second, VNXX routing is contrary to Pac-West's own price list in Washington. Third, VNXX violates industry guidelines regarding proper assignment of

---

Telecommunications Act of 1996 and Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 96-98 (April 17, 2001) ("*ISP Remand Order"*).

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

numbers. Finally, Qwest refuted Pac-West's claim that VNXX should be allowed because it is "indistinguishable" from Qwest's foreign exchange ("FX") service.

15 Thus, Qwest raised legal, factual, and policy issues in its Opening Brief. These arguments were not addressed in the Recommended Decision, but must be addressed in order to decide all of the material issues in this case. In order to facilitate the Commission's consideration of these issues, Qwest will reference the paragraph numbers from its Opening Brief where these issues are discussed, and will more briefly summarize the points below. However, Qwest would note that the Commission at this point does not even have the benefit of a recommended decision on these issues. Consistent with Qwest's motion for consolidation, the Commission may well agree that these issues warrant a hearing, for development of a more complete record and entry of an initial order.

16 A hearing could help develop the issues, especially the policy issues that are implicated by VNXX. For example, in a hearing, more of a record could be developed with regard to the financial impacts of VNXX. Qwest has obtained information in the Level 3 case, and would seek information in Pac-West, regarding the extent to which Pac-West and its customers benefit from free toll calling, and the concomitant extent to which Qwest is harmed. The evidence in both this case and the Level 3 case shows that these carriers offer their customers VNXX at no charge – thus, they essentially have set up the equivalent of 8XX numbers for inbound toll free dialing. From available information, it appears as though Level 3 charges its customers less than $15 per month per telephone number for this service. It is unclear without further discovery how Pac-West's pricing structure compares, but this type of information may be relevant as the Commission considers the financial and policy impacts of allowing VNXX to be used to arbitrage the current toll and access charge structure.

17 As Qwest observed in its Opening Brief, sound public policy counsels against permitting Pac-

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

West to recover intercarrier compensation on VNXX traffic. The customer who places the call to an ISP is a customer of the ISP on Pac-West's network. Pac-West should not be allowed to collect intercarrier compensation for traffic that is properly thought of as Pac-West's own toll traffic; the end result is regulatory arbitrage in which Pac-West profits at Qwest's expense.

18 If Pac-West is able to collect revenue primarily from other carriers rather than its own customers, it creates incentives for inefficient entry of LECs intent on serving ISPs exclusively and not offering viable local telephone competition, as Congress had intended in the Act. Moreover, the large one-way flows of cash make it possible for LECs serving ISPs to afford to pay their own customers to use their services, driving ISP rates to consumers to uneconomical levels. In short, intercarrier payments for ISP traffic create severe market distortions.[8] Important policy issues such as these, where decisions are informed by and dependent upon the factual record, are deserving of further exploration in this proceeding.

1. The Critical Difference Between Local and Toll Calls is the Geographic Location of the Calling Parties

19 Local traffic is telecommunications traffic that originates and terminates within a geographically-defined area. These areas are called local calling areas or extended area service ("EAS") areas.[9] These geographically-defined areas allow an end-user customer to have unlimited calling within these areas for a flat rate. Qwest's local calling areas are defined by its exchange boundary maps and contained in its tariffs and price lists that are on file with the Commission.[10] Local traffic has also recently been defined in the AT&T/Qwest arbitration.[11] There, the Commission accepted Qwest's definition of local exchange service as

[8] These are exactly the problems the FCC identified and sought to guard against in the *ISP Remand Order*. *See*, ¶¶ 70-71 and 74-76.

[9] This description of "local traffic" is consistent with the definitions of relevant related terms contained in Commission rules (see e.g., WAC 480-120-021), Qwest's tariffs, and the parties' ICA.

[10] See, WN U-40, §2.1, and the discussion at paragraphs 32-33 infra.

[11] *In the Matter of the Petition for Arbitration of AT&T Communications of the Pacific Northwest and TCG Seattle with Qwest*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

traffic that originates and terminates within the *same* Commission-determined local calling area. The Commission rejected AT&T's request for a definition based on "the calling and called NPA/NXXs" (i.e., VNXX), noting with approval the Arbitrator's concern that AT&T's definition "is too sweeping in its potential effect and has potentially unacceptable consequences in terms of intercarrier compensation."[12]

20 The Telecommunications Act of 1996 mandated some form of intercarrier compensation for the exchange of local traffic between carriers. 47 U.S.C. §251(b)(5). The FCC promulgated rules, and state commissions arbitrated issues around the mandate for intercarrier compensation for the exchange of this local traffic. Reciprocal compensation requires that the carrier whose retail customer originates a local call must pay the terminating carrier. "Bill and keep," is a form of reciprocal compensation that allows for each carrier to bill their end-user customer and keep the revenue, reducing the need to create a record of and bill for local traffic.

21 Local traffic bound for the internet (ISP-bound traffic) is not subject to reciprocal compensation under 47 U.S.C. §251(b)(5), but is subject to a different intercarrier compensation mechanism (under §251(g)) as set forth in the FCC's *ISP Remand Order* – details of this order are discussed below.

22 Interexchange (long distance, or toll) traffic is traffic that originates and terminates between exchanges located in *different local calling areas*. Toll traffic is measured in minutes of use, and is charged to the end-user customer by the end user customer's selected interexchange carrier ("IXC"). The IXC must pay originating access charges to the originating LEC for the use of its network to start the call, and terminating access charges to the terminating LEC for the use of its network to complete the call. Section 251(g) of the Telecom Act of 1996

Corporation Pursuant to 47 U.S.C. Section 252(b), Docket No. UT-033035, Order No. 05.

[12] Id ¶¶ 14-15.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

preserves this regime.

23 Whether a call is local or long distance is determined by the geographic location of the end points of the calls. Based on these physical end points, the telecommunications industry has developed a method of determining the location (i.e., the local calling area) for intercarrier compensation purposes based on the telephone numbers of the originating and terminating end users. Telephone numbers are displayed in the NPA/NXX format (in which the NPA is the area code and the NXX is the central office code). These three digits (NXX) are assigned to and indicate a specific central office from which a particular customer is physically served. In other words, in the number (360) 753-XXXX, the "753" prefix is assigned to a specific rate center in the (360) area code and thus identifies that the geographic area where the customer is located is Olympia, Washington.

24 The central office code is followed by a four-digit number which together constitutes the telephone number of the end-user customer's telephone line. Based on this format and the known geographic local calling area/EAS boundaries, a call may be determined to be either local or long distance. The numbering guidelines are quite clear in terms of requiring a synchronization between the numbers assigned and the geographic territory associated with those numbers – to freely disregard this expected synchronization would be to completely gut the current system, which distinguishes between local and long distance calling based on customer location.

25 Indeed, as Qwest pointed out in oral argument, VNXX could totally destroy the distinction between local and toll calling, even for non-ISP customers. For example, a residential customer in Seattle could simply ask for a Bellingham, a Vancouver, and an Olympia number to be routed to a home phone – technology exists to do this today, without the purchase of three additional lines. If carriers are permitted to operate in this fashion, the current rate

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

structure could be destroyed.

2. Washington has a Long Regulatory History of Disallowing Schemes Like VNXX that Avoid Payment for Access to the Network (Qwest Opening Brief ¶ 48-49 and 78-82)

26 Schemes to avoid the payment of toll and access charges are not new. The most common toll-avoidance scheme has been something known as "EAS bridging", or "toll bridging". This service allows customers to "bridge" overlapping EAS areas, thus avoiding toll charges. The bridging was accomplished by a device that received calls and allowed them to be transmitted to the next local calling area. Thus, a caller in Bellevue could dial a Renton number associated with the device, (a true local call) and that device would answer, generate a second dial tone, and allow a true local call from Renton to Auburn. However, a direct call from Bellevue to Auburn is a toll call. While VNXX is admittedly a bit more sophisticated and complex than toll bridging, it is functionally no different – end users are permitted to make calls to distant local calling areas without incurring toll charges.

