

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

PAC-WEST TELECOMM, INC.

Petitioner,

v.

QWEST CORPORATION,

Respondent.

DOCKET NO. UT-053036

QWEST CORPORATION'S ANSWER TO
PETITION FOR ENFORCEMENT OF
INTERCONNECTION AGREEMENT, AND
COUNTERCLAIMS

1 Pursuant to WAC 480-07-650(2), respondent Qwest Corporation (“Qwest”) hereby responds to
and answers the petition for enforcement of interconnection agreement that petitioner Pac-
West Telecomm, Inc. (“Pac-West”) filed on or about June 8, 2005 and further, files its
counterclaims against Pac-West.

I. INTRODUCTION

A. Intercarrier Compensation

2 This petition involves the complex question of intercarrier compensation. There are two
general traffic types to which intercarrier compensation applies. Interexchange (toll) traffic is
compensated through switched access charges, while local traffic may be compensated either
through a “bill and keep” or reciprocal compensation arrangement between local carriers.

- 3 Local traffic is telecommunications traffic that originates and terminates in a geographically-defined area that is approved by the Commission. These areas are called “local calling areas” or “extended area service” (“EAS”) areas. See e.g., WAC 480-120-021. These geographically-defined areas allow for an end-user customer’s unlimited calling within these areas for a Commission-approved flat rate.
- 4 With the introduction of competitive local services, the FCC allowed for intercarrier compensation for the exchange of this local traffic. This provided both incumbent local exchange carriers (“ILECs”) and competitive local exchange carriers (“CLECs”) the opportunity to recover the costs associated with interconnection for the exchange of local traffic through a per minute charge. “Bill and keep,” on the other hand, allows for each carrier to bill their end-user customer and keep the revenue, therefore eliminating the need for recording traffic and billing for reciprocal compensation. The concept behind bill and keep is to recover interconnection costs from the end-user customers of the telecommunications network to which those end-user customers are connected. When the traffic that is exchanged between local carriers is in balance, there is a presumption that each network will incur similar costs.
- 5 Interexchange (toll) traffic is traffic that originates and terminates between exchanges located in *different local calling areas*/EAS 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 carrier for the use of its network, and terminating access charges to the terminating carrier for the use of its network to complete the call.
- 6 As described above, the type of traffic, either local or toll, 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 general location (i.e., local calling area/EAS 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). The central office code is then 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.

B. The Pac-West Petition

7 This petition presents an important issue to this Commission. Has the FCC changed the definition of a long distance call? In other words, when a person places a long distance call to a computer, or Internet Service Provider ("ISP") server ("ISP Server"), may the carrier connecting the call to the computer treat the call according to the FCC's *ISP Remand Order* for compensation and access charge purposes?¹ The answer is clearly no. However, Pac-West claims that a call to an ISP Server, at least when the ISP Server is used to connect to the Internet, is, according to the *ISP Remand Order*, to be treated under the process described in that order, *no matter where the ISP Server is physically located*.

8 Pac-West's position is that for a call originated from Olympia, the called ISP Server could be physically located in Seattle, San Francisco, Portland, or Honolulu, and all calls to the ISP Server (and through the ISP Server to the Internet) would be treated for compensation purposes precisely in the same fashion as if both the caller and the ISP Server were physically located in Olympia. This is clearly not the law, and the FCC has made it clear for more than

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, 9163-9181, ¶¶ 23-65, 9186-9190, ¶¶ 77-84 (2001), remanded sub nom, *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).

20 years that a call to a computer (including a call to an ISP Server used to provide information or enhanced services) is to be rated based on the *physical location* of the ISP Server itself, and not the location of any further end point with which the ISP Server may communicate, or to which the computer may direct the call. Pac-West's argument is that the FCC somehow accidentally reversed this consistent precedent, and thus that the FCC has ruled that *all* calls to an ISP Server are to be treated according to the scheme in the *ISP Remand Order*, no matter where the ISP Server is physically located.

9 This issue is important to Pac-West because, if its position were to be accepted, Pac-West would be able to reap significant financial advantages at the expense of Qwest and the public. Not only would customers calling Pac-West's ISP customers avoid paying toll charges for such calls, but Qwest also would be required (after an amendment to the parties' interconnection agreement) to compensate Pac-West for "terminating" the calls at the intercarrier compensation rate (\$0.0007 per minute) for "ISP-bound traffic" set forth in the FCC's *ISP Remand Order*.

10 Pac-West's position is directly contrary to FCC precedent, which requires that a computer (such as an ISP Server) be treated exactly the same as other end-user customers in determining whether a call to the computer is treated as a toll call or a local call. In other words, a call originated from one local calling area to an ISP Server physically located in another local calling area is treated as a toll call. This is the basis for the so-called "ESP Exemption," which requires exactly that.

