

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

PAC-WEST TELECOMM, INC.,

Petitioner,

v.

QWEST CORPORATION,

Respondent.

DOCKET NO. UT-053036

**QWEST CORPORATION'S
SUPPLEMENTAL BRIEF**

1 Pursuant to the Request for Additional Briefing issued by the Washington Utilities and Transportation Commission (“Commission”) on April 26, 2006, Qwest Corporation (“Qwest”) hereby files its Supplemental Brief to address issues in this docket in light of (1) the First Circuit Court of Appeals recent decision, *Global NAPs, Inc. v. Verizon New England, Inc.*, ___ F.3d. ___, 2006 WL 924035 (1st Cir. April 11, 2006) (“*Global NAPs*”) and (2) the *Amicus Brief* filed in that same proceeding by the Federal Communications Commission (“FCC”). For the reasons that follow, the Commission should grant Qwest’s Petition for Reconsideration of the Commission’s Final Order and grant Qwest’s Motion for Summary Determination.

I. BACKGROUND

2 Historically, telephone calls have been divided into two major categories. Calls placed to an end user in the same local calling area (“LCA”) have been classified as local calls. Calls

placed to an end user in a different local calling area have been classified as long distance (or interexchange) calls. After the Telecommunications Act of 1996 (the “Act”) became law, the FCC promulgated regulations that prescribed the intercarrier compensation rules that would apply to each of the two basic types of calls. Local calls placed by a customer of one local exchange carrier to a customer of another local exchange carrier would be subject to reciprocal compensation. Pursuant to Section 251(g) of the Act, long distance calls would remain subject to the access charge rules that had applied before the Act.

3 One significant issue that arose under the reciprocal compensation rules was whether calls placed to an Internet Service Provider (“ISP”) located in the same local calling area as the calling party should be subject to reciprocal compensation even though these calls were often routed to websites outside the local calling area. This issue was addressed in a series of decisions beginning with the FCC’s *ISP Declaratory Order*.¹ The *ISP Declaratory Order* was appealed to the DC Circuit Court of Appeals which after review remanded the issue back to the FCC. *Bell Atlantic Cos. V. FCC*, 206 F.3d 1 (D.C. Cir. 2000). The FCC then issued its *ISP Remand Order* which was also appealed to the DC Circuit. Once again, in *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), the DC Circuit remanded the issue back to the FCC. In so doing, the DC Circuit confirmed that the issue being addressed had remained the same throughout this series of proceedings. The question, as stated by the Court, was what intercarrier compensation should apply to “calls made to internet service providers (“ISPs”) located within the caller’s local calling area.” *Id* at 430 (emphasis added).

4 In its complaint to the Commission, Pac-West sought to obtain compensation pursuant to the *ISP Remand Order* for all calls placed to ISPs, not just calls placed to ISPs located in the same

¹ Declaratory Ruling in CC Docket No. 96-98 and NPRM in CC Docket No. 99-68, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 and Intercarrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689 (1999) (“*ISP Declaratory Order*”).

local calling area as the calling party. Qwest opposed the complaint, and argued that the *ISP Remand Order* expressly recognized that Section 251(g) of the Act preserved the existing access charge rules applicable to long distance calls, including long distance calls placed to an ISP. (*ISP Remand Order*, ¶¶36-39). In the *ISP Remand Order*, the FCC said nothing to indicate that it was extending its new compensation regime to cover long distance calls placed to ISPs. Indeed, the *ISP Remand Order* does not even mention VNXX.

5 On August 23, 2005, the Administrative Law Judge (“ALJ”) issued an Interlocutory Order (“ALJ Order”)² granting Pac-West summary determination and interpreting the *ISP Remand Order* to apply to all calls placed to ISPs including long distance VNXX calls. On February 10, 2006, the Commission issued its order (“Commission Order”)³ affirming the ALJ Order with respect to the scope of the *ISP Remand Order*.⁴ Qwest has petitioned for reconsideration on the ground, among others, that the *ISP Remand Order* left intact the access charge compensation regime applicable to long distance calls placed to ISPs and therefore did not prescribe intercarrier compensation for VNXX ISP traffic.

6 After Qwest filed its Petition for Reconsideration, the First Circuit Court of Appeals issued its decision in *Global NAPs*. *Global NAPs* rejects the Commission’s conclusion that the *ISP Remand Order* compensation scheme applies to all ISP traffic, and in particular, long distance or VNXX ISP traffic. For the reasons that follow, *Global NAPs* requires the Commission to grant Qwest’s petition for reconsideration and enter summary judgment in Qwest’s favor.

