

**BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION**

PAC-WEST TELECOMM, INC.,	)	
	)	
Petitioner,	)	DOCKET UT-053036
	)	
v.	)	
	)	
QWEST CORPORATION,	)	
	)	
Respondent.	)	
.....	)	
	)	
LEVEL 3 COMMUNICATIONS, LLC,	)	
	)	
Petitioner,	)	DOCKET NO. UT-053039
	)	
v.	)	
	)	PAC-WEST MOTION FOR
QWEST CORPORATION,	)	SUMMARY DETERMINATION
	)	
Respondent.	)	
.....	)	

1. Pursuant to the procedural schedule established in this proceeding, Pac-West Telecomm, Inc. (“Pac-West”) provides the following Motion for Summary Determination of its petition for enforcement of its interconnection agreement with Qwest Corporation (“Qwest”) on remand from the federal district court.

**BACKGROUND**

2. Pac-West initiated Docket No. UT-053036 by filing a Petition for Enforcement of its interconnection agreement (“ICA”) with Qwest on June 9, 2005. Pac-West alleged that Qwest was in violation of the ICA by failing to pay compensation for traffic that Qwest delivered to Pac-West for termination, including but not limited to calls from Qwest customers to Internet service providers (“ISPs”) served by Pac-West whose

telephone numbers were rated as “local” but who were physically located in a different local calling area – subscribers of so-called foreign exchange (“FX”) or virtual NXX (“VNXX”) service:

The Interconnection Agreement requires the Parties to compensate each other for terminating “Exchange Service (EAS/Local) traffic.” FX/“VNXX” service is “Exchange Service” provided to a customer physically located in a different exchange. 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. Specifically with respect to ISP-bound traffic, the FCC has concluded that “traffic delivered to an ISP is predominantly interstate access traffic subject to section 201 of the Act, and [the FCC has] establish[ed] an appropriate cost recovery mechanism for the exchange of such traffic.” FCC ISP Order ¶ 1. These requirements are incorporated into the Interconnection Agreement, including the ISP Amendment, and nothing in the order or the Interconnection Agreement limits compensable traffic to calls to ISPs that are physically located in the same local calling area as the calling party. Accordingly, Qwest is in breach of the Interconnection Agreement, as well as the underlying federal law, in refusing to compensate Pac-West for *all* local and ISP-bound traffic, including calls from Qwest customers to an ISP that obtains FX service from Pac-West.<sup>1</sup>

3. Following discovery, simultaneous briefing, and oral presentations, the Commission granted Pac-West’s petition and ordered Qwest to pay Pac-West the intercarrier compensation that Pac-West had billed Qwest. The Commission concluded that the Federal Communications Commission’s (“FCC’s”) *ISP Remand Order*<sup>2</sup> governs intercarrier compensation for all traffic bound for ISPs, regardless of the physical location of the parties or the telephone numbers used:

We interpret the *ISP Remand Order* to apply to all ISP-bound traffic, regardless of the point of origination and termination of the traffic. Under the *ISP Remand Order*, the FCC created a separate compensation category

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<sup>1</sup> Pac-West Petition ¶ 12.

<sup>2</sup> In re 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).

for all ISP-bound traffic. According to the FCC's compensation scheme for ISP-bound traffic, it is irrelevant for purposes of determining compensation whether the traffic is local, toll, or via VNXX arrangements. We reject Qwest's interpretation of the *ISP Remand Order* as limited to calls between a customer and an ISP modem physically located within the same calling area, as well as Pac-West's interpretation that the *ISP Remand Order* applies to all ISP-bound traffic between parties whose numbers are assigned to the same local calling area.<sup>3</sup>

The Commission denied Qwest's motion for reconsideration, and Qwest sought review of the Commission's decision in federal district court.

4. The district court reversed and remanded the Commission's decision, holding that "the *ISP Remand Order* did not address compensation for interexchange ISP-bound traffic, such as the VNXX calls at issue in this case."<sup>4</sup> The Court also noted,

However, the holding of this Court is limited. By reversing and remanding this case, the Court does not hold that the WUTC lacks the authority to interpret the parties' interconnection agreements to require interim rate cap compensation to Pac-West and Level 3 for the ISP-bound VNXX calls at issue. On remand the WUTC is simply directed to reinterpret the *ISP Remand Order* as applied to the parties' interconnection agreements, and classify the instant VNXX calls, for compensation purposes, as within *or* outside a local calling area, to be determined by the assigned telephone numbers, the physical routing points of the calls, or any other chosen method within the WUTC's discretion.<sup>5</sup>

5. Prior to addressing the issues on remand from the district court, the Commission made a ruling on the nature of, and intercarrier compensation applicable to, VNXX traffic in the context of Qwest's complaint against Pac-West and other defendants in Docket No. UT-063038. The Commission found "that VNXX and FX traffic are both interexchange in nature and should be treated similarly as exceptions to access charge compensation for

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<sup>3</sup> Order 05, Final Order ¶ 30 (footnote omitted).

