

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

PAC-WEST TELECOMM, INC.  
Petitioner,

v.

QWEST CORPORATION,  
Respondent.

DOCKET NO. UT-053036

DOCKET NO. UT-053039

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LEVEL 3 COMMUNICATIONS, LLC,  
Petitioner,

v.

QWEST CORPORATION,  
Respondent.

**QWEST CORPORATION'S RESPONSE  
TO PAC-WEST'S MOTION FOR  
SUMMARY DETERMINATION**

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## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ARGUMENT .....	2
A.	Pac-West’s Motion Must be Denied because the Washington Federal Court has Already Considered and Rejected Pac-West’s Arguments .....	3
B.	The <i>ISP Mandamus Order</i> does not Make VNXX ISP Traffic Compensable under the ISP-Bound Traffic Amendment .....	5
C.	The Underlying ICA Between Qwest and Pac-West does not Require Qwest to Pay Inter-carrier Compensation on VNXX ISP Traffic .....	10
D.	Pac-West’s Claim that the ICA Must be Amended is Based on the False Premise that VNXX ISP Traffic is Compensable .....	15
E.	An Evidentiary Hearing would be Required Only to Deal with Very Narrow Issues.....	16
III.	CONCLUSION .....	16

1 Qwest Corporation (“Qwest”) submits the following response to the motion for summary  
determination filed by Pac-West Telecomm, Inc. (“Pac-West”). The Washington Utilities and  
Transportation Commission (the “Commission”) should deny Pac-West’s motion.

## I. INTRODUCTION

2 This proceeding is before the Commission as a result of the remand by the United States  
District Court for the Western District Court of Washington (the “District Court”).<sup>1</sup> In *Qwest*  
*v. Washington State Util. & Transp. Comm’n*, the District Court addressed whether the *ISP*  
*Remand Order*<sup>2</sup> required Qwest to pay intercarrier compensation to Pac-West on calls  
delivered to an ISP located outside of the caller’s local calling area (“LCA”). The scope of the  
*ISP Remand Order* was at issue because Qwest and Pac-West incorporated it into their inter-  
connection agreement (“ICA”) through what Pac-West refers to as the “ISP-Bound Traffic  
Amendment.” In *Qwest*, the District Court ruled that Qwest was not required to pay inter-  
carrier compensation on calls that originated in one LCA and terminated in another. The  
District Court then directed the Commission on remand “to classify the instant VNXX calls for  
compensation purposes, as within or outside a local calling area.”<sup>3</sup>

3 In its motion for summary determination, Pac-West tries to recast the issue before the  
Commission. According to Pac-West, the remand instructions from the District Court are now  
moot as a result of the FCC’s recent *ISP Mandamus Order*.<sup>4</sup> (Pac-West Motion ¶ 9). Pac-  
West also argues that the Commission should reinterpret the ISP-Bound Traffic Amendment as

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<sup>1</sup> *Qwest Corp. v. Washington State Util. and Transp. Comm’n*, 484 F.Supp.2d 1160 (W.D. Wash. 2007) (“*Qwest*”).

<sup>2</sup> 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*”).

<sup>3</sup> 484 F.Supp.2d at 1177.

<sup>4</sup> Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of High-Cost Universal Service Support: Federal-State Joint Board on Universal Service; Lifeline and Link Up; Universal Service Contribution Methodology; Numbering Resource Optimization; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Developing a Unified Intercarrier Compensation Regime; Intercarrier Compensation for ISP-Bound Traffic; IP-Enabled Services*, 2008 FCC LEXIS 7792, 2008 WL 4821547 (Rel. November 5, 2008) (“*ISP Mandamus Order*”). Pac-West refers to this order as the “*ISP Second Remand Order*.”

if the *ISP Mandamus Order* is now part of the Amendment and find that Pac-West is retroactively entitled to compensation from Qwest on VNXX traffic. (Pac-West Motion ¶¶ 10-15). In the alternative, Pac-West argues that the Commission should find VNXX traffic compensable as “EAS/Local” traffic pursuant to the terms of the Parties’ underlying ICA. (Pac-West Motion ¶¶ 16-27).

4 Pac-West is wrong both as to the legal effect of the *ISP Mandamus Order* and as to its interpretations of the ISP-Bound Traffic Amendment and the underlying ICA. The District Court has already considered and rejected Pac-West’s arguments in a decision that is binding upon Pac-West in this remand proceeding. Under both the *ISP Remand Order* and the *ISP Mandamus Order*, VNXX ISP traffic is interexchange traffic that was subject to pre-Act access charge rules under both federal and state law. Thus, the ISP-Bound Traffic Amendment, which incorporates the *ISP Remand Order* (but not the *ISP Mandamus Order*) does not require Qwest to pay reciprocal compensation on VNXX ISP traffic. Furthermore, VNXX traffic does not constitute “EAS/Local” traffic under the Parties’ ICA. Accordingly, Qwest has no obligation to pay intercarrier compensation to Pac-West for the termination of VNXX ISP traffic.