² Order No. 03, *Pac-West Telecomm, Inc. v. Qwest Corporation*, Docket No. UT-053036 (ALJ Caille, August 23, 2005) (“ALJ Order”).

³ Order No. 05, *Pac-West Telecom, Inc. v. Qwest Corporation*, Docket No. UT-053036 (February 10, 2006) (“Commission Order”).

⁴ Order on Remand and Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) (“*ISP Remand Order*”).

II. ARGUMENT

7 The decision in *Global NAPs* requires reversal of the Commission Order for three reasons. First, *Global NAPs* holds that the *ISP Remand Order* did not establish a compensation regime applicable to VNXX traffic or other non-local ISP traffic. Second, the *Global NAPs* court reaches this conclusion based on a preemption analysis established by the United States Supreme Court that is applicable in all circuits, including the Ninth Circuit in which Washington is located. Third, to the extent that the Commission retains authority to establish the terms of intercarrier compensation for VNXX or other non-local ISP traffic, it may establish such terms only prospectively and only after a hearing on the merits.

A. ***Global NAPs* Holds that the *ISP Remand Order* Did Not Establish Intercarrier Compensation Applicable to VNXX and Other Non-local ISP Traffic.**

8 In *Global NAPs*, a company with the same business plan as Pac-West (*i.e.*, providing services to ISPs for dial up access to the Internet) appealed a decision of a Massachusetts federal district court that had upheld a decision of the Massachusetts Commission⁵ that access charges apply to interexchange ISP calls (*i.e.*, VNXX). The Massachusetts Commission had determined that VNXX and other non-local ISP traffic are not subject to the *ISP Remand Order* compensation regime. *Global NAPs* argued that the *ISP Remand Order* preempts state commissions and requires that *all* ISP traffic be subject to the *ISP Remand Order's* compensation scheme.

9 After the *Global NAPs* case was fully briefed and argued by the parties, the First Circuit panel took the unusual step of seeking input from the FCC. Specifically, the court asked the FCC “[w]hether, in the *ISP Remand Order*, . . .the [FCC] intended to preempt states from regulating

⁵ The Massachusetts Commission is known as the Department of Telecommunications and Energy (“DTE”). For clarity, Qwest will simply refer to it as the Massachusetts Commission.

intercarrier compensation for *all* calls placed to [ISPs], or whether it intended to preempt only with respect to calls bound for [ISPs] in the same local calling area?” (*Amicus Brief* at 2; emphasis in original). The *Amicus Brief* responds primarily to that issue.

10 In response to the First Circuit’s inquiry, the FCC made it clear that while the *ISP Remand Order* could be interpreted in different ways, the only issue the FCC was addressing in that order was the intercarrier compensation applicable to calls placed by callers to ISPs in the same local calling area. In its *Amicus Brief*, the FCC stated:

The Commission itself has not addressed application of the *ISP Remand Order* to ISP-bound calls outside a local calling area. Nor has the Commission decided the implications of using VNXX numbers for intercarrier compensation more generally. (*Amicus Brief* at 10-11).

The administrative history that led up to the *ISP Remand Order* indicates that in addressing compensation, *the Commission was focused on calls between dial-up users and ISPs in a single local calling area. . . . Thus, when the Commission undertook in the ISP Declaratory Ruling to address the question “whether a local exchange carrier is entitled to receive reciprocal compensation for traffic that it delivers to . . . an Internet service provider,” . . . the proceeding focused on calls that were delivered to ISPs in the same local calling area.*

The administrative history does not indicate that the Commission’s focus broadened on remand. The *ISP Remand Order* repeats the Commission’s understanding that “an ISP’s end-user customers typically access the Internet through an ISP service located in the same local calling area.” . . . *The Order refers multiple times to the Commission’s understanding that it had earlier addressed – and on remand continued to address – the situation where ‘more than one LEC may be involved in the delivery of telecommunications within a local service area.’”* (*Id.* at 12-13; citations to *ISP Remand Order* omitted; emphasis added).

