BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

PAC-WEST TELECOMM, INC.,	)	
	)	Docket No. UT-053036
Petitioner,	)	
	)	PAC-WEST ADDITIONAL
v.	)	BRIEFING ON PREEMPTION
	)	ISSUES
QWEST CORPORATION,	)	
	)	
Respondent.	)	
	)	

Pursuant to the Commission Request for Additional Briefing ("Request"), Pac-West Telecomm, Inc. ("Pac-West"), provides the following additional briefing on preemption issues in opposition to Qwest Corporation's ("Qwest's") Petition for Reconsideration of the Commission's Final Order. Nothing in the supplemental authority that Qwest has provided should alter the conclusions, and the Commission should not reconsider its Final Order.

DISCUSSION

1. The Request seeks additional briefing on the issue of preemption in light of the U.S. Court of Appeals decision in *Global NAPs, Inc. v. Verizon New England*, Case No. 05-2657 (1st Cir. April 11, 2006). The First Circuit concluded in that case that the FCC's *ISP Remand Order* does not preempt the Massachusetts Department of Telecommunications and Energy from authorizing Verizon New England to impose access charges for all "VNXX" traffic, including ISP-bound traffic. That conclusion is neither binding on this Commission nor correct

2. As an initial matter, Pac-West notes that the First U.S. Circuit Court of Appeals includes the states of Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island. Decisions by that court are not binding in Washington, which is part of the Ninth Circuit. The Commission in its Final Order, moreover, cited federal district court cases in Vermont and Connecticut, both of which are in the Second Circuit and similarly not bound by First Circuit decisions. *Global NAPs* thus does not require any alteration to the Commission's conclusions in the Final Order or undermine the decisions in any of the cases that the Commission cited in that order as persuasive authority. The First Circuit's decision is nothing more than nonbinding authority from another jurisdiction that the Commission may or may not choose to consider.[1]

3. The Commission should not find the First Circuit's decision persuasive, even if the Commission chooses to consider it. This Commission has independently and consistently determined that the *ISP Remand Order* preempts the imposition of access charges on locally dialed ISP-bound traffic. The New England-based court considered the same language in the *ISP Remand Order* that the Commission has considered and reached a different conclusion. That

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[1] Qwest suggested in briefing to the Arizona Corporation Commission that the First Circuit's decision in *Global NAPs* has the same nation-wide binding effect on the interpretation of the *ISP Remand Order* as the D.C. Circuit's opinion in *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), which was the decision on direct review of the *ISP Remand Order*. Qwest cited no authority for this novel proposition, and none exists. Certainly state commissions – as well as federal and state courts – are bound by the decisions of the federal court of appeals that *reviews* an FCC order, but neither the Hobbs Act nor any other federal law gives broad binding effect to the opinion of a federal appeals court that merely *interprets* an FCC order.

conclusion is incorrect, for the reasons that Pac-West has previously discussed in its briefing and, as the Commission requested, will not repeat here.

4. Pac-West, however, observes that the First Circuit failed to consider the FCC's rationale and discussion in the entire *ISP Remand Order*, despite the court's claim to be doing just that. The Commission appropriately asks "why the *ISP Remand Order* would apply a different compensation scheme for intrastate ISP-bound traffic than for local and interstate ISP-bound traffic." The simple answer is that the FCC would and did not.

5. 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.[2]

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 *intra*state access charges. The First Circuit disagreed and stated, "A matter may be <u>subject to</u> FCC jurisdiction, without the FCC having exercised that jurisdiction and preempted state regulation."[3] That court ultimately concluded that the *ISP Remand Order* does not include a "clear indication" that the FCC intended to

[2] *ISP Remand Order* ¶ 57 (emphasis in original).

[3] *Global NAPs*, slip op. at 24 (emphasis in original).

preempt state regulation of ISP-bound traffic.[4] Such a conclusion is inconsistent with the FCC order.

