

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

PAC-WEST TELECOMM, INC.,	)	
	)	Docket No. UT-053036
Petitioner,	)	
	)	
v.	)	
	)	
QWEST CORPORATION,	)	
	)	
Respondent.	)	
_____	)	

**PAC-WEST RESPONSE TO QWEST'S  
EXCEPTIONS TO THE RECOMMENDED DECISION**

**September 30, 2005**

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Pac-West Telecomm, Inc. (“Pac-West”), provides the following response to Qwest Corporation’s (“Qwest’s”) Exceptions (“Exceptions”) to the Recommended Decision to Grant Petition (“Recommended Decision”).

## INTRODUCTION

1. The Recommended Decision would grant Pac-West’s Petition to enforce its interconnection agreement (“ICA”) with Qwest by requiring Qwest to comply with its contractual obligation to compensate Pac-West for all locally dialed traffic, including foreign exchange (“FX”) or “virtual NXX” (“VNXX”) traffic bound for Internet Service Providers (“ISPs”). Not surprisingly, Qwest takes exception to this conclusion, essentially repeating the same arguments it previously made. Those arguments are no more convincing the second time around.

2. The Commission held in a prior proceeding that the compensation requirements in the Federal Communications Commission’s (“FCC’s”) *ISP Remand Order*<sup>1</sup> extend to ISP-bound traffic between telephone numbers that are assigned to the same local calling area without regard to the physical location of the parties to the call.<sup>2</sup> The Recommended Decision reaches the same conclusion, properly rejecting the same language-parsing arguments from Qwest that it previously rejected from the other incumbent local exchange carrier (“ILEC”). The only thing

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<sup>1</sup> *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 96-98 & 99-68, FCC 01-131, Order on Remand and Report and Order (rel. April 27, 2001).

<sup>2</sup> *In re Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC, and CenturyTel of Washington, Inc.*, Docket No. UT-023043, Seventh Supplemental Order: Affirming Arbitrator’s Report and Decision ¶ 35 (Feb. 28, 2003) (“*Level 3 Arbitration*”).

remarkable about this conclusion was that the Recommended Order also cites a Connecticut District Court decision as further support for the Commission's interpretation of the *ISP Remand Order*. Qwest's attempts to inject warrantless complexity and confusion into what is a straight-forward legal issue fail to provide any basis on which the Commission should re-examine its interpretation, much less support Qwest's preferred outcome.

3. The Recommended Decision also rejects Qwest's counterclaims, which similarly seek to muddy the legal waters. Qwest complains that the Recommended Decision errs by failing to spend more time addressing Qwest's specious arguments, but the Recommended Decision gives them as much attention as they deserve. Qwest simply does not want to compensate Pac-West for FX or "VNXX" ISP-bound traffic, and Qwest is asking the Commission to create a law or twist a provision in the ICA to prohibit Pac-West from providing the same service to its customers that Qwest provides to its customers. The Recommended Decision refuses to do so, and the Commission should affirm that decision.

## DISCUSSION

### **A. The Recommended Decision Correctly Disposes of All of Qwest's Counterclaims.**

4. The Recommended Decision, consistent with Commission precedent, adopts Pac-West's interpretation of the *ISP Remand Order* and concludes based on that interpretation that "ISP-bound calls enabled by VNXX should be treated the same as other ISP-bound calls for

purposes of determining intercarrier compensation requirements.”<sup>3</sup> That decision also provides, “this Order does not address the remainder of Qwest’s counterclaims either 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.”<sup>4</sup> Qwest begins its exceptions with the claim that this latter provision represents a failure to decide all material issues. Qwest’s contention is incorrect.

5. The Recommended Decision properly disposes of Qwest’s counterclaims. Qwest’s second counterclaim that “VNXX” is unlawful under state law does not involve any provision of the parties’ interconnection agreement, and Qwest has failed to identify any state law that Pac-West has violated. Qwest’s third and fourth counterclaims arise out of language in the ICA but essentially make the same contention that “VNXX” is improper that the remainder of the decision rejects. Even if the Commission chooses to revisit these claims, the Commission should conclude that they do not withstand scrutiny.