27 The Commission has seen through these schemes and ordered the participants to pay their fair share of the costs associated with accessing the telephone network.[13] The overarching principle in those cases was that companies should not be permitted to avoid toll and access charges by virtue of technological or legal loopholes that might allow such avoidance. VNXX traffic is much the same as toll bridging, and the same legal principles that guided the Commission's decisions in cases involving toll bridgers should apply in this case as well.

28 In response to these toll-avoidance schemes, the Commission has been consistent. In

[13] See, Commission orders in *In the Matter of Determining the Proper Classification of: U.S. MetroLink Corp.*, Second Supplemental Order, Docket No. U-88-2370-J (1989) ("*MetroLink*"), and *In the Matter of Determining the Proper Classification of: United & Informed Citizen Advocate Network,* Fourth Supplemental Order, Commission Decision and Final Cease and Desist Order, Docket No. UT-971515 (1999) ("*U & I CAN"*).

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

MetroLink, the Commission stated:

> It is, of course, true that should MetroLink come into compliance with Commission laws and rules, it will be obliged to pay its fair share of network costs through an appropriate access charge. . . . . Whether MetroLink will continue to be an attractive service alternative when its customers are required to pay all of the appropriate costs of service is not a matter of concern to the Commission. While the policy of the state is to promote diversity in the supply of telecommunications services (See RCW 80.36.300), that policy falls short of a duty to underwrite or subsidize developing competition. Such a subsidy would be the result of a ruling in favor of MetroLink.

29 The Commission goes on to say that "MetroLink has no hope of escaping its obligation of making an appropriate contribution toward the fixed and variable costs associated with accessing the public switched telecommunications network."[14]

30 The Commission was no more sympathetic to the next toll-bridger – a company called U&I CAN. Citing the MetroLink case with approval, the Commission noted that it had previously held that EAS bridging is contrary to the public interest.[15] The Commission also agreed with the Public Utilities Commission of Utah in a case where it set forth the policy reasons against EAS bridging:

> This is not a case of small, virtuous Davids being set upon by a powerful, evil Goliath out to crush legitimate competition. These respondents are offering no innovation in service or technology. **** For their own profit, they are enabling some USWC customers to realize savings to which they are not entitled. In the process, these respondents are depriving USWC of revenues which it would collect otherwise, and they are competing unfairly with authorized resellers of MTS [message toll service or long distance] service who abide by the applicable USWC tariffs.[16]

---

[14] *MetroLink* at p. 7.

[15] *U & I CAN* at p. 9.

[16] Id. at pp. 9-10.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

31 As in *MetroLink* and *U & I CAN*, Pac-West offers no innovation in service or technology, merely a subterfuge under which it avoids paying access charges, and end-users avoid paying toll charges. However, the Recommended Decision contains no discussion whatsoever about this important issue. Qwest believes that VNXX should, similar to toll-bridging, be found to be contrary to the public interest.

3. Pac-West's Position on VNXX is Contrary to its Own Price List in Washington (Qwest Opening Brief ¶¶ 64-65)

32 Though Pac-West claims that it is entitled to compensation on VNXX calls as if they were non-VNXX ISP-bound calls, its own price-list in Washington properly recognizes the definition of local calls, and sets forth end-user charges for both local and toll calls. It sets forth the definition of "access charge" as the charge assessed by a local exchange company to an interexchange carrier for the origination, termination or transport of a call to or from a customer of the local exchange company, and defines "interexchange" as calls, traffic, facilities or other items that *originate in one exchange and terminate in another.*[17] Under Pac-West's own price list then, Pac-West agrees that the nature of the call is determined by its physical end points.

33 Furthermore, Pac-West's price list concurs in and incorporates Qwest's local exchange boundary maps, thereby adopting the exchange boundaries and local calling areas that are the same as in Qwest's tariffs and price lists. Qwest's tariff is absolutely clear that "local service" is service that is furnished between customers' premises "located within the same local service area".[18] A "local service area" is the area within which exchange service is furnished at specific rates without the application of toll charges.[19] "Premises" is defined as the physical

---

[17] Pac-West's Price List, effective July 1, 2003, page 13.

[18] *See*, Qwest's Exchange and Network Services Tariff, WN U-40 §2.1.

[19] *Id.*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

location of the customer, i.e., the space in a building occupied by the customer.[20] These requirements make it clear that the customers' physical locations control whether a call is a local call or a toll call, not whatever artificial dialing convention a creative carrier has been able to employ to avoid toll charges.

4. VNXX Traffic is Improper Under Industry Guidelines (Qwest Opening Brief ¶¶ 66-72)

34 Pac-West's assignment of telephone numbers is not consistent with the telecommunications industry's numbering resource guidelines. Industry guidelines exist to govern the proper use of numbering resources, and Pac-West is required to adhere to those guidelines.

35 In 1995, prior to the passage of the 1996 Act, the FCC created the North American Numbering Council ("NANC"), which would make recommendations to the FCC on numbering issues and oversee the North American Numbering Plan ("NANP"). At the same time, the FCC also created the North American Numbering Plan Administrator ("NANPA"), an impartial entity that would be responsible for assigning and administering telecommunications numbering resources in an efficient and non-discriminatory manner. Under FCC rules, NANPA is directed to administer numbering resources in an efficient and non-discriminatory manner, *and* in accordance with the guidelines developed by INC (the North American Industry Numbering Committee). 47 C.F.R. § 52.13(b) and (d).

36 The Alliance for Telecommunications Industry Solutions (ATIS) has published a set of INC guidelines entitled "Central Office Code (NXX) Assignment Guidelines (COCAG)." These INC guidelines are really more than just guidelines – adherence to those guidelines is an FCC mandate. Pac-West's use of VNXX is in violation of industry guidelines which designate NPA-NXX codes as geographically-specific.

---

[20] *Id.*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

37 Section 2.14 of the COCAG states that "CO [central office] codes/blocks allocated to a wireline service provider are to be utilized to provide service to a customer's premise *physically located* in the same rate center that the CO codes/blocks are assigned. (Emphasis added.) Exceptions exist, such as for tariffed services like foreign exchange services." VNXX is not identified as an exception, and is certainly not an "exception" as it is employed by Pac-West.[21] In addition, section 4.2.6 of the COCAG provides that "[t]he numbers assigned to the facilities identified must serve subscribers in the *geographic area corresponding with the rate center requested*." (Emphasis added.)

38 Finally, "Geographic NPAs" are the "NPAs which correspond to discrete geographic areas within the NANP" while "Non-geographic NPAs" are "NPAs that do not correspond to discrete geographic areas, but which are instead assigned for services with attributes, functionalities, or requirements that transcend specific geographic boundaries, the common examples [of which] are NPAs in the N00 format, e.g., 800." COCAG, § 13.0.

39 The numbers that Pac-West uses in Washington are all Geographic NPA numbers – in other words, they are numbers that should, according to guidelines, correspond to discrete geographic areas. But under Pac-West's misassignment of these numbers, they no longer do. Callers in Olympia who dial a Pac-West 360 "local" number do not reach anyone in the Olympia local calling area – rather, they are transported over Qwest's LIS network to Pac-West's switch in Tukwila, and then on to an ISP server that may be in Washington state, or may be in another state entirely. This use of numbers is in violation of the industry guidelines.

5. VNXX Traffic is Not FX (Qwest's Opening Brief ¶¶ 55-63)

40 Pac-West contends in its Petition that Qwest's FX service is "indistinguishable" from

[21] Qwest has identified over 60% of Pac-West's traffic as VNXX, and Pac-West has not disputed that calculation.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

VNXX.[22] This is untrue for a number of reasons. The services are distinguishable on at least three different bases. First, FX customers are required to purchase a local connection in the distant central office; VNXX customers do not. Second, FX customers are required to pay for the dedicated transport from the distant central office to their physical location in the home local calling area; VNXX customers do not. Third, the number of customers and volume of traffic associated with each service are widely disparate.