11 Based on the statements made by the FCC, the First Circuit held that “the FCC did not expressly preempt state regulation of intercarrier compensation for non-local ISP-bound calls” and that the Massachusetts Commission was “free to impose access charges for such calls under state law.” (2006 WL 924035 at *1). The First Circuit determined that in order for the FCC to have established a compensation regime for non-local ISP traffic, it would have had to

have clearly pre-empted the existing access charge rules applicable to interexchange calls placed to ISPs. The Court concluded that the FCC did not pre-empt existing access charge rules:

Regardless of which approach is used, *the ISP Remand Order does not clearly preempt state authority to impose access charges for VNXX ISP-bound traffic; it is, at best, ambiguous on the question, and ambiguity is not enough to preempt state regulation here.* (*Id.* at *11) (*emphasis added*).

The First Circuit further noted that the *ISP Remand Order* reaffirmed the distinction between reciprocal compensation and access charges:

The FCC has consistently maintained a distinction between local and “interexchange calling and the intercarrier compensation regimes that apply to them, and reaffirmed that states have authority over intrastate access charge regimes. Against the FCC’s policy of recognizing such a distinction, a clearer showing is required that the FCC preempted state regulation of both access charges and reciprocal compensation for ISP-bound traffic.

Indeed, in the *ISP Remand Order* itself, the FCC reaffirmed the distinction between reciprocal compensation and access charges. It noted that Congress, in passing the [Act], did not intend to disrupt the pre-[Act] access charge regime, under which “LECs provided access services... in order to connect calls that travel to points --both interstate and intrastate – beyond the local exchange. In turn, both the Commission and the states had in place access regimes applicable to this traffic, which they have continued to modify over time”. (*Id.* at *12, quoting *ISP Remand Order* ¶37).

12 Under federal law, enhanced service providers (which include ISPs) are treated as end users for purposes of applying access charges.⁶ The *ISP Remand Order* itself recognizes this rule in Paragraph 11 where it states that “ESPs, including ISPs, are treated as end users *for the purpose of applying access charges.*” The FCC has “defined them as ‘end users’ – no different

⁶ “Under our present rules, enhanced service providers are treated as end users for purposes of applying access charges.” *Northwester Bell Telephone Company Petition for a Declaratory Ruling, Memorandum Opinion and Order*, 2 FCC Rcd 5986, 5988, ¶20 (1987).

from a local pizzeria or barber shop.”⁷ Moreover, as the First Circuit noted, “[t]here is no express statement [in the *ISP Remand Order*] that ISP-bound traffic is not subject to access charges.” (2006 WL 924035 at *13). Accordingly, interexchange calls to ISPs are rated as interexchange calls, and subject to access charges, just as any other calls between end users would be rated.

B. The *Global NAPs* Pre-emption Analysis Applies in the Ninth Circuit

13 *Global NAPs* relies upon a well-established pre-emption analysis in reaching its conclusion that the *ISP Remand Order* did not establish compensation for VNXX or other non-local calls to ISPs. (*Id.* at *10-11). In *Hillsborough County v. Automated Med. Labs. Inc.*, 471 U.S. 707 (1985), the United States Supreme Court held that if an agency intends to preempt state regulation, it must clearly indicate its intention. *Hillsborough* is the law and has been followed in the Ninth Circuit.⁸ Thus, the First Circuit’s analysis applies in the Ninth Circuit, not just in the First Circuit as Pac-West may argue.

14 In arguing that the *ISP Remand Order* applies to VNXX and other non-local ISP traffic, Pac-West has to take the *ISP Remand Order* out of context. As the *WorldCom* decision made clear, the issue addressed in the *ISP Remand Order* was limited to the treatment of calls placed to ISPs in the same local calling area. *WorldCom*, 288 F.3d at 430. However, even if one can read the *ISP Remand Order* more broadly, that is not enough under federal law to expand the legal effect of the order to change the pre-existing intercarrier compensation rules applicable to long distance calls placed to ISPs.⁹

⁷ *ACS of Anchorage v. FCC*, 290 F.3d 403, 409 (DC Cir. 2002).

⁸ *SkySign International, Inc. v. City and County of Honolulu*, 276 F.3d 1109, 1116-17 (9th Cir. 2002); *Siuslaw Concrete Construction Company v. State of Washington Department of Transportation*, 784 F.2d 952, 957 (9th Cir. 1986).

⁹ *Qwest Corporation v. Scott*, 380 F.3d 367, 373-74 (8th Cir. 2004) (The FCC’s statement...is susceptible of a broader interpretation if plucked out of context, but we conclude that when the {FCC Order} is read as a whole, the [FCC’s] expressed intent to preempt state regulation does not extend to performance measurements and standards).

