

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

PAC-WEST TELECOMM, INC.

Petitioner,

v.

QWEST CORPORATION,

Respondent.

LEVEL 3 COMMUNICATIONS, LLC,

Petitioner,

v.

QWEST CORPORATION,

Respondent.

DOCKET NO. UT-053036

DOCKET NO. UT-053039

QWEST CORPORATION'S SUPPLEMENTAL
INITIAL BRIEF

I. Introduction

1 Pursuant to Order 11 in this proceeding, Qwest Corporation ("Qwest") submits this memorandum to provide supplemental briefing and authority in support of its motion for summary determination and in opposition to the motions for summary determination filed by Level 3 Communications, LLC ("Level 3") and Pac-West Telecomm, Inc. ("Pac-West").

II. The Pending Motions

2 Qwest's motion for summary determination in this consolidated remand proceeding was filed in February 2009. In that motion, Qwest noted that in the original orders denying Qwest's reconsideration petitions, the Commission stated that the disputes before it relate to "the meaning of the parties' existing interconnection agreement, which incorporates the FCC's *ISP Remand Order as the standard for determining compensation for ISP-*

bound traffic.”¹ In other words, the issue could be stated as follows: given that the *ISP Remand Order* was incorporated into each ICA, either directly or by amendment, is Qwest required to pay intercarrier compensation on all ISP traffic at \$0.0007 (the Pac-West/Level 3 position) or is Qwest only required to pay intercarrier compensation on calls to an ISP located in the caller’s LCA (the Qwest position)?

3 Qwest respectfully argues that there have been no developments in the law that would change the outcome Qwest argued for in 2009. VNXX traffic is not local and never has been under either state or federal law.² The only ISP traffic that is addressed by the *ISP Remand Order* is local ISP traffic. Thus, Level 3 and Pac-West must refund the amounts Qwest paid under the previous Commission orders.³

4 For all the reasons stated in its prior briefing, and because there have been no material changes in the law since that briefing, the Commission should grant Qwest’s motion for summary determination.

¹ Order 06, Docket No. UT-053036 ¶ 17 (June 9, 2006) (Pac-West); Order 06, Docket No. UT-053036 ¶ 17 (June 9, 2006) (Level 3).

² The definitive decision on the call classification issue is the Commission’s July 16, 2008 *Final Order* in Docket UT-063038. Focusing specifically on the same issue remanded to it in this matter by the federal court, the Commission concluded “that VNXX traffic does not originate and terminate within the same LCA.” While noting that VNXX, like FX, is interexchange in nature, the Commission chose not to make it subject to intrastate access charges. The Commission also upheld the *Initial Order’s* conclusion that a geographic test applies for the determination whether traffic is VNXX, noting, among other things, its statutory authorization to prescribe exchange boundaries, its rules defining LCAs on a geographical basis, the approved tariffs of companies like Qwest that define calls based on geographic exchanges, and the fact that in numerous ICAs in Washington, CLECs have adopted the same LCAs as Qwest.

³ To comply with the Commission’s original final orders in these dockets, Qwest made payments to Level 3 covering the time period from October 8, 2004 to April 2007 and to Pac-West for the period from January 1, 2004 through April 2007. In its motion for summary judgment, Qwest sought a refund of those payments plus interest. The amounts are set forth in paragraphs 13 and 24 of the confidential affidavit of Larry Brotherson, filed February 9, 2009, and interest continues to accrue.

III. Background

5 In this remand proceeding, Qwest seeks a ruling consistent with the District Court's determination that the term "ISP-Bound traffic" as used in the *ISP Remand Order* is limited to local ISP traffic. Such a ruling would require refunds of reciprocal compensation payments made to Level 3 and Pac-West for the termination of VNXX traffic, which is not local under Washington law.⁴ In its original final orders in these consolidated dockets, the Commission had ruled that the *ISP Remand Order* obligated Qwest to pay reciprocal compensation on all calls to Internet Service Providers ("ISPs") regardless of the location of the caller and the ISP. On appeal, the United States District Court for the Western District of Washington held that 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" and remanded this matter back to the Commission to classify VNXX calls as either within or outside of a local calling area."⁵ Neither Level 3 nor Pac-West appealed the Washington Federal District Court's *Qwest* decision. Consequently, the *Qwest* decision is *res judicata* and controlling law of the case in this proceeding.

6 On November, 5, 2008, subsequent to the *Qwest* decision, the FCC released its *ISP Mandamus Order* to justify the rules the FCC had adopted in the *ISP Remand Order*. Level 3 and Pac-West have seized on this order to argue that it somehow clarified the meaning of the *ISP Remand Order* such that the *ISP Remand Order* now means that Qwest was all along required to pay Level 3 and Pac-West reciprocal compensation on calls placed to ISPs located outside of the caller's local calling area ("VNXX" calls).

⁴ State commissions define "local calling areas" for their respective states for both interstate and intrastate traffic. First Report and Order, *In the Matter of the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶1035 (Rel. August 8, 1996).

⁵ *Qwest Corporation v. Washington State Utilities and Transportation Commission*, 484 F.Supp.2d 1160 (W.D. Wash. 2007)(the "*Qwest* decision").

7 As explained by Qwest in the initial round of briefing, Level 3 and Pac-West are simply wrong. The FCC issued the *ISP Mandamus Order* in response to the DC Circuit's *WorldCom*⁶ decision that remanded, but did not vacate, the *ISP Remand Order*. Accordingly, the *ISP Mandamus Order*, like the *ISP Remand Order*, addresses only calls placed to an ISP located in the caller's local calling area. The DC Circuit's *Core III* decision, the briefs filed by the FCC in the *Core* appeals and the First Circuit's *Global Naps V* decision all support Qwest's position.

IV. Discussion of Recent Decisions

8 Since the last round of briefing in this matter was completed in March, 2009, two judicial decisions have been released that bear on the motions. The first is *Core Communications v. FCC*, 592 F.3d 139 (DC Cir. 2010) ("*Core III*"), in which the DC Circuit affirmed the rules adopted by the FCC in the *ISP Remand Order*⁷ and the *ISP Mandamus Order*⁸. *Core III* and the briefs filed by the FCC in the *Core* appeals make clear that neither the *ISP Remand Order* nor the *ISP Mandamus Order* require the payment of reciprocal compensation on virtual NXX (or "VNXX") traffic. The second decision is *Global Naps, Inc. v. Verizon New England Inc.*, 603 F.3d 71 (1st Cir. 2010) ("*Global Naps V*")⁹, in which the First Circuit affirmed a judgment awarding Verizon New England Inc. access charges on VNXX traffic. Both of these decisions support Qwest's motion for summary determination.

⁶ *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002)

⁷ 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 (Rel. April 27, 2001) ("*ISP Remand Order*").

⁸ Order on Remand, *In the Matter High-Cost Universal Service Support*, 24 FCC Rcd 6475 (Rel. November 5, 2008).

⁹ The First Circuit describes this appeal as the fifth appeal in a series of disputes between *Global Naps* and Verizon. 603 F.3d at 3. Consequently, it will be referred to as "*Global Naps V*".

A. *Core III*

9 *Core III* is the culmination of a series of FCC decisions and appeals that address whether reciprocal compensation is due on *local* calls placed to an ISP. The *ISP Remand Order* and the DC Circuit's *WorldCom* remand set the stage for *Core III*. The *ISP Remand Order* defined the issue that the FCC addressed throughout the *Core* proceedings to be "whether reciprocal compensation obligations apply to the delivery of calls from one LEC's end-user customer to an ISP in the same local calling area that is served by a competing LEC."¹⁰ *WorldCom* is important because the DC Circuit recognizes that the traffic referred to as "ISP-bound" in the *ISP Remand Order* were "calls made to internet service providers ("ISPs") located within the caller's local calling area."¹¹

10 In *WorldCom*, the DC Circuit remanded the *ISP Remand Order* to the FCC to provide a sufficient legal rationale for the rules adopted in the *ISP Remand Order*. The FCC delayed acting on the remand and in *In re: Core Communications*, 531 F.3d 849 (D.C. Cir. 2008), the DC Circuit entered a mandamus order directing the FCC to respond to the *WorldCom* remand by November 5, 2008 with a final, appealable order that explains the legal authority for the Commission's interim intercarrier compensation rules adopted in the *ISP Remand Order*.

11 On November 5, 2008, the FCC released the *ISP Mandamus Order*. In the *ISP Mandamus Order*, the FCC used the term "ISP-bound traffic" in the same way that the term was used in the *ISP Remand Order* – that is, to refer to calls placed to an ISP located in the caller's local calling area. Indeed, the FCC provides no indication in the *ISP Mandamus Order* that it was expanding the scope of traffic being addressed beyond the local ISP traffic at issue in the *ISP Remand Order*. The *ISP Mandamus Order* does not even mention VNXX traffic.

¹⁰ *ISP Remand Order*, ¶13.

¹¹ *WorldCom*, 288 F.3d at 430.

12 Core Communications, Inc. appealed the *ISP Mandamus Order* to the DC Circuit Court of Appeals. *Core III* is the D.C. Circuits' decision upholding both the *ISP Mandamus Order* and the rules adopted in the *ISP Remand Order*. *Core III* supports Qwest's position that under the *ISP Mandamus Order* reciprocal compensation applies only to calls placed to ISPs located in the caller's local calling area. In *Core III*, the DC Circuit described reciprocal compensation as follows:

Reciprocal compensation arrangements require that when a customer of one carrier makes a *local call* to a customer of another carrier (which uses its facilities to connect, or "terminate" that call), the originating carrier must compensate the terminating carrier for the use of its facilities. (*Core Decision*, p. 4)

13 The parties in *Core III* all recognized that reciprocal compensation did not apply to interexchange calls. Accordingly, DC Circuit stated:

And, as to a LEC's provision of access for completion of a long distance call, the parties agree that the link between the LEC and the interexchange carrier is *not* governed by the reciprocal compensation regime of §251(b)(5). (*Core Decision*, p. 9)

14 The issue before the DC Circuit in *Core III* was whether the FCC's jurisdiction over interstate calls under 47 U.S.C. §201 applied to calls to Internet Service Providers when these calls terminated locally at the ISP modem or server. The Petitioners argued that the FCC did not have jurisdiction over calls that terminated in the caller's local calling area. The DC Circuit summarized their argument as follows:

Petitioners next argue that because the call to the ISP terminates locally, the FCC's authority over interstate communications is inapplicable...Because the "called party" in the case of dial-up Internet traffic is the ISP, petitioners say, the §251(b)(5) telecommunications "terminat[e]" locally and thus the FCC cannot apply its §201 authority over these communications.

15 The petitioners could not have made this argument if the *ISP Mandamus Order* had expanded the scope of the *ISP Remand Order* to include calls placed to ISPs located outside the caller's local calling area. Their argument acknowledges that the *ISP*

Mandamus Order has the same scope as the *ISP Remand Order* and that both decisions address only local calls placed to an ISP.

16 In its briefs to the DC Circuit, the FCC repeatedly stated that VNXX traffic was not at issue in either the *ISP Remand Order* or the *ISP Mandamus Order*. Qwest submitted the FCC's briefs as supplemental authority on June 3, 2009, but they bear mention here. First, in opposing Core's petition for mandamus to the DC Circuit, the FCC was emphatic that "the *ISP Remand Order* addressed only those calls to ISPs 'within the caller's local calling area'" and that "VNXX-related issues, therefore, are not within the scope of the *WorldCom* remand."¹² Second, in its brief to the DC Circuit on appeal of the *ISP Mandamus Order*, the FCC stated again that the calls at issue were those in which "two LECs collaborate to deliver calls to an ISP within a local calling area."¹³ Furthermore, the FCC responded to the state petitioners' arguments that Section 251(b)(5) of the Act should only apply to local telecommunications traffic by arguing that this argument was not ripe because nonlocal traffic was beyond the scope of the ISP-bound traffic addressed in the *ISP Mandamus Order*.¹⁴

B. *Global Naps V*

17 The second significant decision released subsequent to the initial briefing of the pending motions is the First Circuit's *Global Naps V* decision. *Global Naps V* is the most recent appellate court decision in lengthy litigation between Global Naps, Inc. and Verizon New England, Inc. Earlier in the litigation, in *Global Naps I*, the First Circuit upheld an interconnection arbitration decision in which the Massachusetts Department of Telecommunications and Energy (the "Massachusetts Commission") had required Global Naps to pay Verizon access charges for all "virtual NXX" traffic, including non-local

¹² Opposition of Federal Communications Commission to Petition for Writ of Mandamus, p. 26, attached to Qwest's June 3, 2009 notice of supplemental authority.

¹³ Brief for Federal Communications Commission, p. 43, attached to Qwest's June 3, 2009 notice of supplemental authority.

¹⁴ *Id.*, pp. 43-45.

ISP-bound traffic.¹⁵ Global Naps had argued that the *ISP Remand Order* required Verizon to pay reciprocal compensation for all ISP traffic and that the Massachusetts Commission was therefore preempted from requiring Global Naps to pay access charges.

