

compensation because the traffic exceeded the caps on compensable ISP-bound traffic established by the Federal Communications Commission (“FCC”) in its *ISP Remand Order*.² Pac-West sought arbitration of this issue, and a private arbitrator ruled in favor of Pac-West. Qwest, however, continued to refuse to pay, claiming that the same amount of traffic was not compensable because it was “VNXX” traffic, *i.e.*, calls between parties that were physically located in different local calling areas even though they have telephone numbers that are assigned to the same local calling area. Pac-West initiated this proceeding to compel Qwest to compensate Pac-West for terminating this traffic in compliance with the parties’ interconnection agreement.

2. Order No. 5, Final Order Affirming and Clarifying Recommended Decision (“Final Order”) grants Pac-West’s Petition to enforce the interconnection agreement and requires Qwest to compensate Pac-West for terminating all ISP- bound traffic that Qwest originates. Yet Qwest continues to resist complying with its contractual obligations. Qwest’s Petition represents Qwest latest attempt to avoid paying compensation to Pac-West. Qwest does not offer any new explanations for why it believes that first the Administrative Law Judge (“ALJ”) and then the Commission should not have ruled in favor of Pac-West. Rather, Qwest simply makes the same arguments it made twice before, apparently believing that repetition will make its position more persuasive. It does not.

² *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).

3. Enough is enough. Qwest unlawfully withheld close to \$1 million in amounts it owes Pac-West and has required Pac-West to undergo the considerable time and expense of litigating multiple actions to enforce its rights. Qwest has brought nothing new to the table to justify its actions. The Commission, therefore, should deny Qwest's Petition.

DISCUSSION

4. The Final Order concludes "that the FCC has preempted state commissions from determining the jurisdiction and compensation of ISP-bound traffic" and requires Qwest to "compensate Pac-West for all ISP-bound traffic, including VNXX traffic, according to the terms in the ISP Amendment to the parties' interconnection agreement, which adopts the *ISP Remand Order*."³ Qwest takes issue with the Commission's interpretation of federal law, repeating for the third time its contention that specific references by the FCC and the D.C. Circuit to the scope of Section 251(g) and to calls "within the same local calling area" demonstrate that the *ISP Remand Order* addresses only ISP-bound traffic between callers and ISP modems physically located in the same local calling area. The ALJ considered and rejected this argument. The Commission considered and rejected this argument. Qwest has provided no basis for the Commission to reach a different conclusion now.

5. Qwest in its Petition focuses on paragraph 39 of the *ISP Remand Order* in which the FCC stated that "unless and until the [FCC] by regulation should determine otherwise, Congress preserved the pre-Act regulatory treatment of all the access services enumerated under

³ Final Order ¶ 35.

section 251(g),” including access to ISPs. Qwest interprets this paragraph as supporting Qwest’s position that “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.”⁴

According to Qwest, the Commission has committed legal error because “if the call travels from a caller in one local calling area to an ISP located in another local calling area, it is a long distance call subject to intrastate access charges.”⁵ Qwest, not the Commission, is ignoring and misinterpreting the plain language of the *ISP Remand Order*.

6. Paragraph 39 was part of the FCC’s determination (rejected and remanded by the D.C. Circuit) that *all* ISP-bound traffic is “information access” and thus is excluded by Section 251(g) from the reciprocal compensation obligations in Section 251(b)(5). The FCC never found that *any* ISP-bound traffic is exempt under Section 251(g) because it is subject to intrastate access charges. To the contrary, the FCC unambiguously stated that *all* ISP-bound traffic is jurisdictionally interstate:

For jurisdictional purposes, the [FCC] views LEC-provided access to enhanced service providers, including ISPs, on the basis of the end points of the communication, rather than intermediate points of switching or exchanges between carriers (or other providers). . . . Accordingly, the LEC-provided link between an end-user and an ISP is properly characterized as *interstate* access.”⁶

Such access, by definition, is within the sole province of the FCC to establish the appropriate level of compensation and thus cannot be subject to *intrastate* access charges, as Qwest asserts.

⁴ Petition, ¶ 5.

⁵ *Id.*, ¶ 6.

7. Qwest also repeats selected phrases from the *ISP Remand Order* and the D.C. Circuit Court of Appeals decision in yet another attempt to claim that the FCC intended to limit its discussion of ISP-bound traffic to calls between a customer and an ISP modem that are *physically* located within the same local calling area. 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,”⁷ however, indicate nothing more than that the *ISP Remand Order* generally 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. Indeed, the FCC focused on the telephone number, not the customer’s or ISP’s physical location, when describing dial-up Internet access:

In most cases, an ISP’s customer first dials a seven-digit number to connect to the ISP server before connecting to a website. . . . Notwithstanding this dialing sequence, the service the LEC provides is considered *interstate* access service, not a separate local call.⁸

8. The FCC, moreover, has expressly recognized that “location” can be either “physical presence or number assignment.”⁹ The FCC further observed that incumbent local exchange carriers rate calls based on “the respective telephone numbers of the call’s parties, not

⁶ *ISP Remand Order*, ¶ 57 (emphasis in original).

⁷ *Id.* ¶ 10 (emphasis added).

⁸ *Id.* ¶ 61 (emphasis in original).

⁹ *In re Starpower Communications, LLC v. Verizon South, Inc.*, FCC 03-278, File No. EB-00-MD-19, Memorandum Opinion and Order ¶ 15 (rel. Nov. 7, 2003) (citation omitted).

the parties' physical location,"¹⁰ effectively establishing "location" by number assignments.

The references in the *ISP Remand Order* to calls made to ISPs "located in the same local calling area," therefore, include ISPs with telephone numbers assigned to the same local calling area in which the telephone number of the customer calling is assigned – precisely the traffic at issue in this proceeding. Whether viewed as part of all ISP-bound traffic that is subject to the FCC's prescribed compensation, as the Final Order concluded, or as locally-dialed ISP-bound traffic as Pac-West proposed, the Commission correctly concluded that the *ISP Remand Order* requires Qwest to compensate Pac-West for terminating this traffic at the rates established by the FCC.

CONCLUSION

9. The Commission did not err in interpreting federal law and the interconnection agreement to require Qwest to compensate Pac-West for the locally-dialed ISP-bound traffic that Qwest originates and delivers to Pac-West for termination. The Commission, therefore, should deny Qwest's Petition.

DATED this 13th day of March, 2006.

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¹⁰ *Id.* ¶ 13 (emphasis in original).