**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

| PAC-WEST TELECOMM, INC.<br>Petitioner,<br>v.<br>QWEST CORPORATION,<br>Respondent. | DOCKET NO. UT-053036<br><br>QWEST'S PETITION FOR RECONSIDERATION OF THE COMMISSION'S FINAL ORDER |
|---|---|

## I. INTRODUCTION

*1* Pursuant to RCW 34.05.470 and WAC 480-07-850 Qwest Corporation ("Qwest") hereby petitions the Commission for reconsideration of its Final Order No. 05 in this matter, entered February 10, 2006. Qwest asks the Commission to reconsider two aspects of its Final Order. First, Qwest believes that the Commission erred as a matter of law in its reading and interpretation of the two controlling decisions – the FCC's *ISP Remand Order*[1] and the D.C. Circuit Court's decision reversing that order.[2] As a result, the Commission reached an

[1] *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9163-81 ¶¶ 23-65, 9186-90, ¶¶ 77-84 (2001), *remanded sub nom* ("*ISP Remand Order*").

[2] *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *reh'g, en banc, denied* (D.C. Cir. Sept. 24, 2002), *cert. denied*, 538 U.S. 1012 (May 5, 2003) ("*Worldcom*").



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

incorrect conclusion with regard to whether VNXX traffic is included within the term "ISP-bound traffic" as that term is used in the *ISP Remand Order*. Second, Qwest asks the Commission to reconsider its decision on the issue of the dollar amount claimed by Pac West, and exclude the amounts not properly associated with this VNXX dispute.[3]

## II. DISCUSSION

### A. <u>The Commission Should Reconsider its Order with Regard to the Compensability of VNXX Traffic</u>

*2* Qwest asks the Commission to reconsider its Final Order with regard to the issue of the compensability of VNXX traffic. This issue is the central issue in this case, and despite having been addressed numerous times by the FCC and various courts, the one thing that remains clear is that the issue is not clear. Qwest believes that in spite of (or perhaps because of) the many pages of briefing devoted to this issue, the fundamental holdings of the only two relevant decisions somewhat understandably may have been overlooked. It appears from various passages in the Final Order that the Commission has erred in interpreting those two decisions, and Qwest respectfully asks the Commission to reconsider its decision in light of this additional explanation, and correct that erroneous interpretation.

*3* The Final Order relies on a review of a number of decisions in support of its conclusions. *Final Order at ¶ 29.* However, the only two decisions that are controlling are the *ISP Remand Order* itself, and the D.C. Circuit Court's reversal of that order.

*4* First, the Commission's Final Order fails to recognize the critically important discussion in paragraph 39 of the *ISP Remand Order.* This paragraph states with absolute clarity that the FCC is not impacting the pre-existing access charge regime that applied "to the access services that incumbent LECs provide . . . to connect subscribers with ISPs for Internet-bound traffic."

[3] Of course, this second issue is moot if the Commission reverses its order with regard to whether VNXX is compensable as "ISP-bound traffic," since Qwest would not owe Pac West anything under that scenario. However, if the Commission declines to reconsider that question, the disputed dollar amount remains as an issue on which Qwest seeks reconsideration.



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

Indeed, all parties to this proceeding agree that there are certain calls destined to ISPs to which access charges should and do apply. The FCC did not alter this model. The FCC stated: "Accordingly, unless and until the Commission by regulation should determine otherwise, Congress preserved the pre-Act regulatory treatment of *all access services* enumerated under section 251(g). These services thus remain subject to Commission 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 (either individually or jointly with other local carriers) to connect subscribers with ISPs for Internet-bound traffic." (Emphasis added).

*5* By ignoring paragraph 39 of the *ISP Remand Order*, the Commission misreads that order in a number of important respects. In paragraph 30 of the Final Order, the Commission stated that according to the FCC's compensation scheme, "it is irrelevant for purposes of determining compensation whether the traffic is local, toll, or via VNXX arrangements." However, this is clearly wrong because Section 251(g) of the Act preserved the pre-Act regulatory treatment (i.e., access charges) that applied to intrastate long distance calls made to ISPs to access the Internet.

*6* Paragraph 33 of the Final Order states, in support of the Commission's conclusions, that "the FCC further held that 'the definition does not require that the transmission, once handed over to the information service provider, terminate within the same exchange area in which the information service provider first received the access traffic.'"[4] This is true, but it supports the opposite conclusion than the one reached by the Commission. What the FCC is saying here is that *after* the traffic gets to the ISP, it does not matter where it goes from there. This sentence *supports* Qwest's position – that the traffic must first get to the ISP in the same local calling area in which it originated. On the other hand, if the call travels from a caller in one local

[4] *ISP Remand Order*, n.82.



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

calling area to an ISP located in another local calling area, it is a long distance call subject to intrastate access charges.