## II. ARGUMENT

5 Under Washington law, the standard for a summary judgment (or summary determination) is well established. Specifically, the Commission treats “all facts and reasonable inferences from the facts in a light most favorable to the nonmoving party.” *Homestreet, Inc. v. State Dept. of Revenue*, 139 Wash. App. 827, 162 P.3d 458, 464 (Wash. App. 2007). Thus, in deciding Pac-West’s motion, the Commission must resolve all disputed issues of fact in Qwest’s favor and all inferences from them should be treated in the light most favorable to Qwest.

6 While this is a remand proceeding, the underlying action was a petition for enforcement of the ICA, with Pac-West as the petitioner. As such, Pac-West bears the burden of proof to demon-

strate that it is entitled to compensation under the terms of the ICA. Pac-West has failed altogether to meet this burden. Pac-West has failed to demonstrate that either the ISP-bound Traffic Amendment or its underlying ICA requires Qwest to pay intercarrier compensation on VNXX ISP traffic. Furthermore, Pac-West has not presented evidence that the traffic in dispute originated and terminated in the same LCA, and has not even presented evidence that it terminated the traffic in dispute in this proceeding. Pac-West's motion must be denied.

**A. Pac-West's Motion Must be Denied because the Washington Federal Court has Already Considered and Rejected Pac-West's Arguments**

7 The District Court considered and rejected Pac-West's arguments in *Qwest*. The District Court held that Qwest's obligation to pay intercarrier compensation on VNXX calls under the *ISP Remand Order* hinged solely on whether VNXX calls are "within or outside of a local calling area." The Court stated:

Because the *ISP Remand Order* does not require Qwest to pay intercarrier compensation on calls placed to ISPs located outside the caller's local calling area—such as VNXX calls (unless the WUTC decides to define this traffic as within a local calling area)—Qwest is not under the WUTC's present analysis contractually obligated to pay Pac-West or Level 3 the interim compensation rates established by the FCC.<sup>5</sup>

8 Under the *ISP Remand Order*, which is the standard for compensation under the ISP-Bound Traffic Amendment, calls to ISPs are governed by one of two schemes: (1) the interim rate regime established by the *ISP Remand Order*; or (2) the pre-Act access charge regime.<sup>6</sup> The District Court stated:

Although the FCC did reevaluate its use of the term "local" in the *ISP Remand Order*, it did not eliminate the distinction between "local" and "interexchange" traffic and the compensation regimes that apply to each—namely reciprocal compensation and access charges. Indeed, as the First Circuit [in *Global Naps I*] recently explained, the *ISP Remand Order* itself "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

<sup>5</sup> *Qwest*, 484 F.Supp.2d at 1176-77.

<sup>6</sup> *Id.* at 1170.

access services... in order to connect calls that travel to points—both interstate and intrastate—beyond the local exchange” (citations omitted).<sup>7</sup>

The District Court recognized that interpreting the term “ISP-bound traffic” as broadly as Pac-West advocates would undermine the very policy considerations that gave rise to the *ISP*

*Remand Order*:

[I]nterpreting the ISP Remand Order narrowly—e.g., as not addressing VNXX traffic, and as leaving intact the access charge system for inter-exchange ISP-bound traffic—makes sense as a policy matter because the opposite approach, urged by the defendants, would likely *reverse* the direction in which payments for this traffic is ordinarily made. The defendant’s approach “would create new opportunities for regulatory arbitrage, by requiring [Qwest] to pay compensation on calls to ISPs, including...calls to ISPs...for which [i]t had previously received compensation under established rules.” (emphasis in the original).<sup>8</sup>

The policy considerations underlying the rules in the *ISP Remand Order* were reaffirmed in the *ISP Mandamus Order*.<sup>9</sup>

9 Moreover, the District Court considered and rejected the arguments that Pac-West now makes concerning the scope of Section 251(g) because Pac-West made the same arguments to the District Court. Pac-West argued that all ISP-bound calls were subject to reciprocal compensation and that Section 251(g) did not carve VNXX calls out of Section 251(b)(5). Pac-West claimed that there were no pre-Act intercarrier compensation rules with respect to “ISP-bound traffic.” And Pac-West asserted that VNXX traffic did not involve a service provided to “interexchange carriers” (“IXCs”) or “information service providers.”<sup>10</sup>

10 Pac-West chose not to appeal the *Qwest* decision and is thus bound by the Court’s determinations under the doctrines of collateral estoppel and law of the case. Collateral estoppel bars the relitigation of issues of law and issues of fact adjudicated in prior litigation between the same

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *ISP Mandamus Order* ¶¶ 24-27.