11 The federal ESP Exemption prevents a local exchange carrier from charging switched access charges for a call made to a local computer on the basis that the computer ultimately directs the call to an end point (e.g., another computer) or to another station located in another state. This is part of the same rule that held that calls to or from local Private Branch Exchanges ("PBXs")

would not be required to pay switched access charges, even if the calls were connected to another line and ultimately transferred to a distant location. The ESP Exemption never said, explicitly or implicitly, that calls to or from computers (or PBXs) were “local calls,” no matter where the computers (or PBXs) were physically located. Pac-West, however, argues that the FCC, without analysis or even intent, has accidentally changed the entire landscape of access charges, and thus issued a blanket exemption for all calls to and from all computers, no matter where physically located (as long as they ultimately send the call to the Internet). Pac-West’s position that the FCC has made such a major policy shift is completely unsupported. Further, any suggestion that, based on the *ISP Remand Order*, the FCC intended for VNXX calls to ISPs to be “local” is tantamount to claiming that the FCC has claimed regulatory authority over that part of intrastate long distance, and thus intended that 1+ calls to ISPs be deemed “local,” which would be completely without merit. This Commission retains regulatory authority over intrastate calling; the FCC’s *ISP Remand Order* did nothing to change that.

12 Pac-West also ignores applicable Washington administrative rules and definitions and this Commission’s recent ruling in the AT&T/Qwest arbitration proceeding (Docket No. UT-033035) dealing with the definition of a “local” call, in which the Commission ruled that the definition of local exchange service would remain traffic that originates and terminates within the *same* Commission-determined local calling area (thus rejecting AT&T’s request for a definition based on “the calling and called NPA/NXXs” (i.e., Virtual NXX (or VNXX)).² The Arbitrator in that proceeding had also ruled that reciprocal compensation³ for calls that

² “Virtual NXX” or “VNXX,” the subject of this case, is a vehicle by which a carrier obtains a telephone number for one local calling area and uses that telephone number in another geographic area. Using a VNXX scheme thereby makes it appear, based on the *telephone number*, that a call is a local call when, in fact, it is an interexchange or toll (long distance) call (often being transported very long distances).

³ “Reciprocal compensation” refers to the intercarrier compensation mechanism mandated by section 251(b)(5) of the 1996 Telecommunications Act. This is an arrangement between two carriers in which each carrier receives compensation from the other carrier “for the transport and termination on each carrier’s network facilities” of telecommunications traffic that originates on the network facilities of the other carrier.

terminate outside the local calling area in which they originate is inappropriate, and thus that such traffic should be compensated on a bill and keep basis, and the Commission adopted the Arbitrator's Report.⁴ Thus, a CLEC's VNXX offerings that do not provide for toll payments, or an appropriate substitute, or that seek reciprocal compensation or any other intercarrier compensation, are improper.

13 Pac-West also ignores the plain language of the parties' interconnection agreement ("ICA") regarding the types of traffic that the parties have agreed to exchange. The traffic types that the parties have agreed to exchange over the local interconnection trunks and through the ICA Single Point of Presence ("SPOP") amendment are very specifically delineated in the ICA. As is discussed below, the traffic for which Qwest disputes payment does not match the traffic types that the parties agreed to exchange under the ICA. Due to Pac-West's purposeful misuse and improper assignment of telephone numbers, the traffic that Pac-West expects Qwest to exchange does not match any of the specifically-defined traffic types, and therefore is not traffic that the parties have agreed to exchange under the ICA. The solution to this dispute is quite simple. If Pac-West assigns telephone numbers based on the actual physical location of the ISP Server, then the traffic will be properly routed consistent with the definitions in the ICA.

14 In sum, this case raises an important issue from a policy and financial perspective. Ultimately, this Commission should rule in favor of Qwest and thus determine that Pac-West is not entitled to unilaterally change the ICA. The Commission should further rule (as a matter of federal law, state law and sound public policy) that Pac-West is not entitled to fundamentally shift the

⁴ Pac-West's interconnection agreement has a similar definition of "Exchange Service" as that which is in the AT&T agreement. Specifically, the definition in the AT&T agreement (§ 4.0) is as follows: "'Exchange Service' or 'Extended Area Service (EAS)/Local Traffic' means traffic that is originated and terminated within the same Local Calling Area as determined for Qwest by the Commission." The definition in Pac-West's agreement (§ (A)2.19) is as follows: "'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."

toll compensation structure in this state.

II. STATEMENT OF PERTINENT FACTS

A. Background of Dispute

15 This dispute arises because Pac-West has engaged in a practice of providing a service to its ISP customers which enables the ISP's customers who are physically located in a particular local calling area to dial a "local" telephone number to reach the ISP even though the ISP is actually physically located in a different local calling area, or possibly even a different state. Pac-West does this by assigning telephone numbers to Pac-West's ISP customers based on where the call originates, thus allowing the calls to terminate in a different local calling area. Pac-West then knowingly misuses Qwest's Local Interconnection Service ("LIS") so that Qwest will believe it is obligated to route and transport calls to Pac-West disguised as "local" calls (or, as Pac-West would try to define them, "ISP-Bound" calls) when, in fact, the calls should be treated as *toll* calls. While Pac-West seeks this treatment of ISP calls, other carriers seek the same treatment of intercity calls not destined for the Internet. For example, some carriers' VNXX calls might be destined for an inbound telemarketing center, a "help desk," or a voice messaging system.

16 This practice has widespread and significant implications for the entire access compensation system established in Washington and elsewhere. Pac-West seeks to benefit not once, but twice. Pac-West not only wants to allow its ISP customer and the ISP's customers to avoid paying toll charges for long distance calls, but it also seeks to force ILECs like Qwest to pay Pac-West for the privilege of routing and transporting toll calls for Pac-West. Such an approach would lead to severe financial repercussions for the industry, would erode the financial support that originating access provides to local rates, and would further distort the compensation scheme (including universal service funding) underlying the public switched

telephone network.

17 Pac-West's practices raise a wide variety of policy issues. Those issues are being addressed and litigated vociferously before the FCC and the courts. Nonetheless, while those proceedings are pending, Pac-West seeks to sidestep them by charging Qwest without satisfying the change of law process provided for in the ICA. Pac-West's effort is not supported by state law, federal law or the parties' ICA, and thus the Commission should order that Pac-West cease such practices while the issues are sorted out. Because of the status of the law, Qwest has refused to pay Pac-West's improper and inaccurate intercarrier compensation bills for VNXX traffic.

18 Thus, the primary issue raised here is whether or not a call destined for the ISP Server should be subject to the FCC's *ISP Remand Order* rate of \$0.0007 per minute, regardless of the physical location of the person placing the call compared to the physical location of the ISP Server. The FCC has addressed this issue. This Commission has also recently issued a decision regarding the definition of a local call. All of this precedent dictates that Pac-West is wrong.

B. Treatment of Calls Destined for ISPs

1. Federal authority

19 The FCC has a long history of determining the appropriate compensation treatment of traffic destined for "enhanced service providers" or "ESPs" (i.e., providers of communications that modify content). In 1983, the FCC issued an order creating the so-called "ESP Exemption."⁵

The ESP Exemption was not really an exemption, but rather a decision, based on a number of

⁵ See *In the Matter of MTS and WATS Market Structure*, Third Report and Order, 93 FCC 2d 241, 254-255, ¶ 9 and fn. 15, 320, ¶ 269 (1983); *modified on recon.*, 97 FCC 2d 682 (1984) ("*First Order on Reconsideration*"), *further modified on recon.*, 97 FCC 2d 834 (1984) ("*Order on Further Reconsideration*"), *aff'd in principal part and remanded in part sub nom.*, *NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

policy considerations, that enhanced service providers were entitled to connect their points of presence through tariffed local retail services (rather than through tariffed feature group access services that interexchange carriers were required to purchase), even though the facilities were really being used for services classified as interstate.⁶ The FCC assigned the same status to private telecommunications networks or systems (e.g., PBX systems) that accessed local exchange systems for connecting interstate calls.⁷ In other words, the FCC treated the point of presence of an enhanced service provider as if that point of presence were the location of a retail customer.

20 The FCC applied the same approach under the 1996 Telecommunications Act when it addressed traffic routed to the Internet. The FCC determined that ISPs, the heirs to the old “enhanced service provider” designation, were entitled to the same treatment for compensation purposes. Thus, when an ISP is served by a CLEC, the same analysis applies under section 251(g) of the Act. The ISP Server is treated as an end-user location for purposes of compensation, but the call does not terminate at this location. The ISP may purchase services from its telecommunications provider for the purpose of getting its incoming calls to the ISP Server. Compensation between the ISP’s provider (Pac-West) and the LEC (Qwest) that serves the customer that originated the call is based on the geographic location of the two ends of the call.⁸

21 In March of this year, the FCC issued its Notice of Further Proposed Rulemaking in its

⁶ See, e.g., *In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, First Report and Order, 12 FCC Rcd 15982, 16131-34, ¶¶ 341-48 (1997); see also, generally, *In the Matter of Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, Order, 3 FCC Rcd 2631 (1988).

⁷ See *In the Matter of WATS-Related and Other Amendments of Part 69 of the Commission’s Rules*, Memorandum Opinion and Order, 2 FCC Rcd 7424, 7425, ¶¶ 13-15 (1987).

