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Pac-West Telecomm, Inc. (“Pac-West”), provides the following brief in support of its Petition for Enforcement of its Interconnection Agreement with Qwest Corporation (“Qwest”).

## INTRODUCTION

1. The primary issue presented in this proceeding is simple: Does the parties’ interconnection agreement (“ICA”) require Qwest to compensate Pac-West for delivering calls from Qwest customers to Pac-West Internet service provider (“ISP”) customers when the telephone numbers of both customers are assigned to the same local calling area. The answer is equally simple: Yes, the ICA incorporates the Federal Communications Commission’s (“FCC’s”) requirements in its *ISP Remand Order*<sup>1</sup> that interconnecting carriers must compensate each other for traffic bound for ISPs under these circumstances.

2. Qwest attempts to complicate this issue by raising a variety of historic, legal, and policy issues and claims, some accurate some not, full of sound and fury but signifying nothing. Reduced to its essence, Qwest’s position is that Pac-West is not entitled to compensation for providing the same types of services that Qwest provides and for which Qwest receives compensation. Such a position is blatantly anticompetitive and if accepted, would reduce or eliminate alternatives for dial-up Internet access outside the metropolitan areas in Washington.

3. The Commission, as it has in the past, should require Qwest to compensate Pac-West under the rates, terms, and conditions established in the parties’ ICA, for terminating *all*

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<sup>1</sup> *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 96-98 & 99-68, FCC 01-131, Order on Remand and Report and Order (rel. April 27, 2001).

ISP-bound traffic between parties with telephone numbers that are assigned to the same local calling area, as required by the ICA and federal law.

## BACKGROUND

4. Pac-West has provided the factual background underlying the parties' dispute in its Petition and the Affidavit of Ethan Sprague and will not repeat that information here. Instead, Pac-West will address the nature and definitions of foreign exchange ("FX") service and so-called "virtual NXX" or "VNXX" service, which underlie the parties' dispute.

5. FX service "allows a customer in one local calling area to have a local number presence in another local calling area."<sup>2</sup> Qwest unilaterally defines "VNXX" as "a vehicle by which a carrier obtains a telephone number for one local calling area and uses that telephone number in another geographic area."<sup>3</sup> While Qwest's definition is more pejorative, the service to which Qwest refers as "VNXX" provides exactly the same functionality as FX service. Even Qwest concedes that from an end user perspective, FX and "VNXX" services are indistinguishable.<sup>4</sup> Qwest's attempts to characterize "VNXX" service as different from FX service only raise distinctions without a difference, at least with respect to intercarrier compensation.

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<sup>2</sup> *In re Petition for Arbitration of AT&T with Qwest*, Docket No. UT-0333035 ("AT&T Arbitration"), Order No. 4, Arbitrator's Report ¶ 32 (Dec. 1, 2003).

<sup>3</sup> Qwest Corporation's Answer to Petition for Enforcement of Interconnection Agreement, and Counterclaims ¶ 12, n.2 ("Qwest Answer").

<sup>4</sup> Qwest Response to Pac-West Data Request No. 01-021 (selected Qwest responses to Pac-West Data Requests are attached to this Brief as Exhibit A).

6. Qwest states that its “FX service provides a subscriber the ability to purchase *separate dedicated switching and transport facilities* from each local calling area that the subscriber wishes to obtain a local presence.”<sup>5</sup> How Qwest and Pac-West provision their respective services is irrelevant. Pac-West, like other competitive local exchange carriers (“CLECs”) does not use the “hub and spoke” architecture that characterizes Qwest’s network. Rather, Pac-West uses a single switch connected to a fiber ring that covers multiple Qwest wire center serving areas. Pac-West thus does not need to use additional switching and dedicated transport to provide FX functionality, but Pac-West’s network architecture does not make the service any different than Qwest’s service offering. The Commission has previously agreed, finding “VNXX” service

functionally identical to Qwest’s FX service from a customer perspective. The differences on which Qwest dwells are related to the different network architectures employed by the two companies. Encouraging technical innovation and the provisioning of functionally competitive services at lower cost to consumers is central to the goals of the Telecommunications Act of 1996.<sup>6</sup>

7. Somewhat related is Qwest’s apparent claim that CLECs provide “VNXX” without facilities in all of the local calling areas. Whether that is true for some carriers, it is not true for Pac-West. Pac-West’s network reaches most, if not all, local calling areas in which Pac-West has local telephone numbers. Like Qwest, however, Pac-West “does not know if there is a server or modem on the customer’s side of the demarcation point” where the Pac-West network

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<sup>5</sup> Qwest Answer ¶ 49, n.16 (emphasis in original).

<sup>6</sup> *AT&T Arbitration*, Order No. 4, Arbitrator’s Report ¶ 36, n.20.

ends and the customer's facilities begin.<sup>7</sup> Again, Pac-West provides the same service to ISPs that Qwest provides.

