

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

PAC-WEST TELECOMM, INC.,)	
)	Docket No. UT-
Petitioner,)	
)	PETITION FOR ENFORCEMENT
v.)	OF INTERCONNECTION
)	AGREEMENT
QWEST CORPORATION,)	
)	
Respondent.)	
_____)	

Pursuant to WAC 480-07-650, Pac-West Telecomm, Inc. (“Pac-West”), brings the following Petition for Enforcement of its Interconnection Agreement with Qwest Corporation (“Qwest”). In support of its Petition, Pac-West alleges as follows:

PARTIES

1. Petitioner. Pac-West is a corporation that has been registered and classified by the Commission as a competitive telecommunications company. Pac-West is authorized to provide switched and non-switched local exchange and long distance services in Washington.
2. Respondent. Qwest is an incumbent local exchange company (“ILEC”), as defined in 47 U.S.C. § 251(h) and provides local exchange and other telecommunications services throughout the State of Washington.

JURISDICTION

3. Commission Jurisdiction. The Commission has jurisdiction over this Petition and Respondent Qwest pursuant to 47 U.S.C. §§ 251-52, RCW 80.36.610, and WAC 480-07-650.

BACKGROUND

4. Interconnection Agreement. Pac-West and Qwest are parties to the Local Interconnection Agreement Between [Qwest] and Pac-West Telecomm, Inc., for Washington. (“Interconnection Agreement”). The Interconnection Agreement is the result of Pac-West’s request, pursuant to 47 U.S.C. § 252(i), to opt into the Local Interconnection Agreement Between Qwest and Northwest Telephone, Inc., for Washington. The Commission approved the Interconnection Agreement on February 14, 2001, in Docket No. UT-013009.

5. ISP Amendment. On May 24, 2002, Pac-West and Qwest executed an Internet Service Provider (“ISP”) Bound Traffic Amendment (“ISP Amendment”) to the Interconnection Agreement to incorporate the FCC’s Order on Remand and Report and Order in CC Docket 99-68 (Intercarrier Compensation for ISP-Bound Traffic) (“FCC ISP Order”). The Commission approved the ISP Amendment on March 12, 2003 in Docket No. UT-013009.

6. Compensation for Transport and Termination. Section (C)2.3.4.1.1, of the Interconnection Agreement provides as follows:

The Parties agree that per minute of use call termination rates as described in Part H of this Agreement will apply reciprocally for the termination of Exchange Service (EAS/Local) traffic.

Section (C)2.3.4.1.3, of the Interconnection Agreement provides as follows:

As set forth above, the Parties agree that reciprocal compensation only applies to Local Traffic and further agree that the FCC has determined that traffic originated by either Party (the “Originating Party”) and delivered to the other Party, which in turn delivers the traffic to an enhanced service provider (the “Delivering Party”) is primarily interstate in nature. Consequently, the Delivering Party must identify which, if any, of this traffic is Local Traffic. The Originating Party will only pay reciprocal compensation for the traffic the Delivering Party has substantiated to be Local Traffic.

In the absence of such substantiation, such traffic shall be presumed to be interstate.

7. Compensation for ISP-Bound Traffic. The ISP Amendment modifies section (C)2.3.4.1.3, of the Interconnection Agreement, providing in section 1.4 that “‘ISP-Bound’ is as described by the FCC” in the FCC ISP Order and in section 3.2.1 that “Qwest will presume traffic delivered to [Pac-West] that exceeds a 3:1 ratio of terminating (Qwest to [Pac-West]) to originating ([Pac-West] to Qwest) traffic is ISP-bound traffic.” The Amendment further provides in section 3.1 that “Qwest elects to exchange ISP-bound traffic at the FCC ordered rates pursuant to” the FCC ISP Order. Relevant portions of the Interconnection Agreement and the ISP Amendment are attached as Exhibits A and B to the Affidavit of Ethan Sprague (“Sprague Aff.”).

8. Qwest Initial Withholding of Compensation. Pac-West has billed Qwest, and Qwest has paid Pac-West, for terminating local and ISP-bound traffic since the Interconnection Agreement became effective. In early 2004, Qwest started withholding payment on Pac-West’s invoices for compensation alleging that Pac-West had exceeded the growth ceilings for ISP traffic described in section 3.2.2 of the ISP Amendment. After following the dispute resolution provisions of the interconnection agreement, Pac-West and Qwest agreed to a private arbitration to resolve this issue (AAA Case #77Y181-00385-02 (JAG Case No. 221368)). During the pendency of the arbitration, the FCC released its Order in *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, WC Docket No. 03-171, FCC 04-241 (Oct. 8, 2004) (“Core Order”). In the Core Order the FCC found that the growth ceilings were no longer in the public interest and forbore from applying them. On

December 2, 2004, the Arbitrator concluded that the growth ceilings expired at the end of 2003 and that Pac-West is entitled to compensation beginning January 1, 2004, without application of the cap. Qwest did not appeal the Arbitrator's decision. Sprague Aff. ¶¶ 6-10.