⁸ 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. 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).

Intercarrier Compensation docket to consider these issues as a part of an overall examination of intercarrier compensation.⁹ Nevertheless, as of today, the applicable law has not changed. The ISP Server should be considered a retail location for the purposes of appropriate number assignment and determining intercarrier compensation.¹⁰

22 Pac-West ignores this regulatory history by attempting to charge Qwest at the *ISP Remand Order* \$0.0007 per minute rate for terminating such VNXX traffic. Pac-West has argued that the FCC's *ISP Remand Order* and a recent FCC decision related to a forbearance petition by Core Communications fundamentally change this analysis.¹¹ Pac-West argues that *all* traffic destined for the Internet must be treated as subject to the FCC *ISP Remand Order* \$0.0007 per minute rate, regardless of whether such traffic originated from next door, across the state, or even across the country. Its position is simply wrong, and is in violation of the FCC's rules (i.e., the FCC ESP Exemption rule), and essentially has the effect of asserting that the FCC somehow intended to preempt states on the regulation of intrastate traffic.

23 In fact, if Pac-West delivered traffic to its ISP customer's server physically located in the *same local calling area* as where the call originated, Pac-West would be correct that under existing rules, the call would be treated as subject to the *ISP Remand Order* \$0.0007 per minute rate.¹² However, Pac-West's ISP customer's equipment is *not* physically located in the same local calling area as the individual and business customers that call Pac-West's ISP customers. Thus, Pac-West seeks to collect compensation to which it is not entitled.

⁹ *In the Matter of Developing a Unified Intercarrier Compensation Regime, Further Notice of Proposed Rulemaking*, 20 FCC Rcd 4685 (rel. Mar. 3, 2005) ("Further Notice").

¹⁰ For a more detailed analysis of these legal issues, see the *Ex Parte Comments* that Qwest filed with the FCC on March 11, 2005 in response to a forbearance petition brought by Level 3 regarding these issues, which is attached as Exhibit A to this Answer.

¹¹ See Petition of Core Communications for Forbearance under 47 USC § 160(c) from the Application of the ISP Remand Order, Order FCC 04-241, WC Docket No. 03-171 (rel. October 18, 2004) ("Core Forbearance Order").

¹² Such a change would still require an ICA amendment.

24 Pac-West’s approach ignores long-standing FCC precedent, as well as the guidance of a recent Commission decision on these issues. In describing ISP-bound traffic in the background section of the order, the FCC states that “*an ISP’s end-user customers typically access the Internet through an ISP Server located in the same local calling area,*” and that the end users pay the local exchange carrier for connections to the “local ISP.” *ISP Remand Order*, ¶ 10. The FCC defines ISPs as “one set of enhanced service providers.” *Id.*, ¶ 11. (Emphasis added.) The FCC specifically identified the issue that it was addressing as “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.” *Id.*, ¶ 13. (Emphasis added.) Thus, in examining ISP traffic, the *ISP Remand Order* did not address the situation where a CLEC customer’s ISP server is physically located *outside* of the local calling area of both its assigned telephone number(s) and the originating caller. In fact, asserting that the *ISP Remand Order* somehow intended to address this scenario is an implicit claim of FCC preemption of a portion of the intrastate market, an argument for which there is no basis.

25 Similarly, the *Core Forbearance Order* addressed the application of the *ISP Remand Order*. It addressed whether certain provisions in the *ISP Remand Order* should continue to apply to CLECs serving ISPs. Because the *ISP Remand Order* did not address the treatment of calls from one local calling area to an ISP with equipment in *another* local calling area, the *Core Forbearance Order* did not address the issue either.¹³

26 Qwest’s position of the FCC’s actions gains support from the appeal of the *ISP Remand Order*. *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). In *WorldCom*, the court unequivocally

¹³ Pac-West cites to a private arbitration regarding the “growth caps” for ISP traffic in the *ISP Remand Order*. (Petition, ¶ 8.) However, that arbitration had to do whether the growth caps applied after December 31, 2003. It had nothing to do with the issue here, namely, whether VNXX traffic that is destined for an ISP Server is traffic subject to the *ISP Remand Order* \$0.0007 per minute compensation rate. Thus, the arbitration decision is irrelevant.

stated that the FCC's *ISP Remand Order* addressed calls made to ISPs physically located *within the same* local calling area as the originating caller. *WorldCom*, 288 F.3d at 430. Thus, there is a lack of support for the interpretation that Pac-West advocates that the FCC, in the *ISP Remand Order*, somehow summarily changed the long history of determining the appropriate treatment of traffic destined for enhanced service providers.