8. Qwest also contends that "VNXX" is different because it allegedly relies on a misuse of number resources, specifically a CLEC obtaining 10,000 telephone number blocks (NXX codes) in order to provide customers with a local presence in a local calling area other than the one in which they are physically located. That is exactly how Qwest provides FX service. At best, any distinction between a CLEC's use of number resources and Qwest's use of telephone numbers to provide FX service is only a matter of degree.

9. Qwest, as the largest incumbent local exchange carrier ("ILEC") in Washington, provides service in dozens of local calling areas throughout the state and has obtained multiple NXX codes in each local calling area. Qwest uses some of the telephone numbers within those codes in connection with its FX service, but uses most of those numbers to provide its other local exchange services. CLECs do not have that luxury. A CLEC's customer base is miniscule compared to Qwest's, yet numbering guidelines require that the CLEC obtain a full block of 10,000 numbers for each local calling area in which they intend to provide service.<sup>8</sup> A CLEC is not "misusing" numbering resources simply because, unlike Qwest, the CLEC does not have tens of thousands of customers other than FX subscribers to whom it can assign most of the telephone numbers in its assigned NXX codes.

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<sup>7</sup> Exhibit A, Qwest Response to Pac-West Data Request No. 01-012.

<sup>8</sup> The Commission has implemented "code sharing" in some areas to forestall area code exhaust, which reduces that number to as few as 1,000 telephone numbers, but the principle remains the same.

10. Nor is a CLEC's intent to obtain telephone numbers to avoid toll and access charges by providing FX service any different than Qwest's. That is what FX service is designed to do. Qwest offers several services that provide FX functionality.<sup>9</sup> In addition to a pure FX service, for example, Qwest offers a Market Expansion Line ("MEL") product, which Qwest describes as "a remote call forwarding 'feature' that allows a customer to call forward their service to a different location without requiring a physical location in that area."<sup>10</sup> The MEL customer pays toll charges for calls forwarded to a different local calling area, but if a CLEC subscriber places the call to the MEL customer, the call is "treated as a local call for intercarrier compensation purposes."<sup>11</sup> Even though it is an interexchange call and Qwest is providing its MEL customer with toll service, the CLEC does not receive the originating access charges to which it otherwise would be entitled. Indeed, to add insult to injury, the CLEC must *pay* Qwest reciprocal compensation for carrying that toll call. Qwest fails to explain why its MEL product – or any other call forwarding feature that treats toll calls as local calls for intercarrier compensation purposes – is any less a gaming of the intercarrier compensation system than Qwest accuses "VNXX" to be.

11. Qwest, however, contends that a call from a CLEC customer to a Qwest FX

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<sup>9</sup> Exhibit A, Qwest Responses to Pac-West Data Request Nos. 01-005 & 16.

<sup>10</sup> Exhibit A, Qwest Response to Pac-West Data Request No. 01-016.

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

customer “is an interexchange call for which no reciprocal compensation should apply.”<sup>12</sup> The fact is that reciprocal compensation currently does apply to that call. Even if Qwest were proposing to change that and to pay CLECs access charges for such calls – which Qwest is not proposing – it would be an administrative impossibility. Calls are rated and routed based on the telephone numbers of the calling and called parties. No carriers exchange data concerning the actual physical location of those parties because the current system is not set up to do so.<sup>13</sup> Without a massive overhaul of every carrier’s systems, the only way to ensure that all interexchange calls are rated as a toll call is to assign every customer of every carrier with telephone numbers that strictly correspond to the customer’s physical location at the time of the call. That would mean the elimination of all FX service or features, including call forwarding to telephone numbers outside the customer’s local calling area. Qwest, of course, proposes nothing of the kind, and until it does, the Commission should view as self-serving and anticompetitive Qwest’s proposal to treat CLEC FX services and functionalities differently than Qwest treats its own comparable services and features.

## DISCUSSION

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<sup>12</sup> *Id.*

<sup>13</sup> *See* Exhibit A, Qwest Responses to Pac-West Data Request Nos. 01-007, 20 & 22.



**A. The Commission Has Previously Determined, and Should Continue to Find, that Local Exchange Carriers Must Compensate Each Other for Terminating All ISP-Bound Traffic Pursuant to the FCC’s *ISP Remand Order*.**

12. Compensation for ISP-bound traffic is not a new issue for the Commission. In an arbitration between Level 3 Communications and CenturyTel of Washington, the Commission concluded that “ISP-bound calls enabled by virtual NXX should be treated the same as other ISP-bound calls for purposes of determining intercarrier compensation requirements consistent with the FCC’s ISP Order on Remand.”<sup>14</sup> “Although the results in prior arbitration proceedings are not binding precedent, they do provide guidance to the [Commission] with respect to questions of what is lawful, and what is ‘sound public policy’ in the Commission’s view. To the extent Qwest’s arguments here essentially restate the arguments the Commission rejected in the Level 3 arbitration, they also should be . . . rejected here.”<sup>15</sup>

**1. The *ISP Remand Order* Applies to All ISP-Bound Traffic.**

13. The first sentence in the first paragraph of the FCC’s *ISP Remand Order* provides, “In this Order, we reconsider the proper treatment for purposes of intercarrier compensation of telecommunications traffic delivered to Internet service providers (ISPs).” Qwest contends that the Order was more limited, applying only to ISPs whose servers are physically located in the same local calling area as the customer placing the dial-up Internet

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<sup>14</sup> *In re Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC, and CenturyTel of Washington, Inc.*, Docket No. UT-023043, (“*Level 3 Arbitration*”) Seventh Supplemental Order: Affirming Arbitrator’s Report and Decision ¶ 35 (Feb. 28, 2003).