**1. The Recommended Decision Properly Dismisses Qwest’s Second Counterclaim as Arising Under State Law, Not the ICA.**

6. Pac-West initiated this proceeding under WAC 480-07-650, the first sentence of which states, “The purpose of this rule is to provide a speedy and enforceable means to resolve disputes when one party to an interconnection agreement contends that the other party is

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<sup>3</sup> Recommended Decision ¶ 37.

<sup>4</sup> *Id.* ¶ 40.

*violating the terms of the agreement.*” (Emphasis added.) Qwest’s second counterclaim alleges that Pac-West’s use of telephone number resources is a violation of state law. As Pac-West explained in its Brief, even Qwest has acknowledged in a prior proceeding that such claims are improper in a proceeding brought under this Commission rule.<sup>5</sup> The Recommended Decision properly dismisses this counterclaim on that basis alone.

7. The permissibility of “VNXX” under state law and applicable number guidelines, moreover, is not even an issue in this proceeding. Qwest stated in its brief and again in its Exceptions,

If Pac-West were to offer a true FX service, in which its customer was responsible for establishing a physical presence in each local calling area and the traffic was transported to the ISP’s server in that manner, **Qwest would have no objection to that type of service.**<sup>6</sup>

Pac-West stated in its brief that “Pac-West’s network reaches most, if not all, local calling areas in which Pac-West has local telephone numbers.”<sup>7</sup> Qwest has not disputed that statement. Pac-West, therefore, has established a physical presence for its customers in each local calling area, and Pac-West transports the traffic from the local calling area to those customers. While Qwest continues to dispute its obligation to compensate Pac-West for terminating that traffic, Qwest concedes that “this would address the issue of misassignment of numbers.”<sup>8</sup> Accordingly, the

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<sup>5</sup> Pac-West Brief ¶ 35.

<sup>6</sup> Qwest Opening Brief ¶ 58 (emphasis added).

<sup>7</sup> Pac-West Brief ¶ 7, at 3.

<sup>8</sup> Qwest Opening Brief ¶ 58, n.46.

permissibility of “VNXX” service is not an issue at all in this proceeding, much less an issue that requires further factual development.

8. Qwest has also distanced itself from its own counterclaim. Qwest’s second counterclaim was that “VNXX” service is unlawful under state law. Qwest has never cited any state statute, rule, or Commission order that makes “VNXX” service unlawful. Nor could Qwest legitimately maintain that “VNXX” service for ISP-bound traffic is unlawful when the Commission has been aware of such service for some time, yet has never concluded that such service is unlawful.<sup>9</sup> That no doubt explains why Qwest in its Exceptions states that it “presented a number of arguments in its Opening Brief about why the Commission *should not allow VNXX calling in Washington.*”<sup>10</sup> Qwest seeks a *prospective* ruling from the Commission that such calling is impermissible as a matter of public policy. Qwest cannot make such a request in the context of a WAC 480-07-650 proceeding, where the only legitimate issues are the interpretation and enforcement of the ICA. The Recommended Decision, therefore, properly rejected Qwest’s second counterclaim as being outside the scope of this docket, and the Commission should affirm that conclusion.

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<sup>9</sup> *E.g., Level 3 Arbitration; In re Developing an Interpretive or Policy Statement Relating to the Use of Virtual NPA/NXX Calling Patterns*, Docket No. UT-021569, Notice of Docket Closure (July 21, 2003).

<sup>10</sup> Qwest Opening Brief ¶ 58, n.46.

**2. Qwest Failed to Support Its Third Counterclaim that Pac-West Is Violating Any Contractual Obligation with Respect to Number Resources.**

9. Count 3 of Qwest's counterclaim alleges that Pac-West is violating provisions of the ICA concerning numbering resources. The Recommended Decision similarly found this counterclaim to be unsustainable. The recognition in section (G)3.7 that "[e]ach Party is responsible for administering NXX codes assigned to it" does nothing more than clarify that each Party is responsible for its own number resources. That section cannot reasonably be construed to create an independent contractual obligation with respect to how a party obtains or uses telephone numbers. Similarly, the ICA requirement that each party provide all required information for the local exchange routing guide ("LERG") does not create a contractual duty to the other party to comply with all LERG requirements. Qwest cannot reasonably argue to the contrary.