<sup>4</sup> *Qwest v. WUTC*, 484 F. Supp. 2d 1160, 1175-76 (W.D. Wa 2007).

<sup>5</sup> *Id.* at 1177.

interexchange traffic.”<sup>6</sup> The Commission concluded that VNXX ISP-bound traffic is not “within the local calling area” and accordingly is not governed by the *ISP Remand Order*.<sup>7</sup> Rather, the Commission asserted jurisdiction over this traffic as intrastate, interexchange service and required that all VNXX traffic, including such traffic bound for ISPs, should be subject only to bill and keep compensation.<sup>8</sup> The Commission, however, agreed that it could not resolve how its decision in that case ought to apply to Pac-West’s interconnection agreement with Qwest, reserving that issue for resolution in this proceeding.<sup>9</sup>

6. The issue before the Commission on remand, therefore, is whether the ICA between Pac-West and Qwest requires Qwest to compensate Pac-West for terminating VNXX traffic bound for ISPs. Qwest complied with the Commission’s original ruling and paid Pac-West the amounts that Qwest had disputed as VNXX traffic until the federal district court reversed the Commission’s decision. Since that time, however, Qwest has withheld payment for any traffic that Qwest believes is VNXX. Pac-West, therefore, seeks to retain the compensation that Qwest has paid and to obtain additional compensation that Qwest owes under the terms of the parties’ ICA.

### ARGUMENT

7. The Commission has correctly recognized that “interconnection agreements are contracts, the interpretation of which depend on their terms and perhaps facts and

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<sup>6</sup> *Qwest v. Level 3, et al.*, Docket No. UT-063038, Order 10, Final Order, ¶ 134 (July 16, 2008) (“VNXX Order”).

<sup>7</sup> *Id.* ¶ 130.

<sup>8</sup> *Id.* ¶ 169.

<sup>9</sup> *Id.* ¶¶ 139 & 290.

circumstances if necessary to determine the parties' intent."<sup>10</sup> The ICA between Pac-West and Qwest requires Qwest to compensate Pac-West for VNXX traffic terminated to Pac-West's ISP customers, regardless of whether the ISP-Bound Traffic Amendment to the parties' ICA governs such traffic.

8. The FCC has found that traffic bound for ISPs is interexchange traffic governed under Section 251(b)(5) of the Telecommunications Act of 1996 ("Act") and subject to the compensation incorporated in the parties' ISP-Bound Traffic Amendment, at least unless excluded under Section 251(g). The Commission, in turn, has affirmed under Washington law that VNXX, like FX, is an exception to the access charge regime preserved by Section 251(g). Such traffic when delivered to ISPs thus comes within the scope of Section 251(b)(5) and is subject to compensation under the ISP-Bound Traffic Amendment. If the Commission nevertheless determines that such compensation does not apply to VNXX calls, however, Qwest must compensate Pac-West for terminating this traffic as "EAS/Local Traffic" as the ICA defines that term. While additional proceedings will be necessary to establish the number of VNXX minutes Pac-West has terminated, the Commission should conclude as a matter of law and contract interpretation that Qwest is obligated to compensate Pac-West for such traffic under the terms and conditions of the parties' ICA.

**A. The Parties' ISP-Bound Traffic Amendment Governs Compensation for VNXX Traffic Bound for ISPs.**

9. The federal district court remanded the Commission's original decision on Pac-West's Petition with the direction "to reinterpret the *ISP Remand Order* as applied to the parties' interconnection agreements, and classify the instant VNXX calls, for

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<sup>10</sup> *Id.* ¶ 290.

compensation purposes, as within *or* outside a local calling area . . . .”<sup>11</sup> Since the court issued that directive, however, the FCC has revisited the *ISP Remand Order* and found in its *ISP Second Remand Order* that the transport and termination of ISP-bound traffic, like all other telecommunications traffic, is governed by the reciprocal compensation obligation in Section 251(b)(5), regardless of whether it is “local” or interexchange in nature, except to the extent excluded by Section 251(g).<sup>12</sup> The FCC, therefore, has rendered the district court’s direction moot, and the Commission should conclude that VNXX traffic terminated to ISPs is Section 251(b)(5) traffic subject to the compensation obligations in the ISP-Bound Traffic Amendment to the parties’ ICA.