<sup>15</sup> *AT&T Arbitration*, Order No. 4, Arbitrator’s Report ¶ 41.

access call. The Commission rejected this same argument in the *Level 3 Arbitration*. As the Arbitrator explained after quoting the first sentence of the *ISP Remand Order*,

The FCC's order, thus, introduces its subject matter as encompassing all telecommunications traffic delivered to ISPs and not some subset of that universe as CenturyTel contends. The FCC's order is consistent in this regard throughout its discussion and nowhere suggests that its result is limited to the narrow class of ISP-bound traffic that CenturyTel argues is the scope of its application. It is the case, as CenturyTel argues, that both the FCC and the appeals court refer to the traffic that terminates at an ISP within the caller's local area, but they do so not to limit their scope to this subset of ISP-bound calls. Rather, both emphasize that even when the traffic remains in the local area it is not to be treated for compensation purposes as local traffic.<sup>16</sup>

The Commission should again reject Qwest's argument on the same basis.

14. Even if the Commission were to choose to revisit this issue – which it has no reason to do – the Commission would find Qwest's position continues to lack any persuasive appeal. A federal District Court judge in Connecticut recently reviewed the same statements on which Qwest relies from the *ISP Remand Order* and the subsequent D.C. Circuit opinion remanding that Order, and the court reached essentially the same conclusion as the Commission:

What these statements, taken by themselves, do not reveal is how the FCC proceeded to answer that question in the *ISP Remand Order*. In answering the question, the FCC: (a) disclaimed the use of the term "local," (b) held that all traffic was subject to reciprocal compensation unless exempted, (c) held that all ISP-bound traffic was exempted because it is "information access," (d) held that all ISP-bound traffic was subject to the FCC's jurisdiction under section 201, and (e) proceeded to set the compensation rates for all ISP-bound traffic. In short, though the

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<sup>16</sup> *Level 3 Arbitration*, Fifth Supplemental Order, Arbitrator's Report and Decision ¶ 35 (Jan. 2, 2003).

FCC started with the question whether “local” ISP-bound traffic was subject to reciprocal compensation, it answered that question in the negative on the basis of its conclusion that all ISP-bound traffic was in a class by itself.<sup>17</sup>

The court concluded that “the language of the *ISP Remand Order* is unambiguous – the FCC concluded that section 201 gave it jurisdiction over all ISP-bound traffic, and it proceeded to set the intercarrier compensation rates for such traffic.”<sup>18</sup> The Commission, like the Connecticut District Court, should adhere to its prior determination.

15. Qwest nevertheless argues that ISPs are a subset of enhanced service providers (“ESPs”) whose location for call rating purposes has historically been the physical location of the ESP computers receiving the telephone calls. Thus, according to Qwest, calls made to ESps by customers physically located in a different local calling area have been considered toll calls and section 251(g) of the Telecommunications Act of 1996 (“Act”) preserves such treatment. The D.C. Circuit disagreed.

16. The federal appeals court remanded the *ISP Remand Order* because it rejected the FCC’s argument that ISP-bound traffic is subject to section 251(g). The court observed that section “appears to provide simply for the ‘continued enforcement’ of certain pre-Act regulatory ‘interconnection restrictions and obligations.’”<sup>19</sup> The court, however, also found that “nothing in § 251(g) seems to invite the [FCC’s] reading, under which (it seems) it could override virtually

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<sup>17</sup> *Southern New England Tel. Co. v. MCI WorldCom Communications, Inc.*, 359 F. Supp. 229, 231-32 (D. Conn. 2005).

<sup>18</sup> *Id.* at 231.