2. State Authority

27 The Commission has provided strong guidance on this issue in that it recently addressed a dispute about how to define a "local call." It further ruled that reciprocal compensation for calls that terminate outside the local calling area in which they originate (i.e., VNXX traffic) is inappropriate, and thus that such VNXX traffic should be compensated on a bill and keep basis.

28 Specifically, in the AT&T/Qwest arbitration, Qwest and AT&T disputed the appropriate definition of a local call under Washington law. The Arbitrator and Commission agreed with Qwest's position that a "local call" is one "that is originated and terminated within the same local calling area as determined for Qwest by the Commission." The Commission rejected AT&T's proposal to define a local call by reference to "the calling and called NPA/NXXs" (i.e., VNXX). Indeed, the Arbitrator found that although the CLEC must be allowed to offer VNXX services, reciprocal compensation for calls terminating to the CLEC's customers physically located outside the local calling area in which they originate was inappropriate, and thus that such traffic should be compensated on a bill and keep basis. See Order No. 04, Arbitrator's Report, Docket No. UT-033035 (December 1, 2003), ¶¶ 25-38; Order No. 05, Final Order Affirming Arbitrator's Report and Decision, Docket No. UT-033035 (February 6, 2004), ¶¶ 12-16.

29 Moreover, the definitions of "exchange," "extended area service (EAS)," "interexchange" and

“local calling area” in Washington in WAC 480-120-021 are as follows:

“Exchange” means a geographic area established by a company for telecommunications service within that area.

“Extended area service (EAS)” means telephone service extending beyond a customer's exchange, for which the customer may pay an additional flat-rate amount per month.

“Interexchange” means telephone calls, traffic, facilities or other items that originate in one exchange and terminate in another.

“Local calling area” means one or more rate centers within which a customer can place calls without incurring long-distance (toll) charges.

The same analysis applies in this case. For example, section (A)2.19 of the Pac-West ICA provides: “‘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.” (Emphasis added.)

30 Although Pac-West will undoubtedly attempt to distinguish this precedent (such as, for example, by arguing that the traffic at issue is bound for the Internet, and thus that it is somehow exempt from these Washington definitions), the fact is that Washington law makes no such distinction. Nor has the FCC made such a distinction. If VNXX traffic is allowed to flow between carriers, it should not be treated as “local” traffic under the parties’ ICA.

C. Treatment of ISP Traffic under the ICA

31 Further still, Pac-West’s conduct violates the parties’ ICA. The ISP Amendment that Pac-West and Qwest executed and that Pac-West refers to in its petition provides that “ISP-Bound is as described by the FCC in its Order on Remand and Report and Order (Intercarrier Compensation for ISP-Bound Traffic) CC Docket 99-68.” (ISP Amendment, § 1.4.)¹⁴ As

¹⁴ The parties entered into the ISP Amendment in May 2002, and it was filed with the Commission on February 10,

discussed above, the *ISP Remand Order* did not accidentally include traffic destined for an ISP Server physically located in a different local calling area than the originating caller as part of the “ISP-Bound traffic” addressed in the order. Thus, the traffic is not “ISP-Bound” as discussed or defined in the ISP Amendment.

32 Pac-West, however, seeks to sweep aside these definitions by assuming that traffic destined for the Internet automatically falls within the definition of “ISP-bound traffic,” regardless of where the traffic physically originates and terminates. Indeed, Pac-West ignores the FCC history of defining traffic destined for an ISP as traffic that travels solely *within* a local calling area prior to being delivered to the ISP Server. Pac-West also ignores long-standing industry practice of treating calls dialed as 1+ calls to the Internet as being toll calls. Pac-West then hides this practice by improperly assigning local numbers (through its VNXX schemes).

D. VNXX Traffic over LIS Trunks

33 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.)¹⁵

2003. The Commission approved the amendment on March 12, 2003 in Docket No. UT-013009. Qwest notes, however, that Pac-West did not include a full copy of the ISP Amendment in Exhibit B of the Declaration of Ethan Sprague. Rather, the exhibit is missing page 2 of the amendment, which contains the definition of “ISP-Bound.”

¹⁵ 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.

34 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 Commission.” (ICA, § (A)2.25.)
- “Meet-Point Billing” or “MPB” [also known as 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.)

35 As stated, “ISP-bound traffic” is defined by the ISP Amendment (§ 1.4) as described by the FCC in the *ISP Remand Order*. As already discussed above, Pac-West’s contention that the traffic at issue is entitled to treatment and compensation according to the *ISP Remand Order* is incorrect and not an appropriate reading of that order, and conflicts with the Commission definition of local traffic in Docket No. UT-033035.

36 It is possible that Pac-West may claim, as some other carriers have attempted to claim, that this traffic is “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. Pac-West does not deny that it forces Qwest to exchange traffic that is not terminated at the ISP Server in the same local calling area as the originating caller (identical to VNXX traffic), but Pac-West has nevertheless claimed that it is “ISP-bound” traffic. Thus, there should be no contention as to whether the VNXX traffic at issue is “Exchange Service” traffic.

