

**BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION**

PAC-WEST TELECOMM, INC.,	)	DOCKET UT-053036
	)	
Petitioner,	)	
	)	ORDER 06
v.	)	
	)	
QWEST CORPORATION,	)	ORDER DENYING PETITION
	)	FOR RECONSIDERATION
Respondent.	)	
	)	
.....	)	

1     ***Synopsis.** We deny Qwest’s petition for reconsideration and affirm our interpretation of the ISP Remand Order. We affirm our finding that the FCC’s order applies to all ISP-bound traffic, regardless of the point of origination and termination of the traffic. We clarify that preemption is not a basis for our decision.*

**PROCEDURAL BACKGROUND**

2     **Nature of Proceeding.** This proceeding involves a petition filed by Pac-West Telecomm, Inc. (Pac-West), pursuant to WAC 480-07-650, seeking enforcement of terms of its interconnection agreement with Qwest Corporation (Qwest) concerning compensation for traffic to Internet service providers (ISPs). Qwest filed counterclaims against Level 3 contesting compensation for ISP-bound traffic and the propriety of Pac-West’s use of Virtual NXX, or VNXX<sup>1</sup>, traffic under the parties’ interconnection agreement.

3     **Order 03 – Recommended Decision to Grant Petition.** On August 23, 2005, Administrative Law Judge Karen Caillé entered a recommended decision, Order 03 proposing to grant Pac-West’s petition and to order Qwest to compensate Pac-West for transport and termination of all local and ISP-bound traffic originated by Qwest, including VNXX traffic, according to the rates, terms, and conditions in the ISP

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<sup>1</sup> “VNXX” or “Virtual NXX” refers to a carrier’s acquisition of a telephone number for one local calling area that is used in another geographic area. The call appears local based on the telephone number.

Amendment to the parties' interconnection agreement.<sup>2</sup> Order 03 interpreted the Federal Communication Commission's (FCC) *ISP Remand Order*<sup>3</sup> and the parties' interconnection agreement to allow compensation for ISP-bound VNXX traffic under the compensation scheme established in the FCC's order. Order 03 acknowledged Qwest's counterclaims concerning the legality and propriety of VNXX service, but declined to address them on the basis that the counterclaims addressed matters outside the parties' interconnection agreement. The recommended decision proposed that Qwest pay Pac-West for all amounts Pac-West has billed Qwest for traffic terminated since January 1, 2004, plus interest.

4 **Order 05 – Commission Final Order Affirming and Clarifying Recommended Decision.** On February 10, 2006, in Order 05, the Washington Utilities and Transportation Commission (Commission) affirmed the recommended decision in Order 03, clarifying that the scope of the *ISP Remand Order* applies to all ISP-bound traffic, regardless of the point of origination and termination of the traffic. The Commission determined that under the *ISP Remand Order*, the FCC created a separate compensation category for all ISP-bound traffic. Therefore, it is irrelevant for purposes of determining compensation whether the traffic is local, toll, or via VNXX arrangements. The Commission also affirmed the recommended decision's disposition of Qwest's counterclaims, finding Qwest's claims about the use of VNXX neither material nor necessary to decide the issue of compensation for ISP-bound VNXX traffic in a petition for enforcement of Pac-West's interconnection agreement.<sup>4</sup>

5 On February 21, 2006, Qwest filed a petition for reconsideration of Order 05, the Commission's Final Order Affirming and Clarifying Recommended Decision. On March 13, 2006, Qwest filed a letter withdrawing the portion of its petition for reconsideration that addresses the issue of the amount owed to Pac-West by Qwest for

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<sup>2</sup> On August 26, 2005, Administrative Law Judge Ann Rendahl entered an order in Docket UT-053039 that addresses similar issues, granting and denying certain claims in motions for summary determination filed by Level 3 and Qwest.

<sup>3</sup> *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, CC Docket Nos. 96-98, 99-68, FCC 01-131 (rel. April 27, 2001) *remanded sub nom* [Hereinafter "*ISP Remand Order*"].

VNXX traffic. On March 13, 2006, Pac-West filed a response in opposition to petition for reconsideration. On April 12, 2006, Qwest filed as supplemental authority *Global Naps, Inc. v. Verizon New England et al.*, 444 F.3d 59 (1<sup>st</sup> Cir, April 11, 2006) and a related *amicus* brief filed by the FCC. On April 26, 2006, the Commission requested additional briefing from the parties on the issue of preemption in light of Qwest's filing of supplemental authority. The parties filed supplemental briefs on May 10, 2006.

6 **Commission Decision on Petition for Reconsideration.** The Commission denies Qwest's petition for reconsideration of Order 05, finding that its interpretation of the *ISP Remand Order* rests within the boundaries of the FCC's broad language in the order and reflects the FCC's policy and intent of establishing a uniform compensation regime for all ISP-bound traffic.