6. The FCC clearly manifested an intent to assert jurisdiction over ISP-bound traffic. The FCC found, "Most Internet-bound traffic traveling between a LEC's subscriber and an ISP is indisputably interstate in nature when viewed on an end-to-end basis."[5]

> The "communication" taking place is between the dial-up customer and the global computer network of web content, e-mail authors, game room participants, databases, or bulletin board contributors. Consumers would be perplexed to learn regulators believe they are communicating with ISP modems, rather than the buddies on their e-mail lists. **The proper focus for identifying a communication needs to be the user interacting with a desired webpage, friend, game, or chat room, not on an increasingly mystifying technical and mechanical activity in the middle that makes the communication possible**. ISPs, in most cases, provide services that permit the dial-up Internet user to communicate directly with some distant site or party (other than the ISP) that the caller has specified.[6]

7. The FCC thus unequivocally rejected the "two-call" theory on which the imposition of any access charges on locally-dialed ISP-bound calls would depend.[7] The FCC even analogized ISP service to long distance service, "not to prove that ISP service is identical to long distance service, but . . . merely to bolster, by analogy, the reasonableness of not

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[4] *Id*. at 34.

[5] *ISP Remand Order*. ¶ 58.

[6] *Id.* ¶ 59 (emphasis added).

[7] *Id.* ¶ 62.

characterizing an ISP as the destination of a call, but as a facilitator of communication."[8]

Indeed, the FCC, in distinguishing remarks made by its litigation counsel in another case, observed that the issues in that case "have no arguable bearing on whether the [ISP-bound] traffic is **one interstate call (as the [FCC] has always held)** or two separate calls (one of which allegedly is **intrastate**) as some parties have contended."[9] Tellingly, the FCC differentiated *interstate* and *intrastate*, not interstate and *local*. Subjecting some locally dialed ISP-bound calls – which the FCC "has always held" are interstate – to intrastate access charges is fundamentally inconsistent with both the FCC's rationale and conclusion in asserting jurisdiction over these calls. The FCC thus left no room whatsoever for a state commission to assert jurisdiction over a portion of an interstate call.[10] The First Circuit decision ignores the absence of any basis on which intrastate access charges could be imposed on interstate traffic and thus is fatally flawed.

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[8] *Id.* ¶ 60.

[9] *Id.* ¶ 64 (emphasis added).

[10] The First Circuit sought the FCC's views on this issue and relied, in part, on statements made in the amicus brief filed on behalf of the FCC for the court's conclusion that the FCC had not clearly preempted state regulation of the access charges at issue in that case. That amicus brief, however, is of limited utility, having been drafted by FCC "litigation staff" who opined only that the FCC order "can be read to support the interpretation set forth by either party in this dispute." Amicus Brief at 13. The FCC litigation staff nevertheless recognized that "the *ISP Remand Order* deemed *all* ISP-bound calls to be interstate calls subject to the jurisdiction of the FCC, and the language of the *ISP Remand Order* is sufficiently broad to encompass all such calls within the payment regime established by that Order." *Id.* at 10. As discussed above, the First Circuit failed to consider the full impact of this aspect of the Order, choosing to focus instead on the administrative history and litigation staff's opinion that the FCC has not expressly addressed the application of the *ISP Remand Order* in particular, or intercarrier compensation in general, on VNXX traffic. The Commission should note, however, that as Pac-West discussed in its prior briefing in this proceeding, the FCC has addressed (and required) intercarrier compensation in the context of VNXX traffic, further undermining the value of the amicus brief. *See In re Starpower Communications, LLC v. Verizon South, Inc.*, FCC 03-278, File No. EB-00-MD-19, Memorandum

CONCLUSION

8. The First Circuit's decision is neither binding precedent nor persuasive nonbinding authority. 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 for Reconsideration of the Final Order.

DATED this 10th day of May, 2006.

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Opinion and Order (rel. Nov. 7, 2003).