EXHIBIT C

IN PRIVATE ARBITRATION

PAC-WEST TELECOMM, INC., **Claimant,** **v.** **QWEST CORPORATION,** **Respondent.**	**AAA Case #77Y181-00385-02** **JAG Case No. 221368**

Ruling on Joint Motions for Summary Judgment

Background

Qwest is a regional Bell operating company ("RBOC") operating as the incumbent local exchange carrier (ILEC) in fourteen Western region states. Pac-West, operating as a competitive local exchange carrier ("CLEC"), has entered into Interconnection Agreements ("ICAs") with Qwest for a number of those states, including Washington, Oregon, and Arizona.

The FCC issued on April 17, 2001 its so-called ISP Remand Order.[1] Qwest and Pac-West ("the Parties") amended their Washington, Oregon, and Arizona ICAs in January 2003.[2] The Parties made these amendments ("the 2003 Amendments), which are identical for each of the Washington, Oregon, and Arizona ICAs, in order to implement the requirements of the ISP Remand Order. These amendments provide specifically that "the Parties wish to amend the Agreement to reflect the [*ISP Remand*] Order under the terms and conditions contained herein."[3] The amendments address reciprocal compensation for the transport and termination of traffic initiated on one carrier's network and delivered to Internet Service Providers ("ISPs") that are local-exchange-service customers of the other.

The amendments explicitly limit the number of year 2001, 2002, and 2003 minutes for which compensation is required, but do not provide for any such limit on minutes for succeeding years. The parties dispute whether, in the absence of explicit ICA limits for year 2004 and beyond, Qwest may nevertheless cease compensating Pac-West for a certain portion of minutes involved in the transport and termination of ISP-bound traffic. That portion specifically consists of those minutes in excess of the capped amounts for 2003.

Pac-West filed a Demand for Arbitration seeking a resolution of this issue. Qwest filed an

[1] *Order on Remand in the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket No. 96-98, ¶ 58 (April 17, 2001).
[2] Pac-West provided the Arizona ICA amendment as Exhibit 1 to its Demand for Arbitration and the amendments for Washington and Oregon as Exhibits 2 and 3 to the Declaration of Ethan Sprague.
[3] 2003 Agreements, third clause of recitals.

Answering Statement. Each filing contained a number of exhibits. This arbitrator was selected by the parties to address their dispute. At a telephonic pre-hearing conference, the parties agreed to an effort to resolve this issue on cross motions for summary judgment, in hopes of avoiding the submission of evidence. The parties filed their motions and supporting argument on September 8, 2004. Each replied to the other's motion on October 5, 2004. The parties then filed briefs on November 3, 2004 to address questions posed by the arbitrator and to address the FCC's recent decision in the Core Communications Petition. (the "Core Order").[4]

The Parties' Positions

Qwest takes the position that the parties intended by the amendment in question to reflect the intent and to match the scope of the ISP Remand Order. Qwest further argues that other portions of the ISP Remand Order make it clear that the FCC intended to make the cap on minutes survive the end of 2003, in the event that the FCC had not by then (which in fact turned out to be the case) completed its expected review of intercarrier compensation. Qwest notes that the FCC's decided in its October 2004 Core Order to forbear from enforcing the minutes cap. Qwest asserts that this order constitutes a change in law, which the relevant ICAs would not permit to become effective before negotiation of replacement language by the parties.

Pac-West takes the position that the language of the amendment is clear and unambiguous in setting a December 31, 2003 termination date for the minutes cap and that adhering to this end-date is required by established rules of contract interpretation. Pac-West further argues that the lack of ambiguity in the amendment language makes it both unnecessary and inappropriate to examine questions of the FCC's intent with respect to the ISP Remand Order, because the language of the amendment makes it clear that there was no intent to incorporate that Order into the agreement. Pac-West takes the further position that, even had the parties intended such incorporation, nothing in the ISP Remand Order can be read as intending to extend the minutes cap beyond a 2003 year-end expiration provided for in the Order.