7 **Appearances.** Gregory J. Kopta, Davis Wright Tremaine, LLP, Seattle, Washington, represents the petitioner, Pac-West. Lisa Anderl, attorney, Seattle, Washington represents the respondent, Qwest.

## DISCUSSION

### **Petition for Reconsideration**

8 Qwest asserts the Commission erred as a matter of law in its discussion and interpretation of the two controlling decisions in this proceeding, the FCC's *ISP Remand Order* and the D.C. Circuit Court's decision in *WorldCom*,<sup>5</sup> which Qwest asserts reversed the FCC's order. Qwest reiterates its argument that the *ISP Remand Order* addresses only local traffic, and that VNXX traffic is not local traffic. Qwest argues that the Commission's interpretation of these decisions results in an incorrect conclusion about whether VNXX traffic falls within the term "ISP-bound traffic" as the term is used in the *ISP Remand Order*.<sup>6</sup>

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<sup>4</sup> On February 10, 2006, the Commission entered Order 05 in Docket UT-053039 that addresses similar issues concerning enforcement of an interconnection agreement between by Level 3 and Qwest.

<sup>5</sup> *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) [Hereinafter "*Worldcom*"].

<sup>6</sup> Qwest's Petition for Reconsideration, ¶¶1, 4-8. Qwest's petition raises two issues, the second of which is the calculation of the amount of compensation that Qwest owes Pac-West under the Commission's legal

9 In response, Pac-West points out that Qwest repeats the arguments it has made twice before in this proceeding, arguments the Commission previously rejected.<sup>7</sup> Pac-West again responds to those arguments and asserts that whether viewed as part of all ISP-bound traffic that is subject to the FCC's prescribed compensation, as our Final Order concluded, or as locally-dialed ISP-bound traffic as Pac-West proposed, we correctly concluded that the *ISP Remand Order* requires Qwest to compensate Pac-West for terminating this traffic at the rates established by the FCC.<sup>8</sup>

10 After Qwest filed its petition and Pac-West filed its response, the First Circuit Court of Appeals issued its decision in *Global NAPs*.<sup>9</sup> Qwest filed the decision as supplemental authority in this proceeding along with a related *amicus* brief filed by the FCC.<sup>10</sup> We asked the parties to brief the issue of preemption in light of the First Circuit's opinion in *Global NAPs*, and to explain why the *ISP Remand Order* would apply a different compensation scheme to intrastate ISP-bound traffic than for local and interstate ISP-bound traffic.

### 1. First Circuit's *Global NAPs* Decision

11 The First Circuit's decision addresses a 2002 arbitration proceeding before the Massachusetts Department of Telecommunications and Energy (DTE) in which Global NAPs argued that the *ISP Remand Order* preempts state commissions from regulating intercarrier compensation for all ISP-bound traffic. The DTE disagreed, holding that it had authority under state law to categorize certain ISP-bound calls, i.e., VNXX calls, as intrastate calls and treat them as toll calls. The First Circuit upheld the DTE's decision on preemption, concluding the FCC did not expressly preempt

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interpretation of the FCC's *ISP Remand Order* and the parties' interconnection agreement. Since Qwest filed its petition, the parties have agreed on the calculation and payment of the compensation required under the Final Order and Qwest has withdrawn that issue from its petition. *Qwest letter to Carole Washburn re Docket UT-053036*, March 13, 2006.

<sup>7</sup> Pac-West Opposition to Reconsideration, ¶2.

<sup>8</sup> *Id.*, ¶¶ 4-8.

<sup>9</sup> *Global Naps, Inc. v. Verizon New England, Inc. et al.*, Case No. 05-2657, 444 F.3d 59 (1st. Cir. April 11, 2006) [Hereinafter "*Global Naps*"].

<sup>10</sup> Pac West also filed as supplemental authority a recent decision of the Arizona Corporation Commission in a similar enforcement proceeding between Pac-West and Qwest.

state regulation of intercarrier compensation for non-local ISP-bound calls, leaving the DTE free to impose access charges for such calls under state law.<sup>11</sup>

- 12 Qwest asserts the *Global NAPs* decision requires this Commission to reverse its decision in Order 05 because “*Global NAPs* holds that the *ISP Remand Order* did not establish a compensation regime applicable to VNXX traffic or other non-local ISP traffic.”<sup>12</sup> Qwest also argues that *Global NAPs* applies a preemption analysis established by the United States Supreme Court that is applicable in all circuits, including the Ninth Circuit.<sup>13</sup>
- 13 Pac-West asserts the First Circuit’s *interpretation* of the *ISP Remand Order* is not binding in Washington, which is a part of the Ninth Circuit. Pac-West asserts 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.<sup>14</sup>
- 14 Pac-West 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.<sup>15</sup> Instead, the First Circuit chose to focus on the administrative history and the FCC’s 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, to VNXX traffic.<sup>16</sup>

## 2. The *ISP Remand Order* and Intrastate ISP-Bound Traffic

- 15 In response to our question of why the FCC would create a different compensation scheme for intrastate ISP-bound traffic than for local and interstate ISP-bound traffic, Qwest repeats its argument that the FCC’s historical distinctions for compensation for

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<sup>11</sup> *Global Naps*, 444 F3d at 61.