10. On November 5, 2008, the FCC issued its long-awaited order on remand from the D.C. Circuit’s reversal of the *ISP Remand Order*. The FCC adhered to its determination in the *ISP Remand Order* that the reciprocal compensation obligations in Section 251(b)(5) apply not just to “local” traffic but to all telecommunications traffic exchanged with local exchange carriers (“LECs”) unless excluded by Section 251(g).<sup>13</sup> The FCC, however, altered its prior rationale for exercising jurisdiction over ISP-bound traffic in the *ISP Remand Order* and concluded in its latest order that ISP-bound traffic is not excluded from Section 251(b)(5) by Section 251(g):

Here, however, the D.C. Circuit has held that ISP-bound traffic did not fall within the section 251(g) carve out from section 251(b)(5) as “there had been *no* pre-Act obligation relating to intercarrier compensation for ISP-

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<sup>11</sup> *Qwest v. WUTC*, 484 F. Supp. 2d at 1177.

<sup>12</sup> *In re High-Cost Universal Service Support, et al.*, WC Docket No. 05-337, *et al.*, FCC 08-262, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking (rel. Nov. 5, 2008) (“*ISP Second Remand Order*”).

<sup>13</sup> *Id.* ¶¶ 9-16.

bound traffic.” As a result, we find that ISP-bound traffic falls within the scope of section 251(b)(5).<sup>14</sup>

11. The FCC’s conclusion that ISP-bound traffic is governed by Section 251(b)(5) means that rather than determining whether a call to an ISP is originated and terminated within a local calling area, the inquiry under the *ISP Remand Order* as now justified by the *ISP Second Remand Order* is whether Section 251(g) excludes that call from reciprocal compensation. With respect to calls made to ISPs in Washington, the result of this inquiry is that all such traffic not excluded under Section 251(g) is subject to the compensation established by the FCC for ISP-bound traffic as incorporated into the ICA between Pac-West and Qwest through the ISP-Bound Traffic Amendment.

12. Section 251(g) provides, in relevant part, that each LEC shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 . . . .

The D.C. Circuit’s decision reversing the *ISP Remand Order* illustrates the application of this statutory provision. That court concluded that Section 251(g) cannot be interpreted to exclude ISP-bound traffic from Section 251(b)(5) because there was “no pre-Act obligation relating to intercarrier compensation for ISP-bound traffic.”<sup>15</sup> The court further buttressed this conclusion by observing that this section “speaks only of services

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<sup>14</sup> *Id.* ¶ 16 (quoting *Worldcom, Inc. v. FCC*, 288 F.3d 429, 433 (D.C. Cir. 2002)) (emphasis in original).

<sup>15</sup> *Worldcom, Inc. v. FCC*, 288 F.3d 429, 433 (D.C. Cir. 2002) (emphasis in original).

provided ‘to interexchange carriers and information service providers’; LECs’ services to other LECs, even if en route to an ISP, are not ‘to’ either an IXC or to an ISP.”<sup>16</sup>

13. The same conclusion results from applying Section 251(g) to VNXX traffic bound for ISPs under the terms of the ICA and applicable law. There was no pre-Act obligation in Washington relating to intercarrier compensation for traffic bound to ISPs who subscribe to VNXX service. Indeed, VNXX service did not even exist in this state when the Act was passed. FX service – which the Commission has found is functionally indistinguishable from VNXX service – existed in Washington before February 1996 but was not subject to access charge compensation. As the Commission observed, the “Commission historically has treated FX traffic as an exception to such charges.”<sup>17</sup> Since the Act was passed, Section 251(b)(5) has governed calls from one LEC’s customer who is physically located in a local calling area to another LEC’s FX or comparable service customer who subscribes to local service in that same area but who is physically located outside that area, and the LEC serving the “foreign” service subscriber receives reciprocal compensation for terminating those calls. Such traffic, moreover, is exchanged between LECs in Washington, and thus Section 251(g) also does not apply to Pac-West’s termination of calls from Qwest customers to Pac-West’s VNXX subscribers, even when such subscribers are ISPs, because Pac-West is not providing this service “to” an interexchange carrier (“IXC”) or an information service provider.