18 In *Global Naps I*, the First Circuit carefully analyzed the *ISP Remand Order* and its background and context. The First Circuit observed that the “FCC has consistently maintained a distinction between local and interexchange calling and the intercarrier compensation regimes that apply to them.”¹⁶ The Court noted that the FCC itself recognized in the *ISP Remand Order* that the Telecommunications Act of 1996 was not intended to disrupt the pre-Act interstate and intrastate access charge regimes. The Court recognized that the issue before the FCC in the *ISP Remand Order* was whether reciprocal compensation obligations apply to the delivery of calls from one LEC’s customers to an ISP in the same local calling area. The Court observed that there is no statement in the *ISP Remand Order* that ISP traffic is not subject to access charges. Finally, the Court relied upon the FCC’s statements in an amicus brief that in the *ISP Remand Order*, the FCC was considering only calls placed to ISPs located in the same local calling area as the caller. Based on its careful analysis, the First Circuit concluded that it was consistent with the *ISP Remand Order* for the Massachusetts Commission to require the payment of access charges to Verizon on VNXX traffic.

19 *Global Naps V* addresses the damages phase of the dispute between Global Naps and Verizon New England. In *Global Naps V*, the First Circuit affirmed the award of access charges to Verizon New England for the origination of VNXX ISP traffic. In the appeal, Global Naps argued that the FCC’s *ISP Mandamus Order* (or “2008 Order”) clarified that the original *ISP Remand Order* precluded the award of access charges on VNXX traffic.¹⁷ In rejecting Global Naps’ arguments, the First Circuit stated that the “issues the

¹⁵ *Global Naps Inc. v. Verizon New England, Inc.*, 444 59 (1st Cir. 2006)

¹⁶ *Id.*, at 73.

¹⁷ *Global Naps V*, 603 F.3d at 81.

FCC addressed in the 2008 order did not go to the regulation of intercarrier compensation for interexchange ISP traffic.”¹⁸ Moreover, the First Circuit reiterated its earlier holding that “the *ISP Remand Order* did not govern interexchange VNXX traffic.”¹⁹

20 In *Global Naps V*, the First Circuit held that the *ISP Mandamus Order* had the same scope as the *ISP Remand Order*. The Court noted that the *ISP Mandamus Order* justified the same rate cap system as the *ISP Remand Order* and that the rate cap system applied when two carriers collaborate to deliver calls to an ISP within a local calling area. *Id.*, at 82. The Court emphasized that the *ISP Mandamus Order*’s purpose was to justify – not change – a particular rate cap system. According to the Court, Global Naps’ arguments take the *ISP Mandamus Order* out of context and ignore the purpose of the Order.

21 The First Circuit also rejected Global Naps’ arguments based on the FCC’s statements in the *ISP Mandamus Order* that Section 251(b)(5) is not limited to local traffic.²⁰ Like the arguments made by Level 3 and Pac-West here, Global Naps’ arguments were predicated on the false premise that the language of Section 251(b)(5) alone defines the reach of reciprocal compensation arrangements. That premise is false because traffic encompassed by the interstate and intrastate access charge regimes is carved out of Section 251(b)(5) by Section 251(g). The First Circuit noted that the *ISP Mandamus Order* did not address interexchange ISP traffic or even mention access charges. *Id.*, at 83. Moreover, the Court concluded that while the FCC may have had jurisdiction over interexchange ISP traffic, it did not exercise any such jurisdiction in the *ISP Mandamus Order*.

22 *Global Naps III* cannot be reconciled with the positions taken by Level 3 and Pac-West in

¹⁸ *Id.*, at 82.

¹⁹ *Id.*, At 79.

²⁰ The *ISP Mandamus Order* refers to “ISP-bound traffic” as interstate, interexchange traffic only in a jurisdictional sense on an end-to-end basis from the caller to the websites the caller seeks to access,

this proceeding. By affirming the award of access charges to Verizon New England on VNXX traffic, the First Circuit has upheld Qwest's position here that the interstate and intrastate access charge regimes preserved by Section 251(g) of the Act apply to VNXX traffic. Moreover, the First Circuit rejects altogether any notion that the *ISP Mandamus Order* somehow expanded the scope of the *ISP Remand Order* to encompass calls placed to ISPs located outside of the caller's local calling area.

V. Conclusion

23 For the reasons stated herein, Qwest respectfully asks the Commission to grant its motion for summary determination, deny the motions of Level 3 and Pac-West, and order refunds to Qwest of amounts previously paid, with interest.

DATED this 20th day of July, 2010.

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