41 That these distinctions are relevant was aptly noted by the federal district court in a recent decision in Vermont, where the state public service banned VNXX. The CLEC in that case appealed, claiming that the board's decision unlawfully discriminates against VNXX vis a vis FX. The court upheld the board's decision and concluded that a ban on VNXX did not discriminate against the CLEC. The court agreed that FX and VNXX are the same from the perspective of the retail customer, but went on to state that:

> From the carriers' and regulators' point of view, however, the services operate quite differently. When VNXX numbers are assigned, neither Global [the CLEC] nor its customers purchase any equipment, nor do they pay for the costs of transporting the call. Instead, Global relies on Verizon, the ILEC, to transport the calls, in accordance with Verizon's obligation to provide interconnecting services. Global does not dispute the distinction, but considers it irrelevant.[23]

42 Of the over 2 million access lines Qwest serves in Washington, less than 5,000 of them are FX lines – less than one half of one percent. Pac-West serves all of Washington, and uses VNXX codes to every local calling area except Seattle and Spokane. FX is clearly a minor exception to the way calls are routed and rated, but Pac-West seeks to take the exception and turn it into the rule.

---

[22] Petition at ¶ 9.

[23] *Global NAPs, Inc. v. Verizon New England, Inc.*, 327 F.Supp.2d 290, 299 (D. Vt. 2004).

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

a) Qwest's FX service is different from VNXX.

43 Qwest's FX service is very different from VNXX. VNXX uses the PSTN to route and terminate calls to end users connected to the public network in another local calling area. In all respects except the number assignment, the call is routed and terminated as a toll call. Qwest's FX product, on the other hand, delivers the FX-bound calls to the local calling area where the number is actually associated. A Qwest FX customer purchases a dedicated local service connection in the local calling area associated with the telephone number. That local service connection is purchased by the FX customer out of the local exchange tariffs that apply to that local calling area. The calls are then transported on a private line, paid for by the FX subscriber, to another location. Thus, after purchasing the local connection in the local calling area, the FX customer bears full financial responsibility to transport calls from the originating local calling area to the location where the call is actually answered, much as a customer would if the customer purchased 8XX service.

44 Pac-West's approach is fundamentally distinct from FX service. Under FX, the customer who desires a presence in another local calling area is fully responsible to transport the traffic to the location where it wants the call answered. Pac-West wants the call routed over the PSTN, but wants no responsibility for providing or paying for the transport to the distant location, enabling toll calls to ride free over Qwest's transport facilities. In calling its product an FX-like product, Pac-West attempts to confuse this critical distinction. Calls over the public network between communities that use the toll network are toll calls no matter how the numbers are assigned. Calls delivered to end users within a local calling area and transported over private networks are more than a mere technical distinction. It is consistent with the way Commissions have been distinguishing between toll and local calls since access charges were established.

45 If Pac-West were to offer a true FX service, in which its customer was responsible for

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

establishing a physical presence in each local calling area and the traffic was transported out of the local calling area over facilities that are dedicated to the customer, Qwest would have no objection to that type of service.[24] However, Pac-West does not provide this service for the VNXX calls to ISPs – it routes the traffic over Qwest's local interconnection network using LIS (local interconnection service) trunks. This is improper both because the calls are not local and because the parties have not agreed to exchange this type of traffic over LIS trunks.

b) Pac-West charges its ISP customers nothing for its VNXX service.

46 Pac-West has admitted that VNXX service is not separately identified in its price list.[25] From this answer it is clear that Pac-West does not charge its ISP customers for this service, nor do they obtain or pay for a separate dedicated connection to the PSTN, nor do they pay for interexchange transport, all of which are hallmarks of FX service.

47 Thus, VNXX is simply an arbitrage to shift the cost recovery form from the ISP to Qwest. Originally, consumers had to dial 1+ if they were outside the calling area of the ISP modem banks or server, or the ISP had to offer an 8XX or true FX service. Under those circumstances, either the ISP or the consumer paid for the transport between calling areas – either via private line transport, access charges, or toll charges. Pac-West, and other CLECs, have now attempted to alter this cost recovery by using VNXX. Their ISP customers enjoy the benefit of not having to pay for 8XX or FX service. At the same time, by not providing Qwest calling records of the appropriate NXX of the calling area in which the ISP server is physically located, Qwest is denied the opportunity to recover transport costs. Worse still, Pac-West is

[24] While this would address the issue of misassignment of numbers, it would not entitle Pac-West to receive intercarrier compensation for these calls. Intercarrier compensation would not be due on these calls for the same reason as discussed below – ISP-bound traffic is only compensable if it is true local traffic, originating and terminating to the ISP's server in the same local calling area. Even true FX traffic does not meet that definition and the *ISP Remand Order* does not apply to that type of traffic.

[25] See, Pac-West's responses to Qwest's Data Request numbers 13 and 14, attached to Qwest's Opening Brief as Exhibit F.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

also demanding intercarrier compensation from Qwest, as if the traffic were local.

c) End-User Perception of the Call Does Not Alter the Nature of Intercarrier Compensation.

48 Pac-West has argued that VNXX calls and FX calls are identical from the perspective of the party who is calling the VNXX or FX subscriber. While it is true that the end-user perceives a "local" call in both cases, the fact is that the end-user's perception of the call is irrelevant to determining the appropriate intercarrier compensation mechanism. Furthermore, if the calling party knew that the ISP was located outside of the local calling area, the calling party would certainly perceive that toll charges were avoided by use of the VNXX number. Once again, the important distinction between FX and VNXX is that with FX, the FX subscriber has already paid for the seemingly local calls to be transported to a distant local calling area by virtue of paying private line transport charges. This is clearly not the case with VNXX, which inappropriately loads the transport costs on Qwest with no opportunity for recovery.

49 One example that illustrates that end-user perception of the call does not control the nature of the call is here in Washington where carriers allow end-users to dial any 10-digit call as a 1+ call – also called "permissive 11-digit dialing."[26] Under permissive 11-digit dialing, carriers are required to complete a 1+, 11-digit call regardless of whether the call is a local call or a long distance call to which toll charges apply. Thus, a caller in Seattle in the 206 area code can dial a local call to Bellevue as either 425-455-XXXX, or as 1-425-455-XXXX, and the call will go through either way. The end-user is charged in accordance with the true nature of the call, without regard to the dialing pattern. Intercarrier compensation is also based on the true nature of the call as either local or long distance, based on the NPA/NXX of the calling and called parties, and based on their geographic locations. Rating is not based on the dialing

[26] *In the Matter of Permissive 11-Digit Dialing for Local Calls to Become Effective by October 2001, Implementing in the Seattle Local Calling Area by January 1, 2001, Order Directing Implementation of Permissive 11-Digit Dialing for Local Calls,* Docket No. UT-001275 (2000).

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

pattern or on the customer perception of whether the call might be a toll call because the subscriber dialed it using a 1+.

50 Thus, it is clear that VNXX raises important legal and policy issues, which may be further informed by the development of a record, as the ALJ recommended in Level 3. Alternatively, these issues should have been decided in Qwest's favor in the Recommended Decision.

B. The Recommended Decision Erred in Failing to Decide the Issue of VNXX Traffic Over LIS Trunks

51 With regard to Count 4 of Qwest's counterclaims, the Recommended Decision did not explicitly rule on the issue, though implicit in the Decision appears to be a ruling that VNXX may be transported over trunks designed for local interconnection. On this issue, the Commission should also find in Qwest's favor and order Pac-West to cease using LIS trunks to route VNXX traffic.