14. The Commission’s conclusion in the VNXX Order that VNXX and FX are interexchange services does not alter the results of this analysis. The FCC expressly rejected arguments that Section 251(b)(5) applies only to “local” traffic, concluding that

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<sup>16</sup> *Id.* at 433-434.

<sup>17</sup> VNXX Order ¶ 134.



“the transport and termination of *all* telecommunications exchanged with LECs is subject to the reciprocal compensation regime in sections 251(b)(5) and 252(d)(2).”<sup>18</sup> Indeed, the FCC characterized ISP-bound calls as “interstate, *interexchange* traffic,”<sup>19</sup> even when those calls originate and terminate within the same local calling area. Again, the dispositive inquiry is whether Section 251(g) excludes the traffic from the reciprocal compensation obligations of Section 251(b)(5). Transport and termination of VNXX calls to ISPs was not part of the access charge regime in Washington when the Act was passed, is not provided “to” IXC (or information service providers) in this state, and thus is included in the ISP-bound traffic addressed by the FCC’s *ISP Remand Order* and *ISP Second Remand Order*.

15. The ISP Bound Traffic Amendment to the ICA between Pac-West and Qwest governs compensation for ISP-bound traffic. The amendment provides that “‘ISP-bound’ is as described by the FCC in its [*ISP Remand Order*].”<sup>20</sup> The FCC’s *ISP Second Remand Order* did not modify that description but found that it applies to all traffic bound for ISPs unless excluded by Section 251(g). Section 251(g) does not exclude VNXX calls to ISPs in Washington. Accordingly, the ICA requires Qwest to compensate Pac-West for terminating such traffic at the rates specified in the ISP-Bound Traffic Amendment.

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<sup>18</sup> *ISP Second Remand Order* ¶ 15 (emphasis added).

<sup>19</sup> *Id.* ¶ 6 (emphasis added).

<sup>20</sup> ISP-Bound Traffic Amendment § 1.4.

**B. The ICA Requires Qwest to Compensate Pac-West for Terminating EAS/Local Traffic, Including FX/VNXX Traffic.**

16. The ISP-Bound Traffic Amendment does not contain the only terms under which Qwest is obligated to compensate Pac-West for terminating calls that Qwest customers make to Pac-West subscribers. As Pac-West alleged in its Petition, the parties' ICA requires both parties to compensate each other for terminating "EAS/Local Traffic," which includes FX/VNXX traffic. If the Commission determines that compensation for terminating the VNXX traffic at issue here is not governed by the ISP-Bound Traffic Amendment, therefore, the ICA requires Qwest to compensate Pac-West for terminating that traffic as EAS/Local Traffic.

17. As defined in the ICA, "'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 [Qwest's] then current EAS/local serving areas, as determined by the Commission."<sup>21</sup> The ICA requires that "Exchange Service (EAS/Local) traffic will be terminated as Local Interconnection Service (LIS),"<sup>22</sup> and "per minute of use call termination rates as described in Part H of this Agreement will apply reciprocally for the termination of Exchange Service (EAS/Local) traffic."<sup>23</sup> Pac-West and Qwest, therefore, have agreed to reciprocal compensation for all EAS/Local Traffic as the ICA defines such calls.

18. The ICA's definition of EAS/Local Traffic includes FX/VNXX traffic. That definition does not contain any reference to the physical location of the parties to a call,

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<sup>21</sup> Pac-West ICA § (A)2.19.

<sup>22</sup> Pac-West ICA § (C)2.2.1.1.

<sup>23</sup> Pac-West ICA § (C)2.3.4.1.1.

much less require those parties to be resident within the same local calling area. Nor is there any requirement that origination and termination of the calls occur “within” the local calling area. The ICA requires only that the call be originated and terminated “as defined in accordance with [Qwest’s] then current EAS/local serving areas.” Effectively, this language means that if a call is “defined” to be part of a local calling area as established by Qwest and determined by the Commission, that call is “EAS/Local Traffic” under the ICA. The ISP-Bound Traffic Amendment further clarifies that this term is synonymous with traffic governed by Section 251(b)(5) by providing that “the Parties agree to exchange all EAS/Local (§251(b)(5)) traffic at the state ordered reciprocal compensation rate.”<sup>24</sup>

19. The FCC has concluded that “the transport and termination of all telecommunications exchanged with LECs is subject to the reciprocal compensation regime in sections 251(b)(5) and 252(d)(2),”<sup>25</sup> unless excluded by Section 251(g).<sup>26</sup> As discussed above, Section 251(g) cannot be interpreted to exclude VNXX traffic in Washington from Section 251(b)(5).<sup>27</sup> By equating “EAS/Local Traffic” with Section 251(b)(5) traffic, therefore, the parties have agreed that if VNXX traffic is not “ISP-bound” as defined by the FCC, that traffic is subject to reciprocal compensation under the ICA, even though most, if not all, of that traffic is destined for Pac-West’s ISP customers.
20. Qwest’s tariffs, common industry understanding, and LECs’ implementation of their interconnection agreements in Washington are all consistent with this interpretation.

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<sup>24</sup> ISP-Bound Traffic Amendment § 2.

<sup>25</sup> *ISP Second Remand Order* ¶ 15.

<sup>26</sup> *Id.* ¶ 16.

<sup>27</sup> *See supra* ¶¶ 13-14.

A call is “defined” as part of a local calling area when it is originated by an end user in an EAS/local serving area and terminated to an FX subscriber who obtains local service in that serving area but is physically located in a different serving area.<sup>28</sup> Calls from CLEC customers to subscribers of Qwest’s FX and VNXX-like services with telephone numbers rated to the same local calling area are considered Section 251(b)(5) traffic for which the CLEC must pay Qwest reciprocal compensation to terminate, even though the Qwest subscriber is not physically located within that local calling area.<sup>29</sup> VNXX traffic is no different. The Commission has effectively agreed, finding VNXX to be functionally indistinguishable from FX service.<sup>30</sup>

21. Industry practice and the parties’ course of dealing under the ICA further support this view. Qwest and Pac-West have been operating under their ICA since February 2001 and exchanged (and compensated each other for) FX/VNXX traffic as Section 251(b)(5) (or ISP-bound) traffic for almost four years before Qwest objected to compensating Pac-West for terminating such traffic.<sup>31</sup> Similarly, Qwest conceded that it first notified interconnecting carriers of its position that VNXX traffic is not “local” or

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<sup>28</sup> See, e.g., VNXX Order ¶ 95; Qwest Response to Pac-West Request No. 5 (included in Exhibit A to Pac-West Brief in Support of Petition filed July 27, 2005, and attached to this Motion for ease of reference) (“All calls to and from other customers in the same local calling area where the FX customer purchased a connection are treated as local.”).

<sup>29</sup> See, e.g., VNXX Order ¶ 237 (refusing to require bill and keep intercarrier compensation for Qwest’s FX/VNXX services but “recognize[ing] that the VNXX compensation regime we adopt for the CLECs may also equitably apply to Qwest’s FX and VNXX-like services”).

<sup>30</sup> VNXX Order ¶ 103.

<sup>31</sup> Affidavit of Ethan Sprague (attached to Pac-West Petition) ¶ 11.

“ISP-bound” traffic on January 25, 2005, and first began to withhold compensation for what Qwest considered VNXX traffic at that same time.<sup>32</sup>

22. “Trade usage and course of dealing are relevant to interpreting a contract and determining a contract’s terms. Ambiguity is not required before evidence of trade usage or course of dealing can be used to ascertain the terms of a contract.”<sup>33</sup> The Washington Supreme Court recently determined under comparable circumstances to those presented here that trade usage and a course of dealing between parties to a contract had been established that was incorporated into the parties’ agreement.<sup>34</sup> Pac-West and Qwest thus have demonstrated, by their conduct and course of dealing, as well as the language of the agreement, that they intended when executing the agreement to include FX/VNXX traffic within the definition of EAS/Local Traffic. Consistent with the FCC’s interpretation of Section 251(b)(5) and with industry practice in general and the parties’ implementation of their agreement in particular, the VNXX traffic at issue here, like calls to Qwest’s FX and VNXX-like service subscribers, is “EAS/Local Traffic” as the ICA defines that term.

23. The fact that VNXX traffic is destined for ISPs does not alter this conclusion. There is no basis under the ICA, other than the ISP-Bound Traffic Amendment, to treat traffic bound for ISPs who subscribe to VNXX service any differently than traffic bound to any other VNXX service subscribers. The ICA, however, includes a provision that excludes traffic from the parties’ reciprocal compensation obligations if the FCC has

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<sup>32</sup> Qwest Response to Pac-West Request No.23 (included in Exhibit A to Pac-West Brief in Support of Petition filed July 27, 2005, and attached to this Motion for ease of reference).