<sup>19</sup> *WorldCom, Inc. v. F.C.C.*, 288 F.3d 429, 432 (D.C. Cir. 2002).

any provision of the 1996 Act so long as the rule it adopted were in some way, however remote, linked to the LECs' pre-Act obligations.”<sup>20</sup> More specifically, the court concluded that section 251(g) does not apply to ISP-bound traffic exchanged between local exchange carriers (“LECs”):

[I]t seems uncontested – and the [FCC] declared in the Initial Order – that there had been *no* pre-Act obligation relating to intercarrier compensation for ISP-bound traffic. The best the [FCC] can do on this score is to point to pre-existing LEC obligations to provide interstate access to ISPs. Indeed, the [FCC] does not even point to any pre-Act, federally created obligation for LECs to interconnect to each other for ISP-bound calls. And even if this hurdle were overcome, there would remain the fact that § 251(g) speaks only of services provided “to interexchange carriers and information service providers”; LECs’ services to other LECs, even if en route to an ISP, are not “to” either an IXC or to an ISP.<sup>21</sup>

17. Qwest undoubtedly will respond that Pac-West is acting as an IXC, thus rendering the D.C. Circuit’s analysis inapplicable. Of course, the Commission would never reach that step in the court’s analysis because Qwest cannot get past the court’s finding that there was *no* federal interconnection or compensation scheme for any ISP-bound traffic prior to passage of the Act and thus nothing to preserve. Even were that not the case, Pac-West is not acting as an IXC but is operating in the same capacity as any other LEC – providing FX service. Qwest does not

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<sup>20</sup> *Id.* at 433.

<sup>21</sup> *Id.* at 433-34 (emphasis in original and citations omitted).

dispute that telephone calls, both historically and up to the present day, are rated and routed based on the telephone numbers of the calling and called parties. Prior to and following passage of the Act, Qwest has exchanged such traffic with other ILECs as local, not toll, traffic, without regard to the physical location of either of the parties to the call.<sup>22</sup> When Qwest's customers and Pac-West's customers have telephone numbers assigned to the same local calling area, therefore, the traffic exchanged between them has been, and continues to be, considered local, not interexchange, traffic, regardless of the physical location of those customers. Accordingly, section 251(g) does not apply to that traffic.

**2. The Commission Has Considered ISP-Bound Traffic Between Telephone Numbers Assigned to the Same Local Calling Area to Be Subject to Compensation Pursuant to the *ISP Remand Order* Without Regard to the Physical Locations of the ISP Server or Modem.**

18. The Commission has determined that "ISP-bound calls enabled by virtual NXX should be treated the same as other ISP-bound calls for purposes of determining intercarrier compensation requirements consistent with the FCC's ISP Order on Remand."<sup>23</sup> Qwest ignores this determination in its Answer and contends that the Arbitrator in the *AT&T Arbitration* "found that although the CLEC must be allowed to offer VNXX services, reciprocal compensation for calls terminating to the CLEC's customers physically located outside the local calling area in

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<sup>22</sup> See Exhibit A, Qwest Responses to Pac-West Data Request Nos. 01-006 & 7.

<sup>23</sup> *Level 3 Arbitration*, Seventh Supplemental Order: Affirming Arbitrator's Report and Decision ¶ 35 (Feb. 28, 2003).

which they originate was inappropriate, and thus such traffic should be compensated on a bill and keep basis.”<sup>24</sup> The Arbitrator’s Report in that case, however, is far from clear on this issue.

19. On one hand, the Report provides:

While AT&T, in the interest of promoting competition, must be allowed to offer services that are functionally equivalent to existing services offered by Qwest, such as FX and ISP local number presence, insistence that Qwest pay reciprocal compensation for such services is inappropriate. The FCC’s *ISP Remand Order* does not preempt state jurisdiction to determine the appropriate intercarrier compensation scheme for FX functionality provided via virtual NXX, but it is strongly suggestive of what is appropriate given that FX service and ISP local number provisioning both result in a hybrid form of traffic; traffic that is neither clearly local, nor clearly interexchange, and that is largely one-way traffic. Such traffic should be compensated on a bill-and-keep basis.<sup>25</sup>

Taken literally, the conclusion that the *ISP Remand Order* does not establish the compensation for all ISP-bound traffic to calls rated as local directly conflicts with the same Arbitrator’s decision in the *Level 3 Arbitration* that “[w]hile it is true that one of the issues the FCC considers in its order is ISP-bound traffic that reaches a modem bank in the same local exchange area in which the ISP customer resides, the order cannot be fairly read to concern only this subset of ISP-bound traffic.”<sup>26</sup>

20. On the other hand, the following paragraph in the Arbitrator’s Report states as follows:

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<sup>24</sup> Qwest Answer ¶ 28.

<sup>25</sup> *AT&T Arbitration*, Order No. 4, Arbitrator’s Report ¶ 35.

<sup>26</sup> *Level 3 Arbitration*, Fifth Supplemental Order, Arbitrator’s Report and Decision ¶ 34.

On the present record, the Arbitrator concludes that AT&T should be entitled to take advantage of the same exceptions to the typical relationship between NPA-NXX and a single local calling area as Qwest takes advantage of in offering FX and Internet access numbers. This cannot be accomplished, however, by simply adopting AT&T's proposed definition for Exchange Service or EAS/Local Traffic, because that definition is too sweeping in its potential effect and has potentially unacceptable consequences in terms of intercarrier compensation. With appropriate limitations, however, AT&T's use of virtual NXX could be limited to services that are functionally identical to services Qwest now offers to foreign exchange customers and for Internet access. **One possible limitation, for example, would be to allow AT&T to offer virtual NXX to subscribers who desire FX functionality for inbound calls only. Adoption of a bill-and-keep intercarrier compensation requirement for such service would alleviate Qwest's objection to having to pay reciprocal compensation. The parties might fashion other, mutually acceptable limitations.**<sup>27</sup>

The Arbitrator in this paragraph merely *suggested* by way of example that bill-and-keep compensation *might* be one way to address the concerns raised by the parties in that docket but noted that there might be other alternatives. Such a suggestion would be unnecessary if bill-and-keep already applied to all such traffic automatically.

21. The Report further confuses the issue in a footnote that correctly states that the *ISP Remand Order* “has preempted the states from deciding intercarrier compensation for ISP-bound calls” – which contradicts paragraph 35 – but then mistakenly adds that the FCC “has mandated a bill-and-keep compensation scheme, for the time being, at least.”<sup>28</sup> That is true only

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<sup>27</sup> *AT&T Arbitration*, Order No. 4, Arbitrator's Report ¶ 36 (emphasis added).

<sup>28</sup> *Id.* n.21.

“where carriers are not exchanging traffic pursuant to interconnection agreements prior to adoption of [the *ISP Remand Order*].”<sup>29</sup> For carriers like Pac-West that were exchanging traffic with Qwest prior to adoption of that Order, the FCC established per minute of use compensation pending further action by the FCC, and that requirement is reflected in the parties’ ICA.<sup>30</sup>

22. The Commission clarified the apparent inconsistency by emphasizing that in adopting the Arbitrator’s decision, these suggestions – including bill-and-keep compensation – were nothing more than suggestions to the parties in that proceeding:

We emphasize that those principles are stated as dicta. They suggest options for implementation (*e.g.*, agreement to bill-and-keep compensation; FX functionality for inbound calls only), but they do not bind the parties to specific arrangements, nor do they bind us if we must ultimately resolve a dispute over implementation.<sup>31</sup>

The Commission, therefore, has not retreated from its determination that compensation for ISP-bound traffic is not dependent on the physical location of the ISP server or modem.

**3. The ICA Requires Qwest to Compensate Pac-West for All ISP-Bound Traffic Exchanged Between Telephone Numbers Rated as Local.**

23. Pac-West seeks to enforce its existing ICA with Qwest, not arbitrate a new one. Pac-West is entitled to per minute of use compensation for terminating ISP-bound traffic under both its ICA and the *ISP Remand Order*. Section (C)2.3.4.1.1, of the Interconnection Agreement provides, “The Parties agree that per minute of use call termination rates as described in Part H

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<sup>29</sup> *ISP Remand Order* ¶ 81.

<sup>30</sup> *Id.* ¶ 77.

<sup>31</sup> *AT&T Arbitration*, Order No. 5, Final Order Affirming Arbitrator’s Report ¶ 16 (Feb. 6, 2004).



of this Agreement will apply reciprocally for the termination of Exchange Service (EAS/Local traffic.” Exchange Service is defined in section (A)2.19 as “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.” Calls between Qwest customers and Pac-West customers with telephone numbers assigned to the same local calling area fit squarely within this definition, regardless of whether a customer’s telephone or modem is physically located within that local calling area.

24. The ISP Amendment to the ICA expressly states that compensation applies to ISP-bound traffic. Section 1.4 provides that “‘ISP-Bound’ is as described by the FCC” in the *ISP Remand Order* and states in section 3.2.1 that “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) traffic is ISP-bound traffic.” As discussed above, the FCC has never limited ISP-bound traffic to calls between a calling party and an ISP server or modem that are physically located in the same local calling area. Pac-West, therefore, is entitled to compensation at the rates specified in the ICA for ISP-bound traffic between Qwest customers and Pac-West ISP customers whose telephone numbers are assigned to the same local calling area.

25. Qwest disagrees, claiming that the definition of “Extended Area Service (EAS)/Local Traffic (Exchange Service)” in the ICA excludes traffic bound to ISPs whose servers are not physically located in the same local calling area as the calling party. The plain language of the definition does not support Qwest’s claim. There is no reference to the physical location of either the calling or called party. Rather, the traffic simply must be between calling

parties in accordance with established local calling areas. Qwest includes calls to its FX customers, including ISPs, within this traffic, and the Commission has previously determined that Qwest's proposal to exclude these same calls to a competitor's FX customers "is anticompetitive and should not be allowed."<sup>32</sup>

26. Qwest also maintains that the term "ISP-bound" is defined in the ICA as having the same meaning as that term is used in the *ISP Remand Order* and that the FCC referred only to traffic to ISPs whose servers are physically located in the same local calling area as the calling party. As discussed above, the Commission and at least one court have rejected this argument, and the Commission should do so again.