<sup>12</sup> Qwest Supplemental Brief, ¶¶ 8-12.

<sup>13</sup> *Id.*, ¶¶ 13-16.

<sup>14</sup> Pac-West Supplemental Brief, p. 2, fn. 1.

<sup>15</sup> *Id.*, ¶ 4.

<sup>16</sup> *Id.*, p. 5, fn. 10.

local, intrastate and interstate traffic apply to ISP-bound traffic.<sup>17</sup> As Qwest has included these arguments in its opening brief, exceptions to recommended decision, and petition for reconsideration, we do not repeat the arguments here.

- 16 Pac-West asserts the FCC did not establish a separate category for intrastate ISP-bound traffic in its *ISP Remand Order*. Pac-West argues “[t]he 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.”<sup>18</sup>

Pac-West asserts that “[s]ubjecting 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.”<sup>19</sup> According to Pac-West, “[t]he FCC thus left no room whatsoever for a state commission to assert jurisdiction over a portion of an interstate call.”<sup>20</sup>

### 3. Discussion and Decision

- 17 This case involves a dispute about the meaning of the parties’ existing interconnection agreement, which incorporates the FCC’s *ISP Remand Order* as the standard for determining compensation for ISP-bound traffic.<sup>21</sup> Our task is to establish the most logical and reasonable interpretation of the *ISP Remand Order* and then apply that

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<sup>17</sup> Qwest Supplemental Brief, ¶¶ 8-12, 19-20.

<sup>18</sup> Pac-West Supplemental Brief, ¶¶ 4-5, citing *ISP Remand Order* ¶57 (emphasis in original).

<sup>19</sup> *Id.*, ¶7.

<sup>20</sup> *Id.*

<sup>21</sup> Section 1.4 of the ISP-bound Traffic Amendment (ISP Amendment) to Pac-West and Qwest’s interconnection agreement provides “‘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.” Section 3.1 of the ISP Amendment provides “Qwest elects to exchange ISP-bound traffic at the FCC ordered rates pursuant to the FCC’s Order on Remand and Report and Order (Intercarrier Compensation for ISP-Bound Traffic) CC Docket 99-68...”

interpretation to the traffic the parties exchange. The FCC analysis in the *ISP Remand Order* (1) confirms that all ISP-bound traffic is jurisdictionally interstate and subject to its regulatory jurisdiction, and (2) solves the problem of regulatory arbitrage by establishing a unified compensation plan for ISP-bound traffic.<sup>22</sup> The FCC's policy and intent, both in the *ISP Remand Order* and in the *Core Forbearance Order*,<sup>23</sup> is to establish a *uniform* compensation regime for all ISP-bound traffic. Our decision in Order 05 reflects the FCC's intent.

18 We disagree with Qwest's characterization of the First Circuit's decision in *Global Naps*. The First Circuit's decision is limited to the issue of preemption, and is not a determination of the proper compensation scheme for VNXX traffic. Describing a lack of clarity about whether the *ISP Remand Order* preempts state authority to impose access charges for interexchange VNXX ISP-bound traffic,<sup>24</sup> the First Circuit finds the *ISP Remand Order* is "at best, ambiguous on the question, and ambiguity is not enough to preempt state regulation here."<sup>25</sup>

19 In paragraph 35 of Order 05 in Docket UT-053036, we imply that the *ISP Remand Order* preempts state authority over ISP-bound traffic. We did not intend to assert preemption as a necessary basis for our interpretation of the *ISP Remand Order* and clarify in this order that preemption is not the basis for our decision here. The *ISP Remand Order* controls our decision not because of the FCC's preemptive authority, but because the parties have made it controlling by explicitly incorporating the *ISP Remand Order* into their interconnection agreement.

20 Because the issue in this proceeding is not preemption but divining the *ISP Remand Order's* intent for intercarrier compensation for ISP-bound calls, *Global Naps* is not on point. The First Circuit's analysis is clearly focused on preemption. To the extent the court construes the policies and substance of the FCC's order beyond their preemptive effect it is, if not dicta, not binding in Washington.

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<sup>22</sup> *ISP Remand Order*, ¶¶ 52-65, 89-94.

<sup>23</sup> *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. §160(c) From Application of the ISP Remand Order*, Order, 19 FCC Rcd 20179 (2004) [Hereinafter "*Core Forbearance Order*"].

