

**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.	)	
	)	
QWEST CORPORATION,	)	PAC-WEST RESPONSE
	)	SUPPLEMENTAL BRIEF
Respondent.	)	
.....	)	

1. Pursuant to Order 11, Order Establishing Briefing Schedule, Pac-West Telecomm, Inc. (“Pac-West”) provides the following response 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. The Federal Communications Commission's ("FCC's") *ISP Remand Order* and *ISP Mandamus Order*,<sup>1</sup> in conjunction with the D.C. Circuit's decisions on review of those orders, are an interrelated, cohesive whole. Qwest, however, would have the Commission view in isolation the *ISP Mandamus Order* and the *Core*<sup>2</sup> decision confirming it and conclude that they do not affect the Washington district court's interpretation of the *ISP Remand Order*. The Commission should decline to do so. The entirety of the FCC orders and D.C. Circuit decisions establishes that Qwest has a legal obligation under applicable law and the parties' interconnection agreement ("ICA") to pay reciprocal compensation to Pac-West for terminating all locally dialed traffic bound for Internet service providers ("ISPs").

**A. The *Core* Decision Confirms Qwest's Obligation to Compensate Pac-West for Terminating VNXX ISP-Bound Traffic.**

3. Pac-West explained in its Initial Supplemental Brief that the D.C. Circuit's *Core* decision confirms the FCC's interpretation of Section 251(b)(5) to include all traffic bound for ISPs and to require compensation for all locally-dialed ISP-bound traffic at the FCC-prescribed rates as required under the parties' ICA. Pac-West will not repeat that discussion except to the extent necessary to show that the contrary arguments Qwest makes in its supplemental initial brief do not withstand scrutiny.

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<sup>1</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) (prior and subsequent history omitted).

<sup>2</sup> *Core Comm., Inc. v. FCC*, 592 F.3d 139 (D.C. Cir. 2010).

4. Qwest first contends that neither the *Core* decision nor the *ISP Mandamus Order* broadens the scope of “local” ISP-bound traffic that allegedly was the subject of the *ISP Remand Order*. As Pac-West previously demonstrated, Qwest’s contention is incorrect. The D.C. Circuit affirmed the FCC’s determination in the *ISP Mandamus Order* that Section 251(b)(5) governs all traffic – including traffic bound for ISPs – unless exempted under Section 251(g). Section 251(b)(5) thus governs VNXX ISP-bound traffic, and Section 251(g) does not exempt such traffic. As the FCC very clearly explained, “Because our conclusion in this order concerning the scope of section 251(b)(5) is no longer tied to whether this traffic is local or long distance, we need not address arguments made by the parties as to whether ISP-bound traffic constitutes ‘telephone exchange service’ under the Act.”<sup>3</sup> Accordingly, VNXX ISP-bound traffic necessarily is within the scope of the *ISP Remand Order*.<sup>4</sup>

5. Qwest’s Brief latches on to individual words and phrases in the *Core* decision and the *ISP Mandamus Order* and tries to manipulate them into conclusions that directly conflict with the actual holdings of those orders. For example, Qwest quotes from the D.C. Circuit’s opinion that the traffic at issue in *Core* involves a “local call” and that the parties to that case agreed that Section 251(b)(5) does not govern intercarrier compensation for a “long distance call.”<sup>5</sup> The court’s passing use of colloquial terms

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<sup>3</sup> *ISP Mandamus Order* ¶ 13 n.49; *accord id.* ¶¶ 7-8.

<sup>4</sup> *E.g.*, Pac-West Initial Supplemental Brief ¶¶ 3-7.

<sup>5</sup> Similarly, Qwest maintains that the court implicitly recognized that only ISP-bound traffic within a local calling area was at issue because parties appealing the *ISP Mandamus Order* argued that such “local termination” could not give rise to FCC jurisdiction as “interstate communications.” Appealing parties’ arguments do not determine the scope of FCC orders, but as discussed below, the same arguments applied to VNXX calling. As a practical matter, moreover, Qwest’s suggestion that the D.C. Circuit should be interpreted as stating that *Core* itself, the company that has spent a

such as “local” and “long distance” to introduce the subject matter of the case cannot be read to somehow implicitly supersede the *ISP Mandamus Order*’s express findings about the broad scope of Section 251(b)(5), or the D.C. Circuit’s own analysis of Sections 251(b)(5) and 251(g) in *WorldCom* and *Core*.<sup>6</sup>

6. Qwest’s semantic arguments, moreover, are irrelevant. A Qwest customer’s call to an ISP that subscribes to VNXX service from Pac-West is a “local call,” not a “long distance call.” To place that call, the Qwest customer dials a seven-digit number, and toll charges do not apply. Qwest’s own Washington tariff defines such calling as “local.” That tariff defines “local calling” as “calls placed to *telephone numbers* where message toll charges do not apply,”<sup>7</sup> and uses the term “local message” to mean “[a] message *not subject to toll charges*.”<sup>8</sup> To the extent it has any significance, therefore, the D.C. Circuit’s use of the terms “local” and “long distance” cannot reasonably be interpreted to exclude VNXX ISP-bound traffic from the scope of the *ISP Remand Order* or *ISP Mandamus Order*.

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decade advocating for a broader interpretation of Section 251(b)(5), would agree with Qwest’s “local only” interpretation of Section 251(b)(5), is refuted by literally hundreds of pages of *Core* briefs. The court was simply stating that the parties are in agreement that a traditional “1+” dialed long distance call is not within the ambit of Section 251(b)(5).