27. Qwest's own conduct under the ICA further belies Qwest's current interpretation of the agreement. Qwest admits that Pac-West and Qwest have been exchanging traffic, including all ISP-bound traffic between telephone numbers in the same local calling area, pursuant to the ICA since February 2001.<sup>33</sup> Qwest further concedes that January 2005 was the earliest date on which Qwest notified Pac-West and other interconnecting carriers of Qwest's position that FX ISP-bound traffic is not subject to compensation – almost four years after Qwest began exchanging traffic with Pac-West under the current ICA.<sup>34</sup> Qwest denies that it never contended that FX ISP-bound traffic was not subject to compensation, contending that the

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<sup>32</sup> *AT&T Arbitration*, Order No. 4, Arbitrator's Report ¶ 33.

<sup>33</sup> Qwest Answer ¶ 53.

<sup>34</sup> Exhibit A, Qwest Response to Pac-West Data Request No. 01-023.

amount of such traffic was “insignificant” under the growth cap provisions of the ICA “and was irrelevant to the billing by Pac-West to Qwest.”<sup>35</sup> Such claims do not withstand scrutiny.

28. Qwest states that it “cannot completely determine for any given call whether the call is destined for a location within the local calling area or in a different local calling area. Qwest only knows how far it carried the call before handoff to the interconnected carrier, where the carrier’s serving switch is located, and whether the traffic is one-way or two-way.”<sup>36</sup> By its own admission, Qwest cannot calculate the amount of FX ISP-bound traffic Qwest sends to Pac-West. Qwest thus asks the Commission to believe that by sheer coincidence, the amount of FX ISP-bound traffic is, and has been, the traffic in excess of the growth caps the FCC established three years ago for all carriers. Such a contention simply is not credible. Qwest obviously disagrees with the FCC’s decision to eliminate the growth caps on ISP-bound traffic and is grasping for some other way to impose the same limitations. The Commission should see Qwest’s new-found concern with Pac-West’s FX ISP-bound traffic for what it is and should require that Qwest continue to compensate Pac-West for all ISP-bound traffic as Qwest has done for over four years.

29. The parties, however, do not agree on the amount that Qwest owes Pac-West if the Commission requires such compensation. Pac-West has calculated the total amount of compensation to which it is entitled based on spreadsheets that Qwest provided.<sup>37</sup> While Pac-

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<sup>35</sup> Qwest Answer ¶ 53.

<sup>36</sup> *Id.* ¶ 53.

<sup>37</sup> *See* CONFIDENTIAL spreadsheet attached to this Brief as Exhibit B.

West is continuing to explore the reasons why Qwest's calculations of the amount Qwest has withheld are different, Qwest apparently is now contending for the first time that over 20% of the amounts Qwest has withheld are attributable to a "volume dispute."<sup>38</sup> Qwest has never raised this issue with Pac-West, much less explained the basis for this dispute or how Qwest calculates this figure. Once again, Qwest has manufactured a dispute on top of its original dispute as a means to obfuscate and ultimately avoid its obligations to pay Pac-West compensation for the traffic it terminates for Qwest end users. The Commission should reject Qwest's calculations and require Qwest to pay Pac-West all compensation that Qwest has withheld.

#### **4. Public Policy Supports Pac-West's Petition.**

30. The language of the ICA, along with federal and state law, supports Pac-West's Petition and its claims for relief. Qwest, however, asserts that "this case raises an important issue from a policy and financial perspective,"<sup>39</sup> contending that compensating Pac-West for FX ISP-bound traffic "would lead to severe financial repercussions for the industry, would erode the financial support that originating access provides to local rates, and would further distort the compensation scheme (including universal service funding) underlying the public switched telephone network."<sup>40</sup> Qwest fails to provide any support for this Chicken Little scenario, which

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<sup>38</sup> Qwest's third bite at the apple contradicts its claim that 68 percent of its withholding for the 2qtr is related to the "VNXX" dispute. See Affidavit of Ethan Sprague.

<sup>39</sup> Qwest Answer ¶ 14.

<sup>40</sup> *Id.* ¶ 16.

in any event is a topic for the FCC's ongoing intercarrier compensation docket, not an individual state ICA enforcement proceeding.

31. Qwest, moreover, ignores the far more negative impacts of its proposal to disregard the ICA and federal law. "Qwest offers ISPs the ability to have a local number presence in a given local calling area that connects to the ISP's modem bank in another local calling area."<sup>41</sup> Qwest does not even know how many ISP customers it serves "because they do not necessarily identify themselves as ISPs."<sup>42</sup> Qwest thus provides exactly the same service to ISP customers that Pac-West provides, and Qwest seeks to competitively disadvantage Pac-West by increasing Pac-West's costs to serve such customers through not only denying Pac-West compensation for FX ISP-bound traffic, but proposing to impose access charges for that traffic.

32. Pac-West, of course, would not be liable for access charges on most, if not all, of this traffic. To use the Commission's example, if Pac-West were providing service to an ISP whose server is physically located in Seattle but that has customers in Forks who obtain their local service from Qwest, Qwest would be acting as the interexchange carrier and paying terminating access charges to Pac-West. Qwest, in turn, would impose toll charges on its customers in Forks, who almost certainly would then discontinue using the ISP, and the ISP would reduce or eliminate the services it obtains from Pac-West.