<sup>10</sup> Pac-West Brief to Federal Court, at 15-18, attached as Exhibit A.

parties.<sup>11</sup> Law of the case precludes reexamination of an issue previously decided by a higher court.<sup>12</sup>

**B. The *ISP Mandamus Order* does not Make VNXX ISP Traffic Compensable under the ISP-Bound Traffic Amendment**

11 In its motion, Pac-West argues that under the *ISP Mandamus Order* the only ISP traffic that is not subject to reciprocal compensation is ISP traffic that is carved out of Section 251(b)(5) by Section 251(g). (Pac-West Motion ¶¶ 9, 11). Pac-West then asserts that there “was no pre-Act obligation *in Washington* relating to intercarrier compensation for traffic bound for ISPs who subscribe to VNXX service.” (Pac-West Motion ¶ 13). Pac-West contends that VNXX and FX services have been found by the Commission to be functionally indistinguishable and that FX services were not subject to access charges prior to the Act in Washington. Finally, Pac-West argues that FX traffic is exchanged between LECs and that Pac-West does not provide service to an IXC when it terminates calls to VNXX subscribers. (Pac-West Motion ¶¶ 13-14). Based on these assertions, Pac-West concludes that ISP-Bound Traffic Amendment to the ICA (Exhibit D to the Brotherson Non-Confidential Affidavit) requires Qwest to pay intercarrier compensation to Pac-West on VNXX ISP Traffic. (Pac-West Motion ¶ 15).

12 Each of Pac-West’s contentions is erroneous. First, the carve-out in Section 251(g) does not require that access charges apply to the traffic at issue. The carve-out in Section 251(g) requires only that the “traffic” be encompassed by pre-Act regulations, orders or policies preserved by Section 251(g).<sup>13</sup> Section 251(g) preserves the pre-Act intercarrier compensation rules that apply to interexchange traffic, including rules that exempt traffic from access charges. By its terms, Section 251(g) preserves “interconnection restrictions and obligations (including receipt of compensation)” until they are “explicitly superseded by regulations

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<sup>11</sup> *Steen v. John Hancock Mutual Life Ins. Co.*, 106 F.3d 904, 910 (9<sup>th</sup> Cir. 1997).

<sup>12</sup> *In re: Wiersma*, 483 F.3d 933, 941 (9<sup>th</sup> Cir. 2007).

<sup>13</sup> *ISP Mandamus Order* ¶ 16.

prescribed by the [FCC].”<sup>14</sup>

13 On this point, Qwest incorporates its response to Level 3’s motion for summary determination. To summarize, under pre-Act rules, all interstate interexchange traffic was subject to access charges unless exempted by the FCC.<sup>15</sup> Enhanced service providers (“ESPs”), including ISPs, were (and remain) treated as end users for purposes of applying access charges.<sup>16</sup> Access charges applied at the open end of interstate FX services—that is, at the end from which callers place calls.<sup>17</sup> Finally, when two LECs provide originating access to an IXC (which in this case involves Pac-West doubling as a LEC and an IXC), the two LECs jointly bill the carrier who provides the interexchange service.<sup>18</sup>

14 Pac-West’s assertion that there were no pre-Act intercarrier compensation rules governing VNXX traffic in Washington is wrong. VNXX ISP traffic is interexchange traffic, and access charges apply to both inter and intrastate interexchange traffic under the pre-Act rules. For the purposes of analyzing whether compensation is due, VNXX ISP traffic is jurisdictionally interstate for the same reasons that calls placed to an ISP located in the caller’s LCA (*i.e.*, non-VNXX) are jurisdictionally interstate. The *ISP Declaratory Order*, the *ISP Remand Order*, and the *ISP Mandamus Order* all hold that calls delivered to an ISP located in the caller’s LCA are jurisdictionally interstate on an end-to-end basis because ISP traffic is delivered to websites throughout the United States and the rest of the world. When this end-to-end analysis is applied to VNXX ISP traffic, the same conclusion follows. A call to an ISP located outside the caller’s LCA is routed to websites throughout the world in the same way that a call to an

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<sup>14</sup> 47 U.S.C. § 251(g).

<sup>15</sup> 47 C.F.R. § 69.5(b).

<sup>16</sup> *ISP Remand Order*, ¶11.

<sup>17</sup> *In the Matter of Amendment of Part 69 of the Commission’s Rules Relating to Private Networks and Private Line Users of the Local Exchange*, 2 FCC Rcd 7441 ¶ 12 (1987). (“[O]ur access charge orders subject the open end of FX . . . to the switched access charges paid by MTS/WATS *equivalent services*.”) (Emphasis added).

<sup>18</sup> Under the pre-Act JPSA rules, the second originating LEC in the traffic flow does not charge the first originating LEC. This rule is reflected in Part (C)(3) of the Pac-West/Qwest ICA, specifically paragraph (C)3.3: “USW and [Pac-West] will each render a separate bill to the IXC, using the multiple bill, multiple tariff option.”