9. Qwest Subsequent Withholding of Compensation. On December 29, 2004, Qwest officially notified Pac-West that Qwest intended to withhold compensation for alleged "VNXX" traffic retroactive to the beginning of 2004. Qwest defines "VNXX" as a competitive local exchange company ("CLEC") provision of local service to a customer in an exchange other than the exchange in which the customer is physically located. Pac-West considers such service to be indistinguishable from the foreign exchange ("FX") services that Qwest offers to its customers. Qwest has withheld \$637,389.80 in compensation for traffic Pac-West has terminated from January 1, 2004 through March 31, 2005. Sprague Aff. ¶¶ 11 & 16.

10. Negotiations. Without conceding that Qwest's "VNXX" dispute was a new dispute and not an attempt to re-impose the growth ceilings through other means, Pac-West agreed to attempt to negotiate this dispute with Qwest. The negotiations were fruitless. Qwest notified Pac-West by letter dated April 25, 2005 that it has decided to withhold 68.3% of Pac-West's "billed ISP minutes" in Washington in the second quarter of this year. Sprague Aff. ¶¶ 12-15.

11. Notice of Intent to File Petition. Pursuant to WAC 480-08-650(1)(c), Pac-West served a Notice of Intent to File Petition for enforcement of the Agreement ("Notice") on May 12, 2005, more than 10 days prior to the date on which this Petition is filed with the Commission. A copy of the Notice is attached to this Petition.

QWEST VIOLATIONS OF THE AGREEMENT

12. Refusal to Pay Compensation. The Interconnection Agreement requires the Parties to compensate each other for terminating “Exchange Service (EAS/Local) traffic.” FX/“VNXX” service is “Exchange Service” provided to a customer physically located in a different exchange. The industry has recognized this fact by rating and routing calls within the customer’s local calling area as local calls, regardless of the physical location of the customer. Specifically with respect to ISP-bound traffic, the FCC has concluded that “traffic delivered to an ISP is predominantly interstate access traffic subject to section 201 of the Act, and [the FCC has] establish[ed] an appropriate cost recovery mechanism for the exchange of such traffic.” FCC ISP Order ¶ 1. These requirements are incorporated into the Interconnection Agreement, including the ISP Amendment, and nothing in the order or the Interconnection Agreement limits compensable traffic to calls to ISPs that are physically located in the same local calling area as the calling party. Accordingly, Qwest is in breach of the Interconnection Agreement, as well as the underlying federal law, in refusing to compensate Pac-West for *all* local and ISP-bound traffic, including calls from Qwest customers to an ISP that obtains FX service from Pac-West.

13. Course of Dealing/Estoppel. Pac-West and Qwest have been exchanging traffic, including FX/“VNXX” traffic, pursuant to the Interconnection Agreement since February 2001. For almost four years, Qwest never contended that FX/“VNXX” traffic was not subject to compensation. Qwest cannot now re-interpret the Interconnection Agreement to preclude Pac-West from receiving compensation for terminating the very traffic for which Qwest has consistently compensated Pac-West for years. The Commission, therefore, should hold the

Parties to the interpretation of the Interconnection Agreement under which they have operated since it became effective and require Qwest to compensate Pac-West for terminating *all* ISP-bound traffic, including FX/“VNXX” traffic.

14. Res Judicata. An arbitrator interpreted the Interconnection Agreement to require Qwest to compensate Pac-West for all ISP-bound traffic it terminates beginning January 1, 2004. Less than one month after the arbitrator rendered his decision, Qwest notified Pac-West of Qwest’s intention to withhold compensation for the very same traffic in amounts comparable to the amounts Qwest had previously withheld. Qwest thus is impermissibly attempting to evade the arbitrator’s decision by manufacturing arguments that Qwest could have made during the arbitration but waited to raise until just after the conclusion of the arbitration. The Commission should preclude Qwest from having another bite at the same apple and should require Qwest to compensate Pac-West for terminating *all* ISP-bound traffic, including FX/“VNXX” traffic.

PRAYER FOR RELIEF

WHEREFORE, Pac-West prays for the following relief:

- A. An order from the Commission requiring that Qwest comply with the Interconnection Agreement, specifically that Qwest compensate Pac-West for transport and termination of all local and ISP-bound traffic originated by Qwest, including FX/“VNXX” traffic, according to the rates, terms, and conditions in the ISP Amendment, including all amounts Pac-West has billed Qwest for traffic terminated since January 1, 2004, plus interest for all overdue payments at the interest rate specified in the Interconnection Agreement; and
- B. Such other or further relief as the Commission finds fair, just and reasonable.

DATED this 8th day of June, 2005.

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By _____
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