52 Pac-West has argued that the parties have agreed to exchange VNXX traffic over LIS trunks. Qwest disagrees. Section (C)2.1.2 of the parties' ICA specifically delineates the types of traffic that are to be exchanged under the ICA. With respect to the traffic and disputes at issue in this matter, there are three relevant types of traffic which are appropriately exchanged under the agreement and under the parties' SPOP amendment to the ICA: (1) Exchange Access (intraLATA Toll non IXC) traffic, (2) Jointly Provided Switched Access (interLATA and intraLATA IXC) traffic (also known as "Meet-Point Billing" or "MPB") and (3) Exchange Service or EAS/Local Traffic. (See SPOP Amendment, Attachment 1, § 1.)[27]

53 The ICA defines those categories of traffic as follows:

- "IntraLATA Toll (Exchange Access)" is defined in accordance with USW's [Qwest's] current intraLATA toll serving areas, as determined by the Federal Communications

[27] The parties entered into the SPOP Amendment in April 2001, and it was filed with the Commission on April 23, 2001. The Commission approved the amendment on May 9, 2001 in Docket No. UT-013009.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

Commission." (ICA, § (A)2.25.)

- "Meet-Point Billing" or "MPB" [also known as Jointly Provided Switched Access] refers to an arrangement whereby two LECs (including a LEC and Co-Provider) jointly provide Switched Access Service to an Interexchange Carrier, with each LEC (or Co-Provider) receiving an appropriate share of the revenues as defined by their effective access Tariffs. (*Id*., § (A)2.32.)

- "Extended Area Service (EAS)/Local Traffic" (Exchange Service) means traffic that is originated by an end user of one Party and terminates to an end user of the other Party as defined in accordance with USW's [Qwest's] then current EAS/local serving areas, as determined by the Commission. (*Id*., § (A)2.19.)

54 This traffic is clearly not "Exchange Service" traffic, commonly referred to as "EAS/Local traffic." This traffic is defined in section (A)2.19 of the ICA as "traffic that is originated by an end user of one Party and terminates to an end user of the other Party as defined in accordance with USW's [Qwest's] then current EAS/*local serving areas*, as determined by the Commission." (Emphasis added.) Even a cursory examination of the traffic at issue, however, shows that it does not meet this definition. VNXX is not terminated at an ISP server that is in the same local calling area as the originating caller, but Pac-West has nevertheless claimed that it is "ISP-bound" traffic. Thus, there can be no real contention as to whether the VNXX traffic at issue is "Exchange Service" traffic.

55 A traffic type that may *superficially appear* to apply to the VNXX traffic at issue is under the definition of "Exchange Access" traffic, which is defined in section (A)2.25 of Pac-West's ICA as being "in accordance with USW's current intraLATA toll serving areas, as determined by the Federal Communications Commission." While this may appear functionally appropriate, upon closer examination the traffic does not meet this definition either.

56 As a threshold matter, only Pac-West knows the exact location of the ISP. Thus, Qwest cannot completely determine for any given call whether the call is destined for a location within the local calling area or in a different local calling area. Qwest only knows how far it carried the

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

call before handoff to the interconnected carrier, where that carrier's serving switch is located, and whether traffic is one-way or two-way. In addition, even for that traffic which may functionally appear to match the definition, Pac-West's use of VNXX telephone numbers makes it difficult to track such traffic. Pac-West clearly does not intend for the traffic to be treated as "Exchange Access" traffic under the ICA, as evidenced by its misuse of telephone numbers. Thus, it is apparent this definition does not match the traffic either.

57 However, a more complete record on this issue may also benefit the Commission's decision – as the ALJ noted in paragraph 41 of the Level 3 decision on motions for summary determination, VNXX arrangements do not fall within the definition of EAS/Local Traffic, but do appear to fall within the category of interexchange or IntraLATA calls, subject to toll charges. The parties will be permitted to develop a record on that issue in the upcoming hearing.

58 Finally, the last possible traffic type, "Meet-Point Billing" or "Jointly Provided Switched Access," does not match up at all to the VNXX traffic at issue either. This is so because no IXC is involved, as only Pac-West and Qwest are involved in the carriage of the traffic, which is contrary to the definition of the traffic in section (A)2.32 of the ICA.

59 Therefore, in reviewing the ICA's plain language and the VNXX traffic that Pac-West causes Qwest to exchange, none of the traffic types that the parties specifically agreed to exchange match this VNXX traffic. Pac-West can easily remedy the situation by properly assigning telephone numbers based on the actual location of its end-user customers. Thus, it is incumbent upon Pac-West to ensure that the exchange of traffic under the ICA follows the terms and conditions of that agreement. If toll or access charges properly apply to these calls, then Pac-West must give Qwest sufficient information to bill those charges appropriately.

60 In sum, Qwest believes that there are critical issues that are as yet undecided in this case –

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

issues that essentially center around the permissibility of VNXX routing. The Commission should either hold a hearing to allow development of a more complete record, or should decide, in accordance with Qwest's pleadings, that VNXX service should be disallowed in Washington.

IV. THE RECOMMENDED DECISION INCORRECTLY DECIDED THE ISSUES RELATING TO COMPENSATION FOR VNXX TRAFFIC

61 The Recommended Decision did rule on two issues – the issue of whether VNXX traffic is compensable as ISP-bound traffic under the *ISP Remand Order,* and the issue of how much is in dispute between the parties related to VNXX traffic. Qwest respectfully disagrees with the Recommended Decision on both issues, and asks the Commission to reverse the decision as set forth herein.

A. The Recommended Decision Erred in Holding that the ISP Remand Order Applies to VNXX Traffic

62 In the Recommended Decision, the ALJ held that the *ISP Remand Order* applies to all ISP traffic, regardless of the point of origination and termination of the traffic. In reaching that conclusion, the Recommended Decision relied on the earlier decision in Washington in the *Level3/CenturyTel* arbitration, and the Connecticut federal district court in *Southern New England Telephone v. MCI WorldCom Communication* ("*SNET*").[28]

63 Qwest respectfully suggests that the Recommended Decision erred on this issue. When read in its proper context, the only consistent reading of the *ISP Remand Order* is that it applies only to "local" ISP traffic.[29] Qwest's analysis is directly supported by an August 16, 2005 decision of an ALJ in Oregon on the identical issue ("*Oregon ALJ Decision*").[30]

---

[28] 359 F. Supp.2d 229 (March 16, 2005).

[29] For purposes herein, "local" ISP traffic refers to ISP traffic that originates with the end user dial-up customer and terminates with Internet equipment (e.g., modems, servers, and routers) that is physically located within the same local exchange area ("LCA"), as defined by the Commission.

[30] Ruling, In the Matter of Qwest Corporation vs. Level 3 Communications, LLC, Complaint for Enforcement of

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

64 The conclusion of the *SNET* decision is wrong for the reasons set forth in detail hereafter. The errors of the *SNET* decision apply likewise to the *Level 3/CenturyTel* decision. Qwest observes that it was not a party to the *Level 3/CenturyTel* arbitration, and cannot be considered to be bound by that ruling. To the extent that the Commission even considers that ruling to offer guidance on the questions in this case, Qwest submits that it does not. The issue of VNXX at a bill and keep rate, with the per-minute-of-use caps that were in place when that order was entered, presents a significantly different issue than the question presented here, where Pac-West is demanding monetary compensation for un-capped minutes, which include VNXX minutes. Furthermore, several years have passed since entry of that order – the Commission now has a better comprehension of the scope and scale of the VNXX problem, and the extent to which VNXX arbitrage is employed. There is no indication in the *Level3/CenturyTel* order that those issues were raised, considered, or decided in that case.

65 Nor has the FCC preempted this issue, though Pac-West and Level 3 will doubtless claim that to be the case. To the contrary, the FCC has never said that it has preempted this issue. Furthermore, a federal court in Vermont very recently ruled that the FCC had not preempted state commissions on this issue.[31] The court further held that the state commission had authority to determine local calling areas, even in connection with ISP-bound traffic and that the commission had authority to completely ban VNXX traffic.

66 Thus, Qwest respectfully requests the Commission overrule the Recommended Decision and rule that the *ISP Remand Order* (and thus the interim compensation regime implemented in the *ISP Remand Order*) applies only to local ISP traffic.

Interconnection Agreement, IC 12 (OPUC ALJ Petrillo, August 16, 2005) ("Oregon ALJ Decision") (A copy is attached as Exhibit A).

[31] *Global NAPs, Inc. v. Verizon New England, Inc.*, 327 F.Supp.2d 290, 298-300 (D. Vt. 2004).

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

1. The *ISP Remand Order* and Related Cases

67 Administrative orders such as the *ISP Remand Order*, like statutes, should be interpreted by reading them in a consistent manner, giving meaning to all parts thereof, and reading them in the context in which they were decided by the agency. A corollary principle is that an administrative order should not be read so as to ignore or obviate substantive portions of the order.

68 As will be demonstrated hereafter, in order to reach its conclusion the *SNET* court ignored the context of the *ISP Remand Order*, clear statements of the FCC and the D. C. Circuit Court identifying the breadth of the issue decided in the *ISP Remand Order*, and ignored significant substantive portions of the *ISP Remand Order* that directly undercut the court's conclusion. The reliance in the Recommended Decision on the *SNET* case is therefore misplaced.

69 Courts and state commissions are bound by the federal Hobbs Act to follow the rulings of the federal appellate court reviewing FCC decisions. In this case, the reviewing court concluded that the only issue decided in the ISP Remand Order is the proper compensation regime to be applied to *local* ISP traffic. Because the Recommended Decision is inconsistent with that ruling, it must be reversed by the Commission. Before addressing the errors of the SNET decision, Qwest will reiterate its fundamental argument on the breadth of the *ISP Remand Order*.

70 The starting point for analysis is the FCC's 1996 Local Competition Order (also often referred to as the First Report and Order), where the FCC concluded that the section 251(b)(5) reciprocal compensation obligation applies only to "traffic that originates and terminates within a local calling area as defined by the state commissions."[32] Thus, from the inception of

[32] First Report and Order, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499¶ 1034 (1996) ("*Local Competition Order*") (emphasis added); see also ISP Remand Order ¶ 12.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

the 1996 Act, the FCC defined the reciprocal compensation obligation in terms of calls that were local in nature. This, of course, was entirely rational and consistent because other compensation mechanisms had long been in place for interexchange calling (i.e., the intrastate and interstate access charge regimes). Since 1984, state commissions (for intrastate interexchange calls) and the FCC (for interstate interexchange calls) have implemented and continue to follow tariffs that govern the appropriate compensation for interexchange traffic. Under section 251(g), the 1996 Act was not intended to eliminate or otherwise alter these pre-existing compensation mechanisms.

71 Within two years of the Act's passage, the FCC had received numerous requests to clarify whether, given its unique one-way characteristic (where all the traffic flows to the CLEC that serves ISP customers), "local" traffic bound for ISPs should be subject to reciprocal compensation under section 251(b)(5). As a consequence, the FCC opened CC Docket No. 99-68 to address this question, which it combined with its original docket to implement the local competition provisions of the 1996 Act (CC Docket No. 96-98). In February 1999, the FCC entered its *ISP Declaratory Order*.[33] In this order, the FCC concluded that ISP traffic is interstate in nature based on the fact that the ultimate destinations of ISP calls are websites scattered across the country and the world. It is critical to understand the situation, as described in the order, facing the FCC: "ISPs purchase analog and digital lines from local exchange customers to connect to their dial-in subscribers. Under one typical arrangement, *an ISP customer dials a seven-digit number to reach the ISP server in the same local calling area*. The ISP, in turn, combines 'computer processing, information storage, protocol conversion, and routing with transmission to enable users to access Internet content and

[33] Declaratory Ruling in CC Docket No. 96-98 and NPRM in CC Docket No. 99-68, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 and Intercarrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689 (1999) ("*ISP Declaratory Order*").

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

services.'"[34]

72 In *Bell Atlantic Telephone Cos. v. FCC*,[35] the D. C. Circuit vacated and remanded the *ISP Declaratory Order* on the ground that the FCC had failed to adequately explain why the end-to-end jurisdictional analysis was relevant to deciding if ISP calls fit into the local/long distance model.[36] The court could hardly have been more clear in describing the issue the FCC had addressed: "In the [*ISP Declaratory Order*], [the FCC] considered whether calls to internet service providers ("ISPs") *within the caller's local calling area are themselves 'local*.'"[37] There is nothing to suggest in *Bell Atlantic* that either the FCC or the court were addressing anything other than the proper treatment of *local* ISP traffic.

73 On remand, the FCC considered the proper treatment of ISP traffic in light of the *Bell Atlantic* decision. Instead of relying on the end-to-end analysis, the FCC instead held that section 251(g) allowed it to carve out the ISP traffic under consideration from the provisions of section 251(b)(5).[38] The FCC holding is critical. It held that the traffic in question "*at a minimum*, falls under the rubric of 'information access,' a legacy term imported in the 1996 Act from the MFJ . . . ."[39] In other words, other elements of section 251(g) could likewise support the FCC's decision, though they were not addressed in the *ISP Remand Order*. On the basis of this analysis, the FCC concluded that the traffic was at least "information access," and thus did not fall under section 251(b)(5); thus, the FCC held that it could define a separate compensation regime for such traffic. The FCC then defined the interim compensation regime

---

34 *Id.* ¶ 4 (emphasis added).

35 206 F.3d 1 (D.C. Cir. 2000).

36 *Id.* at 1, 5, and 8.

37 *Id.* at 2 (emphasis added).

38 *ISP Remand Order* ¶¶ 42-47.

39 Id. ¶ 42.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

applicable to the traffic in question, which it stated applied to "ISP-bound traffic."[40] The critical issue, then, is what traffic the FCC intended to include within "ISP-bound traffic" for purposes of the interim compensation regime: Was it all ISP traffic or local ISP traffic?

74 The first place to look for an answer to the question is the *ISP Remand Order* itself. The context of the order makes it clear that the only traffic being considered was ISP traffic that originates and terminates in the same local calling area – in other words, local ISP traffic. For example, the FCC commences its background discussion by reiterating its statement from the *ISP Declaratory Order* that:

> an ISP's end-user customers typically access the Internet through an ISP server *located in the same local calling area*. Customers generally pay their LEC a flat monthly fee *for the use of the local exchange network*, including connections to their local ISP. They also generally pay their ISP a flat monthly fee for access to the Internet. ISPs then combine 'computer processing, information storage, protocol conversion, and routing with transmission to enable users to access Internet content and services.'"[41]

75 In the next paragraph, the FCC's focus remains on ISP connections to local serving areas. The FCC notes that ISPs qualify for the Enhanced Services Provider ("ESP") exemption, which allows them to be "treated as end-users for the purposes of applying access charges and are, therefore, entitled to pay local business rates for *their connection to LEC central offices* and the public switched telephone network (PSTN)."[42] The importance of this language cannot be overstated because it demonstrates that the FCC's attention was fixed solely on local ISP traffic. This is demonstrated in the next paragraph, where the FCC once again focuses on "local competition," and the role that reciprocal compensation plays in its development.[43]

---

[40] E.g., Id. ¶ 7.

[41] *Id.* ¶ 10 (footnotes omitted; all footnotes cite to *ISP Declaratory Order*) (emphasis added).

[42] *Id.* ¶ 11 (emphasis added).