ISP located within the caller's LCA would be.<sup>19</sup>

15 In the *VNXX Final Order*, the Commission concluded that it was appropriate to “classify” VNXX ISP traffic as intrastate interexchange traffic.<sup>20</sup> This conclusion is not a statement that VNXX ISP traffic is “jurisdictionally” intrastate. It is a statement that reflects the application of the FCC’s ESP Exemption. Under the FCC’s rules, an ISP is treated as an end user for purposes of applying access charges. Thus, if the caller and the ISP are both located in the same state, the FCC’s ESP Exemption rule requires the intrastate intercarrier compensation rules to be applied. During the hearing in the VNXX Complaint proceeding, the Commission was presented with a fact pattern that assumed that calls to ISPs originated in Washington and were delivered to an ISP modem/server in Washington. Thus, it was appropriate for the Commission to classify the calls in question in that docket as intrastate, interexchange traffic.

16 Pac-West is also incorrect when it asserts that Section 251(g) does not carve out VNXX traffic from Section 251(b)(5) because FX services have been historically exempt from access charges in Washington. (Pac-West Motion ¶ 13). Under the *ISP Remand Order* and Section 251(g), the traffic need only have been subject to a Pre-Act intercarrier compensation rule. The historical rule in Washington was that access charges applied uniformly to carriers acting as IXCs.<sup>21</sup> Even if the exemption for intrastate FX applies to VNXX, the traffic would nonetheless have been subject to a pre-Act intercarrier compensation rule and would thus be carved out from the scope of Section 251(b)(5). It is just that the rule was an exemption from access charges, not a rule that required the payment of access charges.

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<sup>19</sup> *ISP Declaratory Order* ¶¶ 1, 6, 11, 13, 18-20; *ISP Remand Order* ¶ 1 (“we reaffirm our previous conclusion that traffic delivered to an ISP is *predominantly interstate access* traffic subject to section 201 of the Act, and we establish an appropriate cost recovery mechanism for the exchange of such traffic.”); *ISP Mandamus Order* ¶¶ 2, 4, and 17.

<sup>20</sup> *Qwest Corporation v. Level 3 Communications LLC, et al.*, Docket No. UT-063038, Order No. 10 ¶ 146 (July 16, 2008) (“*VNXX Final Order*”). In the *VNXX Final Order*, the Commission limited itself to traffic that was within its jurisdiction. Thus, it classified VNXX in Washington as intrastate interexchange traffic. The Commission did not hold that all VNXX traffic (or VNXX ISP traffic specifically) is jurisdictionally intrastate.

<sup>21</sup> See e.g., Eighteenth Supplemental Order, *Washington Util. & Transp. Comm’n v. Pacific Northwest Bell*, Cause No. U-85-23, 1986 WL 215085 \*95 (Findings 11 & 17) (1986) (access charges to be applied uniformly to all IXCs; LECs shall file intrastate traffic sensitive access charges).

17 Pac-West's argument that it is not providing a service to an IXC is also wrong. (Pac-West Motion ¶ 13). Indeed, Pac-West has completely misframed the issue. The question is not whether the traffic is exchanged between carriers who are both LECs. The issue is whether one or both of the LECs are providing service to an IXC for the traffic in question. VNXX traffic is carved out of Section 251(b)(5) by Section 251(g) because Qwest is providing a service (originating access) to Pac-West who is acting as an IXC. The FCC has recently ruled that the "nature of the traffic," not what a carrier calls the traffic, determines if a carrier is acting as an IXC.<sup>22</sup>

18 When Pac-West provides a VNXX arrangement to its ISP customers, it combines access and transport to create a jurisdictionally interstate interexchange service.<sup>23</sup> Pac-West engages in VNXX so that customers of the ISPs that Pac-West serves do not have to place toll calls in order to reach their ISP.<sup>24</sup> As the Commission has ruled, VNXX traffic is interexchange traffic because it involves calls that are placed by a caller in one LCA and delivered to an ISP modem/ server (or POP) located in a different LCA. Thus, VNXX calls are subject to applicable pre-Act access charge rules, regardless of the dialing pattern for these calls.<sup>25</sup>

19 Pac-West has established seven POIs in Washington.<sup>26</sup> The vast majority of the VNXX traffic at issue in this proceeding was transported by Pac-West from these POIs, often across LATA

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<sup>22</sup> *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd 7457, ¶ 19, fn. 80 (2004) ("IP-in-the-Middle" decision) ("Depending upon the *nature of the traffic*, carriers such as commercial mobile radio service (CMRS) providers, incumbent LECs, and competitive LECs may qualify as interexchange carriers for purposes of [Rule 69.5(b)].") (Emphasis added).

<sup>23</sup> *Petition of Global Naps, Inc. for Arbitration Pursuant to §252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon New England*, Docket No. 6742, 2002 Vt. PUC LEXIS 272, at \*41-\*42 (Vt. PSB 2002)("In effect, a CLEC using VNXX offers the equivalent of incoming 1-800 service....").

<sup>24</sup> *Global NAPs II*, 454 F.3d at 102-03.