<sup>6</sup> See, e.g., Pac-West Initial Supplemental Brief ¶¶ 3-5; Pac-West Response to Qwest Motion for Summary Determination ¶¶ 5-8; *WorldCom, Inc. v. FCC*, 288 F.3d 429, 433-34 (D.C. Cir. 2002). It is worth noting that the D.C. Circuit in the *Core* decision entirely **affirmed** the FCC’s *ISP Mandamus Order*.

<sup>7</sup> WN U-40 Exchange and Network Services § 5.1 (Exchange Areas) at A.2 (emphasis added). Pac-West previously discussed the inconsistencies between Qwest’s advocacy in this case and its own practice of rating calls as reflected in its tariffs. Pac-West Response to Qwest Motion for Summary Determination ¶¶ 14-18.

<sup>8</sup> *Id.* § 2.1, at 1<sup>st</sup> Revised Sheet 11 (emphasis added).

7. Finally, Qwest repeats its observation that counsel for the FCC stated in briefing filed with the D.C. Circuit that VNXX traffic was not at issue in the *ISP Remand Order* or the *ISP Mandamus Order*. Again, this amounts to nothing. Arguments in briefs represent the views of the FCC's litigation counsel; they have no legal force or effect and cannot supersede a decision of the full FCC.<sup>9</sup> This is particularly true when those arguments directly contradict the FCC's holdings in the *ISP Mandamus Order* and *ISP Remand Order*. The FCC's carefully crafted language in those orders, not its counsel's subsequent characterizations, determines the meaning of those orders, and the plain meaning of that language and decision confirms that the FCC's compensation scheme for ISP-bound traffic applies to VNXX ISP-bound traffic.

**B. The First Circuit's Latest *Global NAPs* Decision Does Not Support Qwest's Position.**

8. Level 3 explained in its Initial Brief to Refresh the Record that the First Circuit's decision in *Global NAPs V'*<sup>10</sup> is a product of the unique facts and circumstances of that particular case and is inconsistent with the D.C. Circuit's decision in *Core*.<sup>11</sup> Pac-West concurs in that discussion. Contrary to Qwest's characterization of the First Circuit decision, that court did not undertake an analysis of the impact of the FCC's conclusion that all ISP-bound traffic is governed by Section 251(b)(5). Rather, the First Circuit

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<sup>9</sup> Section 0.251 of the FCC Rules specifies the authority delegated to the Office of its General Counsel. Notably absent from the list is any authority to revise, clarify, or overturn duly issued decisions of the FCC. 47 C.F.R. § 0.251. Only actions taken by a delegate of authority within the express scope of the delegation rules have the same force as FCC action. *See id.* § 0.203. While explanatory statements of its counsel that are consistent with FCC rulings, or which clarify previously unexplained FCC rules, might be given some weight, no weight can be given to arguments by the agency's lawyers before an appellate court that directly contradict or are inconsistent with FCC precedents.

<sup>10</sup> *Global NAPs, Inc. v. Verizon New England, Inc.*, 603 F.3d 71 (1st Cir. 2010).

<sup>11</sup> Level 3 Initial Brief to Refresh the Record ¶¶ 19-21.

(which does not include Washington) undertook only a limited review of the *ISP Mandamus Order*, finding that its “express purpose was to justify – not change – a particular rate system.”<sup>12</sup> That court’s conclusion that the FCC had asserted jurisdiction over all ISP-bound traffic but had not exercised jurisdiction over interexchange ISP-bound traffic simply cannot be squared with the language and meaning of the *ISP Mandamus Order* and the D.C. Circuit’s *Core* decision, which represent the definitive federal law on this issue.<sup>13</sup>

9. One aspect of *Global NAPs V*, however, is noteworthy. The court in that case was asked to enforce an ICA that expressly incorporated a Massachusetts commission requirement that access charges apply to VNXX ISP-bound traffic. While disagreeing with that requirement, Global NAPs was fully aware that it had a contractual obligation to pay access charges for any such traffic it exchanged with Verizon, and Global NAPs disregarded that express obligation at its peril.

10. Pac-West, in sharp contrast, has been exchanging VNXX ISP-bound traffic with Qwest since 2001 under an ICA that expressly requires reciprocal compensation for “ISP-bound traffic” and “Section 251(b)(5) traffic.”<sup>14</sup> The FCC has concluded – and the D.C. Circuit (and even the First Circuit) has confirmed – that Section 251(b)(5) traffic includes

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<sup>12</sup> *Global NAPs V*, 603 F.3d at 82.

<sup>13</sup> As Level 3 accurately observes in its initial supplemental brief, under the Hobbs Act, the D.C. Circuit’s decisions on review of the *ISP Remand Order* and *ISP Mandamus Order* are the definitive federal law on the issue of compensation for ISP-bound traffic and are binding on all courts (and state commissions). The First Circuit’s view of those decisions, on the other hand, is precedential only within the New England states that comprise the First Circuit, which has far less experience reviewing FCC orders than the D.C. Circuit.

<sup>14</sup> *E.g.*, Pac-West Initial Supplemental Brief ¶¶ 8-17.

all locally dialed calls to ISPs.<sup>15</sup> Accordingly, even in the First Circuit's view of the relationship between FCC and state commission jurisdiction over traffic bound for ISPs, Pac-West is entitled to enforcement of its ICA and Qwest's express contractual obligation to pay compensation for all locally dialed traffic bound for ISPs.

### CONCLUSION

11. 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 10th day of August 2010.

**PAC-WEST TELECOMM, INC.**

By:   
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Gregory J. Kopta

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<sup>15</sup> *ISP Mandamus Order* ¶¶ 7-8; *Core*, 592 F.3d at 144; *See Global NAPs V*, 603 F.3d at 82-83.