<sup>24</sup> *Global Naps*, 444 F3d at 72.

<sup>25</sup> *Id.*

21 The FCC acknowledges in its *amicus* brief<sup>26</sup> that the *ISP Remand Order* can be read to find that all ISP-bound calls are interstate calls subject to the jurisdiction of the FCC, and that the language of the order is sufficiently broad to encompass *all* such calls within the payment regime established by the order.<sup>27</sup> We affirm our interpretation of the *ISP Remand Order*, finding that the FCC created a separate compensation category for all ISP-bound traffic, regardless of origination and termination of the traffic, to advance its goal of a uniform intercarrier compensation scheme. Our interpretation falls well within the broad language of the *ISP Remand Order*. Thus, we deny Qwest's petition for reconsideration.

### **FINDINGS OF FACT**

22 Having discussed above in detail the evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues in dispute among the parties and the reasons therefore, the Commission now makes and enters the following summary of those facts, incorporating by reference pertinent portions of the preceding detailed findings:

23 (1) Qwest Corporation is a Bell operating company within the definition of 47 U.S.C. § 153(4), and incumbent Local Exchange Company, or ILEC, providing local exchange telecommunications service to the public for compensation within the state of Washington.

24 (2) Pac-West is authorized to operate in the state of Washington as a competitive local exchange carrier.

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<sup>26</sup> By order entered January 4 2006, the First Circuit requested that the FCC file a brief addressing three issues, including: "Whether, in the *ISP Remand Order*, the Commission intended to preempt states from regulating intercarrier compensation for all calls placed to internet service providers, or whether it intended to preempt only with respect to calls bound for internet providers in the same local calling area?" *Amicus Brief* at 1-2. The FCC litigation staff responded that "[t]he *ISP Remand Order* does not provide a clear answer to this question." *Amicus Brief* at 10. The FCC litigation staff admitted that "[t]he *ISP Remand Order* thus can be read to support the interpretation set forth by either party in this dispute." *Amicus Brief* at 13.

<sup>27</sup> *Amicus Brief* at 10.



- 25 (3) The Washington Utilities and Transportation Commission is an agency of the State of Washington vested by statute with the authority to regulate the rates and conditions of service of telecommunications companies within the state, and to take actions, conduct proceedings, and enter orders as permitted or contemplated for a state commission under the Telecommunications Act of 1996.
- 26 (4) Pac-West and Qwest negotiated an interconnection agreement approved by the Commission on February 14, 2001.
- 27 (5) Pac-West and Qwest executed an ISP-Bound Traffic Amendment (ISP Amendment) to their interconnection agreement approved by the Commission on March 12, 2003.
- 28 (6) The parties' interconnection agreement incorporates by reference the *ISP Remand Order* as the basis for determining compensation for the exchange of ISP-bound traffic.

### **CONCLUSIONS OF LAW**

29 Having discussed above all matters material to this decision, and having stated detailed findings, conclusions, and the reasons therefore, the Commission now makes the following summary conclusions of law, incorporating by reference pertinent portions of the preceding detailed conclusions:

- 30 (1) The Commission has jurisdiction over the subject matter of this proceeding and the parties to the proceeding.
- 31 (2) The Washington Utilities and Transportation Commission is designated in the Telecommunication Act of 1996 as the agency responsible for arbitrating, approving and enforcing interconnection agreements between telecommunications carriers, pursuant to Sections 251 and 252 of the Act.

- 32 (3) The First Circuit's *Global Naps* decision is limited to the issue of preemption and is not a determination of the proper compensation scheme for VNXX traffic.
- 33 (4) The decision in this proceeding does not rest on a finding that the FCC's *ISP Remand Order* preempts state authority for determining compensation for ISP-bound traffic.
- 34 (5) Because the parties' interconnection agreement incorporates by reference the *ISP Remand Order* as the basis for determining compensation for the exchange of ISP-bound traffic, the *ISP Remand Order* controls the Commission's interpretation of the parties' agreement.
- 35 (6) The Commission interprets the *ISP Remand Order* to create a separate compensation category for all ISP-bound traffic, regardless of origination and termination of traffic, to advance the FCC's goal of a uniform intercarrier compensation scheme.
- 36 (7) The interpretation of the *ISP Remand Order* in the enforcement of an interconnection agreement is not a jurisdictional issue, but rather giving meaning to a term of a contract.
- 37 (8) The Commission's interpretation of the *ISP Remand Order* in Order 05 is within the boundaries of the *ISP Remand Order's* broad language and reflects the FCC's policy and intent to establish a uniform compensation regime for all ISP-bound traffic.

**ORDER**

**THE COMMISSION ORDERS:**

38 Qwest's petition for reconsideration of Order 05 is denied.

Dated at Olympia, Washington, and effective June 9, 2006.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner