

**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 INITIAL
QWEST CORPORATION,	)	SUPPLEMENTAL BRIEF
	)	
Respondent.	)	
.....	)	

1. Pursuant to Order 11, Order Establishing Briefing Schedule, Pac-West Telecomm, Inc. (“Pac-West”) provides the following initial supplemental brief to refresh the record on Pac-West’s petition for enforcement of its interconnection agreement with Qwest Corporation (“Qwest”) on remand from the federal district court.

**DISCUSSION**

2. Pac-West explained in its previous Motion for Summary Determination (“Motion”) and response to Qwest’s motion for summary judgment that the traffic in dispute is traffic bound for Internet service providers (“ISPs”) that is subject to reciprocal compensation under Section 251(b)(5) of the Telecommunications Act of 1996 (“Act”)

and thus is subject to the compensation set forth in the ISP-Bound Traffic Amendment (“Amendment”) to the parties’ interconnection agreement (“ICA”). After the completion of that briefing, the D.C. Circuit Court of Appeals issued its decision in *Core Comm., Inc. v. FCC*,<sup>1</sup> in which it upheld the Federal Communications Commission’s (“FCC’s”) *ISP Mandamus Order*.<sup>2</sup> *Core* confirms that the VNXX traffic at issue in this proceeding is ISP-bound traffic subject to compensation under the terms and conditions of the parties’ ICA.

**A. ISP-Bound Traffic Includes VNXX Calls.**

3. The FCC in both the *ISP Remand Order* and the *ISP Mandamus Order* interpreted Section 251(b)(5) to require reciprocal compensation for *all* telecommunications traffic, regardless of whether that traffic is “local” or interexchange, unless exempted under Section 251(g).<sup>3</sup> In the *ISP Mandamus Order*, the FCC concluded that ISP-bound traffic was not exempt under Section 251(g) and was therefore subject to Section 251(b)(5), but that Section 201 of the Act authorizes the FCC to establish the compensation scheme set forth in the *ISP Remand Order*.<sup>4</sup> The D.C. Circuit upheld that conclusion, finding that given the overlap between Sections 201 and 251-52, “§ 251(i)’s specific saving of the

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<sup>1</sup> 592 F.3d 139 (D.C. Cir. 2010).

<sup>2</sup> *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic, et al.*, CC Docket Nos. 96-45, *et al.*, FCC 08-262, 24 FCC Rcd. 6475, Order on Remand and Report and Order (rel. Nov. 5, 2008).

<sup>3</sup> *E.g.*, *ISP Mandamus Order* ¶¶ 9-16.

<sup>4</sup> *Id.* ¶¶ 17-22.

[FCC's] authority under § 201 against any negative implications from § 251 renders the [FCC's] reading of the provisions at least reasonable.”<sup>5</sup>

4. The Appeals Court also rejected a challenge to the *ISP Mandamus Order* on the grounds that “because the call to the ISP terminates locally, the FCC’s authority over interstate communications is inapplicable.”<sup>6</sup> The court found that such an argument is inconsistent with the FCC’s end-to-end analysis of calls destined for the Internet and concluded, “Given that ISP-bound traffic lies at the intersection of the § 201 and §§ 251-252 regime, it has no significance for the FCC’s § 201 jurisdiction over interstate communications that these telecommunications might be deemed to ‘terminat[e]’ at a LEC for purposes of § 251(b)(5).”<sup>7</sup> As such, the court upheld the *ISP Mandamus Order*’s conclusion “that section 251(b)(5) is not limited only to the transport and termination of certain types of telecommunications traffic, such as local traffic.”<sup>8</sup>

5. The *Core* decision represents the federal courts’ blessing of the FCC’s rationale in its *ISP Mandamus Order* for establishing the reciprocal compensation rate for ISP-bound traffic in the *ISP Remand Order*. That rationale, as Pac-West has previously explained, necessarily means that “ISP-bound traffic” as the *ISP Remand Order* uses that term includes traffic bound for ISPs that obtain VNXX service from Pac-West. The *ISP Mandamus Order* and the *Core* decision clarify that Section 251(b)(5) governs intercarrier compensation for traffic bound for ISPs, regardless of whether those ISPs are physically located within the same local calling area as the calling party. Section 251(g)

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<sup>5</sup> *Core*, 592 F.3d at 144.

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

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

<sup>8</sup> *ISP Mandamus Order* ¶ 8.

does not exclude *any* such traffic because there was no pre-Act access obligation for intercarrier compensation for *any* traffic bound for ISPs, including ISPs who subscribe to VNXX service.<sup>9</sup> The *Core* decision is consistent with the D.C. Circuit’s prior findings that the Section 251(g) carve-out cannot be extended to services provided by one local exchange carrier (“LEC”) to another such as VNXX traffic termination: “LECs’ services to other LECs, even if en route to an ISP, are not ‘to’ either an IXC or to an ISP.”<sup>10</sup>

6. The FCC’s end-to-end analysis of calls to the Internet, moreover, applies irrespective of the location of the ISPs and the calling parties. Indeed, the D.C. Circuit rejected an argument that such traffic “terminates locally” because “it implicitly assumes inapplicability of the end-to-end analysis” on which the FCC has consistently relied to assert jurisdiction over these calls.<sup>11</sup> There is simply no rational basis on which Qwest can claim that a different compensation scheme exists for ISP-bound traffic depending on whether the calling party is physically located within the same local calling area.

7. Qwest nevertheless has claimed that the district court reviewing the Commission’s decision concluded to the contrary and that the lower court’s order is binding on Pac-West and the Commission in this case. Critically, however, the district court did not have the *ISP Mandamus Order* or the *Core* decision in front of it when it made its decision. Rather, the district court attempted to make the best determination it could, under the circumstances that existed at the time, of the FCC’s intent with respect to the scope of the *ISP Remand Order*. The FCC subsequently clarified that all traffic

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<sup>9</sup> See Pac-West Motion at 8.

<sup>10</sup> *WorldCom, Inc. v. FCC*, 288 F.3d 429, 433 (D.C. Cir. 2002). See also *Pac-West Motion for Summary Determination* at 7-8.

<sup>11</sup> *Id.*

bound for ISPs is subject to reciprocal compensation, and the D.C. Circuit affirmed that clarification. The Commission now has the benefit of a better understanding of federal law from the FCC's and D.C. Circuit's recent clarifications, and need no longer engage in the interpretative exercise undertaken by the district court. Federal law, therefore, is now clear that the *ISP Remand Order* in light of the *ISP Mandamus Order* and the *Core* decision requires reciprocal compensation for the VNXX ISP-bound traffic at issue in this case.

**B. The ICA Requires Compensation for VNXX ISP-Bound Traffic.**

8. The terms and conditions in the ICA govern the compensation due for the telecommunications traffic that the parties exchange. The ICA requires reciprocal compensation for all Section 251(b)(5) traffic. The FCC has determined that all traffic bound for ISPs is Section 251(b)(5) traffic. The ICA, therefore, provides an independent basis on which to grant Pac-West's Motion in light of the *ISP Mandamus Order* and the *Core* decision.
9. Section 5 of the Amendment to the parties' ICA provides that "[t]he reciprocal compensation rate elected for (§251(b)(5)) traffic" is the "[c]urrent rate for voice traffic in the existing Interconnection Agreement." Similarly in Section 2, the Amendment states that "the Parties agree to exchange all EAS/Local (§251(b)(5)) traffic at the state ordered reciprocal compensation rate." The Amendment, however, also provides in Section 3 that a lower rate applies to ISP-bound traffic as the *ISP Remand Order* uses that term. The ICA thus requires the parties to compensate each other for *all* Section 251(b)(5) traffic at the rate for voice traffic except for ISP-bound traffic, which is compensated at the lower rate in the *ISP Remand Order*.

10. The *Core* decision and the *ISP Mandamus Order* make clear that traffic bound for ISPs is Section 251(b)(5) traffic. The FCC 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>12</sup> The FCC further found that “ISP-bound traffic falls within the scope of section 251(b)(5)” because “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-bound traffic.’”<sup>13</sup> The D.C. Circuit agreed in *Core*, finding that ISP-bound traffic “simultaneously implicates the regimes of both § 201 and of §§ 251-252.”<sup>14</sup> Traffic bound for ISPs, therefore, is Section 251(b)(5) traffic.<sup>15</sup>

11. Qwest clings to a discredited reading of the law, still trying to argue with respect to VNXX ISP-bound traffic that Section 251(g) somehow excludes such traffic from Section 251(b)(5). Section 251(g), however, applies only to “exchange access, information access, and exchange services for such access to interexchange carriers and information service providers” prior to the date the Act was enacted. The D.C. Circuit concluded that Section 251(g) does not exclude ISP-bound traffic from Section 251(b)(5) because “there had been *no* pre-Act obligation relating to intercarrier compensation for ISP-bound traffic.”<sup>16</sup> The conclusion is equally applicable to VNXX traffic, including

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<sup>12</sup> *ISP Mandamus Order* ¶ 15.

<sup>13</sup> *Id.* ¶ 16 (quoting *WorldCom, Inc. v. FCC*, 288 F.3d 429, 433 (D.C. Cir. 2002)).

<sup>14</sup> *Core*, 592 F.3d at 144.

<sup>15</sup> In light of these findings, Qwest’s continuing efforts to litigate its now unsupported claims unreasonably defers significant reciprocal compensation payments Qwest owes to Pac-West and needlessly prolongs dismissal of the issue of repayment of compensation Qwest previously remitted to Pac-West.

<sup>16</sup> *WorldCom*, 288 F.3d at 433 (emphasis in original).

the VNXX ISP-bound traffic at issue here, which did not exist prior to 1996. Indeed, the Commission implicitly recognized as much when it examined VNXX service in Docket No. UT-063038 and established an intercarrier compensation rate for the exchange of VNXX traffic. And as the D.C. Circuit also found, Pac-West's transport and termination of calls from Qwest's local exchange subscribers to Pac-West's VNXX customers is not a service provided "'to' either an IXC or to an ISP."<sup>17</sup> Section 251(g), therefore, does not exclude VNXX ISP-bound traffic from Section 251(b)(5).