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<sup>41</sup> *AT&T Arbitration*, Order No. 4, Arbitrator's Report ¶ 32.

<sup>42</sup> Exhibit A, Qwest Response to Pac-West Data Request No. 01-011.

33. The result would be fewer – or possibly no – alternatives for dial-up Internet access outside the metropolitan areas of Washington. The vast majority of consumers will not pay toll charges to use the Internet. ISPs, therefore, will be forced (a) to obtain FX service from Qwest, (b) incur substantial costs to deploy servers in every local calling area, or (c) discontinue offering service in certain areas – which inevitably will be the non-urban areas of the state. Qwest is the only one who comes out ahead in these circumstances. Qwest’s business services in most of its central offices have been classified as competitive, which would permit Qwest to charge excessive rates to ISPs for FX services if CLECs effectively cannot offer an alternative. Qwest has at least one affiliate that provides dial-up ISP services,<sup>43</sup> so even if ISPs choose to abandon areas rather than pay Qwest’s FX rates, Qwest can be assured that its affiliate will obtain service from Qwest, given that the money is being transferred from one pocket to another. That affiliate, moreover, would then be free to charge a higher rate for dial-up Internet access in those areas where it does not face competition.

34. Consumers and competitors are the losing parties under Qwest’s proposal. Consumers in less populous areas will pay more for Internet access. ISPs will also pay more or forego serving these areas, and CLECs will be limited in their ability to provide services to ISPs accordingly. The FCC is wrestling with these and many other policy issues that arise from the current Rube Goldberg inspired intercarrier compensation scheme. In the meantime, the Commission should enforce the ICA as written and in conformance with current federal law, and

should require Qwest to pay Pac-West the compensation required under the *ISP Remand Order* for all ISP-bound traffic between telephone numbers that are assigned to the same local calling area.

**B. The Commission Should Dismiss Qwest's Counterclaims.**

35. Qwest purports to raise four counterclaims to Pac-West's Petition, but WAC 480-07-650 does not authorize any counterclaims to petitions to enforce interconnection agreements. Indeed, Qwest cites no authority for bringing such claims.<sup>44</sup> Two of Qwest's counterclaims, moreover, allege violations of law other than the ICA, and even Qwest has taken the position that such claims are improper under the Commission's procedural rules:

Nextlink is wrong that it may bring a complaint under WAC 480-09-530 seeking relief for alleged statutory violations. The proper venue for that type of claim is to file a complaint under RCW 80.04.110 and the Commission's procedural rules governing complaints. Nextlink is not entitled to the expedited schedule and truncated procedural requirements of the interconnection enforcement rule if it is seeking a determination of statutory violations.<sup>45</sup>

If Qwest wants to pursue alleged causes of action against Pac-West, Qwest should follow its own advocacy and initiate a separate complaint proceeding. The Commission, therefore, should dismiss Qwest's counterclaims as procedurally improper.

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<sup>43</sup> *Id.* No. 01-003.

<sup>44</sup> *See* Qwest Answer ¶ 56.

<sup>45</sup> *NEXTLINK Washington, Inc. v. U S WEST Communications, Inc.*, Docket No. UT-990340, U S WEST's Answer to Petition for Enforcement of Interconnection Agreement at 4, lines 16-21 (May 12, 1999).

36. If the Commission nevertheless decides to consider Qwest's counterclaims, the Commission should conclude that they are without merit. All of these counterclaims are variations on the same theme that FX ISP-bound traffic is not subject to compensation under the *ISP Remand Order*. Pac-West has thoroughly discussed this issue in support of its Petition but provides a limited discussion in response to each of Qwest's counterclaims. As Pac-West has explained, Qwest's position is unsustainable in light of the parties' ICA and prior Commission determinations.

**1. Pac-West Has Not Violated Federal Law.**

37. Not surprisingly, Qwest cites no specific federal law that Pac-West has violated through its use of telephone number resources or in seeking compensation for FX ISP-bound traffic. There is no such law. No federal law prohibits a carrier from assigning a telephone number associated with one local calling area to a customer who is physically located in a different local calling area. Indeed, Qwest would be in violation of any such law. Similarly, Qwest seeks compensation from Pac-West and other CLECs for calls made to customers using Qwest's FX service and features, including ISPs. Pac-West is not in violation of federal law for doing the same thing.

**2. Pac-West Has Not Violated State Law.**

38. Washington law, like federal law, also does not preclude assigning telephone numbers for FX services or seeking compensation for calls made to customers of such services. Qwest cites no authority for the proposition that the Commission even has jurisdiction over how a carrier assigns telephone numbers to its customers, much less any statutes, rules, or



Commission decisions establishing substantive requirements for customer number assignments. At a minimum, it is incumbent upon Qwest to raise this issue with the FCC, the North American Numbering Council, the North American Numbering Plan Administrator, or some other body with responsibility for national numbering issues prior to asking the Commission to establish its own requirements for one carrier in one state. Qwest has not done so,<sup>46</sup> and the Commission should not entertain Qwest's claim at least until Qwest has pursued that claim in a more appropriate forum.