Arbitrator's Findings

1. The amendment to the parties" ICA provides in part that:

> *3.1* ***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 (FCC ISP Order), effective June 14, 2001*

2. The amendment to the three ICAs next applies the minutes cap set forth in the ISP Remand Order for the years 2001 through 2003, but is silent about such a cap for ensuing years during which the agreements remain in force. The portion of the ISP Remand Order principally and directly addressing minutes cap does not provide explicitly for what should happen to the cap following 2003.

3. The parties' ICA amendment also applies the ISP Remand Order's presumed ratio about minutes delivered to ISPs and about rate caps, including in the provision keeping rate caps in

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[4] *Petition of Core Communications, Inc. for Forbearance Under 47 USC § 160(c) from Application of the ISP Remand Order*, WC Docket 03-171, FCC Release No. 04-241, October 18, 2004).

place pending further FCC order.

4. The ISP Remand Order indicates only a preference for moving to a bill-and-keep arrangement (*i.e.*, the end of any direct compensation for transport and termination of ISP-bound traffic), and specifically provides that a final conclusion on the question of future compensation arrangements would require further inquiry:

- [W]*e affirm our conclusion in the Declaratory Ruling that ISP-bound traffic is not subject to the reciprocal compensation obligations of section 251(b)(5).*[5]
- *Based upon the record before us, it appears that the most efficient recovery mechanism for ISP-bound traffic may be bill and keep, whereby each carrier recovers costs from its own end-users. As we recognize in the NPRM, intercarrier compensation regimes that require carrier-to-carrier payments are likely to distort the development of competitive markets by divorcing cost recovery from the ultimate consumer of services.*[6]
- *We do not fully adopt a bill and keep regime in this Order, however, because there are specific questions regarding bill and keep that require further inquiry, and we believe that a more complete record on these issues is desirable before requiring carriers to recover most of their costs from end-users.*[7]
- *Although it would be premature to institute a full bill and keep regime before resolving the questions presented in the NPRM, n145 in seeking to remedy an exigent market problem, we cannot ignore the evidence we have accumulated to date that suggests that a bill and keep regime has very fundamental advantages over a CPNP regime for ISP-bound traffic.*[8]
- *We believe that a hybrid mechanism that establishes relatively low per minute rates, with a cap on the total volume of traffic entitled to such compensation, is the most appropriate interim approach over the near term.*[9]
- *The interim regime we establish here will govern intercarrier compensation for ISP-bound traffic until we have resolved the issues raised in the intercarrier compensation NPRM.* [10]
- *The three-year transition we adopt here ensures that carriers have sufficient time to re-order their business plans and customer relationships, should they so choose, in light of our tentative conclusions in the companion NPRM that bill and keep is the appropriate long-term intercarrier compensation regime. It also affords the Commission*

[5] ISP Remand Order at ¶3.
[6] ISP Remand Order at ¶4.
[7] ISP Remand Order at ¶6.
[8] ISP Remand Order at ¶76.
[9] ISP Remand Order at ¶77.
[10] ISP Remand Order at ¶77.

adequate time to consider comprehensive reform of all intercarrier compensation regimes in the NPRM and any resulting rulemaking proceedings. Both the rate caps and the volume limitations reflect our view that LECs should begin to formulate business plans that reflect decreased reliance on revenues from intercarrier compensation, given the trend toward substantially lower rates and the strong possibility that the NPRM may result in the adoption of a full bill and keep regime for ISP-bound traffic. [11]

- *We impose an overall cap on ISP-bound minutes for which compensation is due in order to ensure that growth in dial-up Internet access does not undermine our efforts to limit intercarrier compensation for this traffic and to begin, subject to the conclusion of the NPRM proceedings, a smooth transition toward a bill and keep regime. A ten percent growth cap, for the first two years, seems reasonable in light of CLEC projections that the growth of dial-up Internet minutes will fall in the range of seven to ten percent per year. We are unpersuaded by the ILECs' projections that dial-up minutes will grow in the range of forty percent per year, n163 but adoption of a cap on growth largely moots this debate. If CLECs have projected growth in the range of ten percent, then limiting intercarrier compensation at that level should not disrupt their customer relationships or their business planning.* [12]