37 A traffic type that *may superficially appear* to functionally 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.

38 As a threshold matter, only Pac-West knows the exact location of the end-user ISP Server or modem bank for this traffic. 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 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 purposeful misuse and misassignment of 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.

39 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.

40 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. Since Pac-West can easily remedy the situation by properly assigning telephone numbers based on the actual location of its end-user customers, it is incumbent upon Pac-West to ensure that the exchange of traffic under the ICA follows the

terms and conditions of that agreement. In the end, Pac-West is simply attempting to exchange traffic that the parties never agreed to exchange under the terms of the ICA.

III. RESPONSE TO ALLEGATIONS IN THE PETITION

41 Unless specifically admitted in this section, Qwest denies each and every allegation in the petition. Qwest's factual assertions and legal argument contained in the preceding sections of this Answer are incorporated into and should be considered a part of these responses to the individual allegations of the petition.

IV. PARTIES

42 Qwest does not dispute the allegations in paragraphs 1 and 2 regarding the parties to this petition. Qwest, however, does not know the extent to which Pac-West has been authorized by the Commission to provide service in Washington.

V. JURISDICTION

43 Qwest admits that the Commission has jurisdiction over this proceeding.

VI. BACKGROUND

44 Qwest admits the allegations in paragraph 4 of the Petition regarding the ICA.

45 Qwest admits the allegations in paragraph 5 of the Petition regarding the ISP Amendment to the ICA.

46 Qwest admits that Pac-West has correctly quoted sections (C)2.3.4.1.1 and (C)2.3.4.1.3 of the ICA in paragraph 6 of the Petition. However Qwest states that the provisions speak for themselves.

47 With regard to paragraph 7 of the Petition, Qwest states that the ISP Amendment of the ICA speaks for itself. Further, Qwest is without knowledge or information sufficient to form a

belief as to whether all of the relevant portions of the ICA or the ISP Amendment have been attached to the Petition, and indeed, states that page 2 of the ISP Amendment, which contains the definition of “ISP-Bound,” is missing, and therefore denies the same.

48 Qwest admits the allegations in paragraph 8 of the Petition that Pac-West has billed Qwest, and Qwest has paid Pac-West, for the appropriate portions of the appropriate terminating local and ISP-bound traffic since the ICA became effective, in accordance with the parties’ ICA and in compliance with the terms of the FCC’s *ISP Remand Order*. Qwest further admits that in early 2004, in compliance with the ICA and terms of the FCC’s *ISP Remand Order*, Qwest started withholding payment on Pac-West’s invoices for compensation on the grounds that Pac-West had exceeded the minutes of use growth ceiling terms for ISP traffic described in section 3.2.2 of the ISP Amendment. Qwest further admits that after following the ICA’s dispute resolution provisions, Pac-West and Qwest agreed to a private arbitration to resolve this issue (AAA Case #77Y181-00385-02 (JAG Case No. 221368)). Qwest further admits that 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*”), but otherwise states that both the *Core Order* and the December 2, 2004 Arbitrator’s decision speak for themselves. Finally, although Qwest did not agree with the Arbitrator’s December 2, 2004 decision, Qwest admits it did not choose to appeal the Arbitrator’s decision under the terms of appeal in the rules of arbitration governing that decision.

49 Qwest admits the allegations in paragraph 9 of the Petition that on December 29, 2004, Qwest officially notified Pac-West that Qwest intended to withhold compensation for VNXX traffic retroactive to the beginning of 2004, but denies Pac-West’s characterization of how Qwest defines VNXX or Virtual NXX. Qwest further states that on January 25, 2005, Qwest issued formal dispute letters to all CLECs across its region that it suspected of engaging in the

wrongful exchange of VNXX traffic, and that Qwest requested the commencement of formal dispute resolution procedures under the respective ICAs. With respect to whether Pac-West considers VNXX to be indistinguishable from the foreign exchange (“FX”) services that Qwest offers to its customers, Qwest is without knowledge or information sufficient to form a belief as to such allegations, and therefore denies the same, and further, Qwest denies that VNXX is “indistinguishable from FX services.”¹⁶ Finally, Qwest denies Pac-West’s allegations about the compensation for traffic that Pac-West has terminated. Qwest further denies the Pac-West claim that there is approximately \$637,389.80 in dispute from January 1, 2004 through March 31, 2005. Rather, Qwest submits that the maximum amount of the claim is approximately \$401,736.00, based on usage from January 1, 2004 through March 31, 2005.