15 In *Global NAPs*, the CLEC argued that, if the FCC only intended to preempt on local ISP traffic, “it would have expressed its intent more clearly, by specifying ‘local ISP-bound traffic.’” (*Global NAPs*, 2006 WL 924035 at *12). The First Circuit pointed out that this argument ignores the distinction between local and interexchange traffic, and the existing compensation regime for interexchange calls. Relying on paragraph 37 of the *ISP Remand Order*, the Court concluded that the FCC had reaffirmed the distinction between access charges and reciprocal compensation, and that the FCC clearly had no intention of upsetting or altering the existing federal and state access charge regimes. (*Id.*, referring to *ISP Remand Order* ¶ 37).

16 Not only did *Global NAPs* rule that the FCC had not altered the intra- and interstate access charge regimes, it also ruled that the relationship between access charges and the compensation scheme of the *ISP Remand Order* cannot be divorced from their historical context: “Such a rule [that orders be read in context] properly applies to interpretations of agency orders, especially where the order itself details the background against which it was passed.” (2006 WL 924035 at *12, relying on *Central Va. Cmty. Coll. v. Katz*, ___ U.S. ___, 126 S.Ct. 990, 996 (2006)). The historical context of the *ISP Remand Order* led the *Global NAPs* court to conclude that the only issue being considered by the FCC was compensation for local ISP traffic.

C. **The Commission May Not Establish New Intercarrier Compensation Terms for VNXX or non-Local ISP Traffic without a Hearing and the Commission’s Ruling Would Operate Only Prospectively**

17 When Pac-West employs VNXX, it offers its ISP customers what is in substance a 1-800 service. Accordingly, Qwest is entitled to charge Pac-West intrastate or interstate originating access, as the case may be, for Pac-West’s use of Qwest’s local network to originate these calls.

18 *Global NAPs* holds that the FCC did not preempt any Commission authority to establish or

enforce the terms of intercarrier compensation applicable to intrastate VNXX or non-local ISP traffic. That holding does not give the Commission carte blanche authority to change or establish new intercarrier compensation terms applicable to VNXX or non-local ISP traffic. The Commission authority remains circumscribed by Washington law. Two rules of Washington law are significant in this regard. First, the Commission may not set new rates for VNXX or non-local ISP traffic without a hearing. Second, if the Commission determined that it should establish intercarrier compensation terms for VNXX or non-local ISP traffic, any new terms it established could operate only prospectively. Washington law does not permit retroactive ratemaking.

III. THE COMMISSION'S ADDITIONAL QUESTION

19 The Commission's Request for Additional Briefing asked the parties to explain "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 short answer is that the *ISP Remand Order* does not apply different compensation schemes as between intrastate and interstate ISP-bound traffic – rather, it creates and applies one scheme to local traffic, and it leaves intact the pre-existing access charge scheme for interexchange traffic, both inter and intrastate. This is precisely what the FCC authorized state commissions to do in establishing reciprocal compensation for local voice traffic exchanged between carriers.¹⁰ For traditional voice traffic reciprocal compensation applies to local traffic, while access charges apply to interexchange traffic. The reasons to retain the access charge regime are manifold, as Congress recognized in

¹⁰ See, Section 251(b)(5), Section 252 (d)(2)(A), and the FCC's implementing regulations at 47 C.F.R. 51.701, et seq. Rule 701 in particular is instructive, as it defines "telecommunications traffic" as traffic "exchanged between a LEC and a telecommunications carrier other than a CMRS provider, except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access. . . ." Thus, it is clear that both the FCC and Congress envisioned two different compensation schemes, depending upon whether the traffic local or long distance. The *ISP Remand Order* clearly preserves this distinction.

enacting Section 251(g).

20 Thus, for calls placed to an ISP in the same local calling area, the *ISP Remand Order* compensation regime (which currently caps the rate the originating carrier must pay the terminating carrier at \$.0007 per minute of use) applies. Interexchange ISP traffic remains subject to the applicable access charge mechanism depending on the locations of the calling party and the ISP. If the originating caller and the ISP are physically located in different LCAs, both of which are in Washington, intrastate access charges should apply. If the originating caller and the ISP are physically located in different LCAs and in different states, interstate access charges should apply.

IV. CONCLUSION

21 Based on the foregoing, Qwest respectfully requests the Commission to reverse its earlier decision requiring Qwest to pay Pac-West terminating compensation on non-local ISP traffic.

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