<sup>33</sup> *Puget Sound Financial, L.L.C. v. Unisearch, Inc.*, 146 Wa. 2d 428, 434, 47 P.2d 940 (2002) (citation omitted).

<sup>34</sup> *Id.* at 436-36 (finding that “after 48 transactions, a course of dealing was clearly established” that was incorporated into the parties’ contract for services).

determined that traffic is jurisdictionally interstate because it is delivered to enhanced service providers:

As set forth above, the Parties agree that reciprocal compensation only applies to Local Traffic and further agree that the FCC has determined that traffic originated by either Party (the “Originating Party”) and delivered to the other Party, which in turn delivers the traffic to an enhanced service provider (the “Delivering Party”) is primarily interstate in nature. Consequently, the Delivering Party must identify which, if any, of this traffic is Local Traffic. The Originating Party will only pay reciprocal compensation for the traffic the Delivering Party has substantiated to be Local Traffic. In the absence of such substantiation, such traffic shall be presumed to be interstate.<sup>35</sup>

24. This ICA provision is inapplicable to the traffic at issue here, even if the ISP-Bound Traffic Amendment does not apply to VNXX calls. The federal district court interpreted the *ISP Remand Order* to apply only to traffic originated and terminated within a local calling area.<sup>36</sup> The Commission subsequently concluded that VNXX traffic bound for ISPs is *intrastate* traffic, at least to the extent that the calling party and the ISP are both physically located in Washington. The parties’ recognition in the ICA that the FCC has determined that calls to enhanced service providers are jurisdictionally interstate, therefore, does not, and cannot, apply to ISP-bound VNXX traffic when both the federal courts and the Commission have found that the FCC has made no such determination.<sup>37</sup> Accordingly, the ICA requires the payment of reciprocal compensation for all VNXX traffic, including calls bound for ISPs.

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<sup>35</sup> Pac-West ICA § (C)2.3.4.1.3.

<sup>36</sup> See, e.g., *Qwest v. WUTC*, 484 F. Supp. 2d at 1175 (concluding that the FCC “has never directly addressed the issue of ISP-bound calls that cross local-exchange areas”) (quoting *Global NAPs, Inc. v. Verizon New England, Inc.*, 454 F.3d 91, 95 (2nd Cir. 2006)).

<sup>37</sup> Indeed, if the VNXX traffic at issue here were jurisdictionally interstate, the ISP-Bound Traffic Amendment would govern compensation, as discussed in Section A above.

**C. Pac-West and Qwest Must Amend their ICA in Writing to Reflect Any Change in Compensation Established by the Commission.**

25. The Commission concluded in the VNXX Order that VNXX traffic is not “local” but is interexchange traffic that, like FX traffic, is treated as an exception to the application of intrastate access charge compensation and is subject to bill and keep compensation.<sup>38</sup> The Commission reached this conclusion, however, before the FCC found that all traffic exchanged between LECs, including traffic bound for ISPs, whether “local” or interexchange, is subject to Section 251(b)(5) unless excluded by Section 251(g), rendering the continued viability of the Commission’s conclusion open to question.

26. Even if the Commission’s determination remains viable, however, Pac-West and Qwest agreed to a compensation scheme that is different from the one the Commission established. As the Commission recognized, its decision represents a change in the law<sup>39</sup> – or to use the term in the ICA, a change to the “Existing Rules,” which are defined as “the existing state of the law, rules, regulations and interpretations thereof” on which the ICA was based.<sup>40</sup> Under these circumstances, the Commission’s change to the applicable compensation for VNXX ISP-bound traffic is not self-effectuating; rather, the ICA requires that the parties execute a written amendment to incorporate that change:

To the extent that the Existing Rules are changed, vacated, dismissed, stayed, or modified, then this Agreement and all contracts adopting all or part of this Agreement shall be amended to reflect such modification or change of the Existing Rules. Where the Parties fail to agree upon such an amendment within sixty (60) days from the effective date of the

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<sup>38</sup> VNXX Order ¶ 134.

<sup>39</sup> *Id.* ¶¶ 292-93.