10. Even if there were a contractual obligation with respect to a party's use of numbering resources – and there is not – Pac-West has not violated any such obligation. Qwest contends that Pac-West's use of number resources is not consistent with industry guidelines, specifically section 2.14 of the Central Office Code (NXX) Assignment Guidelines ("COCAG"), which provides:

"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. **Exceptions exist, for example tariffed services such as foreign exchange service.**<sup>11</sup>

Pac-West, like Qwest, provides FX service to its customers, including ISPs, and its use of numbering resources is fully consistent with the industry guidelines.

11. Qwest contends that “VNXX” is not specifically identified as an exception and thus is not an exception. That contention is not sustainable. FX and “VNXX” are the same service, so there was no need to use both names. The guideline, moreover, lists FX as an *example* of an exception to the general rule and does not in any way purport to identify FX as the sole exception. Qwest also quotes COCAG section 4.2.6 to the effect that “[t]he numbers assigned to the facilities identified must serve subscribers in the geographic area corresponding with the rate center requested.”<sup>12</sup> Again, this guideline applies to all FX services and would preclude Qwest’s FX services if interpreted as Qwest proposes. Qwest’s “geographic NPA” argument also applies equally to Qwest’s FX service. Qwest has no basis for its contention that Pac-West is not obtaining and using number resources consistent with the ICA and industry guidelines.

12. Qwest nevertheless devotes a substantial part of its Exceptions, as it did its Brief, to its argument that “VNXX” is different than the FX services that Qwest provides, primarily because Qwest imposes an extra charge on its FX customers to obtain a “physical presence” in a local calling area in which the customer is not physically located. The FCC rejected the very

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<sup>11</sup> Qwest Exceptions ¶ 37 (quoting COCAG section 2.14) (emphasis added).

<sup>12</sup> *Id.*

same arguments posed by another ILEC, stating,

This argument misses the point. Verizon South admits that it rates calls to and from its Foreign Exchange customers as local or toll based upon the telephone number assigned to the customer, not the physical location of the customer. Therefore, calls placed between a Foreign Exchange customer and another customer, both of whom have phone numbers that correspond to the same local calling area, are treated as local calls under the Tariff, regardless of the separate charge.<sup>13</sup>

Similarly here, whatever extra charge that Qwest imposes on its FX customers (or that Pac-West may or may not impose on its FX customers) is irrelevant. What is relevant is that Qwest rates as “local” a call between one of its FX customers and another Qwest (or Pac-West) customer with a telephone number assigned to the same local calling area, without regard for the customers’ physical locations. Such circumstances are entirely indistinguishable from the FX or “VNXX” service that Pac-West provides to its customers. Indeed, a Qwest FX subscriber located in Forks who has a Seattle telephone number could call a Qwest FX subscriber located in Bellingham who also has a Seattle telephone number, and Qwest would rate that call as “local” – the very “toll bridging” that Qwest accuses Pac-West of facilitating.

13. Qwest also misses the point in arguing that only a small fraction of Qwest’s total access lines are used to provide FX service. Qwest and Pac-West rate FX and “VNXX” traffic the same regardless of the percentage of their respective total access lines that are used to provide

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<sup>13</sup> *In re Starpower Communications, LLC v. Verizon South, Inc.*, FCC 03-278, File No. EB-00-MD-19, Memorandum Opinion and Order ¶ 15, n.60 (rel. Nov. 7, 2003) (citation omitted) (“*Starpower*”).

such service. Qwest's position is analogous to a claim that Pac-West should not be entitled to reciprocal compensation because Pac-West serves exclusively business customers, while such customers represent only a fraction of the total number of customers that Qwest serves. The Recommended Decision properly concluded that Qwest's third counterclaim lacks merit, and the Commission should adopt that conclusion.