7 Furthermore, the *ISP Remand Order's* references to the caller and the ISP being located in the "same local calling area" cannot be ignored. The FCC first observed that "an ISP's end-user customers typically access the Internet through an ISP server located in the same local calling area."[5] Then, in describing the question it was facing in that very proceeding, the FCC stated that "the 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 a competing LEC."[6] Finally, the FCC notes that the network model that it has in mind in making its decision is one in which "Internet communications originate with the ISP's end-user customer and continue beyond the *local ISP server* to websites or other servers . . .."[7] All of these passages, which cannot be said to be dicta or irrelevant, frame the issue that the FCC is deciding. And that issue is clearly limited to traffic that terminates to an ISP server located in the same local calling area as the calling party. The Commission's contrary interpretation is erroneous as a matter of law.

8 The other authority is of course the D.C. Circuit Court of Appeals, in its review of the *ISP Remand Order.* The critical passage from this court – the Hobbs Act reviewing court of the *ISP Remand Order* – clearly stated that in the *ISP Remand Order* the FCC 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.*"[8] Thus, it is beyond any reasonable dispute, and is stated by the only controlling federal court, that the FCC's holding was limited to those calls where the ISP and the calling party are in the same local

5 *ISP Remand Order* at ¶10

6 *Id at* ¶ 13

7 *Id at* ¶ 14

8 288 F.3d at 430 (emphasis added).



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

calling area. Any court or state commission that concludes that the *ISP Remand Order* governs all ISP traffic is substituting its judgment for that of the D. C. Circuit, the court under federal law with the authority to render a definitive interpretation of the *ISP Remand Order*.

*9* Thus, because the Commission erred in interpreting these orders as a matter of law, the Commission should reconsider its order and reverse its decision on this issue.

### B. The Commission should Reconsider its Final Order with Regard to the Dollar Amount Claimed by Pac West.

*10* Qwest also asks the Commission to reconsider and clarify its decision in the Final Order that the amount due on VNXX traffic is the full $637,389.80 claimed by Pac-West. Qwest's unrefuted evidence shows that the number of minutes in dispute are split between the VNXX dispute and a more traditional volume dispute related to non-Qwest originated traffic. The evidence relied on by both the Initial and Final Orders – the only evidence in this case supporting the dollar amount claimed – shows that VNXX minutes constitute approximately 80% of the total disputed minutes. The remaining balance is disputed by Qwest related to a wholly different issue, unrelated to VNXX or the subject of this complaint.

*11* The Final Order, at paragraphs 58 and 66 simply states that the Commission will use Pac-West's total, which is based on spreadsheets that Qwest provided. The spreadsheet submitted by Pac West, which was altered by Pac West, does not provide factual support for the amount claimed, and the Final Order is in error in relying on it

*12* At a minimum, clarification is necessary to correct one point. 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 discussed this point with Pac-West and Pac-West agreed that the $637,389.90 reflects 17 (not 15) months of disputed billings, and does not include all of



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

Qwest's payments. The Final Order fails to reflect this point, although Qwest raised it in its exceptions and Pac West did not dispute these representations.

*13* However, this clarification would resolve only part of the dispute between Pac-West and Qwest with regard to the amount claimed for a specific period. As stated, 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 this $637,389.90 amount is all related to VNXX minutes. In 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.

*14* 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. Not all of the disputed minutes are VNXX minutes, as clearly shown on the spreadsheet and explained during oral argument. Qwest has refused to pay for a significant number of minutes 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 A, 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.

*15* 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*", more commonly known in the industry as transit traffic. It is this latter category that has come to be referred to



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

in this docket 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.[9]

*16* This information was available to the ALJ prior to entry of the initial order, and to the Commission on review. It is error to ignore this evidence, especially in light of the fact that 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 Final Order is in error in accepting Pac-West's figure. The appropriate dollar amount that is supported by the spreadsheets is the $401,736 that Qwest set forth in its answer – the dollar amount that corresponds to the period January 1, 2004 through March 31, 2004, which is the period identified in the complaint.[10]

## III. CONCLUSION

*17* For the reasons stated herein, Qwest respectfully asks the Commission to reconsider its Final Order and enter an order on reconsideration that concludes, consistent with the *ISP Remand Order* and the *WorldCom* decision, that VNXX traffic is excluded from the term "ISP-bound traffic" as that term is used in the *ISP Remand Order*. If the Commission enters such an order, the disputed amount becomes moot, as Pac West would have no claim for compensation. If the Commission declines to reconsider this aspect of the Final Order, Qwest asks the Commission to reconsider and clarify the payment obligation, to state that the liability for VNXX traffic excludes the minutes associated with the volume dispute raised by Qwest, and hold that the minutes billed by Pac West for transit traffic are outside the scope of this dispute.

---

[9] The Parties' Interconnection Agreement further supports Qwest's position and calculations. The agreement clearly states in Section C: "(C)2.2.3.3 The originating company is responsible for payment of appropriate rates to the transit company [Qwest] and to the terminating company [Pac West]." Pac West did not raise this provision of the ICA, and minutes disputed by Qwest under this provision, as these are, are not properly at issue in this case.

[10] As noted above, Pac West calculated the amount for the period January 1, 2004 through May 31, 2005. Qwest's dollar calculation for that period is $471,403.



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

DATED this 21st day of February, 2006.

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