[43] Id. ¶ 12.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

76 Having articulated the foregoing background, the FCC identified its reason for opening the ISP traffic docket: "[T]he question arose whether reciprocal compensation obligations apply to the delivery of calls *from one LEC's end-user customer to an ISP in the same local calling area that is served by the competing LEC*."[44] Thus, nothing in the FCC's analysis of the nature of the traffic or its implementation of the interim regime suggests that the FCC had broadened the scope of its inquiry in the *ISP Remand Order*. If that had been the FCC's intent, its silence on the subject is notable.

77 For purposes of the issue before the Commission, the most critical decision on the question of the breadth of the *ISP Remand Order* is the D.C. Circuit's review of the *ISP Remand Order* in *WorldCom, Inc. v. FCC.*[45] In contrast to the conclusions of the Recommended Decision and the holding of the *SNET* decision, the D. C. Circuit was crystal clear on its characterization of the issue that was addressed in the *ISP Remand Order*: "In the order before us the Federal Communications Commission held that under § 251(g) of the Act it was authorized to 'carve out' from § 251(b)(5*)* calls made to internet service providers ("ISPs") *located within the caller's local calling area*."[46] This is not a casual background statement; instead, this plain and unequivocal language is the reviewing court's express statement that the *holding* of the *ISP Remand Order* relates *solely* to local ISP traffic.

78 The *WorldCom* court found that section 251(g) did not provide the FCC with a basis for its action, but, at the same time, the court made it clear that it was not deciding other issues that may be determinative and which would justify the FCC's decision, including (1) whether ISP calls are "telephone exchange service" or "exchange access," or neither; (2) the scope of "telecommunications" under section 251(b)(5); or (3) whether the FCC could adopt a bill and

---

44 Id. ¶ 13.

45 288 F.3d 429 (D. C. Circuit 2002).

46 288 F.3d at 430 (emphasis added).

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

keep regime.[47] Furthermore, because there was a "non-trivial likelihood that the Commission has authority to elect such a system," the court remanded, *but did not vacate*, the *ISP Remand Order*. The *ISP Remand Order* remains the applicable law for the treatment of local ISP traffic.

79 Just as the *ISP Remand Order* remains in effect, the *WorldCom* court's characterization of the FCC's holding (that it applies only to local ISP traffic) is binding on all other courts and commissions because the *WorldCom* court is the Hobbs Act reviewing court for the *ISP Remand Order*. Under the Hobbs Act, the federal courts of appeal have "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or determine the validity of (a) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47."[48] Thus, the Hobbs Act grants exclusive jurisdiction over appeals of FCC decisions to the federal appellate courts and, absent reversal of an FCC determination by a federal appellate court, federal district courts and state commissions are obligated under the Hobbs Act to apply and abide by FCC rules and orders. Further, state commissions, the state entities implementing portions of the federal act pursuant to delegated authority, must follow decisions of federal courts interpreting the Act and interpreting FCC decisions that implement the Act.[49] Thus, the Commission and all parties in this case are bound by the *WorldCom* court's characterization of the breadth of the *ISP Remand Order*.

---

[47] *Id.* at 434.

[48] 28 U.S.C. § 2342(1) (emphasis added). 47 U.S.C. § 402(b) sets forth a few specific exceptions to 47 U.S.C. § 402(a), none of which applies here.

[49] *See* 47 U.S.C. § 408 (Orders of the FCC "shall continue in force for the period of time specified in the order or until the Commission or a court of competent jurisdiction issues a superseding order."); *see also Hawaiian Tel. Co. v. Hawaii Pub. Util. Comm'n*, 827 F.2d 1264, 1266 (9th Cir. 1987); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 738 F.2d 901, 907 (8th Cir. 1984) *vacated on other grounds*, 476 U.S. 1167 (1986); *Southwestern Bell Tel. Co. v. Texas Pub. Util. Comm'n*, 812 F. Supp. 706, 708 (W.D. Tex. 1993).

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

2. The SNET Decision Represents a Demonstrably Erroneous Reading of the ISP Remand Order and the WorldCom Decision

a) SNET Ignores the Binding Ruling of the Court in Worldcom

80 The most fundamental error in the *SNET* decision is the way it ignores the *WorldCom* court's conclusion that the *ISP Remand Order* "*held* that under § 251(g) of the Act it was authorized to 'carve out' from § 251(b)(5*)* calls made to internet service providers ("ISPs") *located within the caller's local calling area*."[50] In *SNET*, the ILEC argued that that language defined the breadth of the *ISP Remand Order*. In response, the *SNET* court quoted the foregoing language but erroneously substituted its own judgment for that of the D. C. Circuit, and came to a different conclusion. The *SNET* court's ultimate conclusion directly contradicts the *WorldCom* court's description of the issue decided in the *ISP Remand Order* and thus violates the Hobbs Act.

81 The *SNET* court's alternative analysis is a classic of revisionist history. *SNET* correctly notes that the FCC "began by addressing" the question whether ISP-bound traffic that would typically be referred to as "local" was subject to reciprocal compensation.[51] But the court concluded that "these statements, taken by themselves, do not reveal how the FCC proceeded to answer the question."[52] The *SNET* court states that the FCC did the following in the *ISP Remand Order* to answer the question:

> It disclaimed the use of the term "local."
>
> It held that all traffic is subject to reciprocal compensation unless exempted.
>
> It held that all ISP-bound traffic is exempted from reciprocal compensation because it is "information access."
>
> It held that all ISP-bound traffic is subject to FCC jurisdiction under section 201.

---

50 288 F.3d at 430.

51 359 F.Supp.3d at 231.

52 *Id.* at 231-32.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

Finally, it proceeded to set the compensation rates for all ISP-bound traffic.[53]

82 Thus, the *SNET* court concluded that, even though the FCC started with the question whether *local* ISP traffic is subject to reciprocal compensation, it answered the question "no" on the ground that all ISP-bound traffic is in a category by itself.[54]

83 As will be discussed below, the *SNET* court completely misunderstands the FCC's decision to not use the term "local" in its analysis. Nevertheless, it is true that the FCC did some of the things listed above. But that does not explain nor even address the explicit *WorldCom* language, which cannot be read consistently with the *SNET* court's conclusion that the *ISP Remand Order* really addresses *all* ISP traffic. The *SNET* court attempts to justify its conclusion by stating that the FCC "began" with the question of local ISP traffic, but then expanded its decision to cover all ISP traffic. This is simply not true, particularly given the fact that the *WorldCom* court's characterization of the issue does not describe the "beginning" of the process, but explicitly describes the end of the process (*i.e.*, the *WorldCom* court's statements does not purport to be a description of the initial issue being considered in the *ISP Declaratory Order*; rather, the language specifically describes the *holding* of the *ISP Remand Order*). There is simply no way to reconcile the *SNET* court's conclusion with the *WorldCom* language.

84 In the recent Oregon *ALJ Decision*, the identical issue was addressed. In that case, Level 3 argued that the statements from the *ISP Declaratory Order*, the *Bell Atlantic* decision, the *ISP Remand Order*, and the *WorldCom* decision that described the issue as relating to only local ISP traffic, were merely "background statements." The ALJ rejected that argument:

First, it presumes that both the FCC and the Court chose to describe

---

53 *Id.* at 232.

54 Id.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

> ISP-bound traffic in a particular manner without intending that it have any specific meaning. Second, it ignores the fact that there are repeated references in both the *Declaratory Order* and the *ISP Remand Order* that make it clear that the FCC intended that an ISP server or modem bank be located in the same LCA as the end-user customer initiating the call. Third, Level 3's argument continues to confuse the FCC's jurisdictional analysis of ISP-bound traffic with the definition of how that traffic is provisioned. The FCC has consistently held that ISP-bound traffic is "predominately interstate for jurisdictional purposes." The *ISP Remand Order* did nothing to change that determination. Likewise, the *ISP Remand Order* preserved the FCC's holding in the *Declaratory Ruling*, which defined ISP-bound traffic to require ISP servers or modems to be located in the same LCA as the end-users initiating the call.[55]

85 The difference between the Oregon decision and the *SNET* decision is that the Oregon decision gives meaning to FCC's repeated and straightforward descriptions of the traffic at issue. By failing to do likewise, the *SNET* decision is clearly in error.

b) SNET Misunderstands the FCC's Decision Not to Rely on the Word "Local" in its Analysis.