**3. The Recommended Decision Properly Rejected Qwest's Fourth Counterclaim that the ICA Does Not Authorize Routing of "VNXX" Traffic Over LIS Trunks.**

14. The ICA authorizes the Parties to exchange "Extended Area Service (EAS)/Local Traffic" over Local Interconnection Service ("LIS") trunks. Pac-West explained in its Brief that FX or "VNXX" ISP-bound traffic is included within the definition of EAS/Local Traffic, as well as the ISP Amendment to the ICA,<sup>14</sup> and the Recommended Decision effectively concurred. Qwest challenges that determination, claiming that "VNXX" ISP-bound traffic is not "Extended Area Service (EAS)/Local Traffic," which section (A)2.19 defines 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 [Qwest's] then current EAS/local serving areas, as defined by the Commission." The FCC rejected the same argument, finding that an ILEC's actual treatment of traffic under the tariff, not just the tariff itself, was determinative, and that the ILEC rates and bills calls based on telephone numbers, not the physical location of the calling and called parties:

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<sup>14</sup> Pac-West Brief ¶¶ 21-25.

Verizon South's *conduct* in rating and routing ISP-bound traffic determines whether traffic is local under the Tariff. . . . Verizon South stipulated that, in determining whether traffic is local under the Tariff, it looks to the respective telephone numbers of the call's parties, not the parties' physical location. Verizon South cannot now distance itself from this stipulation by arguing that local traffic, in fact, is something different from what it plainly considered local traffic to be when rating and billing calls under the Tariff. Thus, Verizon South's acknowledged treatment of virtual NXX calls as local under the Tariff establishes its contractual obligation to pay reciprocal compensation for Starpower's delivery of such calls under the Agreement.

We also find relevant Verizon South's concession that it engaged in the very same conduct that it now alleges is unlawful when done by Starpower. Specifically, Verizon South billed and collected reciprocal compensation for calls placed by a CLEC customer to a Verizon South Foreign Exchange customer with a "local" NXX, even when those calls were between parties physically located in different local calling areas. Verizon South has failed to demonstrate why its contractual obligation to Starpower should be different from its own practice.<sup>15</sup>

15. Similarly here, Qwest has never disputed that it rates and routes calls according to the telephone numbers of the calling and called parties, and that Qwest does not – and cannot – consider the physical location of those parties. More specifically, Qwest has Pac-West and other LECs send traffic bound for Qwest's FX customers over LIS trunks. Both parties have delivered FX traffic rated as "local" over the LIS trunks since they began exchanging traffic under the ICA in 2001. Qwest has no basis for claiming now, over four years later, that Pac-West may no longer have Qwest route FX ISP-bound traffic over those trunks while Qwest may continue to

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<sup>15</sup> *Starpower* ¶¶ 13-14 (emphasis in original and footnotes omitted).

have Pac-West route the same type of traffic to Qwest over those same trunks. Qwest's conduct under the ICA and the tariff, not the language itself, is dispositive of this issue and fully supports the Recommended Decision.

16. The FCC, moreover, found that even if it were to look at the tariff language in isolation, it would reach the same conclusion that the ILEC must compensate the CLEC for the "VNXX" traffic that the ILEC delivers to the CLEC:

Even if we focus exclusively on the language of the Tariff, as Verizon South urges us to do, Verizon South's argument that virtual NXX traffic is not compensable under the Agreement still fails. First and foremost, the Tariff does not expressly address whether the "location" of a customer station turns on physical presence or number assignment, so Verizon South's course of performance in implementing the Tariff – which relied exclusively on the latter – is compelling. . . . In short, the Tariff's conception of local traffic includes all traffic for which a customer is billed at a local rate, regardless of the customer's physical location.<sup>16</sup>

The ICA and Qwest tariff language at issue here is subject to the same interpretation, *i.e.*, that FX or "VNXX" traffic is included in "EAS/Local Traffic" because that is how Qwest rates such traffic between its own customers and between its customers and CLEC customers. The Recommended Decision, therefore, properly denied Qwest's fourth counterclaim, and the Commission should adopt that conclusion.