50 Qwest admits the allegations in paragraph 10 of the Petition that Pac-West and Qwest have discussed these issues, but denies that Pac-West “agreed to attempt to negotiate this dispute with Qwest.” Qwest further admits that any such “negotiations,” while helpful in discussion, were fruitless. Qwest further admits that it notified Pac-West in an April 25, 2005 letter that it would withhold 68.3% of Pac-West’s billed ISP minutes in Washington in the second quarter of 2005, which represented the amount of suspected VNXX traffic that is in dispute.

51 Qwest admits the allegations in paragraph 11 of the Petition that Pac-West served a notice of its intent to file a petition for enforcement of the ICA on or about May 12, 2005, and that May 12, 2005 is more than 10 days prior to the date on which this Petition was filed. Qwest further admits that the copy of the letter that is attached to the Petition is a true and correct copy of

¹⁶ Qwest’s FX service is different from VNXX services. Qwest’s FX service provides a subscriber the ability to purchase *separate dedicated switching and transport facilities* from each local calling area that the subscriber wishes to obtain a local presence. The end-user customer pays for such facilities. VNXX, on the other hand, is merely a carrier’s misassignment of telephone numbering resources that were obtained under the auspices of providing service within the local calling area for which they were obtained, but then assigning these numbers to common switching and transport facilities that serve a subscriber regardless of the physical location of the subscriber. VNXX services are provided by carriers like Pac-West in attempts to arbitrage intercarrier compensation by recovering compensation for calls that appear to be “local” but are in fact non-local.

that May 12, 2005 letter.

VII. PAC-WEST'S CLAIMS OF ICA VIOLATIONS

52 Qwest states that the averments in paragraph 12 of the Petition constitute conclusions of law, and as such do not contain allegations which Qwest must admit or deny. To the extent that these averments constitute statements of fact, Qwest admits that the ICA requires the parties to compensate each other for terminating "Exchange Service (EAS/Local) traffic." Qwest, however, denies that FX and VNXX services are "substantially similar," or that VNXX is an "Exchange Service," but admits that VNXX is traffic that terminates to a customer physically located in a different exchange than the originating customer. Qwest further denies that "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." Qwest further admits that Pac-West has correctly quoted portions of one sentence from paragraph 1 of the FCC's *ISP Remand Order*, and that the requirements of the *ISP Remand Order* are incorporated into the ICA, including the ISP Amendment, but Qwest denies that "nothing in the order or the [ICA] limits compensable traffic to calls to ISPs that are physically located in the same local calling area as the calling party." Qwest further denies that it is in breach of the ICA, or underlying federal law, in refusing to compensate Pac-West for "all" local and ISP traffic to which it alleges it is entitled to be compensated.

53 Qwest states that the averments in paragraph 13 of the Petition constitute conclusions of law, and as such do not contain allegations which Qwest must admit or deny. To the extent that these averments constitute statements of fact, Qwest admits that Pac-West and Qwest have been exchanging traffic pursuant to the ICA since February 2001. Qwest further denies that it never contended that VNXX traffic is not subject to compensation. Rather, Qwest states that from a compensation perspective, the impact of VNXX traffic under the growth cap provisions of the FCC *ISP Remand Order* and the parties' ICA was insignificant, and was effectively

irrelevant to the billing by PacWest to Qwest. Qwest became more acutely aware that Pac-West was engaging in such VNXX schemes by PacWest's attempts to increase billing to Qwest for such schemes after the removal of the cap provisions brought about by the December 2, 2004 Arbitrator's decision and the FCC *Core Forbearance Order*. Qwest further denies that it is attempting to "re-interpret" the ICA, or to preclude Pac-West from receiving compensation for terminating "the very traffic for which Qwest has consistently compensated Pac-West for years." To the contrary, Qwest avers that Pac-West is attempting to seek compensation for the very traffic for which it had *not* received compensation in prior years. Finally, Qwest denies that there is any estoppel, or that the Commission should require Qwest to compensate Pac-West for any traffic destined for an ISP that is VNXX traffic.

54 Qwest states that the averments in paragraph 14 of the Petition constitute conclusions of law, and as such do not contain allegations which Qwest must admit or deny. To the extent that these averments constitute statements of fact, Qwest denies that an arbitrator interpreted the ICA to require Qwest to compensate Pac-West for "all" traffic that is destined for ISP equipment beginning January 1, 2004, and further states that the Arbitrator's decision speaks for itself. Qwest further denies that 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," and further states that the amounts that Qwest has withheld are for traffic that was not the subject of the arbitration proceeding to which Pac-West refers. Qwest further denies that Qwest is impermissibly attempting to evade the Arbitrator's decision, or that it is manufacturing arguments that Qwest could have made during the arbitration, or that it waited to raise these issues until just after the conclusion of the arbitration. Qwest further states that the arbitration to which Pac-West refers was clearly irrelevant to the is here, and that the arbitration did not address the VNXX-related issues in dispute in this proceeding. Finally, Qwest denies that it is

attempting to “hav[e] another bite at the same apple,” or that the Commission should require Qwest to compensate Pac-West for “all” traffic destined for ISP equipment, or any ISP traffic that is VNXX traffic.