5. In the Intercarrier Compensation NPR accompanying this order, the FCC said:[13]

> *In a related order that we are adopting today ("ISP Intercarrier Compensation Order"), n3 we address intercarrier compensation for traffic that is specifically bound for Internet service providers ("ISPs We adopt interim measures that, for the next three years, will significantly reduce, but not altogether eliminate, the flow of intercarrier payments associated with delivery of dial-up traffic to ISPs.*

Arbitrator's Conclusions

1. The language of the parties' ICA amendments reflect an intent to incorporate minutes-cap provisions taking a form and scope that are identical to what the FCC set forth in the ISP Remand Order.

The language of the parties' amendment makes it clear that the parties did, as Qwest contends, intend to incorporate the key parameters of the ISP Remand Order without exclusion or alteration. The first provision of the parties' amendment that supports this conclusion is the inclusion of the recital that the "the Parties wish to amend the Agreement to reflect the [*ISP Remand*] Order under the terms and conditions contained

[11] ISP Remand Order at ¶83.
[12] ISP Remand Order at ¶86.
[13] Intercarrier Compensation NPR ¶3.

herein."[14] The term "reflection" suggests a mirroring of the FCC's intent and scope. Pac-West's argument that the parties intended actually to create an altered image of what the FCC ordered is not, absent more, compelling in light of the language of this recital.

There is certainly danger in taking a recital, consisting as it does, of a background statement, as superior to a clearly contradictory and material contract provision that follows. Undoubtedly, the minutes cap constitutes a material provision of the bargain between the parties. However, the recital at issue here can be read as perfectly consistent with all the later, relevant provisions of the contract.

Specifically, the ISP Remand Order discussed a number of parameters involving temporary compensation for ISP-bound traffic. For example, the FCC set a presumption about the ratio of ISP-bound minutes to other minutes, it set rate caps, and it set a minutes cap. For all of the relevant parameters, the parties used language making it clear that they intended no deviation from what the FCC established in the ISP Remand Order. Where there were deadlines for a particular parameter, the parties' amendment reflected them; where the FCC was silent, so were the parties. The manifest effort to parallel ISP Remand Order language, like the recital discussed above, supports the conclusion that the parties intended the treatment of the minutes cap to be as the FCC for in the ISP Remand Order, with respect to the minutes-cap issue.

Taken together, the language of the recital and the language addressing the key parameters of the temporary provisions for ISP-bound traffic compel the conclusion that the parties' intent was to do no more and no less than what the FCC provided for in the ISP Remand Order with respect to the minutes cap.

2. The ISP Remand Order cannot be read as imposing a continuation of the minutes cap past the end of 2003.

PacWest correctly observes that the FCC failed to provide explicitly for a continuation of the cap on minutes eligible for compensation for 2004 and beyond. It is most difficult to find support for an implicit continuation as well. The FCC addressed specifically what would happen to rates, as opposed to minutes, beyond 2003. The FCC continued 2003 rates until further action by the FCC. There is no similar continuation language for the cap on minutes. The other portions of the ISP Remand Order cited by Qwest as continuing the minutes cap are not relevant, or, at best, they are tangential. The language cited by Qwest does not directly address the issue of extending the minutes cap. At most, it should causes a critical reader only to question whether one can rationally presume the FCC to have intended no savings clause for the minutes cap, even though it:

- Generally focused on the need to limit compensation until completing the agency's examination of the matter
- Specifically demonstrated concern about preserving the remainder of the limits on compensation from automatic extinction.

We must begin from the general proposition that the FCC's inclusion of clear language continuing other parameters on compensation for ISP-bound traffic makes the absence of any such language on the question of the minutes cap a matter of significance in

[14] 2003 Agreement recitals, third clause.

interpreting the agency's intent. Having taken care to address specifically the fact that other parameters would not expire without a later order, we should presume, absent strong reasons to the contrary, that, should the FCC would have made a similar provision for the minutes cap, after having assigned it an expiration date, had it intended a similar result.