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<sup>16</sup> *Id.* ¶ 15.

**B. The Recommended Decision Correctly Decides the Issues Relating to Compensation for FX or “VNXX” ISP-Bound Traffic.**

17. The Recommended Decision properly follows Commission precedent and interprets the *ISP Remand Order* to apply to all ISP-bound traffic between parties whose numbers are assigned to the same local calling area. Qwest takes issue with this decision by (1) expanding on its argument that the language of the FCC and D.C. Circuit Court’s decisions is more limiting; (2) criticizing the Connecticut District Court decision interpreting the *ISP Remand Order*; and (3) relying on an Oregon District Court decision on compensation for “VNXX” traffic. These arguments are no more persuasive than Qwest’s original discussion of this issue, and the Commission should adopt the Recommended Decision’s disposition of Pac-West’s Petition.

**1. The ISP Remand Order Applies to FX or “VNXX” ISP-Bound Traffic.**

18. Qwest provides a long history of its interpretation of the FCC’s consideration of compensation for “local” and ISP-bound traffic, beginning with the FCC’s original *Local Competition Order*, in a vain attempt to support its position that the *ISP Remand Order* does not govern FX or “VNXX” ISP-bound traffic. Distilled to its essence, Qwest makes two contentions: (1) The *ISP Remand Order* did not abandon the term “local” for all purposes and did not disturb the notion of “local calling areas” to distinguish between toll and non-toll traffic; and (2) repeated references by the FCC and the D.C. Circuit to calls “within the same local calling area” demonstrate that the *ISP Remand Order* addresses ISP-bound traffic between callers

and ISP modems physically located in the same local calling area. Neither contention supports Qwest's position.

19. Neither the Recommended Decision nor Pac-West asserts that the FCC dispensed with the term "local" for all purposes. Pac-West agrees that local calling areas continue to determine how traffic was rated prior to passage of the Telecommunications Act of 1996 ("Act"), but that recognition alone does not benefit Qwest. The FCC in its *ISP Remand Order* corrected a "mistake" in the *Local Competition Order* by eliminating use of the phrase "local traffic" to determine the types of traffic to which the compensation obligations in 47 U.S.C. §§ 251(b)(5) and 251(d)(2) apply and held that those sections apply to all telecommunications not excluded by section 251(g):

[W]e modify our analysis and conclusion in the *Local Competition Order*. There we held that "[t]ransport and termination of *local* traffic for purposes of reciprocal compensation are governed by sections 251(b)(5) and 251(d)(2)." We now hold that the telecommunications subject to those provisions are all such telecommunications not excluded by section 251(g). In the *Local Competition Order*, as in the subsequent *Declaratory Ruling*, use of the phrase "local traffic" created unnecessary ambiguities, and we correct that mistake here.<sup>17</sup>

20. The FCC went on to conclude that ISP-bound traffic is excluded by section 251(g), but the D.C. Circuit Court of Appeals reversed that conclusion. The court held that section 251(g)

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<sup>17</sup> *ISP Remand Order* ¶ 46 (quoting *Implementation of the Local Competition Provisions in the Act*, FCC 96-325, CC Docket Nos. 96-98 & 95-185, First Report and Order (rel. Aug. 8, 1996) ("*Local Competition Order*")) (emphasis in original) (footnotes omitted).

does not exclude ISP-bound traffic exchanged between local exchange carriers (“LECs”) from section 251(b)(5):

[I]t seems uncontested – and the [FCC] declared in the Initial Order – that there had been *no* pre-Act obligation relating to intercarrier compensation for ISP-bound traffic. The best the [FCC] can do on this score is to point to pre-existing LEC obligations to provide interstate access to ISPs. Indeed, the [FCC] does not even point to any pre-Act, federally created obligation for LECs to interconnect to each other for ISP-bound calls. And even if this hurdle were overcome, there would remain the fact that § 251(g) speaks only of services provided “to interexchange carriers and information service providers”; LECs’ services to other LECs, even if en route to an ISP, are not “to” either an IXC or to an ISP.<sup>18</sup>