55 With respect to Pac-West’s prayer for relief, Qwest states that the prayers do not contain allegations to which Qwest must admit or deny. To the extent that these prayers constitute statements of fact, Qwest denies them in their entirety. Qwest denies that Pac-West is entitled to any relief whatsoever in connection with this proceeding.

VIII. COUNTERCLAIMS

56 Qwest brings these Counterclaims against Pac-West as a result of Pac-West’s violation of federal law, violations of state law, and breach of the terms and conditions of the parties’ interconnection agreement. This Counterclaim consists of four counts, as follows:

COUNT 1 (Violation of Federal Law)

57 Qwest has set forth the applicable federal law regarding calls made to the Internet.

58 Pac-West’s knowing misassignment of local telephone numbers and NPA/NXXs in local calling areas other than the local calling area where its customer’s ISP Server is physically located, its misuse of such telephone numbering resources, and its subsequent attempts to bill Qwest the *ISP Remand Order* rate for such VNXX traffic, are violations of federal law. The Commission should order Pac-West to cease assigning NPA/NXXs in local calling areas other than the local calling area where its customer’s ISP Server is physically located, and cease charging Qwest for such traffic, and further, should require that Pac-West properly assign telephone numbers based on the actual physical location of its end-user or ISP customer.

COUNT 2 (Violation of State Law)

59 Qwest has set forth the applicable state law regarding the definition of a local call and the proper compensation for calls made to the Internet using VNXX schemes, including the Commission's recent order in Docket No. UT-033035.

60 Pac-West's knowing misassignment of local telephone numbers and NPA/NXXs in local calling areas other than the local calling area where its customer's ISP Server is physically located, its misuse of such telephone numbering resources, and its subsequent attempts to bill Qwest the *ISP Remand Order* rate for such VNXX traffic, are violations of Washington law. The Commission should order Pac-West to cease assigning NPA/NXXs in local calling areas other than the local calling area where its customer's ISP Server is physically located, and cease charging Qwest for such traffic, and further, should require that Pac-West properly assign telephone numbers based on the actual physical location of its end-user or ISP customer.

COUNT 3 (Violation of Section (G)3.7 of the ICA)

61 Pac-West is knowingly misassigning local telephone numbers to ISP Servers which are physically located outside the local area to which the telephone number is assigned.

62 Section (G)3.7 of the ICA provides that "[e]ach Party is responsible for administering NXX codes assigned to it." Further, it requires that each party "shall provide through an authorized LERG input agent, all required information regarding its network for maintaining the LERG in a timely manner." Through its actions described above, Pac-West is violating these obligations. This Commission should issue an order finding Pac-West in breach of its contractual obligations and further, should invalidate Pac-West's bills.

COUNT 4 (Improper Routing of Traffic over LIS Trunks)

63 Section 1.1 of Attachment A of the SPOP Amendment authorizes the parties to exchange the

following categories of traffic over LIS Trunks: (1) Exchange Access (intraLATA Toll non IXC), (2) “Meet-Point Billing” (also known as Jointly Provided Switched Access) traffic and (3) Exchange Service EAS/Local Traffic.

64 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 Commission.” (ICA, § (A)2.25.)
- “Meet-Point Billing” or “MPB” [also known as 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.) (Emphasis added.)

65 “ISP-bound traffic” is as defined in the ISP Amendment (§ 1.4), which refers to the *ISP Remand Order*. VNXX traffic, even if it is destined for an ISP, does not fit in any of these categories.

66 Accordingly, Pac-West is violating its ICA by attempting to obligate Qwest to send non-local ISP traffic over LIS trunks. The Commission should order Pac-West to discontinue the practice of misassigning the telephone numbers and cease routing VNXX traffic over LIS trunks to Qwest, and further, should invalidate Pac-West’s bills to Qwest.

IX. RELIEF REQUESTED

67 WHEREFORE, Qwest respectfully requests the Commission provide the following relief:

- A. Deny all of the relief requested by Pac-West in its petition;
- B. Issue an order (1) prohibiting Pac-West from assigning NPA/NXXs in local

calling areas other than the local calling area where the ISP Server is physically located,
(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 actual physical location of its customer's ISP Server;

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

D. Direct Pac-West to follow the change of law procedures contained in its interconnection agreement with Qwest to implement the *Core Forbearance Order*;

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

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

DATED this 15th day of June, 2005.

QWEST

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