<sup>40</sup> ISP-Bound Traffic Amendment § 6.

modification or change of the Existing Rules, it shall be resolved in accordance with the Dispute Resolution provision of this Agreement.<sup>41</sup>

The ICA further provides, “Neither the Agreement nor this Amendment may be further amended or altered except by written instrument executed by an authorized representative of both Parties.”<sup>42</sup> Unless and until the parties modify the ICA in writing, therefore, Qwest remains liable for reciprocal compensation for the VNXX ISP-bound traffic it has sent to Pac-West for termination if such traffic is not governed by the compensation requirements in the ISP-Bound Traffic Amendment.

27. The ICA between Pac-West and Qwest stands in sharp contrast to the agreement between Broadwing and Qwest that the Commission interpreted in the VNXX Order. Unlike the change of law provision in that agreement, the ICA between Pac-West and Qwest has no language contemplating “any true up that may be required”<sup>43</sup> or otherwise demonstrating an intent to apply retroactively any change to the compensation required under the agreement. To the contrary, Pac-West and Qwest expressly agreed that any change to Existing Rules would be reflected in a written amendment to the ICA and would apply only on a prospective basis. Accordingly, the Commission-mandated compensation mechanism for VNXX traffic, including VNXX ISP-bound traffic, does not apply to the disputed traffic at issue in this docket and will apply to future traffic Qwest delivers to Pac-West, if at all, only when and as Pac-West and Qwest modify the ICA in writing to reflect such compensation.

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.* § 7.

<sup>43</sup> VNXX Order ¶¶ 270 & 292.



**D. Further Evidentiary Proceedings Are Necessary to Determine the Amount of VNXX Traffic that Qwest Has Delivered to Pac-West for Termination if the Commission Requires Different Compensation for VNXX Traffic.**

28. If ISP-bound traffic does not include VNXX traffic bound for ISPs, Pac-West asserts that it is entitled to reciprocal compensation for VNXX traffic under the ICA. Qwest, no doubt, will claim that it is not required to pay Pac-West any compensation for such traffic. Regardless of which party's position the Commission adopts, the Commission will need to determine the portion of traffic that Qwest delivered to Pac-West for termination is VNXX traffic if such traffic is not subject to the rates in the ISP-Bound Traffic Amendment. The Commission cannot make such a determination without an evidentiary basis, which currently does not exist.
29. Qwest has made its own calculations of the amount of traffic it has delivered to Pac-West for termination to VNXX subscribers, but such calculations are nothing more than guesswork. Even Qwest concedes that it does not know the physical location of Pac-West's customers, including the modems or servers used by the ISPs to whom Pac-West provides local service. The disputed amounts that Qwest paid because of the Commission's original order in this docket (and withheld since the federal district court's decision), therefore, do not accurately reflect the amount of VNXX traffic that Pac-West terminated.
30. The Commission reached its prior decision based on its interpretation of the *ISP Remand Order* to extend to all traffic bound for ISPs, regardless of the physical location of the parties to the calls. Accordingly, the Commission granted Pac-West's Petition as a matter of law, without the need to make a factual determination of how much of that traffic was VNXX. If the Commission determines that VNXX traffic is subject to different compensation than the rates applicable to ISP-bound traffic, therefore, Pac-West

is entitled to present evidence of the amount of such traffic Pac-West terminated. After ruling on the parties' cross-motions for summary determination, the Commission should conduct subsequent proceedings in this docket to allow Pac-West to make that presentation.

### REQUEST FOR RELIEF

31. WHEREFORE, Pac-West requests the following relief:

A. That the Commission find under the FCC's *ISP Second Remand Order* that VNXX traffic delivered to ISPs in Washington is Section 251(b)(5) traffic subject to the compensation prescribed by the FCC as incorporated into the ISP-Bound Traffic Amendment to the ICA between Pac-West and Qwest; or

B. Alternatively, that the Commission conclude that VNXX traffic is subject to reciprocal compensation as EAS/Local Traffic under the ICA between Qwest and Pac-West, at least until such time as that ICA is amended to reflect the compensation required by the Commission's VNXX Order; and

C. That the Commission conduct evidentiary proceedings to determine the amount of VNXX traffic that Pac-West has terminated if the Commission determines that VNXX traffic is subject to a different form of compensation than other types of ISP-bound traffic; and

D. Such other or further relief as the Commission finds fair, just, reasonable, and sufficient.

Dated this 9th day of February 2009.

**PAC-WEST TELECOMM, INC.**

By: \_\_\_\_\_

Gregory J. Kopta