12. Qwest nevertheless contends that Section 251(b)(5) does not apply to VNXX service provided to ISPs because it is interexchange service, and interexchange service has traditionally been subject to access charges. In the *ISP Mandamus Order* as upheld in the *Core* decision, however, the FCC expressly rejected that argument, "conclud[ing] that section 251(b)(5) is not limited only to the transport and termination of certain types of telecommunications traffic, such as local traffic."<sup>18</sup>

13. Qwest also has tried to bolster its position by claiming that VNXX service is somehow similar or analogous to interstate foreign exchange service that was subject to access charges prior to 1996. VNXX service, however, is a LEC service that is provisioned completely differently than interstate foreign exchange service, is used for an entirely different purpose, and did not exist prior to 1996. Section 251(g) is specific to the pre-Act services *that were actually being provided*.<sup>19</sup> Even if there were similarities between VNXX and interstate foreign exchange service, the statute does not exclude

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<sup>17</sup> *Id.* at 434.

<sup>18</sup> *ISP Mandamus Order* ¶ 8.

<sup>19</sup> Section 251(g) was designed to ensure that new access services would not be introduced once the Act was passed at least in part because the Act requires explicit universal service funds to replace the implicit subsidies embedded in access charges.

from Section 251(b)(5) any services that are “like” the specified historic services – particularly when the D.C. Circuit has declared that the differences (e.g., that the service is LEC-to-LEC and did not exist in 1996) have legal significance. Had the D.C. Circuit applied Qwest’s interpretation of Section 251(g) to ISP-bound traffic, it would have concluded that Section 251(g) excludes from Section 251(b)(5) termination of all calls to ISPs because it is analogous to termination of voice traffic. Indeed, it would be difficult to imagine any service that is not analogous in some way to one of the services specified in Section 251(g), which would result in the exception swallowing the rule. But both the FCC and the D.C. Circuit have repeatedly concluded otherwise, carefully circumscribing the types of traffic that is not governed by Section 251(b)(5).

14. Qwest has also argued that Pac-West is acting as an interexchange carrier (“IXC”) when providing VNXX service. As Pac-West has previously explained, however, Pac-West is no more an IXC in terminating calls to its VNXX customers than Qwest is acting as an IXC when it terminates calls to subscribers of Qwest’s Market Expansion Line (“MEL”) or comparable services. Qwest has offered a protracted explanation of how its MEL customers pay for toll service on the interexchange portion of the service and that access charges apply to that portion, but what happens on Qwest’s side of the network is irrelevant.

15. When a Pac-West customer calls a Qwest MEL subscriber, Pac-West pays Qwest reciprocal compensation to terminate that call. Both Pac-West and Qwest are acting as LECs exchanging Section 251(b)(5) traffic, despite the fact that, after hitting Qwest’s network, the call travels out of the local calling area. So, too, when a Qwest customer calls a Pac-West VNXX subscriber, Qwest and Pac-West are both LECs exchanging



Section 251(b)(5) traffic even though Pac-West may transport that call to an ISP outside the local calling area where the call originated. Qwest thus is not providing service “to” Pac-West as an IXC in those circumstances but is receiving call termination service from Pac-West as a LEC.

16. VNXX ISP-bound traffic is Section 251(b)(5) traffic under applicable law. The only issue, therefore, is the rate at which the ICA requires the parties to compensate each other for transport and termination of such traffic. The Amendment states, “Qwest will presume traffic delivered to [Pac-West] that exceeds a 3:1 ratio of terminating (Qwest to [Pac-West]) to originating ([Pac-West] to Qwest) is ISP-bound traffic.”<sup>20</sup> Qwest has failed to rebut that presumption and thus the ISP-bound traffic rate of \$0.0007 per minute of use applies to the vast majority of traffic that the parties exchange.

17. Even if Qwest could rebut the presumption and demonstrate that a significant portion of the traffic is not ISP-bound traffic, Sections 2 and 5 of the Amendment provide that any Section 251(b)(5) traffic – including VNXX traffic bound for ISPs – that is not “ISP-bound traffic” is compensable at the higher rate applicable to voice services. As a result, Qwest would owe Pac-West even more in reciprocal compensation than Pac-West has claimed. Under no circumstances, however, is Pac-West required under the ICA to terminate calls from Qwest subscribers to Pac-West’s VNXX customers without compensation from Qwest.<sup>21</sup>

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<sup>20</sup> Amendment § 3.2.1.

<sup>21</sup> Because Pac-West has not waived its right to reciprocal compensation, a bill and keep requirement would violate the Act. *See* 47 U.S.C. § 252(d)(2).

**CONCLUSION**

18. For the foregoing reasons and the reasons set forth in Pac-West's prior filings, therefore, the Commission should deny Qwest's Motion and should grant Pac-West's Motion.

Dated this 20th day of July 2010.

**PAC-WEST TELECOMM, INC.**

By:  \_\_\_\_\_  
Gregory J. Kopta