<sup>25</sup> *See, e.g., Order Ruling on Arbitration, In re Petition of MCI Metro Transmission Services, LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with Horry Telephone Cooperative*, 2006 S.C. PUC LEXIS 2, at \*35 (S.C. PUC, January 11, 2006) ("The Commission's and the FCC's current intercarrier compensation rules for wireline calls clearly exclude interexchange calls from both reciprocal compensation and ISP intercarrier compensation. These calls are subject to access charges. This is also the case for Virtual NXX calls, which are no different from standard dialed long distance toll or 1-800 calls.")

<sup>26</sup> Response Declaration of Larry Brotherson ¶ 8.

boundaries, to Pac-West's ISP modem/server equipment, which Qwest now believes is located in Los Angeles. Further, during the period at issue in this proceeding, Qwest Corporation, the ILEC, could not transport traffic across LATA boundaries because the Section 272 separate affiliate requirement barred it from doing so.<sup>27</sup> Pac-West affirmatively alleged in its Petition in this docket that it "is authorized to provide switched and non-switched local exchange *and long distance services in Washington.*"<sup>28</sup> Thus, Pac-West is appropriately classified as an IXC when it utilizes VNXX arrangements to provide service to ISPs.<sup>29</sup>

20 Because Pac-West is an IXC, any termination function that Pac-West provides as a LEC on the terminating end is provided by Pac-West to itself in its capacity as an IXC. Pac-West does not provide this service for Qwest. Under the pre-Act intercarrier compensation rules, a terminating LEC does not charge the originating LEC (or LECs) for terminating an interexchange call. Rather, the terminating LEC charges the IXC that offers the interexchange service.<sup>30</sup>

21 Finally, Pac-West's ultimate conclusion – that the ISP-Bound Traffic Amendment requires Qwest to compensate Pac-West for VNXX ISP traffic – is also wrong. (Pac-West Motion ¶ 15). Pac-West concedes that the ISP-Bound Traffic Amendment incorporates the requirements of the *ISP Remand Order*. The District Court in *Qwest* held that the *ISP Remand Order* does not require Qwest to pay intercarrier compensation on VNXX ISP traffic if the Commission determines that VNXX traffic does not involve calls placed to an ISP located in the caller's local calling area.<sup>31</sup> The Commission has determined that VNXX calls are not local calls and thus the ISP-Bound Traffic Amendment does not require Qwest to pay Pac-West intercarrier compensation on VNXX ISP traffic.

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<sup>27</sup> *Section 272 Sunsets for Qwest Communications International Inc. in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming by Operation of Law on December 23, 2005 pursuant to Section 272(f)(1)*, 20 FCC Rcd 20396 (Rel. December 23, 2005).

<sup>28</sup> Pac-West Petition for Enforcement ¶ 1 (emphasis added).

<sup>29</sup> *IP-in-the-Middle Decision* ¶ 19, fn. 80 (2004).

<sup>30</sup> *Local Competition Order* ¶ 1034.

<sup>31</sup> *Qwest*, 484 F.Supp.2d at 1176-77.

C. **The Underlying ICA Between Qwest and Pac-West does not Require Qwest to Pay Inter-carrier Compensation on VNXX ISP Traffic**

22 In Part B of its motion, Pac-West argues that VNXX ISP Traffic constitutes “EAS/Local Traffic” and is therefore compensable pursuant to the terms of the underlying ICA between Qwest and Pac-West. (Pac-West Motion ¶¶ 8, 16, 20). In the ICA, the term “Extended Area Service (EAS)/Local Traffic” is defined to mean “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.” (¶ (A)2.19, Attachment A, Brotherson Response Declaration, emphasis added). Pac-West seizes on the phrase “defined in accordance with” in order to assert that the definition does not exclude VNXX traffic because the definition contains “no reference to the physical location of parties to the call, much less require those parties to be resident within the same local calling area.” (Pac-West Motion ¶ 18). Pac-West also says that the language does not require that EAS/Local traffic be confined to traffic “within” a LCA. (*Id.*).

23 Pac-West is simply wrong. EAS/Local Traffic is only traffic that originates and terminates in the same LCA. Pac-West’s argument violates the fundamental rule of contract construction that contract language must be interpreted according to its plain meaning<sup>32</sup> Plainly, VNXX traffic, a type of interexchange traffic, does not fall into a category that is variously described as “EAS,” “Local,” and “Exchange Service.” These terms (“EAS, Local, or Exchange Service”) are readily recognizable as telecommunications terms whose plain meaning refers to the provision of service *within* an exchange or EAS area.