21. The D.C. Circuit did not address, much less disturb, the FCC’s determination that section 251(b)(5) governs all telecommunications that is not excluded by section 251(g), and the court found that ISP-bound traffic is not excluded by section 251(g). As a result, ISP-bound traffic is governed by section 251(b)(5) and associated FCC rules, including the rules requiring reciprocal compensation. Both the Recommended Decision and Pac-West interpret the *ISP Remand Order* (as modified by the D.C. Circuit) to govern locally-dialed ISP-bound traffic, *i.e.*, calls between a calling party and an ISP whose telephone numbers are assigned to the same local calling area. This interpretation mirrors the treatment of voice traffic, including calls to and from FX subscribers, and fully preserves the current and historic use of local calling areas to rate and bill traffic.

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<sup>18</sup> *WorldCom, Inc. v. F.C.C.*, 288 F.3d 429, 433-34 (D.C. Cir. 2002).



22. Qwest's second and related argument is that the FCC and the D.C. Circuit intended to limit the discussion of ISP-bound traffic to calls between a customer and an ISP modem that are *physically* located within the same local calling area. Neither the FCC nor the court has said any such thing. To the contrary, the FCC has recognized that "location" can be either "physical presence or number assignment."<sup>19</sup> The FCC further observed that ILECs rate calls based on "the respective telephone numbers of the call's parties, not the parties' physical location,"<sup>20</sup> effectively establishing "location" by number assignments. Accordingly, FCC and D.C. Circuit statements to the effect that "an ISP's end-user customers *typically* access the Internet through an ISP server *located* in the same local calling area"<sup>21</sup> indicate that the *ISP Remand Order* governs locally-dialed ISP-bound traffic, *i.e.*, traffic between telephone numbers that are assigned to the same local calling area, not necessarily between calling parties who are *physically* located within the same local calling area. Qwest's arguments ignore Qwest's own call rating procedures and practices and provide no basis on which the Commission should depart from its prior interpretation of the *ISP Remand Order*.

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<sup>19</sup> *Starpower* ¶ 15.

<sup>20</sup> *Id.* ¶ 13 (emphasis in original).

<sup>21</sup> *ISP Remand Order* ¶ 10 (emphasis added).

**2. The Connecticut District Court Decision Correctly Interprets the *ISP Remand Order*.**

23. The Recommended Decision cites the Connecticut District Court decision in *Southern New England Tel. Co. v. MCI WorldCom Comm. Inc.*,<sup>22</sup> as well as the Commission's decision in the *Level 3 Arbitration*, in supporting Pac-West's interpretation of the *ISP Remand Order*. Qwest makes several attempts to undermine the *SNET* court's decision and analysis, none of which are successful.

24. Qwest contends that the Connecticut District Court ignores language in the D.C. Circuit's opinion on review of the *ISP Remand Order* that the FCC "held that under § 251(g) of the Act it was authorized to 'carve out' from § 251(b)(5) calls made to [ISPs] located within the caller's local calling area."<sup>23</sup> As discussed above, however, "located" in this context refers to number assignment, not physical presence. The fact that an Oregon Administrative Law Judge did not recognize this distinction does not make the District Court decision any less sound.

25. Qwest also reads too much into the *SNET* decision's discussion of the FCC's decision no longer to use the term "local" in the context of carriers' obligations under section 251(b)(5). Compensation for ISP-bound calls rated as toll calls based on the telephone numbers was not before the court. The issue presented was the extent to which the Connecticut Commission's determination on compensation for FX traffic will directly impact compensation

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<sup>22</sup> 359 F. Supp. 2d 229 (D. Conn. 2005) ("*SNET*")

<sup>23</sup> *WorldCom*, 288 F.3d at 430.