86 Another fundamental error of the *SNET* decision is its obvious misunderstanding of the FCC's decision to use terms other than "local" in its *ISP Remand Order* analysis. The *SNET* court characterized this as the FCC's "express disavow[al of] the term 'local.'"[56] That is not what the FCC did in the *ISP Remand Order*. In the *ISP Remand Order*, the FCC was responding to the *Bell Atlantic* decision, which had criticized the FCC's use of the local/long distance distinction in the *ISP Declaratory Order*. Thus, in paragraph 34, the FCC stated that it would "refrain from generically describing traffic as 'local' traffic because the term 'local,' not being a statutorily defined category, is particularly susceptible to varying meanings and, significantly, is not a term used in section 251(b)(5) or section 251(g)."[57] The FCC's decision to focus on statutorily defined terms is a far cry from a complete disavowal of the historical

---

55 *Oregon ALJ Decision* at 9-10 (footnotes omitted).

56 359 F.Supp.2d at 231.

57 *ISP Remand Order* ¶ 34.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

significance of the traditional differences between local and interexchange calling.

87 The heart of the *SNET* court's error is its leap from the FCC's statement to the conclusion that, in not using the term "local," the FCC had completely abandoned the historical distinction between local calling and interexchange calling. Far from it, the FCC was simply shifting its analysis from the word "local," a term not statutorily defined, to statutory terms, in this case the phrase "information access" in section 251(g). Thus, the *SNET* court erroneously transforms the FCC's shift to defined terms into a complete abandonment of all distinctions between local and interexchange calling. Instead of analyzing the subtle shift that actually took place, the Connecticut court concluded: "Put simply, the language of the *ISP Remand Order* is unambiguous – the FCC concluded that section 201 gave it jurisdiction over all ISP-bound traffic, and proceeded to set the intercarrier compensation rates for such traffic."[58] This conclusion fails to comprehend that at least one of the types of traffic referred to in section 251(g) is clearly "non-local" in nature. "Exchange access" is access related to the "offering of access to telephone exchange services for facilities *for the purpose of the origination or termination of telephone toll services.*" 47 U.S.C. § 153(16).

88 On the other hand, the federal Act does not eliminate the concept of local traffic. For example, the term "telephone exchange service," another defined term[59] and one that is not in section 251(g), clearly refers to what is commonly called local service. The point, of course, is that there is nothing to suggest that the FCC completely abandoned the concept of local service, nor does the Act. Instead, as it clearly stated, the FCC based the *ISP Remand Order* on statutorily defined terms, in this case focusing on the "information access" category as the rationale for its decision to develop a separate compensation regime for local ISP traffic.

---

[58] 359 F.Supp.2d at 231.

[59] *Id.* § 153(47).

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

c) The *SNET* Decision Ignores Critical References in the *ISP Remand Order* to the FCC's Intent Not to Interfere with Existing Access Charge Mechanisms.

89 In *SNET*, the ILEC cited paragraph 37, footnote 66 of the *ISP Remand Order*, and argued, correctly, that the *ISP Remand Order* discloses the FCC's intent not to require that ISP-bound traffic already subject to a compensation regime other than reciprocal compensation (i.e., access charges) be subject to the interim regime.[60] The *SNET* court dismissed this argument, stating that the quoted language only indicates that the FCC did not want to disturb the FCC's regulation of access charges. That, of course is a misreading of the language of the footnote, since the quoted language also made it clear that the FCC did not want to interfere with *intrastate access* charges either.

90 If that were not enough, the court's conclusion demonstrates its results-oriented desire to sweep non-local ISP calls into the *ISP Remand Order*. The *SNET* court stated: "[T]his quotation [footnote 66] only indicates the FCC's view that Congress did not want to disturb the FCC's regulation of access charges. It does not want its own regulations to affect calls that are subject to the access charge regime. Even if it did support such a conclusion, it is not clear that a general indication of an agency's intent could override the clear language of the agency's order."[61] In other words, while acknowledging that the FCC intended to avoid impacts on access charges, the *SNET* court ignored that intent, instead concluding that all ISP-bound traffic be subject to the order.

91 The *SNET* court acknowledges the express intent of the FCC, but then adopts an interpretation of the order that does precisely what the FCC said it did not want to have happen. If the

---

[60] 359 F.Supp.2d at 232. Footnote 66 of the *ISP Remand Order* states: "[W]e again conclude that it is reasonable to interpret section 251(b)(5) to exclude traffic subject to parallel intrastate access regulations, because 'it would be incongruous to conclude that Congress was concerned about the effects of potential disruption to the interstate access charge system, but has no such concerns about effects on analogous intrastate mechanisms.'"

[61] *Id.* at 232.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

FCC's intent was to include *all* ISP traffic, there would have been no need to describe the fact it did not intend to create the inevitable impacts of such a holding on access charges. Instead of the *SNET* court's strained and self-contradictory reading of the order, the only way to rationalize footnote 66 with the holding is to conclude, as the *WorldCom* court did, that the order applies only to local ISP traffic.

92 Footnote 66 is not the only part of the *ISP Remand Order* that the *SNET* court treated as a nullity in order to reach its conclusion. There are several others parts of the order, not the least of which is paragraph 37. There, the FCC referred to the three traffic categories of section 251(g), which have one thing in common: "they are all access services or services associated with access." The FCC stated that "It makes sense that Congress did not intend to disrupt these pre-existing relationships. Accordingly, Congress excluded all such access traffic from the purview of section 251(b)(5)."[62]

93 Other portions of the *ISP Remand Order* track the principles stated in paragraph 37 and footnote 66. These too were ignored by the *SNET* decision. Paragraph 39 states that "Congress preserved the pre-Act regulatory treatment of all access services enumerated under section 251(g). These services remain subject to [FCC] jurisdiction under section 201 (or, to the extent they are intrastate services, they remain subject to the jurisdiction of state commissions), ... This analysis properly applies to the access services that incumbent LECs provide . . . to connect subscribers with ISPs for Internet-bound traffic."[63] Footnote 70 states: "We believe that the most reasonable interpretation of that sentence [the first sentence of section 251(g)], in this context, is that subsection (g) was intended to preserve pre-existing regulatory treatment for the enumerated *categories* of carriers, rather than requiring disparate

---

62 *ISP Remand Order* ¶ 37.

63 Id. ¶ 39.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

treatment . . . ."[64]

94 This language again states the FCC's intent not to alter pre-existing access charge mechanisms. Given the reiteration of that recurring principle in the *ISP Remand Order*, the *SNET* court's decision to simply ignore these statements is particularly baffling. To reach the SNET court's conclusions, one would have to conclude that the FCC's statements regarding access are meaningless. However, if the FCC had intended such language to be meaningless, it would have omitted it, not included it. Further, if the FCC had intended to include *all* ISP traffic, it would have been a simple matter to say so, instead of engaging in significant discussion that leads to the opposite conclusion.

95 Similarly, the Recommended Decision in this case fails to address and reconcile questions on this important issue. For example, the Recommended Decision states, at ¶ 58, that Qwest is required to compensate Pac-West for all ISP traffic. However, as Qwest pointed out in its Opening Brief, neither Qwest nor Pac-West have taken such an extreme position. Even Pac-West agrees that certain calls destined for an ISP are subject to access charges, not ISP compensation.[65] Thus, not all ISP traffic is conpensable.