24 Further, the language of the “EAS/Local” definition explicitly refers to Qwest’s tariffs. The phrase “as defined in accordance with [Qwest’s] then current EAS/local serving areas, as

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<sup>32</sup> *Mentor v. King*, 107 Wash.App. 1044, 2001 WL 898752, \*4 (2001) (“When a contract is unambiguous, courts must enforce its terms according to their plain language”), citing *Syrovoy v. Alpine Res., Inc.*, 122 Wash.2d 554, 551, 859 P.2d 51 (1993); *Erickson Paving Co. v. Yardley Drilling Co.*, 7 Wash.App. 681, 685, 502 P.2d 334, 336-37 (1972).

determined by the Commission” directly refers to the LCAs defined in Qwest’s Commission-approved tariffs (which Pac-West, through its own price list, concurs in).<sup>33</sup> Qwest’s Exchange and Network Services Tariff contains the following definitions that assist in determining the meaning of the “EAS/Local/” definition:

“Exchange” is “[a] specified *geographic* area established for the furnishing of communication service. It may consist of one or more central offices together with the associated plant used in furnishing service *within that area.*”

“Local exchange” is an “[e]xchange *in which* the customer’s *premises* are located.”

“Local service” is “[e]xchange access service furnished *between customer premises* located within the same local service area.”

“Local service area” is “[t]he area *within which* exchange access service under specific rates. The area may include one or more exchanges without the application of toll charges.” (Emphasis added).<sup>34</sup>

Pac-West’s price list also uses definitions, including a definition of “interexchange traffic,” that are consistent with those of the Qwest tariff.<sup>35</sup> All of these tariff provisions clearly demonstrate that traffic is defined geographically and that “EAS/Local” refers only to traffic that originates and terminates in the same LCA.

25 Pac-West’s arguments are inconsistent with another basic rule of construction, that “the court ascertains [the] intent [of the parties] from *reading the contract as a whole.*”<sup>36</sup> Thus, a contract

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<sup>33</sup> Pac-West’s Washington price list says that Pac-West “provides local exchange service in Washington within the service territories of Verizon and Qwest. *The Company concurs in and hereby incorporates by this reference all current and effective service territory and local exchange boundary maps filed with the [Commission] by Verizon and Qwest.*” Exhibit 518 (Docket No. UT-063038), at Original Page 13 (emphasis added). Exhibit 518 is attached as Exhibit B to the Smith Affidavit.

<sup>34</sup> WN U-40 Exchange and Network Services § 2.1, at original page 6, (emphasis added).

<sup>35</sup> Pac-West’s definitions are all consistent with Qwest’s interpretation of the language of the ICA . For example:

“‘Exchange’ means a *geographic area* established by a company for telecommunications service *within that area.*” Exhibit 518, Docket No. UT-063038, at Original Page 21 (emphasis added). Exhibit 518 is attached as Exhibit B to the Smith Affidavit that was filed with Qwest’s Motion for Summary Determination.

“‘Local calling area’ means one or more rate centers *within which* a customer can place calls without incurring long-distance (toll) charges.” *Id.* First Revised Page 22 , emphasis added.

“‘Interexchange’ means telephone calls, traffic, facilities or other items that originate in one exchange and terminate in another.” *Id.*

<sup>36</sup> *Dice v. City of Montesano*, 131 Wash.App. 675, 682, 909 P.2d 1323, 1326 (2006) (emphasis added).

provision must be read in context and in a manner that is consistent with other language of the contract. For example, Paragraph (A)1.1, the “scope of the agreement” provision, is illuminating:

“Pursuant to this negotiated *Local Interconnection Agreement* (“Agreement”), Northwest, a Competitive Local Exchange Carrier, and USW (collectively, “the Parties”) will extend certain arrangements to one *another within the geographical areas in which both Parties are providing local exchange service* at that time, and for which USW is the incumbent Local Exchange Carrier within the state of Washington for purposes of providing *local Telecommunications Services.*” (Attached as part of Exhibit A to Brotherson Response Declaration, emphasis added).

Thus, while Pac-West argues that the “EAS/Local” definition includes interexchange traffic, the provision that defines the scope of the agreement is clear that the fundamental purpose of the agreement is to allow the parties to “extend certain arrangements” so that the other party can provide “local Telecommunications Services.” Pac-West’s reading of the “EAS/Local” definition is thus directly contrary to the stated purpose of the ICA, and would essentially nullify the provisions of the ICA that deal with interexchange traffic.

26 The ICA does address “interexchange traffic,” stating that interexchange traffic will be exchanged and that the access charge regime applies to this traffic. For example, Paragraph (A)2.2, the definition of “Access Services,” states: ““Access Services refers to the Tariffed interstate and intrastate switched access and private line transport services offered for the origination and/or termination *of interexchange traffic . . .*” (Attachment A to Brotherson Response Declaration, emphasis added). It is impossible to reconcile this provision with Pac-West’s assertion that interexchange (VNXX) traffic is subject to a compensation regime that applies only to EAS/Local traffic. Pac-West’s effort to equate VNXX traffic with EAS/local traffic simply cannot withstand a broader reading of the contract between the parties.