for ISP-bound traffic.<sup>24</sup> While the language the court used is very broad, it covers only the type of traffic at issue in that case, *i.e.*, FX or “VNXX” ISP-bound traffic. To the extent that the court addresses toll ISP-bound traffic, therefore, the Connecticut District Court’s decision does not “transform the FCC’s shift to defined terms into a complete abandonment of all distinctions between local and interexchange calling” as Qwest argues.<sup>25</sup>

26. The Recommended Decision is similarly limited. In its Petition, Pac-West seeks compensation for all traffic between parties with telephone numbers assigned to the same local calling area, and the Petition raises no issue as to calls rated as “toll” calls, *i.e.*, calls between telephone numbers assigned to different local calling areas. The Recommended Decision “adopts Pac-West’s interpretation of the scope of ‘ISP-bound’ traffic described by the FCC in its *ISP Remand Order*,”<sup>26</sup> which is consistent with Pac-West’s position. That decision cannot reasonably be construed to extend to “toll” calls and Qwest misconstrues the Recommended Decision in arguing to the contrary.

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<sup>24</sup> See *SNET*, 359 F. Supp. 2d at 230 (“Consequently, because the effective date of the *ISP Remand Order* predates the Final decision, any decision the DPUC makes on remand regarding FX traffic will have no direct effect on ISP-bound traffic.”) (quoting prior decision at 353 F. Supp. 2d at 299).

<sup>25</sup> Qwest Exceptions ¶ 87.

<sup>26</sup> Recommended Decision ¶ 37.

### 3. The Oregon District Court Decision Is Irrelevant.

27. Qwest mischaracterizes the Oregon District Court's unpublished decision in *Qwest v. Universal Telecom, Inc.*,<sup>27</sup> in representing its holding to the Commission. In that case, the District Court interpreted an ICA that had not been amended to incorporate the *ISP Remand Order*. As this Commission has concluded in the past, the court concluded that the *ISP Remand Order* does not apply in the absence of an amendment incorporating its terms into the ICA.<sup>28</sup> The court relied on two statements in the *ISP Remand Order* to reinforce that decision.<sup>29</sup> The court thus did not reach any conclusions about whether the *ISP Remand Order* would affect carriers' compensation obligations for ISP-bound traffic, including FX or "VNXX" ISP-bound traffic, if that order had been incorporated into the ICA.

28. The Recommended Decision did not address the Oregon District Court decision because that decision is irrelevant. At issue in this proceeding is the interpretation of the ICA between Qwest and Pac-West, which was amended expressly to incorporate the *ISP Remand Order*. The Oregon District Court, in sharp contrast, was interpreting an entirely different ICA, and the court's discussion of "VNXX" traffic was solely within the context of the language of that ICA. The court never even mentions the *ISP Remand Order* in that entire discussion because the court had previously held that the *ISP Remand Order* was inapplicable to the interpretation of the

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<sup>27</sup> Civil No. 04-6047-AA, Opinion and Order (Dec. 15, 2004).

<sup>28</sup> *Id.* at 12-13.

<sup>29</sup> *Id.* at 11.

ICA.<sup>30</sup> Qwest's reliance on the Oregon District Court's decision, therefore, is misplaced, and that decision has no bearing whatsoever on the issue before the Commission in this proceeding.

29. The Recommended Decision follows Commission precedent and adopts Pac-West's consistent interpretation of the *ISP Remand Order* as governing all locally-dialed ISP-bound traffic. The Recommended Decision is correct, and the Commission should adopt its conclusions.

**C. The Recommended Decision Correctly Requires Qwest to Pay Pac-West the Entire Amount in Dispute.**

30. The Recommended Decision provides that “[w]hile the parties are not in agreement on the amount that Qwest owes Pac-West, this order would recommend that the Commission use Pac-West’s total of \$637,389.80, which is based on spreadsheets provided by Qwest.”<sup>31</sup> Qwest disputes this determination, claiming that a substantial portion of the disputed amount is “due to a volume dispute regarding transiting traffic.”<sup>32</sup> Qwest’s assertions are a day late and without any material support.