3. VNXX Traffic is Not Compensable as ISP-bound Traffic Under the Universal Case

96 The VNXX issue was also addressed in a recent decision by the United States District Court for the District of Oregon. In that case, Universal Telecom argued that Qwest should pay reciprocal compensation on VNXX traffic. The Court first discussed the definition of "local traffic" as contained in Qwest's Oregon tariff and the parties' ICA, which is consistent with the definition of local traffic in this case. The Court then stated:

---

64 *Id.* ¶ 39, n. 70.

65 Qwest Opening Brief at ¶ 25.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

> [F]or a call to be local and subject to reciprocal compensation, it must originate at some physical location within a LCA [local calling area] or EAS and terminated [sic] at a physical location within the same LCA or EAS. Specifically here, for an ISP bound call to be subject to reciprocal compensation it must originate in a LCA or EAS and terminate in that same LCA or EAS by delivery of the call to the SAP. VNXX traffic does not meet the definition of local traffic because it does not originate and terminate in the same LCA or EAS; it instead crosses LCAs and EASs. Therefore, VNXX traffic, whether ISP bound or not, is not subject to reciprocal compensation.[66]

The Recommended Decision does not address why this reasoning was not adopted.

B. The Recommended Decision is in Error with Regard to the Amount in Dispute for VNXX Traffic

97 Pac-West claims that the amount Qwest has withheld due to VNXX traffic is $637,389.90 as of the date of the filing of the complaint. Qwest disagrees with this amount. As set forth in its Answer, Qwest believes that for the 15 months in dispute identified in the Petition (January 1, 2004 through March 31, 2005), only $400,736.00 was attributable to VNXX, while the balance was due to a volume dispute regarding transiting traffic. The Recommended Decision states, at ¶ 38, that although the parties are in dispute about the amount, the Commission should use Pac-West's total, which is based on spreadsheets that Qwest provided.

98 Qwest submits that the Recommended Decision erred by deciding a disputed issue of material fact without testimony or hearing. Further, even if it were permissible to decide this question without a hearing, the evidence in this case clearly supports Qwest's position.

99 The spreadsheet provided by Pac-West contains data mostly supplied by Qwest. However, some data was inserted by Pac-West, including the $637,389.90 on the far right side of that document. There is no calculation or formula supporting that result, and the rest of the data on the spreadsheet does not support a conclusion that that amount is related to VNXX minutes. In

[66] *Qwest Corporation v. Universal Telecom*, Opinion and Order, USDC for the District Court of Oregon at Eugene, Civil Case No. 04-6047-AA (December 15, 2004), page 24.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

fact, the numbers on the spreadsheet, coupled with other evidence that Qwest had raised this volume dispute in January of 2005, support Qwest's position.

100 Although Qwest disputed the Pac-West figure at the outset of this case, it was not clear to Qwest that this material fact was in dispute until the briefs were filed, with oral argument only six days away. Even then, Qwest believed it possible, perhaps even likely, that both Pac-West and the ALJ would understand and accept the volume dispute as explained in oral argument, and as supported by the evidence. Unfortunately, this was not the case. Under the circumstances, the Recommended Decision should have held that a brief hearing should be convened to allow for development of this issue through direct and cross examination. Failure to do so constitutes error, as resolving this issue appears to turn on the credibility of the parties' evidence, yet with no witnesses, no such credibility finding can be made.

101 While Qwest believes that this issue might be fairly simply explained in a confidential hearing session where the numbers could be discussed freely, with questions and answers to work through the issue, the explanation on paper is a bit more difficult. However, Qwest will set forth below why the only outcome that is supported by the record in this case is that the parties have a dispute separate and apart from VNXX minutes, and that Qwest's calculation of the number of minutes and dollar amount is the correct one.

102 First, Pac-West alleged, and Qwest responded, that the period at issue in this dispute was January 1, 2004 through March 31, 2005. Of course the dispute continues each month, but for purposes of allegations and answers with regard to the amount, the period of time was 15 months. However, the spreadsheet submitted by Pac-West as Confidential Exhibit B to its Opening Brief included two additional months of usage in the total, April 2005 and May 2005, and fails to include Qwest's payments for the same period. Qwest has discussed this point with Pac-West and Pac-West has agreed that the $637,389.90 reflects 17 months of disputed

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

billings, and does not include all of Qwest's payments. However, this resolves only part of the dispute between Pac-West and Qwest with regard to the amount claimed for a specific period.

103 Not all of the disputed minutes are VNXX minutes, as clearly shown on the spreadsheet and explained during oral argument. There is a significant number of minutes that Qwest has refused to pay for because Qwest did not originate those minutes to Pac-West, notwithstanding the fact that Pac-West is billing Qwest for them. Item 1 on Confidential Exhibit B, attached, shows the total number of minutes that Pac-West billed to Qwest for 11 months in 2004. Item 2 shows the number of minutes that Qwest's systems recorded as going to Pac-West from Qwest subscribers. The differential, item 3, is large in both percentage points and absolute numbers – over 20% and millions of minutes on an annual basis.

104 Qwest raised this issue to Pac-West in an e-mail on January 12, 2005, explaining that Qwest was withholding for both VNXX traffic and "*non-Qwest originated traffic*." It is this latter category that has come to be referred to as the "volume dispute" – a volume dispute that Pac-West was clearly aware of early on and that was explained on the record. Tr. 59-63. Pac-West has the burden of establishing that all of the disputed minutes are VNXX minutes, and that they are Qwest-originated traffic. As to the 20% that Qwest has identified, Pac-West has provided no evidence to support either contention. Thus, those minutes of use were not properly at issue in this proceeding, and the Recommended Decision erred in accepting Pac-West's figure.

V. CONCLUSION

105 For the reasons stated herein, the Commission should either consolidate and remand the matter for hearing immediately, or reverse the Recommended Decision and deny Pac-West's complaint. The Commission should not condone the VNXX scheme that exploits the telephone numbering system to enable customers to avoid toll charges and Pac-West to avoid

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

responsibility for the costs it imposes on the PSTN. Pac-West clearly has no right under the ICA or applicable law to bill Qwest for VNXX calls to Pac-West's ISP customers. In addition, the Commission should grant Qwest's counterclaims and require Pac-West to enter into an ICA amendment to implement the terms of this order, including an amendment that prohibits the use of LIS trunks for routing VNXX traffic.

VI. RELIEF REQUESTED

106 Qwest respectfully requests the Commission provide the following relief:

A. Grant Qwest's Motion for Consolidation and Conversion, filed August 30, 2005, and convene a prehearing conference to discuss scheduling of the consolidated cases.

B. Alternatively, if the Commission does not grant that Motion, Qwest asks the Commission to reverse the Recommended Decision and deny all of the relief requested by Pac-West in its Petition; and further specifically asks the Commission to:

C. Issue an order (1) prohibiting Pac-West from assigning NPA/NXXs in local calling areas other than the local calling area where Pac-West's customer has a physical presence, (2) requiring that Pac-West cease its misuse of such telephone numbering resources, and (3) requiring that Pac-West properly assign telephone numbers based on the location where its customer has a physical presence;

D. Issue an order that the parties' ICA does not require any compensation for Pac-West's VNXX traffic;

E. Invalidate all Pac-West bills to Qwest seeking or charging reciprocal compensation or the *ISP Remand Order* rate of $0.0007 per minute for any of the VNXX traffic described above;

F. Issue an order prohibiting Qwest from routing VNXX traffic to Pac-West utilizing LIS facilities; and

/ / / / /

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

/ / / / /

/ / / / /

/ / / / /

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

G. Any and all other relief that the Commission deems appropriate.

DATED this 9th day of September, 2005.

QWEST

_____

Lisa A. Anderl, WSBA #13236
Adam L. Sherr, WSBA #25291
1600 7th Avenue, Room 3206
Seattle, WA 98191
Phone: (206) 398-2500

Alex M. Duarte
421 SW Oak Street, Suite 810
Portland, Oregon 97204
Phone: (503) 242-5623

Attorneys for Qwest Corporation

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040