27 Ironically, in paragraphs 19 and 20 of its motion, Pac-West asserts that the phrase “EAS/Local (§251(b)(5)) traffic” in the ISP-Bound Traffic Amendment equates “EAS/Local” traffic with “§251(b)(5)” traffic. That language actually supports Qwest’s position because it

demonstrates that the parties understood that the only traffic subject to reciprocal compensation was EAS/ Local traffic.

28 Paragraph (C)2.3.4.1.3 of the ICA also refutes Pac-West’s argument that VNXX ISP Traffic constitutes compensable “EAS/Local Traffic.” Pac-West cites this provision in paragraph 24 of its motion but completely miscomprehends its legal effect. Paragraph (C)2.3.4.1.3 states:

“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.” (Attached as part of Exhibit A to Brotherson Response Declaration, emphasis added).

This provision is clear. The only traffic subject to reciprocal compensation is *local traffic*.

29 Pac-West erroneously argues that Paragraph (C)2.3.4.1.3 limits reciprocal compensation to local traffic only if there is a determination that particular traffic (such as VNXX traffic) is interstate traffic (Pac-West Motion, ¶¶ 23-24). In fact, under Paragraph (C)2.3.4.1.3 reciprocal compensation applies only to local traffic regardless of whether the traffic is determined to be interstate. The first and third sentences of Paragraph (C)2.3.4.1.3 are not conditioned on any determination that particular traffic is interstate. In the VNXX Complaint Proceeding, the Commission determined that VNXX calls are interexchange calls that are not delivered to an ISP located within the caller’s LCA. Thus, under Paragraph (C)2.3.4.1.3 of the ICA, Pac-West is not entitled to reciprocal compensation on such traffic.

30 Pac-West claims that since 2001 Qwest and Pac-West have “exchanged (and compensated each other for) FX/VNXX traffic as Section 251(b)(5) (or ISP-bound) traffic” and cites paragraph 11 of the Affidavit of Ethan Sprague ostensibly in support. (Pac-West Motion ¶ 21). However, nowhere in that paragraph (and nowhere else in the affidavit) does Mr. Sprague

claim that the parties exchanged or compensated each other for FX/VNXX traffic or that it was characterized as “Section 251(b)(5)” traffic. Thus, Pac-West’s inference that Qwest agreed that the traffic exchanged between the parties during that period was properly within the scope of Section 251(b)(5) is not supported by any evidence.

31 Furthermore, Qwest did not knowingly pay intercarrier compensation to Pac-West on VNXX traffic as Pac-West claims.<sup>37</sup> Indeed, between 2001 and 2004 Qwest paid Pac-West for only portions (well below 50 percent of Pac-West’s billing) of the minutes billed to it by Pac-West. In 2003, for example, Qwest paid Pac-West for only 16 percent of the minutes billed in Washington. Moreover, Pac-West never disclosed to Qwest that Pac-West was using VNXX arrangements and when Qwest had evidence of Pac-West’s use of VNXX, Qwest promptly disputed that it had an obligation to compensate Pac-West for such traffic.<sup>38</sup> Thus, there was no course of dealing between Qwest and Pac-West to pay intercarrier compensation on VNXX traffic.<sup>39</sup>

32 Pac-West’s arguments related to Qwest’s tariff are also erroneous. (Pac-West Motion ¶¶ 20-22). While Pac-West correctly notes that the Commission found that VNXX and Qwest’s FX service provide functionally equivalent capability to end users (*i.e.*, the ability to make an interexchange call by dialing a local number), Pac-West’s conclusion that this compels the conclusion that FX is subject to Section 251(b)(5) is illogical and unsupported. That is not what the Commission ruled in the *VNXX Final Order*. The Commission concluded that both services, given their interexchange nature, are potentially subject to access charges,<sup>40</sup> but

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<sup>37</sup> Response Declaration of Larry Brotherson ¶¶ 3-6.

<sup>38</sup> *Id.*

<sup>39</sup> Pac-West relies on a Washington case, *Puget Sound Financial*, to support its claim that a course of dealing was established because Qwest paid portions of the Pac-West bills from 2001 to 2004. (Pac-West Motion ¶ 22 & fns. 33-34). That case, however, makes it clear that a course of dealing can only be established if it can be shown that it establishes a “common basis of understanding.” *Id.*, 47 P.3d at 943. There is no evidence in this case that Pac-West’s invoices disclosed (in writing or otherwise) that it was billing Qwest for VNXX traffic. It is undisputed that Qwest has always opposed paying reciprocal compensation on VNXX traffic. Finally, while course of dealing and trade usage can assist in ascertaining the terms of a contract, they cannot be used to contradict the plain language of an agreement.