31. Qwest had every opportunity to submit evidence to support its claim that a significant portion of the compensation that Qwest has been withholding since January 1, 2004 is attributable to some other dispute. Pac-West presented evidence of the number of minutes of use and total compensation that Pac-West billed for the amount of traffic it received from Qwest over

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<sup>30</sup> See *id.* at 17-21.

<sup>31</sup> Recommended Decision ¶ 38.

<sup>32</sup> Qwest Exceptions ¶ 97.

their interconnection facilities. Qwest does not dispute this total. Accordingly, it was incumbent upon Qwest to produce evidence to prove that any subset of the traffic Qwest delivered to Pac-West should be excluded from the traffic for which Pac-West is entitled to compensation. Qwest produced no such evidence, and it is far too late in the process to attempt to do so now.

32. Qwest implausibly contends that “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.”<sup>33</sup> Almost \$237,000 separates the Parties’ positions on the amount in dispute – a difference that is indisputably material. Pac-West certainly believed so and produced evidence to support its position in the dispute. Qwest did not even mention the issue in its Brief, much less submit evidence in support of its position. Qwest’s counsel’s discussion of this issue during oral argument is not a substitute for evidence on a matter of fact, and even if it were, the explanation that Qwest believes that 20% of the total traffic is transit traffic included no details of Qwest’s basis for that belief. Confidential Exhibit B to Qwest’s Exceptions not only comes long after the record has been closed, but it also contains no information about how Qwest made those calculations or determined that the traffic Qwest seeks to exclude is transit traffic. The Recommended Decision thus reaches the only possible conclusion possible based on the record evidence, and the Commission should affirm that conclusion.

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<sup>33</sup> *Id.* ¶ 100.

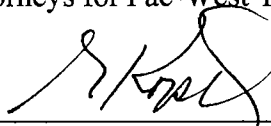
## CONCLUSION

33. Qwest's Exceptions provide no basis on which the Commission should reverse or modify the Recommended Decision, which properly adheres to the Commission's and Pac-West's interpretation of the *ISP Remand Order* and grants Pac-West the relief it has requested. The Commission, therefore, should adopt the Recommended Decision. If the Commission finds it necessary to clarify or expand on the discussion in the Recommended Decision, however, the Commission should do so consistent with enforcing the ICA and should require Qwest (a) to compensate Pac-West at the rates specified in the agreement for all ISP-bound traffic that is exchanged between calling parties with telephone numbers assigned to the same local calling area, and (b) to pay Pac-West all compensation that Qwest has withheld based on Pac-West's calculations.

DATED this 30th day of September, 2005.

DAVIS WRIGHT TREMAINE LLP  
Attorneys for Pac-West Telecomm, Inc.

By



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Gregory J. Kopta  
WSBA No. 20519

**CERTIFICATE OF SERVICE**  
**Docket No. UT-053036**

I hereby certify that on the date given below the original and 8 true and correct copies of Pac-West Response to Qwest's Exceptions to the Recommended Decision, in the above-referenced docket were delivered by Federal Express, overnight delivery, and filed via email, to:

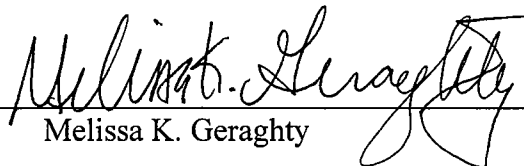
Ms. Carole J. Washburn, Secretary  
Washington Utilities & Transportation Commission  
1300 S. Evergreen Park Drive SW  
Olympia, WA 98504-7250  
Email: <http://www.wutc.wa.gov/efilingpilot>

On the same date, a true and correct copy was sent to the following, via the method indicated:

Lisa Anderl  
Qwest Corporation  
1600 Seventh Avenue, Room 3206  
Seattle, WA 98191

- Email: [lisa.anderl@qwest.com](mailto:lisa.anderl@qwest.com)
- US Mail, postage prepaid
- Federal Express, overnight delivery
- Legal Messenger

DATED this 30<sup>th</sup> day of September, 2005.

By:   
Melissa K. Geraghty