### **3. Pac-West Has Not Violated Section (G)3.7 of the ICA.**

39. Qwest's claim that Pac-West has violated provisions of the ICA concerning numbering resources borders on the frivolous. The recognition in section (G)3.7 that "[e]ach Party is responsible for administering NXX codes assigned to it" does nothing more than clarify that each Party is responsible for its own number resources. That section cannot reasonably be construed to create an independent contract obligation with respect to how a party obtains or uses telephone numbers. Similarly, the ICA requirement that each party provide all required information for the local exchange routing guide ("LERG") does not create a contractual duty to the other party to comply with all LERG requirements. Qwest cannot reasonably argue to the contrary.

40. Even if there were a contractual duty with respect to a party's use of numbering resources – and there is not – Pac-West has not violated any such obligation. Qwest contends that Pac-West's use of number resources is not consistent with industry guidelines, specifically

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<sup>46</sup> See Exhibit A, Qwest Response to Pac-West Data Request No. 01-018.

section 2.14 of the Central Office Code (NXX) Assignment Guidelines (“COCAG”) which

assumes “from a wireline perspective that CO [central office] codes/blocks allocated to a wireline service provider are to be utilized to provide service to a customer’s premise physically located in the same rate center that the CO codes/blocks are assigned. **Exceptions exist, for example tariffed services such as foreign exchange service.**”<sup>47</sup>

Pac-West, like Qwest, provides FX service to its customers, including ISPs, and its use of numbering resources is fully consistent with the industry guidelines.

41. Qwest contends that the absence of an express reference to “VNXX” in guidelines that were issued in June 2005 “indicates to Qwest that the guidelines do not recognize VNXX as an exception in the same manner that FX services are recognized.”<sup>48</sup> That contention is not sustainable. FX and “VNXX” are the same service, so there was no need to use both names. The guideline, moreover, lists FX as an *example* of an exception to the general rule and does not in any way purport to identify FX as the sole exception. Qwest has no basis for its contention that Pac-West is not obtaining and using number resources consistent with the ICA and industry guidelines.

#### **4. Pac-West Is Not Improperly Routing Traffic Over LIS Trunks.**

42. Qwest claims that Pac-West is improperly having Qwest route FX ISP-bound traffic over Local Interconnection Service (“LIS”) trunks because such traffic is not “Extended Area Service (EAS)/Local Traffic.” Pac-West explained above, however, that FX ISP-bound

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<sup>47</sup> Exhibit A, Qwest Response to Pac-West Data Request 01-017 (emphasis added).

traffic is included within the definition of EAS/Local Traffic, as well as the ISP Amendment to the ICA. Indeed, Qwest has Pac-West and other LECs send traffic bound for Qwest's FX customers over LIS trunks. Both parties have delivered traffic rated as local over the LIS trunks since they began exchanging traffic under the ICA in 2001. Qwest has no basis for claiming now, over four years later, that Pac-West may no longer have Qwest route FX ISP-bound traffic over those trunks while Qwest may continue to have Pac-West route the same type of traffic to Qwest over those same trunks.

**5. Binding Arbitration Has Already Determined that the ICA Does Not Require an Amendment to Incorporate the FCC's Core Decision.**

43. Qwest requests that the Commission "Direct Pac-West to follow the change of law procedures contained in its interconnection agreement with Qwest to implement the *Core Forbearance Order*."<sup>49</sup> Qwest, however, raises no claim in its Answer that would support such relief. Nor could Qwest raise such a claim. The parties have already undertaken binding arbitration on this issue, and the Arbitrator concluded that no amendment to the ICA is necessary.<sup>50</sup> Qwest, therefore, is precluded from relitigating this issue before the Commission, and the Commission should dismiss this request for relief, along with all of Qwest's counterclaims.

**CONCLUSION**

44. Qwest disagrees with the FCC's decision to eliminate the growth caps on the

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<sup>48</sup> *Id.*

<sup>49</sup> Qwest Answer ¶ 67D.

<sup>50</sup> Affidavit of Ethan Sprague, Ex. C (Arbitrator's Decision).

amount of ISP-bound traffic subject to compensation under the *ISP Remand Order*. Having lost at the FCC, Qwest has invented a way to circumvent the FCC's decision and effectively re-impose those caps – withhold compensation for FX ISP-bound traffic. Qwest's creativity conflicts with the ICA, federal law, and prior Commission determinations. The Commission, therefore, should enforce the ICA and require Qwest (a) to compensate Pac-West at the rates specified in the agreement for all ISP-bound traffic that is exchanged between calling parties with telephone numbers assigned to the same local calling area, and (b) to pay Pac-West all compensation that Qwest has withheld based on Pac-West's calculations.

DATED this 27th day of July, 2005.

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