<sup>40</sup> *VNXX Final Order* ¶ 134, ¶ 110 (characterizing both VNXX and FX as “form[s] of interexchange traffic”), ¶ 130



instead of applying access charges, the Commission chose to apply bill-and-keep, an exception to access charges.<sup>41</sup>

33 The Second Circuit captured the essentially underhanded nature of VNXX in summary comments in *Global NAPs II*:

*Global wants to use virtual NXX to **disguise** the nature of its calls - that is, to offer its customers local telephone numbers that cross Verizon's exchanges instead of the traditional long-distance numbers attached to such calls. . . . [W]here a company does not own the infrastructure and is not willing to pay for using another company's infrastructure, we see no reason for judicial intervention. Congress opened up the local telephone markets to promote competition, not to provide opportunities for entrepreneurs unwilling to pay the cost of doing business.*

. . . .

*Global's desired use of virtual NXX simply **disguises** traffic subject to access charges as something else and would force Verizon to subsidize Global's services. . . . [T]he FCC has been consistent and explicit that it will not permit CLECs to **game the system** and take advantage of the ILECs in a purported quest to compete.”<sup>42</sup>*

Pac-West’s ability to “game the system” in the past does not justify a finding that Qwest was obligated to pay intercarrier compensation under the ICA.

**D. Pac-West’s Claim that the ICA Must be Amended is Based on the False Premise that VNXX ISP Traffic is Compensable**

34 Pac-West’s argument that Qwest must continue to pay Pac-West reciprocal compensation on VNXX ISP traffic is based on the false premise that the ISP-Bound Traffic Amendment and

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(“we clarify that VNXX traffic does not originate and terminate within the same LCA”).

Pac-West cites paragraph 95 of the *VNXX Final Order* for the proposition that FX is a local service. (Pac-West Motion ¶ 20 & n. 28). In paragraph 95, however, the Commission actually said the opposite:

“ILECs offer a service under state-approved tariffs known as foreign exchange (FX) service, in which they provide a customer outside a local calling area a local telephone number so that persons may call the number without incurring a toll call. The ILEC FX customer must purchase local exchange service in the foreign exchange and must also purchase a retail private line to transport *the non-local calls to the FX customer’s home or business.*” *VNXX Final Order* ¶ 95 (emphasis added).

<sup>41</sup> *Id.* ¶ 134 (“this Commission historically has treated FX traffic as an *exception to such charges*. Given their similarity, we find VNXX traffic should also be treated as an exception. Accordingly, we uphold and further clarify the Initial Order’s decision by finding that VNXX and FX traffic are both interexchange in nature and should be treated similarly as exceptions to access charge compensation for interexchange traffic”) (emphasis added).

<sup>42</sup> *Global NAPs II*, 454 F.3d at 102-03, (emphasis added).

the ICA require Qwest to pay reciprocal compensation on VNXX traffic in the first place. (Pac-West Motion ¶¶ 25-27). As discussed above, that premise is wrong. Since neither the ISP-Bound Traffic Amendment nor the ICA require Qwest to pay reciprocal compensation on VNXX traffic, there is no need for Qwest to amend the ICA to obtain the refund to which it is entitled.

35 Furthermore, if Pac-West were correct on its claims concerning the meaning of the *ISP Mandamus Order*, the *ISP Mandamus Order* would be a change in law that has not been incorporated into the Qwest/Pac-West ICA (which the parties entered into in 2001) or into the 2002 ISP-Bound Traffic Amendment. Thus, the ICA does not require Qwest to pay Pac-West reciprocal compensation on calls placed to ISPs located outside of the caller's LCA, regardless of how one interprets the *ISP Mandamus Order*.

**E. An Evidentiary Hearing would be Required Only to Deal with Very Narrow Issues**

36 Finally, Pac-West claims that if the Commission denies compensation to Pac-West for VNXX traffic, an evidentiary hearing would be necessary to set the amount of compensation or refund. (Pac-West Motion ¶¶ 28-30). That is only true if Pac-West presents evidence that the modem(s) that answer calls placed to Pac-West ISPs were located in Washington during the period in dispute. To this point, Pac-West has not done so. Qwest has stated its current belief that Pac-West has never had any of the necessary Internet equipment located in Washington to qualify any Washington-originated Pac-West traffic as anything other than VNXX traffic. If that is the case, then all amounts paid to Pac-West must be refunded. If not, there may be a need for limited discovery and a brief hearing.

### III. CONCLUSION

37 Pac-West's petition for enforcement seeks to enforce the ICA and the ISP Traffic Amendment, which incorporates the *ISP Remand Order*, both of which are absolutely clear that reciprocal

it is indisputable that the Commission has determined that VNXX is interexchange traffic. Finally, the parties have not incorporated the *ISP Mandamus Order* into the ICA. Thus, the conclusion is inescapable that under the ICA and the *ISP Remand Order*, VNXX traffic is not compensable under any provision of the ICA, unless the Commission determines that VNXX is subject to access charges, which charges would be payable by Pac-West as the IXC to Qwest as the originating local exchange carrier. For the foregoing reasons, Pac-West's motion for summary determination should be denied and Qwest's motion for summary determination should be granted.

DATED this 25<sup>th</sup> day of March, 2009.

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