There does exist in any administrative agency order the potential for omission. We should consider the possibility that the FCC committed an oversight in failing to provide for the continuation of a minutes cap, especially after having done so in the case of other parameters -- for example the rate cap. Were it clear that such an omission had occurred, it would be proper to seek a means for applying the FCC's intent, should it be discernible, to identify what it meant to do, but failed unintentionally to do.

Of course, we should be very hesitant to disrupt objective and reasonably clear provisions of an agency's order without compelling reasons. What that means here is that we should not deal with an order in this fashion unless:

- Other provisions of the ISP Remand Order demonstrate with reasonable certainty an intent to extend the minutes cap, and
- One can identify no rational reason for a failure not to extend the minutes cap until further FCC order.

One cannot conclude that it was irrational for the FCC to have excluded a savings clause for the minutes cap. First, the FCC made it clear that it had not finally determined that its interim (or for that matter any final) compensation method was clearly the correct one. Second, the FCC had separate reasons for the different kinds of temporary limits it put on compensation. The ratio limit arose from the need to determine when one might fairly conclude that ISP-bound traffic was having a material impact on intercarrier compensation. The limit on rates reflected concern about whether transport and termination rates were far above costs for ISP-bound traffic. It is perfectly logical and consistent for the FCC to have reached a conclusion that its ratio and its rate cap would continue to serve public policy, beyond the point in time when the cap on minutes might no longer do so. It is entirely rational for the FCC to have anticipated the possibility that it would ultimately find that there is no long-term concern about arbitrage in the face of the continuation of its ratio presumption and its rate caps.

There is now evidence that this is indeed the thinking of the FCC; *i.e.*, the Core Order, in which the FCC specifically forbears from extending the minutes cap, despite the continuation of the other parameters on compensation for temporary ISP-bound minutes.

3. The Core Order should not be read as an intent by the FCC to change the law established by the ISP Remand Order, but rather to make clear the intent of that order as originally issued.

Qwest's argument on this point is simply that the minutes cap must, as a matter of law, be deemed to have been in existence in 2004. Otherwise, according to Qwest, there would have been no need for the FCC to have exercised forbearance from enforcing it, and, therefore, no need for anyone to have requested such forbearance. In fact, the petitioner in that case asked the FCC for forbearance on a wide range of ISP Remand Order elements, including those with savings clauses that unarguably kept them in existence

pending further FCC order. Accepting Qwest's base argument would, given the multiple issues on which the petitioner sought relief in the Core petition, exalt the niceties of pleading over substance. What bears much more on the matter at hand is whether the FCC used the Core Order to say anything specifically about whether the minutes cap would have continued to exist in the absence of the Core Order.

A close reading of the Core Order language cited by Qwest does not disclose any direct FCC statement regarding the effect of the minutes cap between the end of 2003 and the time (October 2004) that the FCC declared it no longer to be in the public interest. The language cited by Qwest includes a number of references generally consistent with the view that there was at the time of the ISP Remand Order's issuance a time horizon on the minutes cap; *e.g.*, the reference to the two-year period used to estimate growth in dial-up minutes, and "[m]arket developments since 2001 have eased the concerns about growth of dial-up ISP traffic that led the Commission to adopt these rules." On the contrary, no language states that only at the time of the Core Order did the minutes cap cease to exist, or, for that matter, cease to become consistent with the public interest.

The request to clarify the Core Order does not constitute an admission that Pac-West believes the FCC must do more for it to gain the relief it seeks. Rather it appears more designed to bring finality to a matter of economic significance that remains in dispute.

Arbitrator's Decision

1. The cap on minutes for ISP-bound traffic compensation expired at the end of 2003.
2. Pac-West is entitled to compensation for such traffic beginning on January 1, 2004 without application of the cap.
3. Pac-West continues to be so entitled under those interconnection agreements at issue in this arbitration.

Issued By:

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John Antonuk

2 December 2004